EDITED BY ALEXANDER SCHUSTER

EQUALITY AND JUSTICE

SEXUAL ORIENTATION AND GENDER IDENTITY IN THE XXI CENTURY

FORUM

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WITH AN INTRODUCTION BY STEFANO RODOTÀ

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Acknowledgements

This book represents the effort by jurists from all walks of life – legal practitioners, scholars, judges, legal advisers to NGOs, and equality bodies – to reflect on the challenges that sexual orientation and gender identity pose to contemporary law. It originates from the international conference *Equality and Justice - LGBTI (Lesbian, Gay, Bisexual, Trans and Intersex) Rights in the XXI Century* organized by the University of Udine, Department of Legal Sciences, and the association Avvocatura per i Diritti LGBT - Rete Lenford in Florence on May 12 and 13, 2011. It was the closing event of the *EQUAL JUS project - European network for the legal support of LGBT rights*, an action co-funded by the European Union - DG Justice under the Fundamental Rights and Citizenship Programme.
The project aims to combat homophobia and transphobia by increasing the awareness among people that European citizenship adds a new dimension to the protection of fundamental rights and to the inclusion of all individuals. It contributes to the establishment of an open network of lawyers and gives them tools for training and consultation, such as publications, newsletters and a legal database. This book is part of the resources conceived by the project partners, who decided to make it freely available to anyone interested in a free digital edition available on the project website www.equal-jus.eu.
During the two days of the conference participants from all continents discussed the state of legal studies in the field of sexual orientation and gender identity. They believed that only by sharing strategies and resources can we enhance LGBTI rights. The reader will become part of our common effort.
An editor as well as a project manager owes all to the people and organisations that relied on him. I wish to thank first of all the over fifty speakers who by using three working languages contributed to the lively debate that enriched the papers collected in their final version here. I am indebted to the authors, who accepted to publish their valuable research in a multilingual edition. I gratefully wish to acknowledge my deep gratitude to Tim P. Shields for his help with the English language review of the texts. It is my desire also to say thank you to all institutions that supported the project throughout its 18 months and the final conference. The enthusiasm and helpfulness of the bar associations, the local authorities, the equality bodies and the NGOs accompany this book still today.
Last but not least, the European Commission has provided not just the means to realize this project, but most of all the ingredients for the huge leap in the protection of LGBTI persons that we have witnessed in less than two decades. It is an honour to include the flag of Europe in the pages of this book.

Alexander Schuster

INTRODUCTION

Eguaglianza e dignità delle persone LGBTI

Stefano Rodotà

Abstract

The author looks at the advancements in the protection of LGBT rights. He considers the recognition of family unions in European law. The text dwells on the impact of terms such as sexual orientation, sex and gender and the need to overcome dualism. However, discrimination is still an alarming phenomenon. We certainly need to embrace equality, but must also include dignity. There is no dignity without identity, which in turn requires freedom. Homophobia and discrimination undermine one's dignity, and exclusion makes people "non persons". The essay then looks at the Italian legal context and considers the decision on marriage by the Constitutional Court.

* * *

Vorrei cominciare con un riferimento a due documenti europei: la Carta dei diritti fondamentali dell'Unione europea ed i rapporti dell'Agenzia per i diritti fondamentali. La Carta dei diritti fondamentali dell'Unione europea ha dedicato al tema della discriminazione verso le persone LGBTI (gay, lesbiche, gay, trans e intersessuali) un'attenzione non voglio dire particolare, ma certamente specifica. Ciò avviene non solo con la norma generale sull'antidiscriminazione, dove il riferimento all'orientamento sessuale è ripreso dal Trattato di Maastricht, ma soprattutto con l'articolo 9. Esso riguarda le unioni ed è uno dei più innovativi dal punto di vista nella sequenza delle dichiarazioni dei diritti che interessano l'Europa. Inoltre smentisce la tesi per cui la Carta dei diritti sarebbe soltanto un documento in qualche modo riproduttivo del già esistente nel contesto europeo.

È innovativo perché rispetto alla Convenzione europea dei diritti dell'uomo il cambiamento è radicale. L'articolo 12 della Convenzione europea dei diritti dell'uomo afferma: «Uomini e donne in età maritale hanno diritto di sposarsi e di formare una famiglia secondo le leggi nazionali regolanti l'esercizio di tale diritto». L'articolo 9 della Carta dei diritti, invece, si discosta sostanzialmente da questa impostazione, scrivendo: «Il diritto di sposarsi e il diritto di costituire una famiglia sono garantiti secondo le leggi nazionali che ne disciplinano l'esercizio». Cade il riferimento alla diversità di sesso. Quello che era un diritto unico, il diritto di sposarsi e di formare una famiglia, viene invece, nell'articolo 9 della Carta, sostituito da due diritti distin-

ti. È chiarissima l'espressione verbale: «Il diritto di sposarsi e il diritto di costituire una famiglia sono garantiti». Sono due diritti diversi, equiordinati, e non c'è una gerarchia, anche se vi è un riferimento al diritto nazionale. Il cambiamento è tuttavia radicale. Nel quadro delineato dal diritto dell'Unione europea oggi non si può sostenere una superiorità gerarchica del matrimonio tradizionale, né si può identificare ciascuno di questi istituti soltanto in base alla diversità di sesso.

La seconda considerazione è relativa all'articolo 21, dove si fa riferimento all'orientamento sessuale. È bene ricordare il cambiamento che è intervenuto proprio nella terminologia dei documenti europei. L'elenco, peraltro non esaustivo, delle cause di discriminazione si apre storicamente con il riferimento al sesso e si chiude con quello all'orientamento sessuale. Mentre il riferimento al sesso è evidentemente il riflesso storico tradizionale di quella che è l'identificazione attraverso un genere di appartenenza, attraverso il riferimento all'orientamento sessuale c'è una soggettivizzazione. Ciò che viene in evidenza, e quindi può divenire causa di discriminazione, è il modo in cui ciascuno costruisce la propria personalità anche per ciò che riguarda i profili sessuali e affettivi. Questo è un altro elemento da prendere molto seriamente in considerazione, ma che ci porterebbe aldilà delle discussioni su identità e attribuzione di genere. Un recente libro di Flavia Monceri, *Oltre l'identità sessuale*, è molto critico rispetto alle categorie tradizionali e parla del superamento della logica binaria che si ritrova nel mondo. Come evidenziato da un caso del New South Wales in cui un certificato di nascita è stato rettificato lasciando per il campo «sesso» «not specified», la soggettivizzazione impone anche il superamento del carattere binario della discussione sul sesso.

I documenti dell'Agenzia dei diritti fondamentali, che registrano il modo in cui si è venuta evolvendo la legislazione in Europa, sottolineano con molta nettezza lo scarto ancora verificabile nell'ambito sociale. Nell'ultimo rapporto si dice «la situazione sociale è preoccupante». Il rapporto tocca una serie di settori: la parola, la libertà di riunione, il mercato del lavoro, l'istruzione, la salute, la religione, lo sport, i *media*, il diritto di asilo. Si tratta di una documentazione puntuale di discriminazioni che permangono malgrado i progressi sul terreno della legislazione. E allora, non a caso, sta per uscire in Italia un libro che proprio riguardando questo gioco e questa dialettica tra regola e situazione effettiva, ha come titolo *L'abominevole diritto*. È un libro che esce nei prossimi giorni, di Matteo Winkler e Gabriele Strazio, che ci dice molte cose proprio sulla ricostruzione necessaria del contesto.

Allora, come guardare al tema dell'eguaglianza per le persone LGBTI? Partendo dall'eguaglianza certo. Ma il riferimento all'eguaglianza richiede un orizzonte un po' più variegato. Consideriamo la sequenza di alcuni grandi documenti costituzionali del dopoguerra e prendiamo le mosse dalla Costituzione italiana, semplicemente perché è la prima nella sequenza, scritta nel 1947 e entrata in vigore il 1° gennaio 1948. In uno degli articoli chiave, esattamente quello sull'eguaglianza, c'è già nelle prime righe un mutamento significativo, perché si dice: «Tutti i cittadini hanno pari dignità sociale». L'associazione tra eguaglianza e dignità e la sua proiezione nella dimensione sociale è un connotato di assoluta originalità per il tempo della Costitu-

zione italiana ed è un'indicazione che io cito, non per ragioni di patriottismo nazionalistico, ma perché sarà poi l'indicazione che ritroveremo ampiamente in una serie di documenti. Ed è un'indicazione già più ricca di quella che ritroviamo nella Dichiarazione dei diritti dell'uomo delle Nazioni Unite, che giunge un anno dopo, nel 1948. Si apre con le parole: «Tutti gli esseri umani nascono liberi ed eguali in dignità e diritti». Anche qui, rispetto alla tradizione costituzionalistica della fine del Settecento, vi è un'innovazione perché la formula classica è che tutti gli esseri umani nascono liberi ed eguali nei diritti. Invece qui vi è l'aggiunta del riferimento alla dignità. Il punto, non d'arrivo, anzi di chiarissima emersione di questa linea, è l'articolo 1 del *Grundgesetz*, della costituzione tedesca del 1949, che si apre con le parole: «La dignità umana è inviolabile». Le ragioni storiche di questa apertura non hanno bisogno di sottolineatura, ma l'eredità, la linea indicata alla fine della prima guerra mondiale negli anni tra il 1947 ed il 1949, la ritroviamo integra nella prima dichiarazione dei diritti del terzo millennio. È appunto la Carta dei diritti fondamentali dell'Unione europea ad aprirsi con il riferimento alla dignità. «La dignità umana è inviolabile. Essa deve essere rispettata e tutelata».

Ciò che ricaviamo da questa ricostruzione è che la persona è inseparabile dalla sua dignità. Potremmo dire, riprendendo i riferimenti a due grandi ricerche di Louis Dumont, una sull'*homo hierarchicus* e una sull'*homo aequalis*, che quel tragitto descritto da Dumont, dalla gerarchia all'eguaglianza, non si è fermato all'eguaglianza, che pure è stata la grande rivoluzione, la grande promessa tra Settecento e Ottocento, una promessa, peraltro, ancora non adempiuta. Quel tragitto è continuato con la rivoluzione della dignità, è l'*homo dignus* che si affianca all'*homo aequalis*. Naturalmente il riferimento alla vicenda drammatica presente ai costituenti tedeschi, non paragonabile a nessun'altra, la vicenda della Shoah, richiede sempre molta prudenza, perché rischiamo di banalizzare quella che nella storia dell'umanità ha segnato la caduta in un abisso senza eguali, sul quale dobbiamo continuare a sporgerci consapevoli della sua unicità.

Le parole di uno tra i grandi interpreti di quel dramma, Primo Levi, sono importanti: «Per vivere occorre una identità, ossia una dignità». Ecco delineato il quadro: eguaglianza certamente, ma dignità e identità. C'è un articolo della Costituzione italiana dove questo profilo è ben sintetizzato. In essa man mano che si affrontano queste questioni compaiono parole ignote al lessico costituzionale storico. La parola «esistenza» ricorre intensamente nei più diversi documenti e forse la formulazione più felice e comprensiva, o che ci offre più spunti di riflessione, la troviamo nell'articolo 36 della Costituzione dove si parla di «esistenza libera e dignitosa». Si tratta di una nuova associazione: non solo l'eguaglianza è associata alla dignità, ma la dignità a sua volta è associata con la libertà. E questa associazione con la libertà ci dice una cosa molto importante, e cioè che la costruzione della dignità non può essere il risultato di una imposizione dall'esterno, per meglio dire di una imposizione da parte di un altro. Essa è associata alla libertà della persona, e quindi la sua è il risultato di una costruzione tutta affidata all'interessato.

Vediamo, allora, che cosa accade quando la dignità viene messa in discussione. Quando la dignità viene negata nei modi più diversi, è evidente qual è il risultato,

anche dal punto di vista linguistico. La persona di cui si nega la dignità diventa socialmente indegna. Questo è il punto drammatico che noi cogliamo nelle vicende, in particolare, ma non solo, che coinvolgono le persone LGBTI.

Come si separano questi due elementi che avevo detto indissociabili, eguaglianza e dignità, conclusione di quel tragitto che ritroviamo nell'articolo 1 della Carta dei diritti fondamentali dell'Unione europea, che è giuridicamente vincolante dal 1° dicembre 2009 con lo stesso valore giuridico dei trattati? La dignità umana è inviolabile. Dunque, la persona è inseparabile dalla sua dignità in via di principio. Nei fatti, tuttavia, questa separazione accade, si manifesta drammaticamente. Accade con la parola in primo luogo, la parola sociale, il linguaggio. Non c'è bisogno di arrivare alla frontiera dell'*hate speech*, il linguaggio dell'odio, basta il linguaggio quotidiano della stigmatizzazione, della costruzione aggressiva dell'altro, del confinamento in una diversità irredimibile, per far precipitare chi è oggetto di questa parola nella categoria di coloro che non attingono alla pienezza della dignità. In qualche modo, appunto, vengono costruiti come indegni. E quella parola porta con sé un rifiuto, una condanna sociale.

Quando ho cominciato a presiedere l'Autorità garante per la protezione dei dati personali, la prima audizione riguardò proprio le discriminazioni nei confronti degli omosessuali. I componenti di quella autorità erano certamente rappresentativi di culture molto diverse tra loro. E tuttavia fummo concordi nel ritenere che la legge sulla *privacy* ci imponeva di affrontare subito questo tema. Mi presentai a quella audizione, alla quale partecipavano quelli che allora rappresentavano molto bene il mondo delle persone omosessuali, mostrando il titolo di un giornale, di non molto tempo prima: «Architetto omosessuale ferito in un incidente d'auto». È evidente il carico di stigmatizzazione di un titolo come questo, in cui il riferimento all'omosessualità non aveva assolutamente alcun valore informativo, ma rifletteva nient'altro che un modo di guardare a queste persone da parte di chi riteneva di fare attività di informazione.

Queste punte estreme sono scomparse? Non ne sono così sicuro. Anzi, dopo un periodo in cui c'era stato un abbandono di stereotipi nella comunicazione ufficiale, in troppi luoghi dell'informazione questi stereotipi, se vogliamo chiamarli benevolmente così, stanno ricomparendo. E questo accade in forme che accompagnano il risorgere o il riemergere molto forte dell'omofobia, non solo come stigmatizzazione, ma come aggressione fisica. La parola di disprezzo non solo vuole far piombare le persone nell'indegnità, ma le indica come bersagli.

Si è avuta notizia del fatto che l'ufficio della motorizzazione di Brindisi ha negato la patente ad una persona omosessuale perché portatrice di una "patologia" che potrebbe essere di pregiudizio per la guida. Come era già avvenuto per il caso di Danilo Giuffrida, ma lì in sede giurisdizionale, questo provvedimento è stato annullato dall'organo gerarchicamente superiore. E tuttavia la parola del diritto, la parola delle istituzioni, può continuare ad essere questa. Dobbiamo esserne consapevoli, perché in questo modo si nega l'eguaglianza e si fanno precipitare le persone nell'indegnità.

Tutto questo spiega il persistere di infinite resistenze. I segni sono chiari: una sentenza recente parla di atti contrari alla pubblica decenza per due ragazzi che si erano baciati in pubblico, viene bloccata una norma sull'omofobia, le persone LBGTI sono considerate indegne di accedere al matrimonio, all'omogenitorialità, all'adozione, alla stessa identità. È il tragitto che partecipa alla costruzione di un contesto che porta alla trasformazioni di alcuni soggetti in "non persone". Questo fu l'esito estremo della Shoah che, con tutte le cautele ricordate prima, non possiamo dimenticare. La costruzione dell'indegno certamente ebbe nel regime nazista la sua massima manifestazione con la creazione di un altro non solo indegno, ma da confinare nella categoria delle non persone. La "non persona" è l'omosessuale, è il dissidente politico, lo zingaro, in fine e massimamente è l'ebreo. "Non persone", e quindi non portatrici di diritti, alle quali dunque può essere negato tutto perché, trasformati in oggetto, possono divenire, appunto, assoggettate a un potere che si serve di loro nel modo più violento. Il processo ai medici nazisti di Norimberga nel 1946 ci ricordò tutto questo.

Ma noi non possiamo ritenere che tutto questo né ci appartenga storicamente, né appartenga soltanto al passato perché, quando si fanno grandi elogi della moderazione e della mitezza italiana, è vero che, in confronto alla violenza drammatica della Shoah, possiamo anche in qualche modo rassicurarci. E tuttavia non possiamo dimenticare, quando nel 1939 venne pubblicato il primo libro del codice civile, che l'articolo 1, terzo comma, disponeva che «le limitazioni alla capacità giuridica derivanti dall'appartenenza a determinate razze sono stabilite da leggi speciali». Era cioè possibile creare attraverso la legge delle "non persone". Dobbiamo sempre tenerlo presente. Certo, quel grado estremo e aggressivo oggi non appartiene ai nostri ordinamenti, ma non per questo dobbiamo chiudere gli occhi di fronte ad un abominevole diritto che confina, nega, esclude e costruisce un altro, il quale può essere oggetto di aggressione per molti motivi.

Non è un caso che l'«altro» inaccettabile in questa fase storica, non solo in Italia, sia l'immigrato. Abbiamo così due figure oggetto del rifiuto e dell'aggressione. Da una parte quelli che rientrano nell'acronimo LGBTI, cioè coloro che hanno costruito e manifestato precisi orientamenti sessuali; dall'altra l'immigrato, anch'egli oggetto di rifiuto.

Il punto è molto significativo, e ci impone di ribadire che cosa voglia dire costruire l'altro non solo come diseguale, ma indegno. La disuguaglianza non dà la legittimazione all'aggressione. Ma quando l'altro è considerato indegno di appartenere alla stessa comunità alla quale appartengono tutti gli altri, ciò può giustificare il rifiuto prima e l'aggressione poi. Tutto questo è l'effetto di una costruzione sociale significativa, dalla quale noi non possiamo separarci, né possiamo ritenere che sia tutto sommato irrilevante. Ed è una costruzione sociale che deriva da ciascuno di noi. È una costruzione sociale che certo trova le parole del diritto, ma è l'altro che mi costruisce come indegno. Non c'è una natura, un'essenza che mi costruisce come tale. C'è una frase molto efficace di Sartre, che si riferisce all'ebreo. Sartre dice: «L'ebreo dipende dall'opinione sulla sua professione, sui suoi diritti, sulla sua vita». Dunque l'ebreo

non è l'appartenente ad una razza, è il risultato di una costruzione sociale che non solo lo discrimina, ma lo vede appartenente a qualcosa di lontano, altro.

Torno a Levi e alle cose che lui ha scritto, anche qui usando prudentemente il riferimento al dramma oggetto delle sue narrazioni. Uno dei capitoli più belli del libro *I sommersi e i salvati* è quello intitolato a «La zona grigia», nella quale non solo l'indegno viene costruito in quanto tale, ma viene spinto ad estremizzare la propria indegnità per poter sopravvivere. Questo è un dato che non possiamo dimenticare ed è per questo che mi è apparso importante dare una serie di riferimenti al contesto.

Una annotazione ulteriore: la costruzione da parte dell'altro mi porta a dire che tollerare non basta più. Ecco il punto chiave. Perché oggi, per esempio – penso soprattutto agli immigrati – si tollera molto, ma si riconosce pochissimo. Io accetto che l'immigrato stia qui, ma finché fa la badante, viene a lavorare in casa mia, e la sera deve divenire invisibile, si deve allontanare il più possibile da noi. Leviamo le panchine dai giardini perché gli immigrati non possano sedersi, avere vita sociale, avere la dignità sociale di componente di una comunità. Questo dobbiamo tenerlo sempre presente. La tolleranza, passaggio fondamentale della civilizzazione. Il riconoscimento, momento ancora difficile proprio perché è l'altro che mi costruisce come lontano, diverso, indegno.

Inutile parlare della situazione italiana. La nostra Corte Costituzionale, quando è stata investita del problema del matrimonio tra persone dello stesso sesso, ha effettuato, all'interno di una sentenza che ha alcuni punti assai significativi e che non dobbiamo lasciar cadere, un'azione interpretativa, quindi di politica del diritto, non accettabile. Non è accettabile perché ha dato dell'articolo 29 della Costituzione una lettura che per altro contraddice altre sentenze della Corte, nelle quali questa metteva in evidenza come l'istituto matrimoniale si sia profondamente trasformato. Nella sentenza n. 138/2010 ha letto l'articolo 29 della Costituzione come il principio in base al quale poi deve essere reinterpretato il principio di uguaglianza, mentre è ovvio che dovrebbe essere l'opposto. Bisogna infatti misurare l'accettabilità istituzionale di una lettura dell'articolo 29 sul matrimonio in base ai principi di eguaglianza tra le persone. Anche se questo non è avvenuto, non dispero della possibilità che la Corte si manifesti in modo più aperto in futuro, come già è avvenuto altre volte nella sua storia. Si pensi all'adulterio della donna, la cui sanzione penale venne prima ritenuta legittima, poi incostituzionale.

Il ragionamento della Corte non è obbligato. Negli stessi giorni nei quali si esprimeva la Corte italiana, basandosi su una lettura tradizionale del matrimonio per escludere l'accesso da parte di persone dello stesso sesso, il Tribunale costituzionale portoghese, muovendo da una disposizione costituzionale sostanzialmente identica, arrivava alla conclusione opposta. Oggi che c'è uno sguardo reciproco tra le corti – si parla di una *global community of courts* – penso che abbiamo buone ragioni per ritenere che bisogna continuare ad insistere su questo terreno. Intanto, però, prendendo molto sul serio tre aspetti della sentenza della Corte: il riconoscimento delle unioni tra omosessuali come formazioni sociali; il diritto fondamentale delle persone

che costituiscono queste unioni ad avere un riconoscimento legislativo; l'affermazione secondo la quale «può accadere che, in relazioni a ipotesi particolari, sia riscontrabile la necessità di un trattamento omogeneo tra la condizione della coppia coniugata e quella della coppia omosessuale». È l'impegno della Corte a vigilare affinché la disciplina parlamentare rispetti le sue indicazioni. Il punto chiave è la natura di diritto fondamentale.

Ancora oggi il diritto fondamentale riconosciuto dalla Corte è negato dall'inerzia del Parlamento, è negato dalla disattenzione della politica, è negato dalla scarsa rilevanza che la cultura italiana attribuisce alle grandi battaglie per i diritti delle persone. Questo vuol dire che il lavoro di ricerca e di sensibilizzazione, la tenacia nel mantenere questi temi nella discussione pubblica, la denuncia continua dell'insensibilità della politica ufficiale, prigioniera di infiniti opportunismi, costituiscono per tutti una obbligazione morale e civile.

Chiudo con una citazione da un'intervista al New York Times di Martha Nussbaum. Ad una domanda riguardante l'eventualità di un suo nuovo matrimonio, Nussbaum ha risposto così: «Se pensassi di sposarmi, sarei preoccupata del fatto che godrei di un privilegio negato alle coppie dello stesso sesso».

Questa è la via da seguire. Non solo rispettare l'altro, ma costruire tutti noi nella dignità e nell'eguaglianza.

I.
SEX AND GENDER

Gender and Beyond: Disaggregating Legal Categories

Alexander Schuster

Abstract

Western legal tradition relies on cryptotypes, implicit and silent legal categories that shape the law and the *homo juridicus*, the legal agent that unconsciously represents the model for crafting both civil and common law. He has long been the symbol of sexism and heteronormativism, but is now undergoing a profound evolution epitomized by the shift from the legal notion and term of sex to gender. The essay argues that gender is the legal category for overcoming discrimination and favouring gender-neutrality. It identifies trends and inconsistencies in national and international systems and argues that for instance same-gender marriage should be the expression to be used. In the meanwhile a *homo juridicus europaeus* has come to light.

* * *

The limits of my language mean the limits of my world.
Ludwig Wittgenstein, *Tractatus Logico-philosophicus*, 5.6.

1. Homo juridicus, quo vadis?

For a long time they remain hidden, away from everyday thoughts. Society is not aware of their presence, yet it decides and moves in a way that implicitly reaffirms their existence and influence. Jurists unconsciously rely on them for crafting new laws and legal codes and for founding their legal reasoning. They are the cryptotypes, tacit ideas of society that turn into implicit legal categories, axioms deemed to be as obvious and inherent in the nature of things that they are not even mentioned and considered totally unquestioned assumptions.

A prominent Italian legal scholar borrowed the term cryptotype (from Ancient Greek κρυπτος and τυπος) from synchronic linguistics and applied it to legal phenomena[1]. When we speak we follow several rules. Speakers are fully aware of some

[1] On the notion of cryptotype applied to law see Rodolfo Sacco 'Introduzione al diritto comparato' in Id. (ed.), *Trattato di diritto comparato* (UTET 1992) 125ff. See also Id., entry *Crittotipo*, in *Digesto disc. priv.* (4th edn, UTET 1993) 39 f.

rules, but not of others, because they are implicit and specific to language use. The same goes for the law. Lawyers draft new legislation, interpret regulations and apply norms using a background of categories that are covert.

Whereas legal cryptotypes have always existed and always will, the era of European codifications in the XIX and XX century has significantly wrought changes in the way they impact legal routine and reasoning. Starting with the *Code Napoléon* codifications are epitomes of systematic approaches. The efforts to build a rationalistic-deductive legal system by XIX century German scholars yielded for example the *Begriffsjurisprudenz*. Inspired by Cartesian logic, the legal order is based on and coincides with exact, complete, exhaustive and systematic jurisprudence. Its axioms, however, are not all overt, with far-reaching consequences on the degree to which a legal system can evolve and adapt to social changes.

Social sciences build theories by relying on an ideal set of assumptions, and as far as human behaviour is concerned they define an agent summarizing the strongholds of the theory[2]. Microeconomics has developed what is the best example of a rational model, i.e. the economic agent. The *homo oeconomicus* is a purely theoretical agent, who acts in view of obtaining the highest possible well-being for himself based on the information available and respecting in a rigorous, rational way his set of preferences[3]. Microeconomics developed theories explaining this *homo oeconomicus* and his behaviour and thereby defining the rules of the market. Theory and practice, however, do not always coincide. This *homo* is perhaps selfish, and rationality does not always lead our actions, which are subject to emotional swings, so that critiques arose against this theoretical model. A similar pattern applies to the law as well.

The European legal tradition similarly relies on an implicit vision of the human being. This is the agent of the law and the system draws from these ideal rules of conduct, obligations, rights applying to the individual and to society as a whole. This agent is endowed with rationality and therefore is expected to react to legal incentives and sanctions. He has individual preferences, benefits from a social status and has a certain place in society by being part of social groups such as a family, associations, political parties, and enterprises. The more a system puts efforts to concentrate the founding pillars of its legal order in a limited number of sources, such as codes, the more it is drawn to rely on an original set of axioms most of which are tied together in a model of a legal agent. The common law tradition is not a stranger to cryptotypes and equally relies on implicit ideas and categories epitomized by a model of legal agent. Its traditional core does not differ substantially from the civil law one.

[2] See the *homo sociologicus* introduced by Ralf Dahrendorf in 1958: *Homo Sociologicus: Ein Versuch zur Geschichte, Bedeutung und Kritik der Kategorie der sozialen Rolle* (VS Verl. für Sozialwissenschaften 2006), English translation *Homo sociologicus* (Routledge & K. Paul 1973).

[3] For an overview of the *homo oeconomicus* see for instance Joseph Persky, 'Retrospectives: The Ethology of Homo Economicus' [1995] Journal of Economic Perspectives 221.

The era of codifications has opened the gates of the law to the modern *homo juridicus*[4]. Such a formidable advancement in legal history required a theoretical framework and a common ground, which was however not made fully explicit. The *homo juridicus* is to legal sciences what the *homo oeconomicus* is to economics. They both permit the reduction of the multitude of human beings to unity; they are the means for the *reductio ad unum* of the human landscape. He is – so to say – the one man that rules them all, the model of legal subject, and the main character in Europe's legal narrative. Yet one element significantly distinguishes the economic and legal models from each other. Whereas the economic human is firstly theorized thoroughly – explicitly starting with economic theories that are developed moving from the assumptions the model is based off –, the law takes a completely different route. The legal order does not presuppose a full theory of the legal human as a precondition for the definition of the law. The model is implicit. Its theoretical definition, rather than preceding the production of norms, emerges all along legal history. Only the social evolution of the law unravels the deepest assumptions. Whilst the *homo oeconomicus* is the explicit starting point of the system, the *homo juridicus* is an implicit foundation that is given a fuller description rather at the end of his life, i.e. when he is progressively disavowed by the law.

The craftsmen of the French Code civil of 1804 and of Germany's *Bürgerliches Gesetzbuch*, the BGB of 1900, sketched an agent by using a highly dogmatic toolbar. Who he or she really is has long remained an unaddressed question. His characteristics became clear at a later stage, when the eternal fight throughout history for equality and justice challenged the status quo. Still today not all is evident and known. As the law continues to evolve and the legal culture adapts to new inputs and social claims, history unravels assumptions that we were not aware of before, no matter how essential they might be to our construction of society. Actually, the more foundational they are, the deeper we have to dig.

In the past two centuries history has taught us much about the agent that is common to the Western legal tradition. Racism and sexism have shown that this *homo juridicus* was not representing any and every human being, but took the appearance of the masculine side of humanity. Moreover, his skin had a very specific colour: white. It was with this background that the law depicted rights and freedoms of the individual. All those not matching this legal agent fell outside the Law, confined in other parts of the legal systems, never enjoying the main stream of protection of the law. Exclusion reached the point of denying any legal subjectivity to human beings,

[4] This expression occurs for the first time in the work by a well-known French author, Alain Supiot, who developed the idea of *homo juridicus* as the link between man as a finite biological and material entity and its legal dimension that overcomes this limits. See *Homo juridicus essai sur la fonction anthropologique du droit* (Seuil 2005), English translation by Saskia Brown, *Homo Juridicus. On the Anthropological Function of the Law* (Verso 2007). The same expression, even though it has commonalities with Supiot's, is employed in the present essay independently and performs a different function.

from ancient times to very recent history[5]. Racial laws and gender discrimination equally pertain to the history of all Western legal traditions and are common to other ones as well. For a long time all of the above was perceived as natural, self-evident, based on axioms not to be contested and not requiring any justification. African Americans, Jews and women shared a common fate.

Our past tells us more. Our *homo juridicus* was also a religious man. In many instances he was linked to just one religious confession. Dissenting people not sharing the established creed were deprived of rights, placed outside the protection of the law. The religious wars that devastated Europe throughout the centuries brought essentially an increased separation of Church and state. Nonetheless our man was still inherently religious and the perceived and recurring menace of non-Christian religions at the borders of Europe contributed to his identification with a Christian man, a common model for Western countries. All Christians rallied their forces under a common faith. By indulging in creating Latin writing, we could say that the *homo christianus* successfully replaced in the law the *homo catholicus* and the *homo protestans*. The history of family law is evidence to the common ground of civil law and common law traditions, deeply rooted in canon law and modern Christian traditions. The position of the wife vis-à-vis the husband, the role and powers of the father over his children, as well as the privileges granted to the so-called legitimate family, holding for centuries and still today the monopoly over the legal notion of family are all examples of issues that European and North American jurists have debated in terms of equality.

Yet this white, Christian and masculine individual soon acquired new nuances. The rise in awareness by minorities and neglected sectors of society and their claims for recognition cast a new light on the legal agent. History progressively showed that this man was also mostly wealthy and a bourgeois. Today we know through the emerging of hidden discrimination that our *homo juridicus* is healthy and far from disabilities. The UN Convention on the Rights of Persons with Disabilities is clear evidence to this, as it aims to set new remedies to discrimination derived from a law conceived for non-disabled individuals.

In the last decades, however, we also realized that he is heterosexual. The model of legal agent that the whole family law postulates influences above all marriage and parenthood, and thereby curtails rights in several other fields of the law, such as inheritance law, employment and social rights. The impact of the heterosexual side of the *homo juridicus* on the system and on individuals was not even perceived, as axiomatic arguments based on tradition and nature – whatever these terms may refer to – made elementary gender-based rules and assumptions self-evident.

The advancement of rights campaigns and the increase of social pressure for greater equality make assertive self-evident arguments no longer sustainable and in-

[5] Hannah Arendt saw in this a new form of despotism. In *The Origins of Totalitarianism* (George Allen & Unwin 1967) 237 she wrote: "The first essential step on the road to total domination is to kill the juridical person in man".

duced judiciaries to reason ex novo on the justifications for certain statutory provisions or traditional norms derived from never questioned interpretative options. If we consider the gender requirement for two eligible spouses, we know that until recently many legal systems did not explicitly state diversity of gender as a requirement. They even deny that same-gender marriage performed elsewhere is something resembling marriage and therefore conclude its non-existence rather than invalidity[6].

Cryptotypes remain covert until historical sensitivity does not point to traits of the *homo juridicus* that were until then unknown and yet deeply entrenched in our minds. Sexism and heteronormativity[7] are still prime examples of contemporary attitudes of the legal orders and at the centre of the legal shift towards broader inclusion and greater equality. The way is now paved for abandoning the shores of these two deeply rooted attitudes and for the move towards a legal system based on gender-neutrality. The bearing is set. How to navigate the hazardous waters of legal innovation is yet to be seen. The starting point is certainly a critical and sound comprehension of cryptotypes and the legal semantics associated thereto.

2. From cryptotypes to legal notions

2.1. Sexual dualism

Traditional legal systems considered man as the legal agent. The existence of women was a fact that the law would take into consideration where strictly needed. It would take it for granted that the world is based on a sexual dualism and regard it as a mere fact for most of its provisions. However, following the rise of women's right, either implicitly or explicitly, in discriminating in favour or against, the legal system would rely on the idea of sex as a criterion. Its relevance brought it to the status of an autonomous legal notion: the law depends on sex as one of its categories.

Masculinity and femininity appear such self-evident elements of our natural world that no legal definition of sex is provided, not even in international instruments. This is not surprising if one considers that sex as a legal requirement is often implicit, albeit of the greatest importance. Marriage perhaps provides the best ex-

[6] A traditional doctrine in Italian civil law that nowadays is aptly questioned affirmed that sameness of gender of the spouses does not even allow to preliminarily categorize their union under marriage, although other legal systems lawfully would do so. The Supreme Court of Cassation stated that the essential, "natural" elements of marriage are not even given, so that such "marriages" in the eyes of Italian law are condemned to be "non-existent", a consequence much more negative than annulment.

[7] According to L Berlant and M Warner, 'Sex in Public' [1998] Critical Inquiry 24, 547-566, 548, "[b]y heteronormativity we mean the institutions, structures of understanding and practical orientations that make heterosexuality seem not only coherent – that is, organised as sexuality – but also privileged. Its coherence is always provisional, and its privilege can take several (sometimes contradictory) forms: unmarked, as the basic idiom of the personal and the social; or marked as natural state; or projected as an ideal or moral accomplishment".

ample of how the law relies on sex without providing any reference to it[8], but there are others. In Italy electoral laws did not explicitly postulate the right to vote as limited only to men, but when the limitation was challenged courts found it unnecessary to seek textual support for constructing the provision as limiting voting rights to men, as it was considered self-evident[9]. Only in 1946, when Italians were given the choice to opt for the monarchy or the republic, did women gain full equality.

The legal idea of sex builds on its naturalistic evidence and makes it a category, a label for classifying individuals and a requisite to which consequences are attached, not last of which is inequality. We can nowadays apprehend several critical issues due to this category.

Firstly, this purported naturalistic origin of the dualism rests on biological evidence, but is still a cultural construct. The binary interpretation of chromosomes is led by cultural paradigms and overlooks that nature does not always fit in categories created by mankind. Intersexuality is a telling example. If one had hypothetically to concede that sexual organs and chromosomes had to play a role in the law, an exclusively binary system would not be satisfactory. Such a system overlooks the situation of some individuals – no matter how many – and forces them to adapt to life schemes that they did not want to choose, be it because they fell in a category not matching their feelings or simply because they did not want any label imposed but were forced nevertheless to opt for one. The absence of a legal definition of sex leaves it to administrative registrars and to judges to ultimately decide critical cases.

Secondly, the more women became fully-fledged legal subject with rights and duties in an increasing number of legal fields, the more sex became an explicit element in identifying privileges and reiterating discrimination. For instance, the dominance of men in the employment sector could no longer be based on implicit

[8] Laws provide differently for men and women and provide legal instruments to combat discrimination, but do not define sex or gender. See for instance the most important international instrument in the field of non-discrimination against women: Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly. However, the equivalent instrument adopted by the Council of Europe Committee of Ministers on 7 April 2011, the Convention on preventing and combating violence against women and domestic violence, CM(2011)49 final, CEST No 210, provides at article 3 a definition of gender. It shall mean "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men". No definition for sex is given, even though both terms are mentioned and used in the text. Article 4 on Fundamental rights, equality and non-discrimination mentions both sex and gender as non discrimination grounds. The explanatory report does not explain such a choice. Both texts are available online <http://conventions.coe.int>, accessed 28 May 2011.

[9] Following the experience in the United States Maria Montessori, a prominent Italian pedagogue, in 1906 supported a campaign for the extension of the right to vote to women, who were asked to register on the electoral lists. The Italian Court of Appeals rejected with one exception the application. The Court of Cassation eventually quashed the decision of the Court of Appeal of Ancona of 25 July 1906, which had granted the request. The reasoning by the courts drew on tradition and the natural roles in society given to men and women.

sexist assumptions. In some cases sex became an explicit requirement, in others sex started to be mentioned as a non-discrimination ground.

The introduction of a new term, gender, is the turning point in the awareness process of how discrimination occurs, which is taking place in society. The legal history of gender discrimination testifies to the role that the category of sex has played and still plays in society and in the law in particular.

2.2. Sex and gender

Different treatment of men and women was justified by biological differences and was considered self-evident. As time passed, justifications were increasingly questioned, up to the point where differences in employment conditions and pay, family law etc. were strictly scrutinized. It became clear that the reasons for discriminating were not chromosomes and biological traits *per se*, but rather the social construct of man and woman. By then it became clear that not sex, but gender was the target of discrimination. For this very reason reference to sex in public policies and legal discourse faded out in favour of gender, so that expressions such as "gender equality", "gender balancing", "gender-neutrality" are now of common usage. The law is part of this terminological change, to which the notion of gender identity offers a significant contribution[10].

Chromosomes do not account for the character and the psyche of individuals, nor for their attitudes and preferences like manner of dressing or taste in music. If gender refers to the identity, appearance or behaviour as perceived by an individual, her or his most intimate identification, then it does not relate to her or his "biological file", which usually accounts for the sex assigned at birth.

The protection of women and of gender identity at European and national level shows that in the eyes of the law gender prevails over sex. On the one hand sex is replaced by gender or reinterpreted as meaning gender, on the other hand legal systems affirm the legal supremacy of gender over sex. With regard to the first aspect, besides the formal use of "gender identity" in specific legislation, both in the English legal terminology and in some Latin languages gender is now used instead of sex, with the double positive consequence of focusing on the real object of discrimination, which is gender and not sex, and of including also transgender persons. See for instance the recent gender violence legislation in Spain, but also the Council of Europe Convention on preventing and combating violence against women and domestic violence, which was the very first international instrument to explicitly

[10] According to the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

mention protection on the ground of gender identity[11]. The prevalence of gender over sex occurs also in all instances where the law prohibits enquiries into the history of transgender persons. Civil status certificates, records and diplomas have to be updated with the new gender and disclosure of previous personal history is prohibited for the protection of private life. This certainly follows from the protection of sensitive personal data, but also signifies that what matters to the state is no longer the sex of the individual, but her or his gender. This is the category that the law now embraces, biological evidence being a mere fact to which the law pays no legal attention unless it is relevant as an element of a given legal situation.

3. Disaggregating legal categories

With the shift from sex to gender the cryptotype of a sexual dualism as a social construct comes to the surface. By embracing the term gender jurists show awareness of the fact that rules are in reality linked to the social role assigned either to men or to women. The more public policies and the legal system realize that disparate treatment between genders in many instances is unjustified and not based on "heavy reasons", the more the system moves towards gender-neutrality. At the same time, gender-neutrality leads the legal order to a development that permits to dismiss not only sex, but gender itself as a legal category, reaching the fullest degree of gender-neutrality.

Is a legal order without gender conceivable and in how far can the system currently move in this direction? Would abandoning gender as a legal category entail a denial of the biological difference of human beings that is associated with the traditional sexual dualism? Certainly not. The viewpoint of the current analysis is strictly legal and its scope is the legal phenomenon. Other sciences may well rely on sex and gender as relevant notions. This, however, does not imply that the same notions must be part of the set of elements that build the legal fact or the legal system. A natural fact, like a colour of a building, is not a legal fact. The frame of the law does not coincide with the frame of reality. Therefore, the law does not deny that "individual X" may well be from a social point of view a man or a woman, yet the eyes of the law see individual X just as a human being, without attaching any more relevance to gender than to ethnic origins or sexual orientation.

This does, however, not mean that the law is or must always be blind to human biology and its evidence. Before discussing the relevance of one of the most significant issues – pregnancy – an example will clarify how physical or natural elements determine certain legal consequences without becoming legal categories. Discrimination grounds should always be left open, as they know no limit: Article 21 of the Charter of fundamental rights of the European Union contains a quite lengthy list

[11] See below for the more detailed analysis of the usage of gender in language groups.

of protected grounds, which is however open-ended as it may well cover other grounds. The scope of the protection is even broader as discrimination may occur per association or operate intersectionally. One hypothesis that may take place is discrimination because of one's height, e.g. discrimination against short people seeking a job and deemed unfit to perform the required duties. Height is not a legal category, yet the law identifies and reacts against discriminatory situations that are based on height like on any other physical trait such as weight (for instance, bullying at school against obese children). In several occasions judicial scrutiny has struck down height as a condition because it is not related to any genuine job requirement.

The law can approach pregnancy in a way similar to height. Biological evidence is not denied by the legal notion of gender and protection does not diminish in a gender-neutral legal system. Discrimination against or in favour – protective measures or legitimate differences in treatment – would still find their place in the legal scenario as they did before. However, the focus is no longer on sex *per se*, but on biological evidence. Pregnancy would be protected as such, regardless of gender[12]. Critics of comprehensive gender-neutrality may consider such theories merely speculative and incapable of meeting a common feeling that mandates to stick to the legal protection of women during pregnancy. It must be understood that protection does not diminish and actually such a move is necessary to allow the system to further protect situations that may lead to heavy and socially pernicious discrimination, e.g. when sex and gender do not coincide and a biological mother is of masculine legal gender.

The dissociation of biological facts from sex and even from gender solves issues that the law is soon called upon to address, i.e. gay and transgender parenthood. Recognizing the protection of parenthood in general, rather than of motherhood on the one side and fatherhood on the other side, leads systems to gender-neutrality also with regard to parental authority, parental leaves and other benefits related to

[12] The US Supreme Court dealt with the issue of discrimination and pregnancy in *Geduldig* v. *Aiello*, 417 U.S. 484, 497 n. 20 (1974). The Court held that "*[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification […] The program divides potential recipients into two groups-pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes*". Upon this decision Congress passed the *Civil Rights Act* in 1964 and specified that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions". Also the European Court of Justice had to deal with a similar issue and decided that discrimination on ground of a person being pregnant is direct discrimination against women. See case C-179/88, *Handels-og Kontorfunktionærernes Forbund* [1990]ECR I-3979, para 13; C-394/96, *Brown* [1998] ECR I-4185, paras 24-27; C-460/06 *Paquay* [2007] ECR I-8511, para 29. An analysis of European and North American cases is found in Christa Tobler, *Indirect discrimination: a case study into the development of the legal concept of indirect discrimination under EC law* (Intersentia 2005) 46 ff.

parenting[13]. More importantly, dissociation appears to be the only coherent way to approach the legal issues that will arise from the positive trend to abandon the sterilisation requirement for gender reassignment[14]. A transgender person is considered by the law as belonging to the reassigned gender, without any relevance left for previous history related to the biological sex. There is no "legal resurrection" of the biological dual category when a non-sterilized biological female person of male gender delivers a child or an MtoF transgender person fathers a child because her male reproductive organs were still functional[15].

By focusing on pregnancy and not on femininity the law effectively addresses the real situation that deserves protection, i.e. human reproduction. By embracing a gender-neutral approach in all fields – e.g. family and employment – the legal order could eventually also dismiss the *legal* category of gender. All this becomes possible without causing inconsistencies in the legal order only if the focus is narrowed down to the real situation in need of protection and thereby overcoming critiques that there is no legal possibility of relinquishing sex or gender[16]. Abandoning both sex and gender actually contributes to avoiding inconsistencies that originate from the most recent jurisprudence on gender identity, such as parenthood by transgender persons retaining their reproductive capacity.

[13] This is the approach to a certain extent of Council Directive 2010/18/EU of 8 March 2010 implementing *the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive* 96/34/EC.

[14] The most recent overview on European national legislations regulating gender recognition is provided by: Council of Europe Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe* (report, 2011), 85-87.

[15] When the German Federal Constitutional Court decided that mandatory surgery for full gender recognition was unconstitutional – BVerfG, 1 BvR 3295/07 of 11 January 2011 – it did consider the issue of how to classify the relationship between a transgender parent and the child that is born before or after reassignment. The Court decided that the parent should be considered a father or a mother based on his or her biological sex, which would solve the problem. This decision by the Court is doubtful and could on this point be decided differently in view of the progressive position expressed on the recognition of same-gender parenthood through adoption by the life partner of the biological mother in 1 BvL 15/09 of 10 August 2009.

[16] The Constitution Court of Belgium stated that sexual dualism was not a constitutional pillar of the national legal order. The judgement No 159/2004 of 20 October 2004 says it clearly: "*La Cour répond ensuite que la circonstance que la Constitution attribue une importance particulière à l'égalité entre hommes et femmes, par le biais des articles 10.3 et 11bis de la Constitution, n'a pas pour effet que la 'dualité sexuelle fondamentale du genre humain' puisse être considérée comme un principe de l'ordre constitutionnel belge. L'article 12 CEDH et l'article 23 du Pacte international relatif aux droits civils et politiques ne peuvent pas davantage être interprétés en ce sens qu'ils obligeraient les États contractants à considérer la 'dualité sexuelle fondamentale du genre humain' comme un fondement de leur ordre constitutionnel*". Although still perceived as social evidence, dualism is not a founding pillar of the legal system. The judgement may be interpreted as expressing the view that the law must not incorporate all social categories and assumptions, but should be limited instead to those notions and categories that are strictly needed to regulate society and the common living.

Dissociation of behaviours, attitudes and biological traits narrows down the scope of the legal protection and targets the specific element that only justifies the preferential treatment. EU law has actively dismissed any approach that reiterates social constructs like gender. The *Test Achats* case[17] may be read in this way. The ECJ has not upheld the possibility to base insurance plans purely on gender. Such practice would indeed reinforce ways of classifying individuals that have long served to nurture stereotypes. Insurance companies can certainly distinguish on statistics and maintain actuarial schemes, yet they must do it based on other patterns than the ones that have served discrimination. Other schemes are possible, however they must be objectively justified and not rely on social assumptions that reproduce discriminatory patterns.

4. Sex and gender: an assessment

4.1. The semantic shift in Western languages

Is the semantic and practical distinction of the terms sex and gender only abstract speculation or is there evidence that legal systems have already – either consciously or unconsciously – implemented a shift from sex to gender? In order to respond to this question reference to language families ought to be made.

All legal vocabularies share sex as the original term to distinguish between men and women. They evolved however differently and we can currently identify three main trends. A first group of legal systems embraced gender as the new term replacing sex. Whereas sex still is the term in the less recent legislation, gender progressively replaces it in newest legislation and case-law. Although a sort of cohabitation of the two terms occurs, the trend is set. The semantic shift is taking place in full knowledge of their difference in meaning: not biology, but the social, cultural and psychological identification as man or woman is at the core of the legal reasoning. This is notably the case of the United States, the United Kingdom and other English-speaking countries. Also some Romance languages now widely use gender. Spanish *género* is found in the legislation of both the state and the subnational entities, the so-called *comunidades*[18].

In a second group of legal systems gender is employed less extensively. Gender is either used by legal scholars but not in everyday practice or its use is still insufficiently widespread to be considered as having already replaced sex. However, in some cases there seems to be a positive trend, which is likely to be strengthened by a positive dissemination of the true meaning of gender as opposed to sex and of the

[17] Case C-236/09 *Test-Achats and Others v. Conseil des ministres* [2011] OJ C 130/4.

[18] See for instance ley orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género; ley 30/2003, de 13 de octubre, sobre medidas para incorporar la valoración del impacto de género en las disposiciones normativas que elabore el Gobierno.

advantages of the semantic shift in abandoning gender stereotypes in the law. Especially in these contexts it is of paramount importance to have legal practitioners understand that gender is not a matter for scholars, but a legal concept that must be embraced as part of an evolving legal trend to eradicate discrimination. Some French scholars use gender (French *genre*), but they represent a minority and the French case is currently closer to the third group described below. Italy's record is more positive. Not only scholars, but also the national legislator and the regional legislative assemblies have embraced gender[19]. European Union law progressively embraces gender. By way of example Directive 2006/54/EC[20] uses both sex and gender, however without any apparent reason for the use of one rather than the other. Moreover the name of the newly established agency for the equality of men and women is called European Institute for Gender Equality and countless acts by EU institutions employ this term, e.g. the European Pact for Gender Equality (2011-2020)[21]. The European Court of Human Rights has started to use gender in some English written judgements and is likely to move forward in this direction. In *Konstantin Markin v. Russia*[22] the Court dealt with parental rights denied to fathers in the armed forces and made a statement in favour of relinquishing the 'traditional gender roles' (*rôle traditionnel des deux sexes* in the French version). In other judgements there is evidence of the use of the term gender as a discriminatory ground or as the privileged term for referring to men and women or to parental gender[23]. In

[19] At the regional level see regional law Tuscany May 13, 2004 No 25, *Norme per l'elezione del Consiglio regionale e del Presidente della Giunta regionale*, art. 8 (gender is now the preferred term in the field of electoral law). The Italian Parliament has recently employed gender in the law November 4, 2010 No 183 (so called *Collegato lavoro*), whose article 46, uses expressions such as "differenze di genere" (gender differences) and "discriminazioni di genere" (gender discrimination).

[20] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 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. See especially the recitals and article 29 on gender mainstreaming. The latter expression is translated in the other official languages quite differently and this diversity is evidence to the variety of semantic options in the national legal orders.

[21] See Council conclusions on the European Pact for gender equality for the period 2011-2020 adopted at the Council meeting of 7 March 2011. The Court of Justice also uses the term gender.

[22] App no 30078/06 (ECHR, 7 October 2010).

[23] The Court uses gender in the most recent decisions. See for instance *Németh v. Hungary* App no 29436/05 (ECHR, 14 June 2011) dealing with visitation rights of divorced parents and using only the term gender; *Rytchenko v. Russia* App no 22266/04 (ECHR, 20 January 2011), where sex is used only once and gender is the preferred term in dealing with a child custody dispute among opposite-gender parents); *T.N. v. Denmark* App no 20594/08 (ECHR, 20 January 2011). See also the partly concurring and partly dissenting opinion of Judge Sajó in *M.S.S. v. Belgium and Greece* [GC], App no 30696/09 (ECHR, 21 January 2011), who refers to *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94 as a case on discrimination on the ground of gender. Gender instead of sex is also used in *Kolkova v. Russia* App no 20785/04 (ECHR, 13 January 2011). With regard to the advisory jurisdiction of the Court, see *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the*

the English only written judgement of *Schalk and Kopf v. Austria* the Court uses both sex and gender when reviewing their case-law on marriage of transsexuals. The use of the terms, however, does not appear consistent, as will be seen below.

Finally, a third group of legal systems do not use the term gender, but nevertheless incorporate the notion it stands for. Languages that have not included gender in their legal terminology stick to sex, yet have reviewed its definition so to include what currently is better understood under the label gender. In other words, sex coincides currently with gender and expands on the meanings of sex that depart from its biological dimension and embrace the psychological and social ones. In *P v S*[24] the European Court of Justice certainly redefines for the first time the term sex in EU legislation in order to cover also discrimination against persons that have undergone or intend to undergo sex reassignment surgery. Advocate General Tesauro argued that the traditional male-female dichotomy is far too narrow and sex should be addressed as a continuum[25]. The Court could only rely at the time of the decision on EC provisions combating discrimination on grounds of sex and nationality. As a consequence it had to stretch the ground of sex in order to protect the situation of Ms P. However, that this was only a strategic means to reach a higher goal – dignity and freedom – is evident from the reasoning itself[26]. As long as gender identity is not included as such in the text of EU legislation the Court will have to rely on sex and reinterpret it as including at least transsexuals.

Reinterpretation of the term sex as including also gender is the common approach of Germanic languages. German legal terminology uses only the term *Geschlecht*, which includes both the notions of gender and sex. The pivotal notion in the German system is "sexual identity", which ensures also protection on the grounds of sexual orientation and gender identity[27]. The same applies to the Swedish legal vocabulary, where *kön* – literally sex – is considered to cover both sex and gender[28] and the na-

election of judges to the European Court of Human Rights, 12 February 2008, where gender is the prevailing term, although sex is still considered – perhaps due to its occurrence in legislative documents – as synonyms. The French version of the advisory opinion only uses *sexe*.

[24] Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143. See also Case C-423/04 *Richards* [2006] ECR I-3585. The principle set out in the case-law was then codified in Recital 3 of the Preamble of the Gender Recast Directive.

[25] See Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143, Opinion of AG Tesauro, para 17.

[26] "To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard". *P v S*, para 22.

[27] German law transposing EU directives sticks to this approach and avoids reference to the corresponding EU terms: see the *Allgemeine Gleichbehandlungsgesetz* (AGG) of 2005. However, although sexual identity is still the prevailing legal notion in Germany, some subnational entities, the *Länder* – see for instance the Constitution of the *Land* of *Thüringen* – now employ the expression sexual orientation.

[28] An analysis of the semantics of sex and gender in Swedish legal jargon is found in the expert report to the Government on the status of refugees and gender-related persecution *Flyktingskap och*

tional non-discrimination law[29] uses the broad *kön* (sex) compound expression *könsöverskridande identitet eller uttryck* (transgender identity or expression) to cover gender identity. The influence of the latter expression in affirming the prevalence of the term gender is evident and deserves now a specific analysis.

4.2. The impact of the expression gender identity

Whereas legal terminology varies considerably with regard to the use of sex and gender, there is a certain convergence with regard to the use of gender identity. Due to the novelty of the term and the relatively recent protection provided to transgender persons, it is explicitly mentioned only in few legal sources. Nevertheless, jurists are familiar with the expression world-wide and a common use can be traced in the legal jargon, in legislation and/or in case-law. Italian national legislation still does not employ the term and law no. 164 of 1982 is titled "rectification of sex attribution" (*rettificazione di attribuzione di sesso*) and focuses on transsexualism. However, subnational legislation uses this expression widely, an evidence to the increasing trend to include gender identity in the legal discourse[30]. Even where other corresponding legal expressions are dominant, gender identity is not a stranger to the law, although in some instances there might be a problem in creating a literal equivalent in those languages that do not use gender as a legal term, e.g. Germany. Also international organisations employ the expression regularly[31].

The notion of gender identity and its protection as a ground of non-discrimination are quite recent. The *homo juridicus* was modelled on biological sex as long as it was perceived as a self-evidence of human nature. When gender roles were "disag-

könsrelaterad förföljelse, Stockholm, SOU 2004:31, 73-76 and 163-168, available at <http://www.sweden.gov.se/sb/d/108/a/11484> accessed 23 May 2011. See the Executive Summary in English, p. 17: "The Swedish word kön refers in legislative contexts to both the biological concept of 'sex' and the cultural and social concept of 'gender'". The discussion in the report is triggered by the use in English written documents of the term gender as in UNHCR, *Guidelines on international protection: Gender-Related Persecution within the context of Article 1 A (2) of the Convention and/or its Protocol relating to the Status of Refugees*, HCR/02/01, 7 May 2002, mentioned in the report itself.

[29] Diskrimineringslag (2008:567).

[30] See the Italian regional laws of: Liguria 10-11-2009, no 52, *Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere*; Marche 11-02-2010, no 8, *Disposizioni contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere*, and Marche 11-11-2008, no 32, *Interventi contro la violenza sulle donne*, art. 1; Piemonte 29-05-2009, no 16, *Istituzione di Centri antiviolenza con case rifugio*, art. 4; Puglia 19-09-2008, no 23, Piano regionale di salute 2008-2010; Toscana 15-11-2004, no 63, *Norme contro le discriminazioni determinate dall'orientamento sessuale o dall'identità di genere*; law of the Autonomous Province of Trento 09-03-2010, no 6, *Interventi per la prevenzione della violenza di genere e per la tutela delle donne che ne sono vittime*, art. 3.

[31] See for instance Council of Europe, Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member States on measures to combat discrimination on grounds of sexual orientation or gender identity and UN Human Rights Council Res 17/19 (15 June 2011) UN Doc A/HRC/17/L.9/Rev.1 on Human rights, sexual orientation and gender identity.

gregated" from chromosomes, gender became an autonomous notion. However, the complex distinction of the two notions and the apparent overlap of situations referred to by using either sex or gender did not favour a consistent legal usage of the two terms. Whereas both notions refer to the same individual with regard to cisgender persons, i.e. individuals whose gender coincides with the traditional binary sexual category they are associated with, transgender people necessarily call into question this overlap.

Gender identity casts a new light on the legal discourse of sexual dualism as traditionally conceived and results in a litmus test for verifying the heteronormativity of a legal system at different levels: openness of the legal discourse to the latest developments in social sciences; coherence in the use of legal terminology; and, consistency of the legal order, with special regard to family law.

Medical sciences, philosophy and social sciences use gender as a leading category. Medical diagnostics use expressions such as gender identity disorder and philosophers have developed theories and still engage in a lively debate on the notion and implications of gender. Social sciences other than law have developed instruments to approach diversity and equal opportunities such as gender budgeting and gender mainstreaming. Legal sciences are now faced with challenges that deserve new concepts and new instruments in order to understand social developments. By incorporating the new perspective of gender it adapts to the most recent developments in the study of society. Gender as well as sexual orientation are significant contributions for unravelling the *homo juridicus* and for abandoning stereotypes and prejudice.

Legal sciences have actually already engaged in a dialogue with other social sciences, yet quite often fertilisation remains very theoretical and far from everyday legal discourse. The use of the term gender in legislation and case-law is not coherent. In many instances gender is used as a synonym for sex and some expressions seem just to be fixed and employed without any critical approach as to their justification. For instance 'gender identity' is correctly used, but then other expressions seem incapable of being embraced, like same-gender, even though it would seem the most appropriate concept to be included. A telling example are so-called same-sex unions.

5. Same-sex unions is not the issue

Whereas we talk of gender-neutrality with special regard to family institutions, only the expression same-sex unions and similar are used. In so far as a legal system has already included the term gender, the persistent use of sex in legal discourse is doubtful. Coherence in theory is here linked to semantic coherence. The expressive powers of language dictate what problems one is able to solve. A few points may clarify why the current use is inconsistent at the very least for the first group of languages that was described above, the one in which gender is the widespread legal notion.

If we consider the history of marriage and of inequality between spouses the law served the purposes of preserving gender roles. The authority of the husband and the position of the wife are all linked to gender. The role of the wife essentially coincides with the position of women in society and inequalities moved along this line from family institutions to employment. The traditional construction of marriage is sexist and heteronormative. It is based on gender, not on sex. As long as discrimination was justified as inherent in nature and, therefore, in sex, one could aptly talk of same-sex unions. However, once inequality is understood as an effect of a social and cultural construct, discrimination in family institutions is correctly linked to gender, not to sex. Consequently, it is gender, not sex that matters in marriage and to an equivalent, yet different extent in parenting.

The issue of the legal and social debate of the past two decades is not same-sex unions, but same-gender unions. At stake is the suitability of the conjugal bond to include and protect a love that long dared not speak its name. Can two men or two women nourish an intimate feeling that is equally strong and equally passionate as the one between opposite-gender persons? Is this feeling dependent on the chromosomes of the couple or rather on the perception one has of the social roles of husband and wife? By opening up marriage the legal system rejects gender roles in marriage and makes a true step towards reaffirming full equality within the marital institution, now conceived as a bond between two persons placed on the same footing. It is no accident that so-called gay marriage is a step towards *gender*-neutrality (and not sex-neutrality). It is therefore very surprising to see how extensively and without any critical exception common-law and in general English-language based legal systems use the expression same-sex.

Without dwelling too much upon parenthood, a similar reasoning applies to same-gender parenthood. Whereas the biology of the members of the couple has no bearing in defining a common life or the quality of a loving relationship, it is a significant factor in human reproduction. Nonetheless, parenthood today goes well beyond genetics. Reproductive techniques, intentionality and social parenthood cast a new light on parental institutions and international and national courts and legislators have embraced this new perspective[32]. A good parent and the best interest of the child are defined by having in view not the sex, but rather the gender of the adults involved[33]. The aptitude of a household to welcome a child should be decided on the basis of the qualities of the prospective parent or parents, regardless of their chromosomes.

The closing argument in support of the expression same-gender is the history of gender identity and marriage. The tradition definition of marriage is linked to the

[32] About the evolution of family law and the gendered nature of parenting law see Susan B. Boyd, 'Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and responsibility' (2007) 25 Windsor Y.B. Access Just. 63.

[33] The Council of Europe European Convention on the Adoption of Children (Revised) of 2008, CETS no 202, does not mandate adoption for same-gender couples. However, it includes this option in several of its provisions. See articles 7.2, 5.1, 8 and 9.

legal category of sex. A mostly implicit rule provided that only two persons of the opposite sex could marry. No regard was given to the gender identity of the individual, as only the sex assigned at birth mattered. Then, the recognition of gender found its place in the legal discourse and an increasing number of states granted recognition to the psychological dimension of one's identity and set aside sex as the legal notion. Transsexual and to a lesser extent transgender people could also marry another person they previously could not. Where marriage is not open to gay and lesbian couples, this other person must be of the opposite gender or, in those linguistic contexts where sex is reinterpreted as meaning gender, of the opposite (psychological and legally assigned) sex. In these systems there has been a subtle move from an opposite-sex to an opposite-gender marriage. This is notably the case under the European Convention of Human Rights (hereinafter ECHR).

Article 12 of the ECHR reads: "Men and women of marriageable age shall have the right to marry and to found a family, according to national laws governing the exercise of this right". It has been interpreted until *Goodwin v. UK*[34] as being related to sex and protecting same-sex marriage only. After Goodwin article 12 has been reinterpreted by the Court as protecting opposite-gender marriage, so that a transsexual person such as Ms Goodwin could marry a male partner. However, the Court in *Schalk and Kopf v. Austria*[35] delivers a judgement that casts doubts on how the judges conceive and use sex and gender in their discourse. The two terms seem to coexist, as if there were two marriages under article 12, an opposite-sex marriage and an opposite-gender marriage[36]. Yet the Court recognises that also cisgender persons have a (legal) gender and that they enter into opposite-gender marriages, an explicit expression used by the Court[37]. Moreover, the Strasbourg judges use gender

[34] ECHR 2002-VI; (2002) 35 EHRR 447.

[35] App no 30141/04 (ECHR, 24 June 2010).

[36] At para. 51 of the judgement the Court says: "In a number of cases the question arose whether refusal to allow a post-operative transsexual to marry *a person of the opposite sex to his or her assigned gender* violated Article 12. In its earlier case-law the Court found that the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria *for determining a person's sex for the purposes of marriage*". The first period seems to suggest that in a couple made of a cisgender and a transgender person, the first falls within the category of sex, the other into the category of gender. The second period points to sex (not gender) as being the requirement for marriage. In para. 52, however, the Court affirms that article 12 relies on the category of gender (therefore not sex) and says that: "[In Goodwin the Court] considered that the terms used by Article 12 which referred to the right of a man and woman to marry no longer had to be understood as *determining gender* by purely biological criteria". (Emphasis added.)

[37] Para. 53 clearly shows that the Court considers opposite-gender a correct expression also with regard to a union between two cisgender persons. However, it also proves that the Court considers it as interchangeable with the expression "same-sex". Referring to two precedents on mandatory divorce for gender reassignment, the judges write that the Court there "noted that domestic law only permitted marriage between *persons of opposite gender, whether such gender derived from attribution at birth or from a gender recognition procedure*, while same-sex marriages were not

also in other contexts, as the cases on parental leave and custody mentioned above have shown (e.g. "gender role" or "gender discrimination").

The most recent jurisprudence of the Court shows that there is a move towards the replacement of sex by gender, both as term and notion[38]. Yet the use of the two terms by the 47 judges remains unclear. The Court should fully embrace gender and the use by article 14 of the term sex is no obstacle. *Schalk and Kopf* is not a case on same-sex marriage. It is a case on same-gender marriage. Two transgender persons recognized in their reassigned gender willing to marry pose exactly the same legal issue as two cisgender persons asking for the same right.

6. *The rise of the* homo juridicus europaeus

Compared to other national and international contexts European institutions are at the forefront of the legal shift from sex to gender. This is not surprising. The legal systems of the Council of Europe and of the European Union both are carriers of equality and of gender-neutrality. By combining their fields of intervention they cover all sectors of the national legal orders, from employment to family law, from criminal law to social rights. They converge towards a common set of rules in the field of fundamental rights and of non-discrimination. This is already true today, but certainly the accession of the EU to the ECHR will strengthen this convergence. The shift is also taking place at the national level. Western countries, with few exceptions, are increasingly embracing gender-neutrality in parenthood and family law in general.

The trend towards gender-neutrality cannot be properly conceived with the use of the term and notion of sex. Cases involving gender inequality, sexual orientation and gender identity can be better seized if analysed under the legal category of gender. A conceptual effort to disaggregate sex from gender accompanied by a semantic shift in legal terminology will allow the law to meet the challenges of a society that is moving towards greater social inclusion and shows a sincere commitment to eradicate inequality[39].

permitted". Therefore, also cisgender persons are given a legal gender at birth. The construction of gender by the Court as encompassing in the analysis of article 12 also cisgender people is confirmed in para. 59: "Christine Goodwin is concerned with marriage of partners who are of *different gender, if gender is defined not by purely biological criteria but by taking other factors including gender reassignment of one of the partners into account*". The confusion with sex, considered as an equivalent term, is however clear in the subsequent period: «Similarly, Article 12 enshrined the traditional concept of marriage as being between a man and a woman. The Court acknowledged that a number of Contracting States had extended marriage to *same-sex partners…*" See also other paragraphs in the Court assessment. (Emphasis added.)

[38] It is worth mentioning that in *P.V.* v *Spain* App no 35159/09 (ECHR, 30 November 2010) the Court explicitly included transsexual persons under the protection of Article 14 of the Convention.

[39] Much thought of this essay derived from the seminal article by MAC Case 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurispru-

Undoubtedly, what matters is not the term, but rather the implementation of the new legal notion: gender. Therefore, legal systems that are not ready or are unwilling to embrace the term have reinterpreted the traditional term of sex, giving it new substance. However, this leads to confusion in what it really means and most jurists are inclined to read it as conveying the biological dualism of mankind.

The *homo juridicus* as defined by the codifications of the past centuries is coming to an end. A new legal human is taking shape and a key role is played by European citizenship. As the Luxembourg judges said in 2001 and restated in several occasions, EU citizenship "is destined to be the fundamental status of nationals of the Member States"[40]. Dignity and equality are cornerstones of the European system, whose main actor has appeared on the horizon. The *homo juridicus europaeus* lives out the European dream of an inclusive and equal society. Her or his traits express the protection of dignity and fundamental freedoms. Gender-neutrality is part of the legal world he populates.

Although he is not the main character of a European codification, he is the actor against which his national counterparts are compared. He is a vector for gender-neutrality and for fighting discrimination in a society that is willing to cream off remnants of stereotypes, unquestioned tradition and social exclusion. Neutrality of the law is the outcome of a process that scrutinizes legal norms without considering that tradition is a sufficient justification for reiterating social roles and prejudice. Gender-neutrality calls for a new analysis of what really deserves legal protection and for focusing on the fact, on the real situation rather than on social constructs. By questioning and rebuilding the links between legal provisions and the specific cases they aim to protect the system evolves and adapts to new social challenges.

The *homo juridicus europaeus* has limited, although powerful, means to influence national legal orders. They are required to adapt only incidentally if a breach is found, i.e. with regard to specific situations. European case-law has an impact in specific cases and does not impose new foundations to the legal order. However, the most reluctant member states face an increasing number of challenges that eventually lead to a critical point. Respect for gender-neutrality in family law, for instance, though originally limited to a few sectors, expands steadily. The pillars of the system begin to show signs of strain. Only a new codification of family law may solve otherwise unavoidable inconsistencies. A new *homo juridicus* drawn with the colours of equality and justice is coming to light.

dence' [1995] Yale LJ 1. The author writes in her concluding remarks: "By disaggregating gender from sex and sexual orientation focusing attention on the reasons why the feminine might have been devalued in both women and men, I hope to protect what is valuable about the traditionally feminine without essentializing it, limiting it to women, or limiting women to it" at 105.

[40] Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31. See also Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] OJ C186/5, para 47; Case C-34/09 *Zambrano v Office national de l'emploi* [2011] OJ C130/2, para 41; Case C-135/08 *Rottmann v Freistaat Bayern* [2010] OJ C113/4, para 43.

Est-il juste de diviser le genre humain en deux sexes ?

Daniel Borrillo

Résumé

Les individus sont juridiquement classés en deux sexes de leur naissance. Cette assignation semble si naturelle qu'il résulte pratiquement impossible de la questionner. Alors que ni la race, ni la classe ou encore moins la religion ne figurent plus dans les actes de l'état civil, l'appartenance aux catégories masculines ou féminines non seulement s'imposent à nous mais déterminent, de surcroit, droits et obligations spécifiques. La suppression du classement juridique par sexe mettra fin non seulement aux problèmes rencontrés par les transsexuels et les intersexuels mais aussi à la prohibition du mariage entre personnes de même sexe ainsi qu'à l'homoparentalité. A partir d'une analyse du droit français, l'auteur critique la naturalisation du classement par sexe mais justifie son utilisation à des fins protectrices. Si le sexe n'est plus pertinent pour l'identification des personnes, il demeure un outil essentiel dans la lutte contre les discriminations et la promotion de la diversité.

Abstract

The Law classifies individuals into two sexes at their birth. This assignment seems so natural that the result is that it is practically impossible to question it. Whereas neither race, class nor religion appears more in the acts of the civil statue, membership to the categories of male or female not only are binding on us but determine, in addition, specific rights and obligations. The end of legal classification by sex will put an end not only to the problems encountered by transsexuals and interssexuals but also to the prohibition against marriage between people of the same sex and other rights including homoparentality. Starting from an analysis of French law, the author criticizes the naturalization of classification by sex but justifies its use at protective ends. If sex is no longer relevant for the identification of people, it remains an essential tool in the fight against discrimination and in the promotion of diversity.

* * *

1. Introduction

En France, le terme « genre » comme synonyme de « sexe » est dépourvu d'existence juridique. Le mot « genre » apparaît surtout dans les textes relatifs au droit d'auteur pour désigner le « genre littéraire, artistique ou un type d'industrie ». Le langage juridique correspond ici à la langue courante : le genre fait référence à l'en-

semble d'êtres ou d'objets ayant la même origine ou liés par la similitude d'un ou de plusieurs caractères : appartenir à un genre, rentrer dans un genre.

C'est sous le terme « sexe » que la catégorie sociologique de *genre* apparaît dans le droit national. Au niveau international, depuis la conférence de Beijing de 1995 le droit international a consacré l'émergence du concept de genre pour faire référence aux rapports sociaux de sexe et surtout à la discrimination des femmes[1]. C'est donc par le droit international que la catégorie entrera indirectement en droit français.

Même, si plusieurs rapports européens font référence au genre, les textes juridiques de l'Union Européenne utilisent le vocable « sexe » (égalité ou discriminations fondées sur le sexe) ou « hommes et femmes » (égalité entre hommes et femmes). Ainsi, les directives relatives aux discriminations se réfèrent à toute « situation, disposition, critère ou pratique qui désavantagerait particulièrement les personnes d'un sexe par rapport à des personnes de l'autre sexe ». L'action positive est définie par le droit européen comme des mesures « destinées à faciliter l'exercice d'une activité professionnelle par le sexe sous-représenté ou à prévenir ou compenser des désavantages dans la carrière professionnelle ». Le harcèlement est « la situation dans laquelle un comportement non désiré lié au sexe d'une personne survient avec pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant ».

En tout état de cause, les dispositifs juridiques aussi bien nationaux, européens qu'internationaux se fondent sur la présupposée existence de deux sexes juridiquement établis. Les individus se trouvent ainsi assignés à l'une ou l'autre de ces deux catégories distinctes et stables : hommes et femmes.

Le droit ne fait ici que refléter une tradition multiséculaire qui a naturalisé cet arrangement binaire du genre humain.

Le contenu du terme sexe apparaît clairement défini par le droit interne comme assignation à une catégorie, d'une part, et comme injonction à la non-discrimination, d'autre part. Le sexe est donc à la fois identification et protection.

Permettez-moi, dans un premier temps, de présenter cette double signification du vocable pour, par la suite, tester sa pertinence juridique.

[1] Je n'aborde pas dans mon article le passionnant débat sur l'articulation entre les catégories sexe et genre dans les sciences humaines, mon objectif est bien plus modeste et consiste uniquement à placer le débat au niveau concret du droit. Sur les questions théoriques et philosophiques, je renvoie le lecteur aux articles suivants : Fabienne Malbois « Les catégories de sexe en action. Une sociologie praxéologique du genre », *Sociologie* 1/2011 (Vol. 2), p. 73-90). Jean-Pierre Vidal « De la déconstruction de la différence des sexes à la " neutralisation des sexes ", pour une société " postsexuelle " ! », *Connexions* 2/2008 (n° 90), p. 123-138.

2. Le sexe comme catégorie d'identification des personnes

Dès leur naissance, les individus sont juridiquement classés dans la catégorie mâle ou femelle. Cette assignation trouve son origine dans le tréfonds de notre culture. Ainsi, le récit de la Genèse, raconte que Dieu créa l'homme d'abord puis « L'Éternel forma une femme de la côte qu'il avait prise de l'homme, et il l'amena vers l'homme. Et l'homme dit : Voici cette fois celle qui est os de mes os et chair de ma chair ! On l'appellera femme, parce qu'elle a été prise de l'homme. C'est pourquoi l'homme quittera son père et sa mère, et s'attachera à sa femme, et ils deviendront une seule chair ». L'évidence d'une Humanité binaire trouve ses origines dans la Bible.

F. Héritier va encore plus loin que la théologie lorsqu'elle affirme :

> la différence sexuée et le rôle différent des sexes dans la reproduction. […] Il s'agit là d'un butoir ultime de la pensée, sur lequel est fondé une opposition conceptuelle essentielle : celle qui oppose l'identique au différent, un de ces *thematha* archaïques que l'on retrouve dans toute pensée scientifique ancienne comme moderne, et dans tous les systèmes de représentation[2].

Dès l'origine donc l'assignation sexuée des individus n'a pas seulement une finalité réflexive (par rapport à soi) mais aussi relative (aussi bien dans une relation de subordination que dans un rapport de supplémentarité) : il s'agit à la fois d'une manière de s'auto-définir et de désigner l'altérité pour mieux décrire la nécessaire complémentarité (subordination ou suprématie) du sujet référent. Le sexe indique, dans le même temps, la nature biologique des êtres sexués (mâle et femelle) et les rapports familiaux et sociaux qu'entretiennent les genres masculin et féminin entre eux. Cette vision relationnelle du sexe suppose une idéologie (longtemps implicite) qui est non seulement celle de la subordination des femmes mais surtout de la nécessaire complémentarité entre les sexualités, autrement dit, l'hétérosexualité obligatoire.

Le sexe fait donc référence à la fois à un statut et à une fonction : l'appartenance aux classes mâles ou femelle (statut) et la hiérarchie des genres et des sexualités (fonction). La différenciation du *sexe-statut* et du *sexe-fonction* est donc dépourvue d'existence matérielle, elle sert toutefois à comprendre la complexité et la dimension polyfonctionnelle de la catégorie ainsi qu'à intervenir juridiquement sur la réalité.

2.1. Le sexe comme statut

Les individus qui entrent à leur naissance dans les catégories sexuées ne peuvent échapper à leurs groupes ou désister de leurs alignements que très difficilement (avec l'autorisation du médecin et du juge et toujours dans le cadre d'une procédure administrative) du fait de la permanence du signe biologique de la différence des sexes. Le sexe apparaît comme le cas le plus strict d'assignation identitaire. Il s'agit d'une partition irrémédiable de l'humanité car fixée de manière définitive.

[2] Françoise Héritier, *Masculin/féminin : la pensée de la différence*, Paris, Odile Jacob, 1996, p. 17-18.

Ainsi, le premier alinéa de l'article 57 du Code civil dispose : « l'acte de naissance énoncera le jour, l'heure et le lieu de la naissance, le sexe de l'enfant et les prénoms qui lui seront donnés… ».

C'est l'examen des organes génitaux externes du nouveau-né qui détermine :
– l'appartenance à l'un ou l'autre sexe,
– la reconnaissance de cet état par la société (état civil),
– l'attribution de prénoms, le plus souvent sans ambiguïté quant au sexe de celui ou celle qui le porte.

Selon la jurisprudence, « tout individu, même s'il présente des anomalies organiques, doit être obligatoirement rattaché à l'un des deux sexes, masculin ou féminin, lequel doit être mentionné dans l'acte de naissance »[3]. De surcroît, *l'Instruction générale relative à l'état civil* précise que « lorsque le sexe du nouveau né est incertain, il convient d'éviter de porter l'indication 'sexe indéterminé' et l'officier d'état civil doit conseiller aux parents de se renseigner auprès de leur médecin pour savoir quel est le sexe qui apparaît le plus probable compte tenu, le cas échéant, des résultats prévisibles d'un traitement médical. C'est ce sexe qui sera indiqué dans l'acte, sauf à le faire rectifier judiciairement par la suite en cas d'erreur »[4]. Appelé autrefois hermaphrodisme (fils d'Hermès et d'Aphrodite)[5], ce phénomène est connu scientifiquement aujourd'hui sous le terme d'intersexualisme[6]. Cas de force majeure, cette situation permet une modification du sexe déclaré, considéré comme résultant d'une erreur matérielle du fait de l'incertitude initiale : l'article 288 de l'Instruction générale relative à l'état civil est complété comme suit :

> Si, dans certains cas exceptionnels, le médecin estime ne pouvoir immédiatement donner aucune indication sur le sexe probable d'un nouveau-né, mais si ce sexe peut être déterminé définitivement, dans un délai d'un ou deux ans, à la suite de traitements appropriés, il pourrait être admis, avec l'accord du procureur de la République, qu'aucune mention sur le sexe de l'enfant ne soit initialement inscrite dans l'acte de naissance. Dans une telle hypothèse, il convient de prendre toutes mesures utiles pour que, par la suite, l'acte de naissance puisse être effectivement complété par décision judiciaire. Dans tous les cas d'ambiguïté sexuelle, il doit être conseillé aux parents de choisir pour l'enfant un prénom pouvant être porté par une fille ou par un garçon.

Ainsi, la cour d'appel de Versailles a fait suite à la demande de rectification de l'état civil et de changement de prénom d'un enfant ayant présenté dès la naissance

[3] Cour d'Appel de Paris, 18 janvier 1974 : D. 1974, p. 196 conclusion Granjon.
[4] Instruction générale relative à l'état civil, Art. 288.
[5] Le mythe d'Hermaphrodite raconté par Ovide dans le livre IV des *Métamorphoses* est la première explication de ces individus qui semblent « n'avoir aucun sexe ou les avoir tous deux ».
[6] Caractérisé par la présence chez un même sujet de tissu testiculaire et de tissu ovarien séparés ou fusionnés en un seul organe.

des organes sexuels masculins extrêmement insuffisants, puisque finalement le sexe indiqué à l'origine s'était révélé erroné[7].

En dehors des cas d'hermaphrodisme, la Cour de cassation adoptait une position restrictive et n'acceptait les demandes en rectification de l'état civil que dans certaines circonstances exceptionnelles. Pendant longtemps la justice française était sourde aux demandes des transsexuels et si l'opération de réassignation sexuelle était tolérée, la modification de sexe dans les documents d'identité leur était refusée au nom de l'indisponibilité de l'état des personnes, principe d'ordre public en vertu duquel seule l'Administration a qualité pour fixer et authentifier l'état civil de l'individu sujet de droit.

Le transsexualisme met en évidence la complexité du sexe : sexe génotypique, sexe phénotypique, sexe endocrinien, sexe psychologique, sexe culturel et sexe social. Lorsqu'il n'y a pas accord entre les aspects biologiques et les aspects psychosociologiques du sexe, certaines personnes se trouvent face à une situation de trouble d'identité de genre. Souvent elles souhaitent se soumettre à une intervention chirurgicale pour rectifier leur anatomie[8] et changer d'état civil. Le refus de mettre en accord les documents d'identité avec le nouveau sexe a été considéré par la Cour européenne des droits de l'homme contraire au respect du droit de la vie privée[9] provoquant un revirement de la jurisprudence française[10]. De surcroit, depuis la circulaire du 14 mai 2010, il n'est plus nécessaire d'avoir subi une opération de réassignation sexuelle (c'est-à-dire d'ablation des organes génitaux), les traitements médicaux-chirurgicaux ayant entraîné des changements irréversibles pouvant être suffisant pour justifier la demande de changement de sexe à l'état civil.

2.2. Le sexe comme fonction

Le sexe apparaît non seulement comme un statut (attribut de la personnalité) mais aussi comme une fonction qui renvoie aux rôles sociaux attendus de l'un et l'autre sexe. Pendant longtemps le sexe-fonction organisait juridiquement la subordination des femmes. Ainsi, du droit constitutionnel au droit civil, du droit du travail au droit de la famille, les lois excluaient les femmes des droits fondamentaux tels le droit de vote, le droit de disposer de son patrimoine, de l'égalité au sein de la famille…

7 Cour d'Appel de Versailles, 22 juin 2000, *JCP* 2001.II.10595, note Guez.

8 Les premières opérations de changement de sexe eurent lieu durant le 1er et 2ème siècle av. J.-C., G. Androutsos, M. Papadopoulos, S. Geroulanos, « Les premières opérations de changement de sexe dans l'antiquité », *Andrologie* (2001), 11 n° 2, p. 89-93.

9 *B. c. France* du 25 mars 1992 (n° 13343/87). Cette décision de la CEDH produit un changement de sa propre jurisprudence. En effet dans les affaires *Van Oosterwijck c. Belgique* du 6 novembre 1980 (n° 7654/76), *Rees c. Royaume-Uni* du 17 octobre 1986 (n° 9532/81), *Cossey c. Royaume-Uni* du 27 septembre 1990 (n° 10843/84), la CEDH n'avait pas condamné les Etats qui ne modifient pas l'état-civil des transsexuels.

10 Ass. Plén., 11 décembre 1992, *JCP* 1995 II, 21991.

Si l'appartenance à l'un ou l'autre sexe n'apparaît plus comme un élément déterminant dans la jouissance des droits alors pourquoi continuer à en faire un élément de l'état civil ? La seule raison d'une telle continuité renvoie à l'institution matrimoniale, considérée par la jurisprudence de la Cour de cassation et du Conseil constitutionnel comme nécessairement hétérosexuelle.

Il résulte également significatif que les lois soient en général rédigées d'une manière neutre (sans genre) : « toute personne a le droit… », « tout individu a le droit… », « Chacun a le droit… » ou encore « nul ne peut être… » mais, lorsqu'il est question du mariage, les créanciers dudit droit fondamental deviennent des sujets sexués : « A partir de l'âge nubile, l'homme et la femme ont le droit de se marier et de fonder une famille… »[11].

En droit français ce n'est pas seulement la différence des « sexes-statut » qui est une condition sine qua non du mariage mais aussi la différence des « sexes-fonction ». En effet, en 2005 le procureur de la République s'est opposé au mariage de Camille Barré, transsexuelle de 46 ans (femme pour l'état civil) et Martin León Benito, transgenre (homme pour l'état civil) de 30 ans qui se faisait appeler « Monica » à cause d'absence d'une « véritable volonté matrimoniale, le but exclusivement recherché étant étranger à celui de se comporter comme mari et femme ». Se présenter habillées en femme suffi pour rendre le consentement suspect. Si l'absence de différence de sexes n'apparaît pas comme le motif explicite empêchant cette union (elle est souvent évoquée pour renforcer la simulation dénoncée), la manière d'organiser la logique argumentative laisse entrevoir une ambiguïté quant à la qualification de l'opposition à mariage. Ainsi, derrière la simulation, le Procureur et le tribunal entendent sanctionner également l'absence de différence de sexe, comprise non pas dans de différence biologique mais comme absence de désir hétérosexuel. Ce qui pose problème au Procureur ce n'est pas tant que Camille soit une femme mais plutôt qu'elle désire des individus avec une apparence féminine. Or, le fait que M. Leon s'habille en femme et revendique un prénom féminin ne constitue nullement la preuve d'un défaut de sincérité de l'intention matrimoniale. Le TGI de Nanterre confirmera l'opposition à mariage même si la volonté de respecter le devoir conjugal et *l'affectio maritalis* semblaient incontestable. Ce qui est contesté par le tribunal n'est pas tant le fait que les requérants ne souhaitent pas se soumettre au devoir conjugal mais la manière dont ils entendent l'exécuter. Ainsi, s'abritant der-

[11] Art. 12 de la Convention Européenne des droits de l'Homme. L'article 16 de la Déclaration universelle des droits de l'Homme établit : « A partir de l'âge nubile, l'homme et la femme, sans aucune restriction quant à la race, la nationalité ou la religion, ont le droit de se marier et de fonder une famille. Ils ont des droits égaux au regard du mariage, durant le mariage et lors de sa dissolution ». Conscient des enjeux futurs, le parlement européen cesse de définir le mariage à partir de la différence des sexes dans la Charte européenne des droits fondamentaux et énonce simplement : « Le droit de se marier et le droit de fonder une famille sont garantis selon les lois nationales qui en régissent l'exercice » (article 9).

rière la théorie de la simulation[12], les juges entendent mettre en cause l'existence même du mariage. Pour ce faire, ils opèrent un glissement conceptuel : à la place de la différence de sexes comme statut, ils introduisent la différence de sexe comme fonction (avoir l'apparence de sexes opposés et répondre au désir hétérosexuel). Le tribunal va ainsi utiliser un artifice qui permet de s'opposer au mariage le qualifiant à la fois d'acte simulé et d'union homosexuelle. Même si les requérants démontrent leur volonté commune et durable de vivre comme conjoints, leur union ne peut exister puisqu'elle ne prend pas la forme hétérosexuelle. Par cette décision, les juges estiment que M. Benito, tout en étant un homme aux yeux de loi, ne peut pas accomplir convenablement le devoir conjugal : il ne désire pas une femme en tant qu'homme mais en tant que femme[13]. Ce qui compte pour la bonne exécution du devoir conjugal, ce n'est pas seulement le sexe-statut mais aussi le sexe-fonction. Conscients de la difficulté à assumer la différence de sexes-fonction comme *conditio sine qua non* du mariage, les juges de la Cour d'appel de Versailles ont confirmé l'opposition à mariage en se fondant sur la théorie de la simulation sans renoncer pour autant à condamner le mariage homosexuel :

> qu'en réalité les appelants entendent […] s'unir en tant que femmes et contrevenir pour mieux la combattre la prohibition actuelle du mariage entre personnes de même sexe » et « qu'une telle intention équivaut à un défaut de consentement…[14].

Les parties ne s'étant pas pourvues en cassation, la décision de la Cour d'appel est devenue donc définitive.

Ces décisions mettent de manifeste que dès nos jours, le sexe-fonction (sur un plan juridique) ne plus tellement un instrument de la domination des femmes mais plutôt une catégorie de domination des homosexuels : pas de droit au mariage pour les couples de même sexe, pas de succession *ab intestat*, pas de pension de réversion, pas de filiation adoptive ou par procréation artificielle.

Afin de restituer sa pleine capacité protectrice, la catégorie sexe, pris dans sa dimension relationnel, devrait faire référence non seulement aux « rapports sociaux de sexe » mais aussi aux « rapports sociaux de sexualités ». La dimension protectrice de la catégorie trouverait ainsi toute sa souplesse et tout son sens.

[12] L'impossibilité d'attaquer frontalement la nature homosexuelle du mariage explique l'utilisation abusive de l'argument de la simulation afin de rendre l'union d'un homme et d'une femme sur le plan juridique impossible car elle ne prend pas l'apparence d'une union hétérosexuelle.

[13] « Force est en l'occurrence d'observer que Monsieur Benito, Martin Leon quelles que soient les circonstances, revendique sa féminité, arbore l'apparence d'une femme, signe avec le prénom féminin de Monica qu'il s'est attribué », TGI Nanterre, 10/06/2005.

[14] Cour d'Appel de Versailles 1er Ch. 08/07/2005.

3. Le sexe comme catégorie de protection des personnes

L'analyse du droit positif révèle que le fait d'appartenir à un sexe plutôt qu'à un autre emporte de moins en moins l'application d'un statut spécifique. En effet, la plupart des règles qui accordaient à la femme un statut juridique inférieur à celui de l'homme ont disparu au cours du XXe siècle et ceci grâce aux politiques antidiscriminatoires et de promotion de l'égalité qui ont fait du « sexe » une catégorie non plus de domination mais d'émancipation.

3.1. Le sexe comme catégorie antidiscriminatoire

L'égalité des sexes est consacrée au niveau constitutionnel depuis le préambule de la Constitution de 1946. Elle figure également parmi les missions fondamentales de la Communauté européenne (article 2 du traité CE). La Convention européenne des droits de l'homme et la Charte des droits fondamentaux de l'UE consacrent l'égalité des sexes et combattent les discriminations fondées sur le sexe. En droit civil, aucune disposition ne fait de la femme un être inferieur soumis à la puissance du mari et en matière d'autorité parentale, le principe est celui de l'exercice commun par le père et la mère. En droit du travail est affirmé le principe de l'égalité de traitement entre les hommes et les femmes. Cette égalité se manifeste notamment à propos de l'accès à certaines professions qui étaient auparavant interdites aux femmes et à propos de l'égalité des rémunérations. Les principes d'égalité des sexes et de non discrimination constituent la règle, au point d'avoir entraîné en 2001 la disparition de l'interdiction du travail de nuit des femmes.

Sous l'angle du droit conventionnel des droits de l'Homme, la CEDH a considéré que le terme « sexe » de l'article 14 de la convention (non discrimination) devait être interprété comme incluant l'orientation sexuelle[15].

Le « sexe » comprend alors aussi les « sexualités » pour les juges de Strasbourg. Les juges du droit communautaire ont fait une interprétation différente : Le 30 avril 1996 une femme transsexuelle réussie à convaincre la Cour de Luxembourg que son licenciement constituait une discrimination fondée sur son sexe. Si la notion de discrimination fondée sur le sexe protège les transsexuels on aurait pu imaginer qu'une telle protection pouvait être élargie aux gays et lesbiennes. Ce fut l'argument développé par l'avocat de Lisa Grant, une femme lesbienne qui décida de saisir la Cour de Justice de Communautés Européennes invoquant l'article 119 du traité de Rome sur l'égalité de traitement des sexes. L'avocat général de la Cour suivant les arguments de l'avocat de la demanderesse, a considéré que la notion de discrimination fondée sur le sexe pouvait également comprendre la discrimination fondée sur l'orientation sexuelle. Ainsi, en comparant la situation de Lisa Grant à celle d'un homme hétérosexuel, l'avocat général conclu que c'est le sexe de Mme Grant qui est à l'origine de la discrimination et non pas le fait qu'elle soit lesbienne. Effective-

[15] *Salgueiro da Silva Mouta c. Portugal (1999)* du 21 décembre 1999 (n° 33290/96).

ment, si la requérante avait été un homme et non pas une femme, elle aurait pu bénéficier des avantages découlant de sa vie de couple avec une femme. Il s'agirait bien donc d'une discrimination fondée sur le sexe entrant dans le domaine de compétence de la Cour. Bien que la CJCE suive généralement l'opinion de son avocat, dans l'affaire Grant la cour s'en est éloignée en statuant qu'il n'y avait pas de discrimination fondée sur le sexe mais sur l'orientation sexuelle, écartant ainsi sa juridiction. Cette interprétation de la CJCE a révélé la nécessité d'instruments spécifiques de protection contre les discriminations envers les gays et les lesbiennes. C'est la voie empruntée par le traité d'Amsterdam du 20 octobre 1997 lorsqu'il introduit un nouvel la catégorie « orientation sexuelle » dans un nouvel article 13 du traité. C'est donc à cause d'une vision du sexe limité à sa dimension de statut et non pas de fonction que la cour de Luxembourg à obligé le législateur européen à créer la catégorie « orientation sexuelle ».

3.2. Le sexe comme catégorie promouvant la diversité

Le sexe est non seulement une catégorie antidiscriminatoire mais aussi une catégorie de promotion de la diversité. En effet, à la fin des années 1990, pour la première fois en France, les lois dites « sur la parité » ont marqué l'émergence d'une politique publique volontariste en faveur des femmes dans la représentation politique. La loi constitutionnelle du 8 juillet 1999 a ajouté à l'article 3 de la Constitution un alinéa disposant que « la loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et aux fonctions électives ». Un an plus tard, la loi électorale du 6 juin 2000 a fixé les modalités pratiques censées « favoriser » cet égal accès des femmes et des hommes dans le champ de la représentation politique. En tant qu'instrument favorisant l'égalité matérielle, la parité tend à corriger une situation politique historiquement défavorable aux femmes.

Sans me prononcer sur les bienfaits d'une telle politique, il est permis de se poser la question de savoir si, suivant le raisonnement de la CEDH qui fait du sexe une catégorie englobant l'orientation sexuelle, la parité ne devrait-elle pas également bénéficier les homosexuels. En effet, comme les femmes, les gays sont très nettement sous-représentés dans les assemblées électives au niveau local et national. Par ailleurs, les lesbiennes pouvant invoquer la parité, cette situation crée une inégalité entre les hommes et les femmes homosexuel-les.

4. Pertinence de la catégorie « sexe » dans le Droit

Le problème que pose le sexe comme catégorie juridique est bien celui de l'essentialisation de types pour une classification cherchant à légitimer son ordre ou sa hiérarchie en l'appuyant sur des distinctions inscrites dans la nature des choses et des êtres. La marque biologique du sexe inscrit la différence dans les corps et dans les chairs se renfermant sur les individus qui ne peuvent s'évader de leur prison identitaire. L'utilisation du terme sexe dans les registres de l'état civil présuppose une

réalité biologique première ce qui implique de reconnaître cette enfermement des individus et de cautionner une pérennisation des identités obligatoires.

En tant que catégorie explicite, le sexe, comme élément identificatoire des personnes entretien l'illusion de la naturalité de la différence entre les hommes et les femmes et surtout de sa nécessaire complémentarité. Comme l'avait déjà souligné E. Balibar par rapport à la race, l'histoire naturelle des sexes n'est autre chose que la justification de l'hétérosexualité comme identité dans une perspective d'une identification avec les valeurs mystiques d'une civilisation supra-juridique et trans-historique à la fois naturelle et spirituelle (rappelons-nous les cris d'alerte des anthropologues, psychanalystes et autres experts, annonçant la fin de la civilisation si jamais le PaCS était adopté).

Cependant, comme nous l'avons souligné auparavant, la catégorie « sexe » ne produit pas les mêmes effets lorsqu'elle est utilisée à des fins identificatoires qu'à des fins protectrices. L'inscription de l'appartenance sexuée dans le droit comme élément d'identification entraine une « fatalisation » des caractères psychosomatiques de genre : la contingence est ainsi transformée en nécessité. L'individu ne saurait dès lors échapper à la catégorie fatale à laquelle l'assigne son apparence physiologique. La catégorie sexe, juridiquement défini l'est sur la base de critères naturels allégués. Cette utilisation de la marque biologique donne aux catégories ainsi sexuées des caractéristiques spécifiques. D'abord, elle joue sur la perception et la représentation de la différence, le sexe biologique (et l'hétérosexualité) se manifestant sous le signe de l'évidence. Ensuite, elle installe un mode particulier de fonctionnement social, dans la mesure où la différence de sexe renvoie historiquement à la subordination de la femme et aujourd'hui à l'hétérosexualité nécessaire (au moins au niveau du couple et de la filiation). La différence de sexes est bien une réalité symbolique fondée sur la croyance de la suprématie culturelle de l'hétérosexualité. Il faudrait donc conformément à la tradition républicaine française bannir le « sexe » (comme catégorie d'identification) de tous les documents d'identité à commencer par l'acte de naissance et le numéro de la sécurité sociale.

En revanche, le sexisme et l'hétérosexisme doivent continuer à être combattus par la loi. Autrement dit, la catégorie « sexe » et « orientation sexuelle » se trouvent justifiées lorsqu'elles ont comme finalité non pas enfermer les individus dans des catégories identitaires mais leur permettre justement de s'en émanciper.

Comme pour les statistiques ethniques et les politiques d'affirmation de l'égalité et la diversité, on pourrait utiliser pour le sexe aussi la méthode de l'auto-identification. Elle consiste soit à fournir une liste de modalités pré-établie (homme, femme, sexe neutre…) que les répondants sont invités à sélectionner, soit à laisser ouverte la réponse, ce qui suppose que le libellé de la question utilise des termes non équivoques pour les enquêtés.

Voici le paradoxe auquel on n'échappe pas sous peine de faire disparaître le point d'appui du changement social : Refuser la catégorie au niveau identificatoire pour mieux la revendiquer sur le plan anti-discriminatoire.

Conclusion

Pour répondre concrètement à la question qui a donné le titre de mon intervention « Est-il juste (pertinent, souhaitable…) de classifier juridiquement le genre humain en deux sexes ? ».

Nous pouvons dire « oui », « non » et « ça dépend ».

– Non, lorsque le sexe est utilisé comme une catégorie imposé par l'Etat aux individus à des fins d'identification, cela permettrait de résoudre un certain nombre de problèmes auxquels sont confrontés les intersexués et les transsexuels. Aussi, l'interdiction du mariage entre personnes de même sexe deviendrait caduque.

– Oui, lorsque le sexe sert comme catégorie de protection contre les discriminations et comme mesure correctrice favorisant la diversité mais à condition que cette notion (déjà appliqué évidemment aux femmes mais aussi aux transsexuelles et aux lesbiennes) soit extensible à d'autres groupes historiquement discriminés ou sous-représentés en raison de leur sexualité comme c'est cas des hommes homosexuels.

II.
CONSTITUTIONAL AND COMPARATIVE APPROACHES

Intervento di saluto e ringraziamento… con un accenno a qualche tematica di diritto costituzionale

Ludovico A. Mazzarolli

Riassunto

Nel breve intervento che segue, l'A. porta ai Convegnisti, a nome del Dipartimento di Scienze giuridiche dell'Università di Udine – soggetto «capofila» del Progetto – i saluti, approfittando dell'occasione offerta per ringraziare molti dei soggetti che hanno reso possibile la realizzazione dello stesso. Svolge, inoltre, alcune brevi considerazioni in tema di «tolleranza», «pluralismo» e «eguaglianza».

Abstract

Professor L.A. Mazzarolli addresses his greetings on behalf of the Department of Legal Sciences of the University of Udine, leading partner of the Equal Jus Project. He then adds some short considerations on the constitutional aspects of tolerance, pluralism and equality.

* * *

Autorità, Colleghi, Signore e Signori,

un grazie vivissimo a tutti gli organizzatori del Convegno per avermi voluto qui a Firenze, a porgere uno dei saluti di benvenuto in questa fase di apertura dei lavori.

Il mio Intervento di saluto – forse un po' (… ma poco) più lungo di quelli che mi hanno preceduto – si motiva con la circostanza che attualmente ricopro la carica di Direttore del Dipartimento di Scienze Giuridiche dell'Università di Udine, soggetto «capofila» del Progetto europeo *Equal Jus - European Network for the Legal Support of LGBT Rights*.

Comprenderete e scuserete, quindi, come, innanzitutto, mi corra l'obbligo di ringraziare una serie di persone, senza il contributo e l'opera fattiva delle quali, il Progetto non avrebbe visto l'inizio, né, quindi, tantomeno la fine, in questa splendida cornice… in questa comunque splendida cornice.

È vero, l'originariamente prevista collocazione del Convegno nel fine-quattrocentesco *Salone dei Cinquecento* di Palazzo Vecchio aveva un *sapore* del tutto particolare, ma, a mio avviso, non tanto per questioni relative al *prestigio* della collocazione, quanto piuttosto perché si tratta della più ampia sala italiana, realizzata al precipuo scopo di gestire pubblicamente il potere civile. Il che, quindi, avrebbe assunto una ragione del tutto particolare in relazione ai temi del Convegno.

Ma, come diciamo noi giuristi, *ubi maior, minor cessat* e la visita del Presidente della Repubblica italiana a Firenze ha costretto a un imprevisto (e imprevedibile) cambiamento di programma.

Ed eccoci quindi nell'*Istituto degli Innocenti*, o, meglio, nello *Spedale degli Innocenti* o *degli Orfani*: primo orfanotrofio d'Europa, ospitato in uno stupendo edificio più antico di più di mezzo secolo rispetto al Salone del Cinquecento.

Non ci abbiamo dunque perso né dal punto di vista storico-architettonico, né dal punto di vista per così dire «evocativo», anzi: siamo nel posto giusto perché si possa discutere di diritti di chi è, o comunque si sente, «parte debole»[1].

In primis, allora, un grazie a Francesco Bilotta, professore aggregato nella Facoltà di Economia dell'Università di Udine, che, del Progetto, è stato ideatore e propugnatore, assumendo le vesti di responsabile scientifico dello stesso.

Un grazie vivissimo all'avv. Alexander Schuster che è stato co-iniziatore del Progetto e che, come assegnista esterno all'apparato universitario, ha assunto il difficile incarico di «coordinatore» dell'iniziativa a partire dal 1 dicembre 2010 e con termine stabilito al 31 maggio prossimo, avvalendosi della collaborazione di altri assegnisti, tra i quali i dott. Tommaso Giovannetti e Flavio Guella. Sempre l'avv. Schuster, d'intesa con i *Partners*, ha poi anche assunto – e a titolo gratuito – fino al 28 febbraio scorso, la Direzione del «Centro studi Lenford» di Firenze, attivato dal *Partner* «Avvocatura per i diritti LGBT», in adempimento del Progetto.

Notevole mole di lavoro ha svolto anche il supervisore finanziario – il *Financial Officer* – del tutto: il dott. Osman Ahmed Bashir, così come ha fatto – spendendo molto più tempo di quello che risulterà agli atti – il personale di ruolo della Segreteria del Dipartimento di Scienze Giuridiche dell'Università di Udine, con particolare riguardo per la Signora Rossana Savastano, Segretario Amministrativo del Dipartimento, che non si è mai sottratta al tentativo di dare una mano fattiva allo svolgimento del Progetto, anche con riguardo a mansioni, incarichi e compiti che non rientravano nei suoi doveri, nel suo monte ore ecc., nonché per la dott.ssa Sonia De Marchi, senza l'ausilio della quale sarebbe stato ben più difficile chiudere il Progetto nei tempi prescritti. Ma, d'altra parte, come sanno bene gli universitari italiani oggi qui presenti, la continua attività per così dire di «sussidiarietà orizzontale» di chi lavora nell'Università e per l'Università, è oramai pressoché necessaria a che questa nobile, ma poverissima, Istituzione, posa svolgere – come può – i compiti, o almeno parte dei compiti, che le sono propri.

Chiudo la parte dei ringraziamenti con un pensiero riconoscente ai diversi *Partners* del Progetto (sulla diversa misura dei diversi apporti dei quali penso meglio Vi dirà l'avv. Schuster nel corso dei suoi interventi durante il Convegno), ma soprattutto un «grazie» alla Commissione europea e, per essa, a chi oggi qui la rappresenta e/o l'ha rappresentata, agendo in nome e per conto della stessa, nel corso dei fre-

[1] Tanto è vero che l'edificio ospita stabilmente il *Centro Nazionale di Documentazione e Analisi sull'Infanzia e l'Adolescenza*, l'organismo, cioè, di cui l'*Osservatorio nazionale per l'infanzia e l'adolescenza* si avvale per lo svolgimento delle proprie funzioni (cfr. <http://www.minori.it/?q=centronazionale>).

quenti e vari contatti con il Dipartimento di Scienze Giuridiche udinese, intervenuti nei lunghi mesi di questo impegno.

Due sole battute «nel merito» per concludere il presente Intervento.

«Non sono d'accordo con quello che dite, ma difenderò fino alla morte il vostro diritto di dirlo».

Proposizione normalmente e di regola attribuita a Voltaire, come contenuta nel suo *Trattato sulla tolleranza universale* del 1763, ma in realtà della poco conosciuta scrittrice inglese Evelyn B. Hall che, di Voltaire, fu *solo* biografa, scrivendo, all'inizio del Novecento (1906) e sotto lo pseudonimo di S.G. Tallentyre, il libro: *Gli amici di Voltaire*.

Adopero la citazione perché quel che mi interessa porre il rilievo, come cultore del Diritto costituzionale italiano, è non solo che unicamente il radicarsi di una cultura della tolleranza consente l'espressione delle diversità e quindi di quel valore del pluralismo sui cui si fondano, in ambiti molteplici, le più moderne Costituzioni democratiche contemporanee, compresa quella italiana; ma, a ben guardare, che solo il prendere piede della predetta cultura della tolleranza può consentire a chi oggi esprime il pensiero della maggioranza di potere rivendicare, un domani che diventasse minoranza, il diritto di esprimere le proprie idee.

Il porre in essere l'attività del «tollerare», da questo punto di vista, non significa affatto «sopportare», il che sarebbe sminuente, ma garantire gli altri, garantendo sé stessi, o, se preferite, garantire sé stessi, garantendo (anche) gli altri.

E, da questo punto di vista, chi insegna il Diritto costituzionale e chi si appresta a impararne i fondamenti, non dovrebbe mai trascurare la lettura e la dovuta considerazione dei classici del pensiero liberale moderno [si pensi, oltre al già citato Voltaire, p. es., a lavori di un secolo prima o di un secolo dopo: come l'*Epistola sulla tolleranza* di John Locke (1685, ma pubbl. nel 1689), o *Il saggio sulla libertà* di John Stuart Mill (1859)]: è in essi, e in altri lavori dello stesso spessore, che già affondano le radici tutte le caratteristiche che consentono di considerare un'odierna civiltà come liberale e/o democratica.

In secondo luogo, chi studia il Diritto costituzionale non può fingere di non sapere e di non sentire il dovere di ribadire sempre e con forza a chi il Diritto costituzionale non lo frequenta, che il tanto conclamato – ma solo quando fa comodo – «principio di eguaglianza» non si limita a tutelare la parità di trattamento tra situazioni eguali (o il trattamento simile di situazioni simili), ma presenta anche una seconda faccia, forse meno conosciuta, ma non per questo meno importante. Esso, infatti, al contempo impone (non consente!) di trattare in maniera diversa situazioni diverse e in maniera dissimile situazioni dissimili, adeguatamente e previamente motivando.

«Tolleranza», «pluralismo», «eguaglianza», «diseguaglianza»… e potrei continuare.

Mi fermo, invece, onde non sottrarre tempo agli illustri relatori, venuti anche da lontano, che siete qui per ascoltare.

Augurandomi di veder presto pubblicati gli *Atti* del Convegno, per soffermarmi su di essi con l'attenzione che il tema merita, posto che «la libertà di parola, senza la libertà di diffusione [*del pensiero manifestato*] è solo un pesce dorato in una vaschetta rotonda» (Ezra Pound), un cordiale augurio di una buona prosecuzione dei lavori.

Rethinking the Judgement on Discrimination: A Horizontal Analysis of European Jurisprudences

Carmelo Danisi

Abstract

Being increasingly called upon to express its opinion on measures that directly or indirectly give rise to discriminating practices, the European Court of Human Rights uses different parameters based on the risk factors involved. A horizontal comparison of the jurisprudence stated in Article 14 has shown clearly that where sexual orientation is concerned, the discretion afforded to judges fosters an excessively indulgent approach towards State reason, whereas higher protection standards have been adopted with reference to other factors.

This scenario is further complicated by the ever-growing importance given to standards prevalent in the European Union, also considering the EU's possible accession to the ECHR. A convergence with the Court of Justice, which is also oriented towards a differentiated protection of the relevant discrimination grounds, is thus possible.

The contribution of the Charter of Nice represents a fundamental step towards "rethinking" the judgement on discrimination, in order to enable the European Courts to act in a univocal manner for all risk factors. The protection of the rights of vulnerable groups should prevail over the comparison of situations. This must be achieved through certain and transparent judgement phases. With this aim in mind, dialogue between the Courts may converge on the defence of human dignity.

* * *

Introduction

This essay is based on a study of discrimination case law pertaining to the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). A comparative analysis between these jurisdictions is increasingly necessary in the perspective of European Union (EU) accession to the European Convention of Human Rights (ECHR). Both the ECtHR and the ECJ have developed tools to evaluate violations of the prohibition against discrimination, and the exchange of ideas between them is most welcome to reinforce the strength of judgements independently of the specific risk factor involved. Without clear statements on how a discrimination claim is analysed, the increasing demand for substantial equality would not find a rational answer. Three sections will follow: (1) a horizontal analysis of the protection granted

to discrimination claims by both European courts; (2) questions arising from the recent jurisprudence on discriminatory treatment based on sexual orientation; and (3) suggestions for rethinking judgement in discrimination cases in order to: (a) establish clear standards in relation to all grounds of discrimination, thus limiting judicial discretion; and (b) envisage the possibility of including dignity as the core value to be defended in discrimination related applications.

1. A Horizontal Analysis of Recent European Case Law

Article 21.1 of the Charter of Nice contains the most comprehensive – although not exhaustive – list of prohibited factors, including ethnic origin, gender, religion and sexual orientation. Through its judicial activity, the ECtHR recently identified two more discrimination grounds: transexuality[1] and HIV status[2]. The extension of the notion of "vulnerable groups" can be seen as a sign of the vitality of the European non-discrimination protection system. Moreover, new concepts require special consideration, starting with the increasing importance of discrimination based on multiple grounds. A recent European Agency of Fundamental Rights (FRA) report showed that there is now a sizable group of people discriminated against for more than one reason and new mechanisms have to be defined to address their claims, above all setting aside the definition of a comparator[3]. For the ensuing horizontal analysis the selection of judgements is limited to the most significant.

1.1. The ECtHR approach

Judge Tulkens said recently:

> alors que l'article 14 a eu pendant longtemps une existence assez effacé, au point que le président Melchior posait la question de savoir s'il était vraiment nécessaire, il connaît aujourd'hui une singulière évolution et même une 'profonde mutation'[4].

There are several relevant elements to be considered. Firstly, nowadays the ECtHR is more willing to examine applications under Article 14 also when a violation of a substantial right has been found[5]. Secondly, the extension of Article 14's

[1] *PV v Spain* App no 35159/09 (ECHR, 30 November 2010), para 30.
[2] *Kiyutin v Russia* App no 2700/10 (ECHR, 10 March 2011), para 64.
[3] FRA, *Focus report: Multiple discrimination* (EU-MIDIS 5 Data, February 2011).
[4] Francoise Tulkens, 'L'évolution du principe de non-discrimination à la lumière de la jurisprudence de la Cour européenne de droits de l'homme' in Jean-Yves Carlier (ed.), *L'étranger face au droit* (Bruylant 2010) 193. In her study Judge Tulkens has also recalled that in the Inter-American Human Rights protection system the Court has defined the right to not being discriminated as a *jus cogens* rule of international law (Advise OC-18/03, 17 September 2003).
[5] Recently, *O'Donoghue and others v UK* App no 34848/07 (ECHR, 14 December 2010). Among others, Aaron Baker, 'The Enjoyment of Rights and Freedoms: a New Conception of the 'Ambit'

field of application both *ratione materiae* and *ratione personae* means that at the present time the "within the ambit" is a less decisive factor because of ECtHR interpretative power. Thirdly, the growing recognition of indirect discrimination as well as the obligation for States to provide specific significant reasons for adopting different treatment in relation to the most sensitive grounds. In addition, the recent interpretation of Article 14 has made it clear that not only procedural requirements must be observed by national authorities, but also that positive actions are required to prevent discrimination among private persons. This means the prohibition has an essentially horizontal effect. Finally, it is now possible to obtain partial reversal of the burden of proof in favour of the claimant. Thanks to these developments, higher new standards were recently reached by the Court in cases concerning gender and ethnic origin: *Opuz v Turkey*[6] and *Orsus and others v Croatia*[7]. They are a perfect example of the ECtHR's attempt to narrow the margin of appreciation the States enjoy in the introduction of differential treatment on the grounds of the identified factors.

The *Opuz* case was the first instance of the Court ruling that gender-based violence is a form of discrimination under the ECHR. Article 14 was read in combination with the right to life and the prohibition of torture, condemning a widespread phenomenon that Turkey has tried unsuccessfully to eradicate. Moving from this specific case, judges have criticized the general social attitude towards women and disregarding the fact that it is influenced by dominant cultural and religious values, the ECtHR has ruled that Turkish authorities have to observe positive obligations. After finding violations of Article 2 and Article 3 ECHR, the Court referred widely to international standards in declaring that a State's failure, albeit unintentional, to protect women from domestic violence breaches their right to equal protection before the law[8]. In such a case, it is clearly irrelevant to find a comparator for condemning violation of Article 14. The claim was resolved from the standpoint of the general situation of disadvantage that women still face in Turkey, facilitated by the judicial passivity toward married men which may be said to have had an important role. The ECtHR could not have reached a similar standard, already affirmed in international law and several domestic law, without taking into account the vulnerable condition of women, as well as stereotypes and prejudices that damaged the dignity of Mrs. Opuz and her mother.

under Article 14 ECHR' (2006) 69 MLR 714; Jeroen Schokkenbroek, 'The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation' (1998) 19 HRLJ 31; Stephen Livingstone, 'Article 14 and The Prevention of Discrimination in the European Convention on Human Rights' (1997) 1 EHRLR 25; Robert Wintemute, *Sexual Orientation and Human Rights: the United States Constitution, the European Convention, and the Canadian Charter* (Oxford, Clarendon Press 1995) ch 4 and 5; Chiara Favilli, *La non discriminazione nell'Unione Europea* (Bologna, il Mulino 2009), ch 4.

[6] *Opuz v Turkey* App no 33401/02 (ECHR, 9 June 2009).

[7] *Orsus and Others v Croatia* App no 7710/02 (ECHR, 15 June 2010).

[8] *Opuz* (n 6) para 191.

The same approach can be observed in the *Orsus* case, in which the Grand Chamber noted primarily an issue of discrimination rather than a *per se* violation of a right, i.e., the right to education guaranteed by Article 2 Protocol 1. At the heart of the claim there was the applicants' placement in separate classes and only with pupils of their own ethnic origin as schoolchildren, on account of their lack of proficiency in the Croatian language. The forced segregation caused them emotional and psychological harm but according to national courts, later confirmed by the Constitutional Court, the complainants did not suffer discriminatory treatment. The Grand Chamber, in opposition to the Chamber's judgement, found a violation of Article 14, stressing that the case could not be limited to the individual applicants but had to include reference to their minority group[9]. Since the Roma are a specific, disadvantaged and vulnerable group, Croatian authorities must also take into account relevant special needs in exercising a wide margin of appreciation in the education sector. In particular, without any reference to the comparability of situations, the Strasbourg Court affirmed:

> even without any discriminatory intent on the part of the relevant State authorities, the fact that the measure in question was applied exclusively to the members of a singular ethnic group […] calls for an answer from the State to show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate[10].

In the final analysis, the Grand Chamber held that no objective and reasonable justification was given for the treatment of the applicants. It is interesting to note that in this ruling dissenting judges saw mainly an opportunity to develop "the ECHR concept of discrimination", stressing the situation of the group and disregarding both the margin of appreciation and the consensus of CoE States, the latter defined in the judgement as "only" emerging.

1.2. The ECJ approach

Within its field of competence, the EU has developed a unique non-discrimination system whose scope has recently been extended thanks to ECJ interpretation[11]. The enforcement of the Treaty of Lisbon has paved the way for a stronger role for EU institutions not only due to the content of the Charter of Nice but also to its Article 21.1, introducing for the first time a right to non-discrimination in EU law[12]. The

[9] *Orsus* (n 7) paras 147-8.
[10] *Ibid.*, para 155.
[11] Andrea Eriksson, 'European Court of Justice: Broadening the scope of European nondiscrimination law' (2009) 7 IJCL 731; Gavin Barrett, 'Re-examining the Concept and Principle of Equality in EC Law' (2003) 22 YEL 117; P Craig and G De Bùrca, *EU law: text, cases, and materials* (OUP 2008).
[12] Among others, Ursula O'Hare, 'Enhancing European Equality Rights: A New Regional Framework' (2001) 8 MJIL 133; Sejal Parmar, 'International Human Rights and the EU Charter' (2001) 8 MJIL 351.

EU Treaty's Article 2 recalls equality as well as dignity as two of the fundamental values on which the Union is built and it foresees a pluralistic, tolerant, fair and non-discriminatory society. Moreover, the Treaty on the Functioning of the EU has reaffirmed EU involvement in the fight against discrimination based on specific grounds and changed legislative procedures for the adoption of new texts granting a proactive role to the Parliament. Bearing these institutional developments in mind, we shall consider the ECJ approach to discrimination claims and explore the scope for stronger dialogue with ECtHR in this field of law[13].

Some key points may be addressed briefly. Firstly, the ECJ must ensure it maintains a fair balance between member State and EU attributions[14]. Secondly, in EU law a clear distinction has been established between direct and indirect discrimination; consequently only the latter may be justified. Moreover, in contrast to the ECHR, the ECJ emphasizes the need for a comparative evaluation to establish direct discriminatory treatment[15]. It is questionable if the distinction still makes sense in light of the case law of both Courts[16]. Thirdly, once a *prima facie* case of direct or indirect discrimination has been established, the burden of proof lies with the respondent to show that there has been no breach of the prohibition; in this respect, the protection seems more effective in the EU system than in the ECHR framework.

On more than one occasion the ECJ has been able to enhance the effectiveness of EU non-discrimination provisions. There are two highly significant cases in which the Court preferred a broader interpretation of the relevant directives in order to grant protection. Thus, in *Feryn* the ECJ stated that the aim of Directive 2000/43 is to foster conditions for a socially inclusive labour market and its achievement justifies that the existence of direct discrimination is not dependant on the identification of a complainant who claims to have been a victim[17]. In *Coleman* the ECJ held that prohibition of

[13] On the role of human rights in EU after Lisbon, see Lucia Serena Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' (2008) 27 YEL 65. The Author states: "the Charter […] reduces the wide discretionary powers of the ECJ to decide what rights are fundamental and their scope", 78; Marta Cartabia, 'I diritti fondamentali in Europa dopo Lisbona: verso nuovi equilibri?' (2010) 3 GDA 221.

[14] Case C-13/05 *Chacon Navas* [2006] ECR 2006 I-06467; Case C-411/05, *Palacios de la Villa* [2007] ECR I-08531, Marco Peruzzi, 'Da Mangold in poi. L'interpretazione delle direttive 2000/43 e 2000/78 nelle pronunce pregiudiziali della Corte di Giustizia' in Laura Calafà and Donata Gottardi (eds.), *Il diritto antidiscriminatorio* (Ediesse 2009) 105.

[15] Mark Bell, 'The Right to Equality and Non-Discrimination' in Tamara Hervey and Jeff Kenner (eds.), *Economic and social rights under the EU Charter of Fundamental Rights: a legal perspective*, (Oxford-Portland, Hart 2003) 91. It must be noticed that in this study the author observes that while Articles 20 and 21 of the Charter are horizontal provisions, the subsequent ones deal with specific forms of discrimination thus requiring a proactive role in relation to gender, disability, children and elderly people.

[16] Denis Martin, *Egalité et non-discrimination dans la jurisprudence communautaire: étude critique à la lumière d'une approche comparatiste*, (Bruxelles, Bruylant 2006) 587.

[17] Case C-54/07 *Feryn* [2008] ECR I-05187. The case concerned Mr. Feryn publicly stating his

discrimination and of harassment in EU law is not applicable only to people who are themselves disabled but also to those treated less favourably as parents of a disabled child[18]. The Court rejected the observations submitted by several EU member States who claimed that only persons in a comparable situation, treated less favourably in relation to specific grounds, can rely on the EU directive[19]. Since the prohibition would have been undermined by an opposite decision, the ECJ ruled in favour of raising a notion of "discrimination by association". While in *Feryn* the Court protected the group dimension since every person of that particular ethnic origin could be humiliated and demoralized by the statements at issue, given their already disadvantaged position in society, in *Coleman* the ECJ seems to accept the idea expressed by Advocate General Maduro:

> The aim of Art 13 EC and of the Directive is to protect the *dignity* and autonomy of persons belonging to those suspect classifications […] Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human […] Similarly, a commitment to autonomy means that people must not be deprived of *valuable options* in areas of fundamental importance for their lives by reference to suspect classifications […] The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of *valuable options*. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else […] At this point, it is fair and reasonable for anti-discrimination law to intervene[20].

Thus, values must be taken into account when judging discriminatory treatment. The weight given to "valuable options" by people who are treated differently on the ground of an identified risk factor must be afforded consideration by the judge as well as by the legislator in order to evaluate when it is reasonable to intervene.

2. Sexual Orientation: A Risk Factor Without Relative Guarantees? Inconsistent Approach by the Courts

Has this kind of proactive approach been adopted in all discrimination claims? If we analyze those cases in which there is a claim of an alleged discrimination based

intention not to hire persons of a certain racial or ethnic origin, thus excluding *de facto* those persons from the application process.

[18] Case C-303/06 *Coleman* [2008] ECR I-05603. It is worth noticing that the EU judges were conscious of the consequences of this ruling: "It is apparent from the order for reference that, should the Court's interpretation of Directive 2000/78 contradict that put forward by Ms Coleman, her application to the referring tribunal could not succeed under national law", para 25.

[19] *Ibid.*, para 41.

[20] Case C-303/06 *Coleman* [2008] ECR I-05603, Opinion of AG Maduro, para 10 (italics added). See also Case C-54/07 *Feryn* [2008] ECR I-05187, Opinion of AG Maduro, para 14.

on sexual orientation, some doubts arise. In effect, both Courts seem unable to derive related guarantees from the status that sexual orientation has acquired recently.

2.1. The ECHR system

After *L. and V*[21]. and *Karner*[22] included sexual orientation among suspect grounds, the effectiveness of counteraction to discrimination was enhanced by procedural rules. In this context Professor Brems states:

> […] the effect of the 2003 shift in the case law is decisive. The 'very weighty reasons' test restricts the state's margin of appreciation and reduces the importance of balancing between a right and its restriction ground, which is the field in which the consensus criterion plays. Comparative argument, whether bearing on legislation or public opinion, will not normally amount to 'very weighty reasons' that may justify rights restriction[23].

Thus, in the recently decided *Kozak v Poland*[24], the ECtHR had an important opportunity for reaffirming this strict scrutiny test. Acknowledging for the first time that same-sex couples shall enjoy family life and were thus protected under Article 8 ECHR[25], the Strasbourg Court followed some key stages in judgement to rule whether the measure was in compliance with Article 14: firstly, the existence of a different treatment based on the applicant's homosexuality; secondly, the request to the State for the reasons underlying this treatment and the control of the legitimacy of the aim pursued in adopting it; thirdly, the need for evident proportion between the measure at issue and the aim sought. Through this strict test the ECtHR was able to affirm the legitimacy of the aim – the defence of the "traditional" family – but at the same time to protect a disadvantaged person whose position in Polish society is particularly vulnerable. This line of reasoning allowed the ECtHR to apply the same guarantees affirmed in *Opuz* and in *Orsus* to discrimination based on sexual orientation, concluding in favour of the applicant and against State discretion.

Against this well-established jurisprudence, the evaluation of the alleged violation of Article 8 read in combination with Article 14 in *Schalk and Kopf v Austria*[26] was

[21] *L and V v Austria* App no 39392/98 and 39829/98 (ECHR, 9 January 2003).

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

[23] Eva Brems, 'Should Rights Shape Societies and Their Values, or Should Societal Values Shape Rights?' in Andras Sajò and Renata Uitz (eds.), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2010) 167.

[24] *Kozak v Poland* App no 13102/02 (ECtHR, 2 March 2010).

[25] It anticipates the stronger statement made in *Schalk*, see Carmelo Danisi, 'Successione nel contratto di affitto: quale protezione per la famiglia tradizionale dopo il caso Kozak c. Polonia alla Corte di Strasburgo?' [2010] F&D 10.

[26] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010). See Loveday Hodson, 'A Marriage by Any Other Name? Schalk and Kopf v. Austria' (2011) 1 HRLR 170.

very surprising. Leaving aside concerns about Article 12, we can concentrate on the procedures followed by the ECtHR to discharge Austrian authorities for having discriminated against the applicants. To start with, in contrast to the *Orsus* approach, the ECtHR held that although there is a growing consensus on this issue, a majority has still not been reached. Relying only on this rule, the judges also failed to interpret the ECHR as a living instrument: the distinction made by Austrian authorities was not analysed in light of the condition of contemporary society and standards of protection already established by the Court. The line of reasoning followed was atypical. Firstly, the judges addressed the issue of whether the applicants were in a relevant similar situation to different-sex couples; secondly, they assessed the existence of an emerging European consensus towards legal recognition of same-sex couples; thirdly, they referred to a wide margin of State appreciation in this context. Although it did find that "same-sex couples are in a similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship"[27], it did not investigate the very serious reasons. Questionably no analysis at all was dedicated to the evaluation of proportionality between the desired aim and the means used by Austria, assuming that the aim – the defence of the traditional family – was already declared legitimate. It is not surprising that the main critics of the final decision were the dissenting judges as their opinion clearly demonstrates.

Arguing that the ECtHR must maintain credibility towards CoE member States and does not anticipate changes in the domestic arena cannot be a justification for failing to follow clear procedures in the evaluation of discrimination claims[28]. The suspicion of arbitrariness in relation to this specific case is reinforced by the decision to reject the request for referral to the Grand Chamber[29]: the panel of five judges of the Grand Chamber did not deem that the case raised a serious issue of general importance (!).

2.2. The EU system

Similar remarks can be advanced in relation to the inconsistency seen at EU level when sexual orientation is at issue. It seems that both Courts converge in limiting their proactive role in addressing bias against homosexuals. If we look back to the past, this tendency has already been demonstrated in the well-known *Grant* case[30], in which EU

[27] *Ibid.*, para 99.

[28] In the Seminar "Mainstreaming diversity", ECtHR building, Strasbourg, 3-4 February 2011, the attending judges stressed that the Court must exercise self-restraint due to the subsidiary character of the ECHR.

[29] Registrar of the European Court of Human Rights, 'Court's judgment concerning Austrian authorities' refusal to allow marriage of homosexual couple becomes final' (*ECHR Press Release*, 29 November 2010) <http://www.echr.coe.int/echr/en/header/press/links/archived+news/archivesnews_2010.htm> accessed 10 April 2011.

[30] Case C-249/96, *Grant* [1998] ECR 1998 I-636. See Steve Terrett, 'A Bridge too Far? Non-Discrimination and Homosexuality in European Community Law' (1998) 4 EPL 487; Paolo Pal-

judges were unable to affirm that discrimination based on sexual orientation was prohibited under Community law.

The first case in which the ECJ has given an interpretation of Directive 2000/78 with respect to this factor is *Tadao Maruko*[31]. After *Mangold* and the surprising affirmation of the prohibition of discrimination based on age as a general principle of EU law, the ECJ was expected to adopt a proactive role in answering doubts advanced by the German Court. Although the ECJ clarified the extent of Recital 22 of the directive, making it clear that in exercising their competence on marital status, member States must comply with Community law and with the provisions relating to the principle of non-discrimination, the ECJ moved away from the opinion expressed by Advocate General Colomer[32]. The ruling was thus based on the notion of direct discrimination and on the comparability of situations: a deliberate underestimating of the right at issue and of Mr Maruko's vulnerable condition is evident. Although the ECJ is not a human rights court, on other occasions it has demonstrated a deeper approach. Notwithstanding the indications given to the referral judge about the existence of a direct discrimination as to whether a surviving life partner could be considered to be in a situation comparable to that of a spouse and be entitled to the benefit in question, it is unclear why the prohibition of discrimination based on sexual orientation could not be affirmed as being a general principle of EU law. The identification of different treatment as direct discrimination is suspicious: in a similar case before the ECtHR, judges in Strasbourg would probably have applied a strict review test after identifying discriminatory treatment based on sexual orientation[33].

The ECJ has recently had an important opportunity to review its previous case law. In the *Römer* case, the question of the existence of a "specific" general principle of EU law was advanced by the referring court and, as Advocate General Jääskinen also claimed in his opinion[34], a negative answer must require a convincing explanation of the reasons why sexual orientation has a different status compared to other grounds listed in Article 21.1 of the EU Charter of Fundamental Rights. In this light it is worth noting that the ECJ has recently repeated the Mangold approach in the *Kücükdeveci* case[35]. This strong position was taken by the ECJ in one of the first rulings delivered after the enactment of the Charter of Nice. Referring also to Article 21 of the Charter, the Court reaffirmed that Directive 2000/78 only establishes a general framework for

laro, 'I diritti degli omosessuali nella Convenzione Europea per i diritti umani e nel diritto comunitario' (2000) 2 RIDU 104.

[31] Case C-267/06 *Tadao Maruko* [2008] ECR I-01757. However, the Case C-117/01 *K.B.* [2004] ECR I-00541 is also very significant.

[32] Case C-267/06 *Tadao Maruko* [2008] ECR I-01757, Opinion of AG Colomer.

[33] *PB and JS v Austria* App no 18984/02 (ECHR, 22 July 2010) in which the Court adopts a strength approach in relation to a violation of the right to property in combination to Article 14 concerning a same-sex couple. See Carmelo Danisi, 'Sulle conseguenze del riconoscimento della vita 'familiare" [2011] F&D 1.

[34] Case C-147/08 *Römer* (ECJ, 10 May 2011), Opinion of AG Jääskinen, para 46.

[35] Case C-555/07 *Kücükdeveci* [2010] OJ C 63/05.

opposing discrimination based on included grounds while the principle of equal treatment derives from various international instruments and from the constitutional traditions common to the Member States. As in the case of gender[36], age is protected by a general principle which operates both as interpretational guidelines and as standards of review by which executive and legislative acts must be judged. The expected statement in *Römer* concerning the EU commitment on sexual orientation has not been made[37]: it is evident that this factor cannot not be derived by the constitutional traditions of member States but the age could not be found in a different position. An important suggestion in the Advocate General's opinion is worth quoting here, even if he stressed that it is a field in which each member State has exclusive competence:

> […] un cas de figure dans lequel un État membre n'admettrait aucune forme d'union légalement reconnue qui soit ouverte aux personnes de même sexe pourrait être considéré comme constituant une discrimination liée à l'orientation sexuelle, parce qu'il est possible de faire dériver du principe d'égalité, combiné avec le devoir de respecter la *dignité humaine* des personnes homosexuelles, une obligation de reconnaître à celles-ci la faculté de vivre une relation affective durable dans le cadre d'un engagement juridiquement consacré[38].

It must be remembered that, also in exercising their powers, domestic authorities must respect the principle of non-discrimination to avoid imposing disadvantages derived from a way of life based on a different sexual orientation. No constitutional provisions on the special value of a traditional union can thus provide a reasonable justification. Logically, given the legitimacy of the aim in this field, a strong role of necessity as well as proportionality is appropriate.

3. Rethinking Discrimination Judgement Through Dialogue Between Courts: The Need for a Consistent Approach

Despite the controversial issues that emerged in *Schalk*, the case showed the close bond between the two European law systems. The ECtHR relied on secondary EU

[36] Recently, Case C-236/09 *Association belge des Consommateurs Test-Achats ASBL* [2011] OJ C 130/4.

[37] The judgement was delivered on the 10th of May 2011. Through an unsatisfactory reasoning the EU Court found direct discrimination based on sexual orientation but restricted the occurrence of the discriminatory treatment to several conditions (see § 52). As far as the question on the existence of a EU general principle of discrimination based on sexual orientation is concerned, the Court answered indirectly: it only held that the right to equal treatment could be claimed by an individual only if the related case falls within the scope of European Union law (§ 60) – i.e., from the expiry of the period for transposition of the Directive 2000/78. It is even more surprising that neither the Charter of Nice nor its Article 21 was recalled in any part of the judgment and no references were dedicated to the inspiring analysis of the Advocate General.

[38] Case C-147/08 *Römer* (ECJ, 10 May 2011), Opinion of AG Jääskinen, para 76 (italics added).

law to extend the concept of family life to same-sex couples[39] while it recalled the Charter – which has the same legal value as the treaties – and its Article 9 to assert that "the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex"[40]. It cannot be denied that the EU Charter of Fundamental Rights acquired two main functions: on one hand containing rights with wording that reflects changes in European society, being thus a good reference for an interpretation of the ECHR as a living instrument; on the other hand it expresses the consensus existing at least amongst the 25 European States on current human rights standards (if we exclude the UK and Poland for their position on the Charter). It follows that how the ECJ interprets the Charter's provisions may have an important impact on ECtHR case law as well as on the ongoing dialogue in the field of non-discrimination[41]. Moreover, the effect on ECtHR of EU Commission's proposals to facilitate freedom of movement for all couples in EU cannot be underestimated.

Introducing a general prohibition of discrimination in Article 21, the Charter has not only narrowed the gap between the two systems of protection in force in Europe, but on closer observation has also restored two important values to the European scenario: equality as stated in Article 20 and dignity, which opens the entire catalogue of fundamental rights guaranteed by the Charter. The ratification of Protocol 12 ECHR by all EU member States will complete this reinforced framework[42].

These developments are certainly welcome, but without an overall rethinking of the judgement on discriminatory treatment we feel they will not be enough. As far as Protocol 12 is concerned, it probably increases the material scope of Article 14 less than had been supposed[43]. If substantial guarantees are not provided by the ECtHR during judgement, it will be able to shape procedures in order to limit intervention in sensitive issues[44]. Thus key criteria must be outlined, as can be observed from the experience of non-European Courts[45]. Clear mechanisms are

[39] *Schalk and Kopf v Austria* (n 26) para 94.

[40] *Ibid.*, para 61.

[41] Koen Lenaerts and Eddy de Smijter, 'The Charter and the Role of the European Courts' (2001) 8 MJIL 90.

[42] CoE, 'Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms: CETS No.: 177' (*Council of Europe - Treaty Office*, 4 November 2000) <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&CL=ENG> accessed 15 June 2011. Total number of ratifications by May 2011: 18 States.

[43] Robert Wintemute, 'Filling the Article 14 "Gap": Government Ratification and Judicial Control of Protocol No. 12 ECHR', (2004) 5 EHRLR 484.

[44] *Sedic and Finci v Bosnia and Herzegovina* App no 27996/06 and 34836/06 (ECHR, 22 December 2009). From this first judgement in which Protocol 12 was applied, it cannot be affirmed that the Court is willing to change its approach to discrimination claims. Article 14 standards will be thus maintained. See Lucy Claridge, 'Protocol 12 and Sejdic and Finci v Bosnia and Herzegovina: A missed opportunity?' (2011) 1 EHRLR 82.

[45] Murray Wesson, 'Contested Concepts: Equality and Dignity in the Case-Law of the Canadian

needed to enhance control of the inclination of judges to shape their rulings according to the grounds of discrimination and of the rights at issue. The dialogue between the ECtHR and ECJ can be very useful in this context. With the Charter of Nice, the ECJ will be called upon to face claims based on grounds included in the text, and common solutions can be found.

The main advantage for the Courts will be avoiding suspicion of arbitrariness while enhancing the protection of the most disadvantaged groups. It seems crucial for the legitimacy of human rights, and it will increase legal certainty by furthering the predictability of interpretations[46]. In this way, the inconsistency shown in claims of discrimination based on sexual orientation can probably be overcome. In particular, as far as the ECHR is concerned, the danger is that the same discretion showed in *Schalk* could be applied in two highly significant pending cases: *Gas and Dubois v France*[47] and *Chapin and Charpentier v France*[48].

At the same time, given the present day standards of protection and the faint-hearted attempt to include values in the Courts' previous case law, the dialogue between Strasbourg and Luxemburg might explore the possibility of including values in equality claims[49]. Using dignity to recognize discriminatory treatment can be useful for identifying the sense of granting those valuable options to which Advocate General Maduro referred above.

3.1. Clear procedures in the evaluation of discrimination claims

Distinguished scholars have pointed out that the approach of the Courts has not always been consistent or logical[50]. To assure coherence with the European non-discrimination system some key points may be advanced.

A. *Focus on Rights* - The difficulty of granting an *effet utile* to the prohibition of discrimination has been constrained by the research of analogy between relevant situations. When European judges face delicate issues they usually start their reasoning from this point, with the risk that in the event that it is not verified, they proceed no further. Such an approach is nowadays unsatisfactory and even the case law recalled above shows that this stage has already lost its importance in part. Instead,

Supreme Court and South African Constitutional Court' in Andras Sajò and Renata Uitz (eds.), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2010) 271; Gay Moon, 'From Equal Treatment to Appropriate Treatment: What Lessons can Canadian Equality Law on Dignity and Reasonable Accommodation teach the United Kingdom?' (2008) 6 EHRLR 695.

[46] Eva Brems, *Should Right Shape Society* (n 23) 147.

[47] *Gas and Dubois v France* App no 25951/07 (ECHR, 31 August 2010).

[48] *Chapin and Charpentier v France* App no 40183/07 (ECHR).

[49] Gay Moon and Robin Allen QC, 'Dignity Discourse in Discrimination Law: A Better Route to Equality?' (2006) 6 EHRLR 610.

[50] Among others, Denis Martin, *Egalité et non-discrimination dans la jurisprudence communautaire* (n 16) 608; Gavin Barrett, 'Re-examining the Concept and Principle of Equality in EC Law' (n 11) 135.

European Courts can concentrate their attempts to limit discrimination by focusing on rights. Thus, the question requiring an answer is "on what grounds has an individual been denied a right or refused the advantage of higher protection provided by the law?" If the answer is "on suspect grounds", a strict review test must be adopted and the analogy stage disregarded. The European discrimination law in this way may attempt to grant equal rights and protection to all the different groups living in European society and overcome their historical disadvantage.

B. *Suspect grounds* - As has been described, the EU Charter provides the most updated list of prohibited grounds and the same can be found in ECtHR case law. After the enactment of the Treaty of Lisbon, the ECJ may be asked to further develop its case law, granting the same level of protection and status to *all* grounds. Most of them refer to groups with a long history of ignored rights as well as prejudice and vulnerability: the dimension of the group is already recognized in ECtHR case law but the impact of biased treatment on the complainant in relation to their position in society is often neglected. For an effective protection of human rights proclaimed in the ECHR and in the EU Charter, the perspective of the individual or the group of origin must be taken into account rather than that of the perspective of the society at large. Again, if the effect of the treatment is to keep the claimant in a disadvantaged position in society or give rise to the idea that they are less deserving of concern, respect and consideration, then both Courts are called upon to assure a strict scrutiny test.

C. *Strict scrutiny test* - Recognizing that a right has been denied or that lesser protection has been afforded due to a risk factor must always require a review that takes into account the legitimacy of the alleged discrimination while evaluating the related necessity and proportionality. The ECtHR's approach based on "very weighty reasons" has proved to be useful because the test is hard to satisfy when *prima facie* discrimination is perceived. It is interesting to note that the EU Charter has followed this approach: its equality provisions must be read in conjunction with Article 52.1, whose limitations are subject to the principle of proportionality and may be made only if they are necessary, intending to fulfil EU general interest or protect the rights of others. In light of this, a more central role might be accorded to proportionality: European judges may require a high degree of intensity to render distinctions or different impacts especially difficult to justify. In short, a vulnerable position shall in any case and in relation to any rights require a strict scrutiny test. Cases such as *Schalk* cannot be accepted in a coherent human rights system.

D. *Consensus/margin of appreciation* - Both Courts have recognised the right for European States to act freely in specific domains. As for the ECJ the division of competences between the Union and member States is fundamental in this connection; the ECtHR has several times recalled that States enjoy a wide margin of appreciation in deciding how to treat different situations. The criteria often used seem to be related to the right at issue and do not follow a coherent approach: the ECtHR

has mentioned it only when it wants to leave room for diversity among States. Indeed, when there is a wide consensus in a specific field the margin left to domestic authorities is often restricted. However, this operation is done with a high level of discretion: thus in *Orsus* a violation of Article 14 was found although the consensus was only *growing*. The question that can be moved to European Courts is rather simple: when the protection of human right is at issue, does the margin of appreciation/consensus doctrine really matter? Although the Charter of Nice has to be applied within the EU fields of attribution and the ECHR does not contain a full catalogue of fundamental rights, it is clear that member States are required to respect equality and non-discrimination provisions when acting in areas of their exclusive power. In short, when a suspect ground is concerned neither the margin of appreciation nor the consensus have to weigh in the judgement.

E. *Kinds of discrimination* - In light of the above and of a deeper dialogue between European Courts in this field of law, doubts arise about the distinction between direct and indirect discrimination in EU law in relation to the consequences that the ECJ derives from it. Although it has been important for focusing the attention on masked discrimination, this distinction may lose its significance with a focus on rights, suspects grounds and the consequent strict review test. The requirement of analogy for finding a direct discrimination at the ECJ is unsatisfactory from a human rights point of view: a more flexible approach may be necessary. Thanks to the strict review test every form of discrimination can be prohibited at the same level and suspicion of judges' manipulation of this notions in their reasoning will disappear. In addition, new concepts have acquired importance such as discrimination on multiple grounds or discrimination by association. The ECtHR can thus take advantage of the developments issued in EU law.

F. *Indivisibility of rights* - The Charter of Nice has innovated human rights law notwithstanding the intention of its authors. Moreover, through a peculiar structure, it seems to stress the indivisibility of rights: no one needs more consideration than others. From this clear statement we can easily assert that no matter what right is at issue, they deserve the same level of scrutiny when alleged discrimination is denounced in their enjoyment or refusal. The present day conditions of European society require a higher standard of protection that cannot be limited to some rights or freedoms.

3.2. A potential common value: the protection of human dignity

The ECtHR and ECJ have generally made limited use of values in the context of non-discrimination[51]. However, it is not an entirely alien concept, being used to

[51] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655.

define harassment as a form of discrimination. Relying on the Charter of Nice, European Courts are called to think about the opportunity to use dignity to strengthen their common involvement in limiting discriminatory treatment. Taking into account criticism of the available experiences of non-European Constitutional Courts, it cannot be denied that many of the abovementioned cases were finally found to be in violation of the prohibition of discrimination through a consideration of the particular disadvantaged social position of the related group and the consequences of the alleged treatment on their dignity, intended as the value recognized to them by society. In this way, the protection of rights will shape society and not the contrary[52]. The dimension of equality put aside in the past with more weight given to non-discrimination is now shaping the European system of protection. The Charter, with its emphasis on "dignity" and "equality", must be seen as an increasing European consensus on the importance of placing those values at the heart of human rights legislation[53]. Moreover, the Charter is structured in such a way as to stress the indivisibility of rights, and every single provision has to be interrelated with the others[54]. Thus dignity and equality/non-discrimination have to shape every right and the ECJ, followed by the ECtHR through an evolutionary interpretation of the ECHR, can be called upon to drive the change.

Harsh criticism has been moved against those jurisdictions that have used dignity to evaluate discriminatory claims. However, the proposal here is simpler: dignity can be used as a secondary means of analysis for European Courts, advanced in light of their recent judgements and of Charter content. Dignity can be expressly addressed in relation to all relevant risk factors while it matches perfectly with the stages outlined above: it does not require a comparison to be made but is able to crystallize the equal worth of every person[55]. Including dignity in the fight against discrimination will therefore lead to a society based on the right to be different since equal concern and respect for every person will be recognized. Moreover, thanks to the focus on dignity provided by the Charter, a positive argument can easily be derived. If State actions are limited by the defence of dignity, the latter can also be seen as an aim: its achievement can be pursued by granting valuable options to those who are currently deprived of it. As it has been noted: "new relationships between prin-

[52] Eva Brems, *Should Right Shape Society* (n 23).

[53] Stefano Rodotà, 'La Carta come atto politico e documento giuridico' in Andrea Manzella and others (eds.), *Riscrivere i diritti in Europa. Introduzione alla carta dei diritti fondamentali dell'Unione europea* (Bologna, il Mulino 2001).

[54] See the comments of the Praesidium responsible for drafting the Charter, available at <www.europarl.eu.int> accessed 15 June 2011.

[55] Gay Moon and Robin Allen, 'Dignity Discourse in Discrimination Law' (n 49) 638. The authors state: "dignity is working today its way into the assessment of how and when generic comparisons should be made, as well as showing when they should not be made. The mere recitation of the equal treatment principle without argument as to what was or was not comparable could not have achieved this result".

ciples are clearly growing with respect to dignity, which is more and more effectively interacting with freedom and equality"[56].

4. Conclusions

The "cross-horizontal" case law analysis herein shows that a commitment by European Courts to non-discrimination is evolving but is neither consistent nor clear. The enactment of Protocol 12 ECHR and of the Charter of Nice may not be sufficient for higher levels of protection. A proposal is to define criteria for an enhanced analysis of discrimination claims, thus limiting judicial discretion. Both the ECtHR and ECJ have developed effective protection tools and for mutual European discrimination law a reciprocal comparison may be required in order to identify each system's pitfalls. Although Courts were set up with different objectives, the growing importance of human rights in the EU has drawn Strasbourg and Luxembourg closer. A further step is now needed: an overall afterthought on discrimination rulings adopting a human rights approach. Values can be an important part of recovering the equality dimension in prohibiting discrimination. Focusing on the protection of rights and of vulnerable groups, European judges are called upon to avoid suspicion of arbitrariness and to ensure *all* risk areas are reviewed equally. Perhaps by following this path, equality and non-discrimination may finally develop from comparison-based concepts into the interpretative measures of the entire catalogue of Europe's human rights.

[56] Stefano Rodotà, 'La bandiera della dignità' *Repubblica* (Rome, 15 February 2011) <http://www.repubblica.it/politica/2011/02/15/news/la_bandiera_della_dignit-12474868/?ref=HREA-1> accessed 10 April 2011.

Constitutional Paradoxes from Inequality Equality to Equality: the Italian Case (with a Little Help from Abroad)

Pietro Faraguna

Abstract

The aim of this paper is to investigate the constitutional significance of the risks of an abrupt shift from a situation characterised by a strong social and legal stigma of homosexuality to the full recognition of equality between same-sex couples and heterosexual couples. The article focuses on the motivational strategies of the constitutional courts dealing with cases concerning equality: there may be reasons to affirm the appropriateness of the constitutional courts' self-restraint, the paradoxes arising from a broader (but still not full) recognition of the equality of same-sex couples suggest the importance of a flexible constitutional approach by the courts themselves thus allowing a future overruling.

* * *

1. Introduction: expectations, surprises, and the "time factor" in the protection of fundamental rights

Any reader of this book is probably well aware of the fact that the Italian constitutional court gave its first pronouncement on the issue of same-sex marriage on April 15th 2010[1]. The same reader may not be abreast of the fact that the commentators' reactions to this ruling were very diverse, but shared a common denominator: a lack of surprise[2].

Italy remains, in fact, among the western legal traditions, one of the few countries (perhaps the only one) which accords a very low level of legal relevance to the social fact of same-sex unions. It could be said that the Italian legal order gives this fact no

[1] Corte costituzionale, sent. n. 138/2010, then confirmed by Corte costituzionale ordd. nn. 276/2010 and 4/2011.

[2] See Barbara Pezzini, *Il matrimonio same-sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent n. 138 del 2010 della Corte Costituzionale* [2010] Giur. Cost. 2715; M. Croce, 'Diritti Fondamentali Programmatici, Limiti all'Interpretazione Evolutiva e Finaità Procreativa del Matrimonio: dalla Corte un Deciso Stop al Matrimonio Omosessuale' (*Forumcostituzionale*, 23 April 2010) <http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/giurisprudenza/2010/0008_nota_138_2010_croce.pdf> accessed 27 April 2010.

relevance at all: just as the cohabitation between my cat and me[3] has no meaning in the legal world, so does a stable union between two persons of the same sex.

Considering this legal background, it was easy to predict that the constitutional court would reject the claim to the highest level of equalization between same-sex unions and heterosexual unions.

Nonetheless, I find it anything but trivial to remark that even the legal scholarship which implored the court to declare the law unconstitutional would not have bet any money on the Courts' response.

Is this just because the lawyers (especially the constitutional ones) are conscious of the political soul of a constitutional court, which suggests, leads, and constrains the juridical one[4]? I think there are much deeper reasons for the "constitutional caution" of the commentators, and that the same caution is of relevance to the actions of any player involved in the debate about the recognition of same-sex relationships.

A comparative overview shows that the way to equality is not a static claim, but a dynamic process: not necessarily slow, but still a process; and any process, in order to be dynamic, has to deal with time.

I need to start with a rude simplification. I will assume a hypothetical route towards a full affirmation of equality between same-sex couples and heterosexual couples, in order to set the vector of the process in question.

I will draw the most common points of this hypothetical route to equality according to a comparative overview (section 2). Afterwards, the experiences will be ordered on the grounds of an "equality vector" (section 3). Subsequently, the following analysis will focus on the possible contradictions arising from a incremental recognition of same-sex unions' recognition (section 4).

In the final section, the above considerations will be applied to the Italian case, where the legal recognition of same-sex couples could be set at stage zero, and where the Constitutional Court was recently asked to jump the whole incremental process through the mere extension of a constitutional right to marry to same-sex unions (section 5).

2. Identifying the equality stair rungs through a comparative overview

The main object of this contribution does not focus on a comparative overview of the different legal assessments of same-sex unions in different countries, nevertheless a brief comparative overview may be useful, even merely because homosexuality is a universal social fact, which means that everywhere around the world there is

[3] The provoking comparison is drawn from Matteo Bonini Baraldi, *La famiglia de-genere* (Mimesis 2010) 147.

[4] Croce (n 2) 1.

a potential claim for equality. In this section I will summarize different countries' legal responses to that claim, and identify the legal players involved in the process.

2.1. Same social fact, different levels of legal protection

The same-sex marriage issue developed recently and quickly. Not later than in the late '80s discussing about same-sex marriage would have been considered more as a form of legal fiction rather than a scholarship's exercise. In 1986 the Supreme Court of the United States pronounced on *Bowers v. Hardwick*. At that time sodomy was a crime in twenty-four States and in the District of Columbia in the U.S.[5]. In seven of those states the prohibition only regarded homosexual couples.

Since then, things have changed radically. Every single day a new country is added to the list of those recognising same-sex marriage. Without wanting to be exhaustive, and limiting the list to European Countries, since 2001 (when same-sex marriage became legal in the Netherlands) homosexuals have obtained the right to marry a person of their sex in Belgium, Spain, Norway, Sweden, Portugal and Iceland. Four other Countries are now passing similar legislations (Luxembourg, Andorra, Finland and Slovenia)[6].

Taking into account also non-European countries, the list goes on and it becomes really hard to keep it updated: same-sex marriage is nowadays legal in Canada, Argentina, South Africa, five States in the U.S., in the District of Columbia and in two districts of Mexico.

As fast as this process may have been, it was correctly described as a gradual[7] and necessary[8] process. It was gradual, in the sense that it was composed of "several small, sequential steps"[9]. It was necessary, in the sense that each step towards the expansion of civil rights was critical to enabling the next[10].

The legal scholarship[11] identifies certain trends and patterns in this global pro-

[5] Comment, 'Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe', [2004] Harvard LR 2004.

[6] A recent and updated recognition may be found at Marco Gattuso, 'Matrimonio tra Persone dello Stesso Sesso', in Paolo Zatti (ed.), *Trattato di Diritto di Famiglia* (Giuffré 2011 forthcoming) and on-line <http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0265_gattuso.pdf>.

[7] Kees Waaldijk, 'Others May Follow: the Introduction of Marriage, Quasi-Marriage, and Semi-Marriage For Same-Sex Couples in European Countries' [2004] 569.

[8] Comment, 'Inching Down the Aisle' (n 5) 2009.

[9] Waaldijk (n 7) 577.

[10] Yuval Merin, *Equality for Same-Sex Couples: the Legal Recognition of Gay Partnerships in Europe and the United States* (University of Chicago Press 2002) 308; *Comment, Inching Down the Aisle (n. 8) 2009.*

[11] Waaldijk (n 7) 571; similar categories were tracked by Caroline Forder, 'European models of Domestic Partnerships Laws', [2000] Can. J. Fam. L. 371, 390 and Robert Wintemute, 'Conclusion' in Robert Wintemute, Mads Adenas (eds.), *Legal Recognition of Same-Sex partnerships: A Study of National, European and International Law* (Hart Publishing 2001) 764.

cess, and distinguishes three levels of legal protection of same-sex unions: the broader, and in a certain sense stronger one, is the mere extension of the "traditional" marriage to same-sex couples. The second level consists of the recognition of a "quasi-marriage", a new legal form of partnership created by a formal act of registration and consists of almost all of the rights and obligations of the "traditional" marriage. The third level of recognition is identified as a "semi-marriage", which consists of a new legal form of partnership, different from the "quasi-marriage" because it results in only a limited selection of the rights and obligations of marriage.

Considering a global move, at least in western Countries, towards a legal emancipation of homosexuality, the "gradual and necessary" process seems far from being completed.

The incompleteness emerges not only from the fact that the process still appears inhomogeneous, but also because it is hard to set a finish line. A full recognition of the right to marry is in fact, on the one hand, one of the strongest reactions of a legal order to the claim for equality; but on the other hand it opens the floodgate to a new wave of claims for equality, related to the familiar status and the recognition of legal parenting[12].

The incompleteness also derives from the fact that in certain Countries the process has arrived to the recognition of registered partnerships, a second-class status of registered same-sex couples.

Moreover, even within the gay and lesbian movement it was argued that the formal recognition of the right to access "traditional" marriage should not be the movement's final wish: this is because, from that point of view, accessing the traditional marriage would mean to inherit the whole conservative and hegemonic configuration of marriage[13].

2.2. Same legal issue, same legal argumentations

Taking into consideration the global diffusion of same-sex marriage, many of the arguments in favour and against its recognition are exportable or importable.

It may be useful to summarize the most common arguments against the recognition of same-sex marriage[14]. The first argument is the definitional one, which presupposes a legal and/or traditional conception of marriage in the sense it includes only heterosexual couples: this argument is obviously stronger in those cases where traditional conception is strengthened by formal provisions of positive law. The argument gains significant power if the gender neutrality of marriage is excluded by an explicit constitutional provision. This interpretation of marriage leads to the af-

[12] An efficient and recent synthesis can be found in Kees Waaldijk, 'Overview of Forms of Joint Legal Parenting Available to Same-Sex Couples in European Countries' [2009] Droit et Société 383.
[13] Nancy D. Polikoff, 'We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' [1993] Va. LR 1636.
[14] The synthesis is draft from Monini Baraldi (n 3) 35.

firmation of the non-discriminatory character of traditional marriage: every man is entitled to marry a women and vice versa.

The second argument is the functional one: marriage and family are connected notions, and marriage serves the traditional purpose of family, in other words, procreation and education of the offspring.

The third and final argument presupposes the public irrelevance of same-sex couples, whose liberty could be protected only in a private dimension.

Conversely, the most common arguments in favour of the legalization of same-sex marriage are based on the recognition of a fundamental right to marry, which would be included among the inalienable human rights; this right includes the freedom to choose freely one's spouse; homosexuals are excluded from this fundamental right; gays and lesbians fundamental right to privacy would also be violated in this way.

2.3. The Constitution, the legislator, the judges, the courts, the people

The inhomogeneity of the forms of legal recognition of the same social fact is not limited to a quantitative aspect: different legal orders not only accord different rights and obligations to same-sex couples, but also recognise those rights and obligations in highly different ways.

In some countries the introduction of new forms of legal recognition of same-sex unions has been the result of a legislative reform; in some of these countries the Constitution was gender-neutral, in others it was necessary to amend it in order to encompass a broader notion of marriage, capable of including same-sex unions; in other countries the legislative process had to take into account popular consultations; in others, judicial contribution played the most significant role to get the process started.

As far as the Constituent (or the constitutional legislator) is concerned, same-sex marriage is explicitly prohibited in 29 States of the U.S.A. and in fifteen other countries (Lithuania, Poland, Latvia, Bulgaria, Montenegro, Serbia, Ukraine, Belarus, Moldova, Honduras, Ecuador, Congo, Kenya, Rwanda and Uganda).

The constitutional prohibition of same-sex marriage may not consist of a clear norm: in this frame, the constitutional experience in Spain seems very important. Although the Spanish Constitution expressly states (Article 32) that "men and women have the right to marry", it was interpreted in the sense that all men and women have the right to marry, but not necessarily to marry a person of the opposite sex[15]. This constitutional reading admitted the enactment of the legislation introducing same-sex marriage without any constitutional amendment.

It has been said that the role of the judiciary in the same-sex marriage issue was greater in common law countries than in civil law ones. This aspect is not surprising

[15] See Marc Carrillo, 'La legge spagnola sul matrimonio tra omosessuali e i principi costituzionali' [2005] Foro It. 264.

if considered in the general frame of the relationships between legislator and courts in the common law traditions, compared to civil law systems[16].

In at least nine states a court's pronouncement had a decisive role in the introduction of same-sex marriage: it was directly imposed by the courts in South-Africa, in five states of the U.S.A. (Massachusetts, Connecticut, Iowa, New Hampshire and Vermont) and in the District of Columbia; the Supreme Court of Nepal did not declare null the exclusion of same-sex couples from the right to marry, but ordered the legislator to provide a new gender-neutral legislation; finally, in Israel, the Supreme Court admitted the recognition of same-sex marriages which were validly celebrated abroad.

A common denominator of this list is self-evident: none of these Countries are European. It is said that the European approach has always been much more "incremental"[17], and the biggest steps were taken by the democratic legitimate bodies.

As far as popular participation is concerned, the constitutional experience of the United States gives unequivocal indications: where and when a referendum was held, the result was in most cases against the extension of marriage to same-sex couples. This happened both in case where the referenda's object was set in positive terms (would you like same-sex marriage to be recognised?)[18] and also in cases where it was set in negative terms (would you like same-sex marriage to be banned?)[19].

The popular consultations gave similar results even in those cases in which the question wasn't raised on the recognition of same-sex marriages, but on the recognition of weaker forms of registered partnerships[20].

On the whole, in 31 cases the polls were contrary to same-sex couples' claims, whereas in only two cases the results were different: in Arizona a bill introducing a ban of on same-sex marriages and registered partnerships was rejected in 2006, but was subsequently approved by another poll in the same State two years after. Fi-

[16] It is also to consider that, on the other hand, for "Anglo-American lawyers, the pattern of incremental social change is a familiar one, especially in the gradual extension of civil rights": see Graham Gee and Gregore C.N. Webber, 'Same-Sex Marriage in Canada: Contributions From the Courts, the Executive and Parliament' [2005] KCLJ 132.

[17] Comment, 'Inching Down the Aisle' (n 5) 2010.

[18] This was the case of Maine, 2009. The data result from Paolo Passaglia, 'Il matrimonio tra persone dello stesso sesso in alcuni stati europei' (*Cortecostituzionale.it*) <http://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_Il_matrimonio_tra_persone_stesso_sesso_12012010.pdf> accessed 14 April 2011.

[19] This was the case of eleven U.S. Countries: Alaska, 1998, Hawaii 1998, Nevada, 2002; Mississippi, 2004; Missouri 2004; Oregon, 2004; Colorado, 2006; Tennessee, 2006; Arizona, 2008; California, 2008.

[20] In nineteen cases the people of a State rejected such a legislation: Nebraska, 2000; Arkansas, 2004; Georgia, 2004; Kentucky, 2004; Louisiana, 2004; Michigan, 2004; North Dakota, 2004; Ohio, 204; Oklahoma, 2004; Utah, 2004; Kansas, 2005; Texas, 2005; Alabama, 2006, Idaho, 2006; South Carolina, 2006; South Dakota, 2006; Virginia, 2006, Wisconsin, 2006; Florida 2008.

nally, in only one State (Washington), a popular consultation approved a bill that extended rights and obligations of *de facto* heterosexual partners to homosexual couples.

In this framework, the constitutional experience of California is especially notable: in 1971 the Constitution came to a gender-neutral definition of marriage, although in 1977 the heterosexual requirement of marriage was settled by law. In 2002 a popular consultation on the proposition 22 (disposing the heterosexual character of marriage) approved this requirement, nonetheless the legislature seriously attempted to introduce a bill legalising same-sex marriage twice, in 2005 and 2007. Both bills were stopped by the Governor's veto, on the ground of the popular support expressed by the 2002 referendum.

Since 2007 the same-sex marriage issue followed two parallel paths in California: on one hand, the compatibility of proposition 22 was questioned in front of the courts, on the other the political circuit gave momentum to the process for constitutional amendment in order to constitutionalize the necessary heterosexuality of marriage.

As far as the judicial way is concerned, proposition 22 was upheld by the Supreme Court of California on 15th May 2008[21]. But only a few months later a popular consultation was called on the issue of introducing proposition 8 into the Californian constitution, which disposed the same-sex marriage ban.

A narrow majority approved the ban, and substantially overruled the Court's pronouncement. Those rapid and wide normative swings led to serious inter-temporal issues, casting legal uncertainty over the 18.000 same-sex marriages celebrated between May and November. Moreover, it was questioned whether the constitutional amendment introducing proposition 8 was, rather than an amendment, a constitutional revision, altering the substantial identity of the Californian Constitution[22]. Again, the Supreme Court was called to rule on both issues: the decision confirmed the legitimacy of the same-sex marriages that were valid according to the law at the time they were celebrated. As far as the second issue was concerned, the Supreme Court declared the constitutional compatibility of the amendment process, both formally and substantially.

3. Ordering the stair rungs on the equality's vector

This comparative overview shows that the reactions of different legal orders to the same claim for equality were and are very diverse: it is of course too ambitious, and probably impossible to say which of them are the most successful in legal terms.

[21] *In re marriage cases*, 43 Cal.4th 757 (2008) [Cal.Rptr.3d 683, 183 P.3d 384 76].

[22] See Comment 'California Supreme Court Classifies Proposition 8 as "Amendment" Rather than "Revision" - Strauss v. Horton, 207 P.3d 48 (Cal. 2009)' [2010] Harv. LR 1516.

Nonetheless, through a dynamic analysis of the different legal experiences it seems possible to sketch a hypothetical equality's vector which tracks the route oriented towards the removal of any difference regarding the treatment of homosexual and heterosexual. The vector generally coincides with the timeline of the legal emancipation of homosexuality: from the starting point; the decriminalization of homosexual conduct, the next steps are the prohibition of discrimination on the basis of sexual orientation, and the extension of social and economic rights to gays and lesbians; these steps precede the legalization of registered partnerships, which could serve as a social preparation for the legalization of same-sex marriage[23].

The timing of this process wasn't homogeneous in the countries where it developed, until the arrival of the final step, the recognition of same-sex marriage. Limiting the survey to European Countries that introduced same-sex marriage, only in the Netherlands and Belgium the legalization of homosexuality has ancient roots: in the latter it was established in 1843, in the former in 1811. In the remaining four countries the legalization of homosexuality is relatively recent: 1944 in Sweden, 1979 in Spain and 1983 in Portugal.

Remarkably, every European Country where same-sex marriage is legalized had introduced some form of registered partnership before: Norway came first (and in general, second only to Denmark[24]) in 1993, and, in the following years, strengthened the legal protection of same-sex couples, making, since 2002, second parent adoption of a partner's child possible. Sweden introduced registered partnerships in 1994, enacting a legislation with a considerable proximity to the "traditional marriage" (joint adoption was recognised and since 2005 even the IVF for lesbian couples). Similarly, in 1997 the Netherlands introduced a new form of legal protection for same-sex couples, establishing a frame of rights and obligations not very far from marriage, with the remarkable exception of adoption rights.

The legislative jump to same-sex marriage has been relatively bigger for Belgium, Spain and Portugal. In the first of these three Countries, same-sex couples were only entitled, since 1998, to access a form of "legal cohabitation" (*cohabitation légale*), equally accessible to heterosexual and homosexual couples, which legal content was quite far from the marriage status.

In Spain the "preparation" of the same-sex marriage legislation was arranged on a

[23] It is significant to remark that the same Country (the Netherlands), that first recognised the same-sex marriage, was also the first Country to decriminalize homosexuality (1811), and to adopt explicit criminal provisions to prosecute sexual orientation discrimination (1992). On the other hand, in the United States experience, there are some examples of States, such as Illinois, where sodomy was decriminalized a long time ago, but same-sex unions received slower recognition: see Richard Posner, 'Should There Be Homosexual Marriage? And If so. Who Should Decide?' in Mich. LR [1997] 1578, 1579. Illinois recently passed (January 2011) legislation on civil unions, that provides to same sex couples the same rights and duties of marriage under state law.

[24] Denmark was the first European Country to introduce a form of registered partnership available to same-sex couples in 1989, but never adopted a legislation enacting the same-sex marriage.

regional ground: in thirteen *Comunidades Autónomas* out of seventeen some form of registered partnership was introduced before 2005 (year of the enactment of the Spanish same-sex legislation). Finally, since 2001, in Portugal homosexual couples are entitled to join the same rights and obligations provided for *de facto* heterosexual unions.

While the legislative experience towards the legal recognition of rights and duties for same-sex couples has not generally experienced significant stops, things went differently when the Courts played a decisive role in the process. In this frame, the Californian experience shows the risks of a popular backlash when the step forward is taken by a Court.

4. The egualitarian paradox

Not surprisingly, different countries derive diverse legal consequences from the same social facts (in this case a stable union between two persons of the same sex): in fact "law always picks and chooses among facts in the worlds, deeming some relevant and ignoring others"[25]. Nevertheless, the selection of relevant facts in the world may not be irrational or arbitrary. Just as none would doubt the unconstitutionality of a norm excluding blond people from the right to marry another blond, the prohibition of same-sex marriage needs to find a legally relevant justification.

This is, in fact, the very essence of equality: its classic formulation, in force of which "people who are alike should be treated alike" and "people who are unalike should be treated unalike", was described as an empty idea[26], which it is indeed. However, once the empty idea is filled up with legal significances, the principle of equality presupposes rationality: any form of discrimination should be rational and connected to a legitimate public purpose[27].

From this point of view, it may be easier to justify the rationality of a system where a stable union between two men or two women has no legal significance, rather than affirming the rationality of a legal order according only some rights and obligations of marriage to same-sex couples aspiring to a legal recognition.

As far as a legal order accords no relevance to same-sex unions, the idea of equality towards the right to marry remains in fact "empty". This is not to say that this

[25] Andrew Koppelman, 'Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein' [2001] Ucla LR 519, 533.

[26] Peter Westen, The Empty Idea of Equality, Harv. LR [1982] 537 and Kent Greenawalt, How Empty Is the Idea of Equality? Col. LR [1983] 1167. The idea that the principle of equality may be considered as an empty principle was already discussed in Italy by Livio Paladin, *Il Principio Costituzionale d'Eguaglianza* (Giuffré 1965).

[27] This idea was justified in terms of the deliberative process by Cass R. Sunstein: "the distribution of benefits or the imposition of burdens must reflect a conception of the public good. Benefits and burdens may not be based solely on political power or on a naked preference for one group over another", Cass R. Sunstein, *Designing Democracy. What Constitutions Do* (OUP 2001) 188.

solution is also just, but only to remark that a situation of total inequality equality is paradoxically easier to justify in terms of equality.

On the contrary, once homosexuals are given the chance to access registered partnerships, for example, it becomes very difficult to justify their exclusion from the right to "marry traditionally". The legal order, in that case, recognises a situation worthy of protection: the stable union between two persons of the same sex. Consequently, the empty idea of equality cited above gets filled up with legal contents which are very hard to reconcile.

Commonly, registered partnership are intended as a "good substitute" for marriage. This configuration seems to accord to registered partnerships a "second best" solution in terms of equality, in case the political conditions do not consent to aim at the legalization of same-sex marriage.

The possibility of intending registered partnerships as a valid substitute for marriage firstly depends on the rights and duties covered by the legal form. As mentioned above, the legislative solutions were so significantly diverse as to impede a common consideration of the phenomenon.

Moreover, if the registered partnerships consist of a new form of legal recognition of two persons (homosexuals or heterosexuals), a "second best" solution could lead to even worse results in terms of equality than the situation arising in case of loss of any legal recognition available to same-sex partnerships.

In fact, if heterosexual couples had access to the new form of registered partnership under a conscious and free renunciation of the traditional model of marriage, same-sex couples would not have the room for any choice.

Signs of this paradox in terms of equality emerge when *ad hoc* new forms of registered partnerships carry the same rights and obligations of marriage, but are still separated by a nominal watershed. Marriage remains a privileged word, its use is limited to heterosexual couples; registered partnerships (or civil unions, or other terms), even though legally equal to marriage, are nominally put on another ground. This nominal issue was argued, not only by the legal scholarship[28], but also in front of some U.S. Courts. In some relevant cases, the courts decided that the nominal separation was a constitutional violation[29].

Perfectly symmetrical are the motivations that, in 2007, induced the Hungarian constitutional court[30] to declare the law on registered partnerships unconstitutional[31].

[28] See recently Courtney Megan Cahill, '(Still) Not Fit To Be Named: Moving Beyond To Explain Why "Separate" Nomenclature for Gay and Straight Relationships Will Never Be "Equal"' [2009] Georgetown LJ 1156.

[29] I'm referring to a decision of the New Jersey Supreme Court and a trial's Court decision in Connecticut. Respectively *Lewis v. Harris*, [2006] NJ, 908 A.2d 196 and *Kannegan v. State* [2006] Conn. Supr Ct., 909 a.2d 89.

[30] Decision 154/2008 (XII. 17.) AB.

[31] Law n. CLXXXIV, 17 December 2007 promulgated in the Official Gazette 2007/186 on 29 December, 2007, with the planned date of coming into force at 1 January 2009.

Considering that the new form of legal recognition was available to both heterosexuals and homosexuals, the constitutional court qualified civil unions as a marriage's duplication, diminishing the traditional marriage's supremacy, protected by the Constitution.

5. The Italian case: from Zero to Hero (and back?)

The success of a comparative overview ends where a significant diversity of positive law emerges. As for the same-sex marriage issue, the relevant data of positive law are at least of three kinds. First, the constitutional provisions in marriage and family matter; second, the legislative context in the same matter; third, the position and authority of the supreme/constitutional Court in the relevant legal order.

Following these three paths, the isolation of the Italian legal order, mirrored in the denial of any form of recognition to same-sex unions finds some plausible explanation.

As for the part recognizing family as the natural society based on marriage, Article 29 of the Italian Constitution gives some arguments to a hermeneutic approach which considers the adjective "natural" as excluding homosexuals from the right to marry.

These arguments are certainly not decisive, and apart from the convincing opposite argument of an author[32] who noted the paradox of putting together a natural entity (family) with an institutional one (marriage), the Spanish case cited above shows that such constitutional provisions do not prohibit a legislative enactment of a same-sex marriage legislation.

As far as the second field is concerned, the legislative context regarding family's matter does not seem to prohibit a new configuration of the legislative notion of marriage, aiming at the inclusion of same-sex couples.

On the contrary, the family's law reform in 1975 proved the elasticity of the notion of marriage included in the Italian constitution: without any formal amendment, the insolubility of marriage was broken, and a general reform of the relationship between spouses was enacted, not against, in the frame of the constitutional provisions.

As far as the third and final field is concerned – the position and authority of the constitutional Court in the legal order – the issue is quite controversial. A serious analysis of this point falls outside the scope of this contribution, but would explain the reason why nobody was surprised by the first Italian Court's judgement on same-sex marriage. Although the composition of the Italian constitutional Court suggests a strong independence of its members from politics[33], the action of the Italian court must be aware of the political reaction of its decision in socially sensitive matters such as family law.

[32] Roberto Bin, 'La Famiglia: alla Radice di un Ossimoro' [2000] Studium Iuris 1066.

[33] This is what emerges from a comparative survey of the judges' selection procedures: see Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht* (first published Suhrkamp 1991, Giuffré 2006) 643.

5.1. Legal tools for a step further

Considering the issue of same-sex marriage in the Italian legal order from a purely theoretical point of view, there are at least three ways of obtaining legal recognition of same-sex unions.

The first is legislative reform, which was taken successfully in most European countries. The recent legislative attempts in that direction showed that, as far as Italy is concerned, the time is not likely ripe for such legislation, and in reality will not be for a while.

Another mechanism – again from a purely theoretical point of view – could be the referendum under Article 75 of the Constutition, which allows the people to abrogate a legislative norm. This path is really purely theoretical, because the exclusion of same-sex couples from the right to marry is not provided expressly by any explicit rule: it has been said that the prohibition consists of a norm not corresponding to any rule[34].

This legislative darkness would require a really dangerous two-step process. Firstly, an express ban of same-sex marriage could be introduced in the civil legislation, and then a referendum could be called in order to abrogate the new law. Considering the high validity turnout required for this kind of referendum (half of the electorate) and the perception of same-sex marriage as a minority claim, this way appears as a sure legal suicide for the issue of same-sex marriage[35].

The normative darkness has led at least one commentator[36] to affirm that the absence of an imperative rule prohibiting same-sex marriage should enable common judges to interpret the law in the sense of admitting same-sex marriages. Although this solution is based on several consistent arguments, it was not adopted by the judges who referred the issue to the constitutional court for the first time. The latter approved the judges' configuration, recognising a settled interpretation of the civil law intending heterosexuality as a constitutive element of marriage.

The last tool provided by the Italian legal order seems to be the submission of the question to the constitutional court.

5.2. The embarrassed reaction of a constitutional court in front of a "virtual" fundamental right

Once considered the theoretical legal ways of obtaining some kind of legal recognition of same-sex couples, it is not surprising that the first submission of a constitu-

[34] Gilda Ferrando, 'Questo matrimonio non si può fare?', in Roberto Bin and others (eds.), *La «società naturale» e i suoi "nemici"* (Giappichelli, 2010) 137.

[35] I will not try to foresee the orientation of the Italian people on the merit of the hypothetical question (want you the same-sex marriage be abrogated?), although some polls showed less trivial results than what I imagined; see, for example, Eurispes, *Gli italiani e i gay. Il diritto alla differenza*, 2003, where 51% of the interwiees were in favour of recognising the right of same-sex couples to marry.

[36] Francesco Bilotta, 'Matrimonio (gay) all'italiana' [2006] Nuova Giur. Civ. Comm. 91.

tional question on same-sex marriage in the Italian experience followed a long period of legislative inactivity on the same matter.

The parliamentary debate concerning a new bill on some form of registered partnership always fell through tough political contrasts[37].

In this frame the Constitutional Court's judgment pronounced on April 15th 2010 found an inexorably hostile ground.

This is the reason why the importance of the Constitutional Court's ruling does not reside in the acceptance or rejection of the constitutional question, but in the motivational strategy behind the rejection.

The comparative overview played a significant role in the court's reasoning, not in a quantitative manner, but in a qualitative one[38]. In fact, the constitutional judges firstly stated that same-sex unions fall within the "social formations", according to which the Republic recognises the inalienable human rights (Art. 2 of the Constitiution). Secondly, from this inclusion, the Court derived the fundamental right of same-sex couples to live their couple status and to gain – "in the time and within the limits established by the law"[39] – legal recognition of the related rights and duties.

This reasoning could perfectly serve as a motivation moving toward the necessity of equalization of homosexual and heterosexual couples as far as marriage is concerned, being the latter the social formation whereas heterosexual couples live their couple status.

However, drawing from a comparative survey, the Court ascertained that, since different legal orders accorded diverse levels of legal protection to same-sex unions, the claim for recognition may be satisfied through different solutions, among which the legislator is the only player entitled to choose.

Behind this reasoning, the Court operated a division of the constitutional question submitted, in two parts: the first concerning the recognition of a right to live life together as a couple; the second concerning the recognition of a right to marry.

Once detected – with some help from a comparative view – that the first aspiration could be satisfied through different means, the Court excluded a constitutional violation through the ban of same-sex marriage. The motivation of the Court on this aspect was considered very weak[40] in the part it resided on an originalist argument.

[37] A survey of these (failed) experiences is reported by Augusto Barbera, *Le convivenze paraconiugali: dai PACS ai dico* (Cacucci 2007). The only provisions taking into account the legal relevance of "other forms of cohabitation" are disposed by some regional Statute, but the constitutional court (Case n. 372 and 378/2004, 29th November 2004) cleared that such provisions have no prescriptive value.

[38] The use of comparative arguments was an high selective one, otherwise it would have imposed a much more progressive approach, as noted by Andrea Pugiotto, 'Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio' (*Forumcostituzionale*, 19 January 2011) 18 accessed 10 April 2010.

[39] Corte costituzionale, sent. n. 138/2010.

[40] See Pugiotto (n 38) 12.

The Courts' reasoning was indeed mostly focused on the interpretation of Article 29 of the Constitution, and left little room for the question of the compatibility of the ban on same-sex marriages with the principle of equality included among the parameters. In this frame, heterosexual and homosexual couples were apodictically defined as inhomogeneous.

This reasoning led a commentator to note that the Court's ruling was at the same time too broad and too narrow[41]: the Court said too much, where it recognised a fundamental right, conditioned by the legislator's intervention ("within the times, modalities and limits established by law"[42]). At the same time the court said too little, because no urgent warning was consequentially addressed to the legislator.

Consequently, the implementation and protection of a fundamental right depend on the intervention of a reluctant legislator. Moreover, specifying that the recognition of a fundamental right is not only conditioned by the time of the legislative intervention, but also by its limits, the Court gave some arguments to interpret its decision as an implicit constitutional prohibition of same-sex marriage[43].

Indeed, the commentators' readings of the ruling transformed as the question was raised on the constitutional compatibility of same-sex marriage and not – as it really was – on the constitutional compatibility of the ban on same-sex marriage.

The shift in legal discourse on the second front (is same-sex marriage compatible with the constitution?) is extremely dangerous[44]. As comparative experience shows, in those countries where the constitution expressly bans same-sex marriages, a ripple effect on legislative ground commonly emerges: although the constitutional prohibition of same-sex marriages does not impede the adoption of legislative measures extending other forms of legal recognition to same-sex couples, in fact this does not happen.

The darkness of constitutional provisions on equality and marriage allows in fact the reconstruction of three interpretative paths.

Following the first one, same-sex marriage would be constitutionally imposed, and the constitutional court should declare the legislation prohibiting it incompati-

[41] Roberto 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"' (2010) 00 RivistaAIC <http://www.associazionedeicostituzionalisti.it/rivista/2010/00/Romboli01.pdf> accessed 2 July 2011.

[42] Corte costituzionale, sent. n. 138/2010 (8 c.i.d.).

[43] See Pugiotto (n 38). Even if it is also possible to find opposite arguments in the motivation, where the court denies that a legal recognition of same-sex couples could consist *only* (and so, implicitly including this option) of the recognition of same-sex marriage. In this direction see Pezzini (n 2).

[44] A part of the legal scholarship denies in fact that the Italian constitution would allow any form of recognition of an union between two human beings other than marriage: see Antonio Ruggeri, 'Idee sulla famiglia e Teoria (e Strategia) della Costituzione' [2007] Quad. Cost. 751, 753; Vincenzo Tondi della Mura, 'La Dimensione Istituzionale dei Diritti dei Coniugi e la Pretesa dei Diritti Individuali dei Conviventi' [2008] Quad. Cost. 101.

ble with the constitution. This was the reconstruction of the constitutional question submitted to the Court, and rejected in its decision n. 138/2010.

Following the second interpretative path, same-sex marriage would be forbidden by the Italian constitution. The motivation behind the rejection of the same-sex issue by the constitutional Court gave some arguments pointing at that direction. Notably, those inferences do not find any legal justification, assuming that a rejection ruling does not bind any player of the legal order[45].

Following the third path – logically set in the middle of the first two – same-sex marriage would not be forbidden, nor imposed by the Italian constitution. Although this interpretation seems to be quite reasonable, it falls in deep constitutional contradictions: is the right to marry a fundamental one? It seems to be[46], but only in its traditional configuration: in other words, the legal order only recognises a fundamental right to marry a person of the opposite sex. Nonetheless the Italian constitutional Court recognised a fundamental right to live life as a couple, to which homosexual and heterosexual couples are equally entitled.

Finally, the latest, apparently reasonable interpretative path seems to turn into unreasonable implications. We should assume the existence of two separate fundamental rights: the right to marry, reserved to heterosexual couples, because this is the original meaning of the constitutional provision regarding marriage; and the right to live life together as a couple, as fundamental as the first, but not enacted. The *ratio* of this separation remains unclear, if it is true (and it is) that procreation is an unsuitable argument, for being both over-inclusive and under-inclusive[47].

5.3. Conclusions

Nevertheless, the third path (the constitution allows, but does not require, nor forbid same-sex marriage) has a decisive quality: it does not ask too much, and consents the same gradual process that took place in other European countries.

The imposition of same-sex marriage through a constitutional court's decision would face a serious risk of a political and/or popular blacklash.

I do not consider this argument as a mere political one: the hitches of the equality's walk in some U.S. countries where the judicial branches pushed too much against the will of the population, showed the concrete risks of a popular backlash. Should this happen in Italy, it would not be hard to find a broad legislative consen-

[45] Francesco Dal Canto, 'Le coppie omosessuali davanti alla Corte costituzionale: dalla "aspirazione" al matrimonio al "diritto" alla convivenza' (2010) 00 19 RivistaAIC <*www.associazionedeicostituzionalisti.it/rivista/2010/00/Dal_Canto.pdf*> accessed 2 July 2011.

[46] The Italian constitutional court recognised a fundamental right to marry in several judgements: among other, see Corte costituzionale, sent. n. 445/2002.

[47] It is over-inclusive because it does not take into account those spouses, validly married, who do not wish or cannot procreate. It is under-inclusive, because it ignores (at least) those lesbian couples who use IVF.

sus in order to change the constitution, and to expressly state the heterosexual character of marriage[48].

As a consequence, the last resort (or better, the second last resort) would be to hold a referendum under Article 138 of the Constitution: in this case, on the one hand, the absence of a valid turnout would help a result in the sense of protecting a minority; on the other hand it would not be so easy to find any subject legally entitled to call the referendum.

In case the referendum should not take place, the last resort may only be the constitutional adjudication on the constitutional amendment. The constitutional Court has indeed qualified equality as one of the supreme principles of the legal order, which not even Constitutional Law can remove. It is certainly a big risk, and likely not desirable, to play for such high stakes on the table of constitutional justice[49].

In 1997, when the issue of same-sex marriage was moving its first steps in the American constitutional debate, Richard Posner wrote that "judges must accord considerable respect to the deeply held views of the democratic majority. When the Supreme Court moved against public school segregation, it was bucking a regional majority but a national minority (white southerners). When it outlawed the laws forbidding racially mixed marriages, only a minority of states had such laws on their books. Only when all but two states had repealed their laws forbidding the use of contraceptives even by married couples did the Supreme Court invalidate the remaining laws. It created a right of abortion against a background of a rapid increase in the number of lawful abortions. Were the Court to recognize a right to same-sex marriage today, it would be taking on almost the whole nation"[50].

The opposite risk laying behind this sort of reasoning is the abdication of the proper role of constitutional justice: the protection of fundamental rights against the democratic majority.

The risk is quite serious in a country where the recent past casts a deep mistrust on the capacity of the legislator to satisfy the claim for recognition emerging from same-sex couples.

[48] Something similar happened when the legislator amended art. 111 Const. after a harsh contrast with the constitutional court: see Nicolò Zanon, 'La Corte, il legislatore ordinario e quello di revisione, ovvero del diritto all'ultima parola al cospetto delle decisioni d'incostituzionalità', [1998] Giur. Cost. 3169.

[49] This is because most of the constitutional lawyers would qualify equality's as a supernorm: see Alessandro Pizzorusso, *Che cos'è l'eguaglianza* (Editori Riuniti 1983) 49 and Costantino Mortati, *Istituzioni di Diritto Pubblico* (IX ed. Cedam 1976) 1023. The constitutional court itself qualified equality as a supreme principle of the legal order (Corte costituzionale sent. n. 15/1996). But someone else, without refusing this qualification, could also mean that the protection of traditional, heterosexual marriage is a supreme principle of the legal order as well: see Antonio Ruggeri, 'Idee sulla famiglia e teoria (e strategia) della Costituzione' in Roberto Bin and others (eds.), *La «società naturale» e i suoi "nemici"* (Giappichelli 2010) 757.

[50] Richard Posner, 'Should There Be Homosexual Marriage? And If so, Who Should Decide?' [1997] Mich. LR 1578, 1586

In Italy the same-sex protection issue seems to be laying in an "institutional cul-de-sac". In fact, the incremental process is steady at the zero stage, and it is hard to imagine any constitutional player moving the first step. Moreover, the time does not seem ripe for unlocking the impasse with a legislative intervention, nor ripe for putting such expectations on the constitutional court.

Nonetheless simply taking note that the issue of the recognition of same-sex unions in Italy is stationary would be dishonest, and there is no chance to foresee some development in the following years.

The reality is certainly harsh: same-sex marriage is forbidden by law, as it was before April 15th 2010. No forms of civil partnerships are disposed by law, and there is no bill with reasonable chances of approval before the Parliament.

Nevertheless, same-sex marriage has become in few years a central issue of debate, both for legal scholarship and the public opinion. In the past months, several academic symposiums took place on this issue; same-sex marriage became a common topic in law students' theses; and recently a question on this issue submitted to the constitutional court gave birth to an intense debate in the media and the public opinion.

This would have been unthinkable a few years ago. A further sign of change can also be drawn from some of the reactions to decision n. 138/2010 of the constitutional Court. A small part of the legal scholarship whose opinions are firmly contrary to the recognition of same-sex marriage observed that the constitutional court only save the nominal value of traditional marriage, and opened to an occult expropriation of its substantive value[51].

The constitution does not merely reflect the definition of the constitutional court: sensitive issues, such as the one discussed in this paper, need to be constantly shaped through the active contribution of all constitutional players (public opinion and legal scholarship included) working as an open community of interpreters[52].

[51] Vincenzo Tondi della Mura, 'La Sentenza della Corte Che Ha Difeso la Parola "Matrimonio"' (*Ilsussidiario*, 19 April 2010) <http://www.ilsussidiario.net/News/Cronaca/2010/4/19/SOCIETA-La-sentenza-della-Corte-che-ha-difeso-la-parola-matrimonio-/80480/> accessed 5 April 2011

[52] I refer here to the conception of Peter Häberle, *Die Verfassung des Pluralismus* (Athenäum 1980).

Sexual Minorities in India and Nepal: Some Recent Developments*

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Abstract

During the last decade, old and newer forms of sexual divergence from heteronormativity have acquired a growing importance within the public debate in India and Nepal, culminating in some recent Court decisions about the rights of "sexual minorities".

In the first part of my paper, I will focus on the history of the recent legal struggles, analyzing the requests presented by the petitioners, the arguments of the opponents and the Court decisions.

Then, I will analyze some interesting aspects of the wider public debate about sexual minorities, where pro and con ideological arguments are forged, and where potential conflicts between the rights of LGBT(I) people and other groups could arise. I will underline both the aspects specific to each country, and the similar elements, i.e. a strong link between sexual minorities and HIV/AIDS-related issues, the need to (re)construct an indigenous history of sexual diversity and the visible presence of "third gender" people as a cultural matter of fact.

Finally, I will focus on the potentiality and weaknesses of the actual LGBT(I) groups' arguments and practices, through the analysis of the connections between old problems and new perspectives.

* * *

1. Introduction

In recent years, sexual-minority-related issues have acquired a growing visibility in many developing countries, including India and Nepal, both in the wider public debate and in the more specialized legal discourse. Activists from NGOs, intellectuals and ordinary people have worked patiently in the often difficult process of imagining and creating a more comprehensive space for all who do not recognise themselves in heteronormativity[1]. This long journey led the way to some important Court decisions.

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[1] I use this term as a synonym of the phrase "normative heterosexism".

We can find similarities as well as differences in the general context of the two countries. From the legal point of view, the main divergence regards the decision-making judicial hierarchy. As a matter of fact, in Nepal it was the Supreme Court that ruled in respect of LGBT(I)[2] rights, whereas in India the recent decriminalization of "sodomy" was made by the Delhi High Court. In this case the choice of filing a petition at a High jurisdictional body instead of recurring to the apex Court depended on the specific features of this country, namely a socio-legal climate less open than in Nepal. For this reason, such a choice could have different effects on the future of LGBT(I) discourse in each country.

2. Nepal

2.1. Background information on LGBTI people in Nepal

Nepal's recent history has been very complex[3]. The country's first Constitution dated back to 1990 and it defined Nepal as a constitutional monarchy and a Hindu reign. In 1996 a cruel guerrilla war between the Government and Maoist rebels began. As a result, a large number of people became internally and externally displaced and approximately 12,000 more died during a single decade. In 2001 the royal family died in unclear circumstances and Gyanendra, the brother of the late king, took the power. In 2005 the new king decided to declare an emergency status during which the fundamental rights of Nepalese citizens were greatly limited. King Gyanendra's harsh decisions led to a revolution and as a result Nepal lived an important political transition between 2006 and 2007. In the new Interim Constitution, 2063 (2007 AD), the country is no more a monarchy but "an independent, indivisible, sovereign, secular, inclusive federal democratic republican State"[4].

Therefore, despite the continuing critical situation, the last few years have been beneficial with regard to the rise of anti-discriminatory issues. The shaping of a new, really inclusive and deeply democratic country is a big challenge but also a great opportunity for a wide range of "minorities", that is all the groups once discriminated by law or by custom. LGBTI people are one of those groups.

Until recently, Nepalese LGBTI people did not experience a friendly environ-

[2] I write the "I" part of the acronym within brackets as a unique sign for the different definitions used in each country, usually LGBTI in Nepal and often LGBT in India. In this latter, however, different definitions based on other criteria can be found (see here, paragraph 3.4).

[3] A very useful online resource on Nepal is the website <http://www.nepalresearch.org>, accessed 20 April 2011. It provides regularly updated and well organized reviews of articles in English.

[4] Article 4 of the Interim Constitution of Nepal, 2063 (2007). See UNDP NEPAL, *The Interim Constitution of Nepal, 2063 (2007). As amended by the first to sixth amendments* (January 2009) at <http://www.nic.gov.np/download/interim-constitution.pdf> accessed 20 April 2011.

ment. Even if in the *Muluki Ain*[5] there was no specific "anti-sodomy" provision[6], the norm of the society was the heterosexual family and at least in theory sexual activity should have taken place only within the marriage. Different forms of sexuality were perceived as shameful. The most visible part of the sexual minority, that is the *metis*, cross-dressing men/transgendered women, were an easy target for police harassment and violence, which usually went unreported and unpunished.

The protagonist of the Nepal's LGTBI struggle is the Blue Diamond Society (BDS)[7], the most important NGO aimed at improving sexual health, human rights and well being of sexual and gender minorities. It was founded in 2001 by Sunil Babu Pant, now the first openly gay MP and member of the Constitutive Assembly. BDS was the initiator of the legal struggle that ended with the Supreme Court's decisions.

2.2. The Supreme Court judgments

The history of the Nepalese legal struggle is a short one. In fact, the whole process took less than two years. On April 18th 2007, BDS and other petitioners filed a Public Interest Litigation (PIL)[8] in the Supreme Court of Nepal. On the December 21st 2007, the Court issued a first decision. Finally, on November 17th 2008, it delivered its final judgment, confirming the previous decisions (full rights to LGBTI people on their own identity, also in the new Constitution) and giving its consent to same-sex marriages[9].

[5] That is "Country Code". It is a comprehensive legislation that includes criminal law provisions, dating from 1854. At the moment, the Nepalese law system is going through a radical renewal.

[6] A provision against "unnatural sex" can be found in part 4, chapter 16 "Sex with Animals", art 1: "No one may penetrate an animal or make an animal penetrate him/her or may do or make another person do any kind of unnatural sex"; art. 4 "In this chapter, not mentioned in other sections, anyone who does or makes someone practice unnatural sex may be sentenced to one-year jail or 5000 Nrs fine".

[7] Due to the fact that the Constitution of Nepal did not recognize sexual minorities, BDS was registered as a sexual health programme. Its mission is to improve the sexual health, human rights and well being of sexual and gender minorities in Nepal including third-genders, gay men, bisexuals, lesbians, and other men who have sex with men (MSM). BDS website is <http://www.bds.org.np> accessed 20 April 2011.

[8] The PIL is an important tool of the so-called judicial activism. It is a specific form of writ petition, in which the *locus standi* is quite widened. Under art 107(2) of the Interim Constitution, every Nepalese citizen can file a PIL on matters of important public interest, especially when the people or the group whose rights are compressed have not the possibility or the strength to file a petition by themselves.

[9] In this work, only the first decision will be analyzed, since a translation of the final verdict does not exist. For a good analysis of the Nepal's background on sexual minorities' rights and of the Supreme Court hearings till November 2007, see IGLHRC, 'Nepal Supreme Court Case on Relief for Sexual and Gender Minorities: Observers' Report' (December 2007) <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/111-1.pdf>. For the English translation of the sentence see National Judicial Academy, 'Sunil Babu Pant and Others v Nepal Government and

The petitioners' requests[10] were mainly three: to recognize the civil rights of transgender people without asking them to renounce one gender identity for another; to amend existing discriminatory laws and create new ones preventing discrimination and violence against LGBTI communities; and to require the State to make reparations to LGBTI victims of state violence and/or discrimination.

The opponents[11] denied that existing laws were discriminatory and affirmed that since the Interim Constitution held many grounds aimed at assuring the right to non-discrimination – namely religion, sex, caste, origin, race, language or belief – there was no need for further special legal protection for the petitioners.

The Supreme Court's general reasoning was that LGBTI people, who are not male or female in terms of sex, or masculine or feminine in terms of gender due to natural and biological factors, are nevertheless natural persons and Nepalese citizens, and therefore are entitled to the enjoyment of the rights provided by Constitution, law and the human rights' conventions ratified by Nepal. For this reason, the State has an obligation to create a non-discriminatory and favorable environment and to formulate laws accordingly.

Then, the Court specified the main grounds of the decision, i.e. rights to equality and non-discrimination. It displayed the theoretical legal frame on which the decision would rely, i.e. Part III and IV of the Interim Constitution and some important international instruments, namely the ICCPR and ICESCR. The references to Part III of the Constitution regarded Article 12, i.e. right to freedom, and specifically 12(1), right to live with dignity, and Article 13, right to equality (read in connection with Article 26 of the ICCPR). Regarding Part IV, the Court referred to Articles 33, "Responsibilities of the State", and 34, "Directive Principles of the State".

The judges held a second specific argument about same-sex marriage, based on Articles 2, 16 and 17 of the ICCPR and on Article 10 of the ICESCR. All these were read jointly with the aim of "correcting" the apparently exclusive man/woman framing of the Article 23 of ICCPR on family.

The Court also quoted sources external to the Nepalese legal system such as judgments of the European Court of Human Rights[12], the South African Constitutional Court[13] and the U.S. Supreme Court[14], specialized books and recent international instruments as the Yogyakarta Principles.

Others [Decision on the rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People]' 2 NJA L.J. (2008) 261 <http://njanepal.org.np/Anex_2.pdf>. Both documents accessed 20 April 2011.

[10] Blue Diamond Society, MITINI Nepal, Cruse AIDS Nepal and Parichaya Nepal.

[11] The Office of the Prime Minister and Council of Ministers, Legislature-Parliament, and Ministry of Law, Justice and Parliamentary Affairs.

[12] *Christine Goodwin v the United Kingdom* App no 28957/95 (ECHR, 11 July 2002)

[13] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1999 (1) SA 6, 1998 (12) BCLR 1517

[14] *Lawrence v Texas*, 539 US 558 (2003)

The decision is deeply intertwined with the human right view, strongly underlining the importance of the concepts of privacy and dignity.

Finally, the Supreme Court decided to issue two directive orders to the Government of Nepal. The first declared the need to formulate appropriate legislation or to amend the existing laws inconsistent with the dignity claim of LGBTI people. The second, more specific, regarding the right to same-sex marriage, asked the Government to form a committee to carry out research about the practices regarding gay and lesbian marriage and related jurisprudence developed in other countries, and to take initiatives as recommended by that committee.

The final judgment of November 17th 2008 recognizes the right to own property and to employment. It rules that cross-dressing is not perversion but an expression of individual freedom. Furthermore, it orders that the language of the new Constitution, to be completed by May 2011, must not discriminate against the sexual minorities. Besides, it reiterated the admissibility of same-sex marriage and ordered the Government to enact a law on that subject.

At the moment, the orders have not been implemented, yet, but a bill regarding same-sex marriage is going to be drafted in the next months.

2.3. Peculiar features of the discourse about LGBTIs in Nepal

Although the history of the LGBTI rights was closely linked to the HIV/AIDS issues, the legal strategy adopted by the petitioners has not been limited to that matter. Due to the continuous work by NGOs like BDS and to the favorable socio-political situation, the requests had been shaped and formulated within an inclusive and comprehensive ideological frame. For example, the choice of the acronym LGBTI, comprising also the "intersex" category, suggests a will for the widest inclusion. The petition was not a challenge towards an existing discriminatory law, but a wider request of constitutional conformity of the whole legal system to the fundamental rights of sexual minorities. The requests to the Court about LGBTIs' identity focused both on gender identity and on sexual orientation, highlighting the different needs of all the members of the sexual-minority community[15].

However, the struggle of LGBTI activists is aimed at changing not only the law, but also the perception of alternative sexualities by the society at large. In this regard, the group uses a joint perspective through which LGBTIs are one minority amongst many others, working together to build a thoroughly inclusive and democratic country. At the same time, many efforts are made to raise the self-confidence of LGBTI people as well as to improve the skills of the most deprived members of this community, to allow them to become economically independent and to earn a living out of their capacities. This approach, definable as a "holistic" one, seems highly profitable. As a general trend, the media are looking favourably

[15] During the hearings before the apex Court, *meti* people played an important role through their presence and their testimony.

upon LGBTIs and society is demonstrating a growing acceptance of the community. At the moment, BDS continues to be the main spokesperson for Nepalese LGBTIs.

3. India

3.1. Background information on LGBT people in India

India, the "world's largest democracy", is at the same time a multiform and also a contradictory country. It is a secular state[16], but its legal system as well as its social and political life are based on "religious" differentiations often leading to open and violent interreligious conflicts, resulting sometimes in real pogroms[17]. The political frame is characterized by a growing Hindu "fundamentalism", aimed at the creation of a "Hindu nation" inhabited only by real Hindi-speaking Hindu people. The criminal law is unified for all the citizens, but the personal laws are differentiated according with "religious" criteria[18]. In general, the public debate is characterized by a communal trend which leads to continuing unsettlements. Therefore, on highly debated issues like women's and sexual minorities' rights, the Government is often likely to give in to the pressures of "religious" or reactionary groups.

As in Nepal, sex has been and is yet a taboo. The accepted social norm is the heteronormative one, with a strong underlining of the procreative purpose of "natural" sex. Accordingly to that vision, all not procreative sex is a sin or a shame, i.e. "unnatural". Until the decision by the Delhi High Court of July 2009, "sodomy" was considered a criminal offence, punishable with imprisonment and a fine.

During the last decade, however, a heterogeneous movement claiming the rights of LGBTs has originated. Stemming from different backgrounds and somehow set-

[16] The Preamble of the Constitution states that India is "a sovereign socialist secular democratic republic".

[17] We can recall the riots during the Partition period, the 1984 anti-Sikh pogrom in Delhi, the 1986 destruction of the Babrji Mashid in Ayodya, the 2002 anti-muslim Gujarat pogrom.

[18] I use quotation marks for the term "religious" to highlight the peculiar use of this word in the context of the Indian secularism. Without dwelling excessively on this specific matter, it is fundamental to underline its features. Firstly, the *current* rigid distinction of Indian citizens within different socio-religious groups, normally perceived and described as "traditional", actually originated during the colonial period in the frame of the British reorganization of the "native" laws, so that some critics define these mongrelized systems as "anglo-hindu" and "anglo-islamic". At the same time, the framing of these differences in the legal system led to a strenghtening of the religious distinctions in the political realm, which increased the communalism, that is an intolerant attitude within the Indian society. Secondly, in such a system individuals cannot choose which specific religious community to belong to, since this is imposed on them as from their birth, which gives rise to a problem of **"**imposed identity**"**. Thirdly, the criteria used to identify the members to whom different personal laws apply have often been superficial; i.e. people belonging to heterodox "religions" as buddhists and jainas are compelled to follow the Hindu law.

ting themselves different goals, the members of this community have nevertheless acquired a certain visibility on the social arena.

3.2. The "Naz" petition: a long and difficult history[19]

In September 2001, after the arrest of some activists involved in HIV/AIDS counseling work, the Naz Foundation[20] decided to file a Public Interest Litigation[21] in the Delhi High Court. After the initial hearings, in November 2004 the Court dismissed the PIL on a minor technicality about the *locus standi* of the NGO[22]. The Naz Foundation, the Lawyers Collective[23] and the LGBT group that had gathered around the NGO and the legal case decided to file an appeal to the Supreme Court asking whether the dismissal by the Delhi High Court was founded. In February 2006 the apex Court stated that the matter of the PIL did require consideration and remitted it to the Delhi High Court, which finally emitted its decision, on July 2nd 2009[24].

The history of the "Naz petition" tells not only the mere chronology of a legal question, but also the birth, growing and developments of the "sexual-minority community" of India. During the decade in which the petition had followed its difficult legal path, the rising LGBT community often criticized the quite narrow focus used by the Naz Foundation in its arguments before the Court.

In actual facts, the petition addressed only private male homosexual activity in the context of HIV/AIDS. On one hand, that peculiar framing left aside many other problems and alternative sexual identities, narrowing the significance of sexual-minority-oriented politics and risking to be turned into a dangerous new source of social stigma; on the other hand, however, it was probably the only way to start a

[19] For an in-depth and punctual analysis of the Naz petition history and its precedents, see Radhika Ramasubban, 'Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India' in Richard Parker, Rosalind Petchesky and Robert Sember (eds.), *SexPolitics. Reports from the Front Lines*, <http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf> accessed 20 April 2011.

[20] The Naz Foundation (India) Trust is a New Delhi based NGO working on HIV/AIDS and sexual health since 1994. It uses a holistic approach to combat HIV, focusing on prevention as well as treatment, trying to reach out to the marginalized population infected and affected by HIV, and to sensitize the community about the virus, as well as to highlight issues related to sexuality and sexual health. See <http://www.nazindia.org/> accessed 20 April 2011.

[21] In India, the concept of PIL has found a juridical approach. In a 1981 sentence, *SP Gupta v Union of India* [1981] (Supp) SCC 87, Justice PN Bhagwati acknowledged the right to seek judicial redress for the legal wrong or legal injury caused to a person or a determinate class of persons under article 32 of the Constitution of India.

[22] The Delhi Court stated that the petition could not be maintained since the Naz Foundation was not personally aggrieved in that no case under the challenged section had been filed against the group.

[23] The Lawyers Collective, established in 1981, is one of the leading public interest service providers in India. See <http://www.lawyerscollective.org/> accessed 20 April 2011.

[24] The judgment is available on the Naz Foundation's website, <http://www.nazindia.org/judgement_377.pdf> accessed 20 April 2011.

change in Indian law and society. In any case, the delays and the obstacles occurred during the eight-year-long legal struggle allowed the sexual-minority community to grow up, to cement, to give a wider outlook of itself on the Indian society, and to add new and different materials – in the form of reports, personal statements, affidavits and so on – to support the Naz petition before the Court.

3.3. The Delhi High Court decision[25]

The petition challenged section 377 of the Indian Penal Code (IPC) on "Unnatural Offences"[26] punishing same-sex intercourse[27], as violative of Articles 14 (equality), 15 (non-discrimination), 19 (freedom) and 21 (life) of the Indian Constitution. Furthermore, the Naz Foundation added that the provision was detrimental for public health, because it hampered the work of prevention of HIV/AIDS, concealing the activities of gay men and MSM, i.e. "men who have sex with men", through fear of social stigma and violence. However, due to the fact that section 377 IPC is used to punish crimes relating to child sexual abuse and to fill a lacuna in the rape law, the challenge was only partial. The request was to declare the involved section as constitutionally invalid insofar as it affected private sexual acts between consenting adults, or alternatively that it should be read down as to exclude consenting same-sex sexual acts between adults[28].

The opposing arguments proposed by some of the respondents[29] were mainly

[25] *Naz Foundation v Govt. of NCT of Delhi*, 160 Delhi Law Times 277 (Delhi High Court 2009).

[26] Section 377 IPC states: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section". The offences punishable under s 377 IPC are considered as quite serious. For that reason, bail cannot be granted and a police officer can file a report (FIR), and arrest the accused person without a court warrant.

[27] The jurisprudence of s 377 IPC regards normally *male* same-sex intercourse, but at least in one case the provision had also been used to prosecute a lesbian couple, see *Naz Foundation v Govt of NCT of Delhi* at para 22. Since the provision's enactment, however, there have only been a few trials based on criminalization of same-sex conducts between consenting adults. The real force of the provision was its ideological power, which was used very often to blackmail potential "criminals", putting on them a strong social stigma and therefore undermining the self-esteem of this large section of society.

[28] *Naz Foundation v Govt of NCT Delhi*, paras 6-7.

[29] The Naz Foundation was the only petitioner, whereas the respondents were eight. Some of them proposed a vision opposed to that of the Naz Foundation, for example the Union of India through the Ministry of Home Affairs, the Joint Action Council Kannur and Mr. B.P. Singhal. Others, like the Ministry of Health and Family Welfare through the National Aids Control Organization (NACO) and Voices Against 377, supported partially or totally the petitioner's arguments. Due to the fact that the Ministry of Home Affairs and the Ministry of Health and Family Welfare provided opposing stances, the Delhi High Court declared that "[a] rather peculiar feature of this case is that completely contradictory affidavits have been filed by two wings of Union of India", see *ibid.* para 11.

based on the need to protect public morality against the rise of decadent/repugnant homosexual conducts. This view was strictly linked to the "traditional culture" argument, according to which India cannot accept homosexuality as a foreign behavior contrary to the traditional/cultural norm of the country. Regarding the public health question, the opposing argument stated that section 377 IPC, by way of criminalizing homosexual activity, was the only barrier against the spread of HIV/AIDS virus. With regards to equality and non-discrimination, the opponent parties stated that section 377 IPC was not discriminatory as it was framed as gender neutral. As far as the possible infringements of the freedom of expression, it was asserted that section 377 IPC did not impact upon it as what was criminalized was only a sexual act and people should have the freedom to canvass any opinion of their choice including the opinion that homosexuality should be decriminalized. Finally, it was declared that maintaining section 377 IPC was necessary, because if it had been struck down, it would be impossible for the State to prosecute any crime of non-consensual carnal intercourse against the order of nature or gross male indecency[30].

The Delhi High Court articulated its position in a one-hundred-thirty-two-paragraph-long judgment. Its minor arguments were based on the analysis of similar decisions in other jurisdictions, on international instruments including the Yogyakarta Principles, and on scientific findings with regard to the nature of homosexuality[31]. At the same time, however, it seems the Court felt the need to ponder its decision, probably because of the necessity of ruling out a steady and well balanced sentence on a highly debated and controversial subject.

The Court's core argument relies on the analysis of the concepts of dignity, autonomy and privacy guaranteed under Article 21, i.e. right to life, and of the question of equality and non-discrimination, respectively mentioned in Articles 14 and 15 of the Constitution.

The Court stated that human dignity is based on the autonomy of the private will and on a person's freedom of choice and of action. It relies upon recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others[32]. The guarantee of human dignity forms part of the Indian constitutional culture. Similarly, the right to privacy recognizes not only the negative right to occupy a private space free from government intrusion, but also a positive right to a sphere of private intimacy and

[30] *Ibid.* para 24 (iii-iv).

[31] Besides quoting the "standard" judicial cases – the already mentioned *Goodwin v UK*, *Lawrence v Texas*, *The National Coalition for Gay and Lesbian Equality v The Minister of Justice*, the Delhi Court also cited other judgments notable for the debated subject.

[32] It is interesting that the Delhi High Court used the female pronoun only once. The reasons can be different: maybe the judges bore in mind the neutral idea of "person" or maybe, considering the fact that they were ruling on *male* same-sex activity, they felt unnecessary to introduce the female pronoun. However, this fact could demonstrate that the abstract subject of law continues being imagined predominantly as male.

autonomy which allows every human being to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one's sexuality is at the core of this area of private intimacy. Both dignity and privacy rights are guaranteed by and can spelt out from Article 21 of the Indian Constitution[33].

Regarding the constitutional guarantees of equality and non-discrimination, the Court stated that Article 14 strikes at arbitrariness, because it involves negation of equality. Criminalizing private conduct of consenting adults which causes no harm to anyone else, section 377 IPC had no other purpose than to criminalize a conduct which failed to conform with the moral or religious views of a section of society. This discrimination severely affects the rights and interests of homosexuals and deeply impaired their dignity. The criminalization of private sexual relations between consenting adults, absent any evidence of serious harm, deemed the provision's objective both arbitrary and unreasonable. Regarding the right to non-discrimination enshrined in Article 15, the Court held that "sexual orientation" must be considered a ground analogous to "sex". Then, discrimination on the basis of sexual orientation is not permitted by the aforesaid Article. Furthermore, the Court stated that discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15, that is discrimination towards homosexuals must be exerted neither by the State nor by other citizens[34].

As evident, the judges connected the right to dignity with the freedom of choice and of action as well as with the claim to equality. Furthermore, the Court also extended the scope of the petitioner's request, originally limited to the mere recognition of a private space allowing consensual same-sex acts in which the State could not intrude. In fact, even if the judges did not rule specifically on the conformity between section 377 IPC and Article 19 (right to freedom) of the Constitution, by mentioning the horizontal application of the right to non-discrimination, they further connected this latter to freedom of movement. By doing so, they broadened the concept of privacy[35].

With connection to public health, the sentence adopted and widened[36] the views of the petitioner. The judges declared that section 377 IPC acted as a serious impediment to the success of the interventions for the prevention and treatment of

[33] *Naz Foundation v. Govt. of NCT of Delhi*, paras 26-41.

[34] *Ibid.* paras 88-104.

[35] Even if in para 126 'Infringments of Article 19(1) (a) to (d)', the Court declares "In the light of our findings on the infringement of Articles 21, 14 and 15, we feel it unnecessary to deal with the issue of violation of Article 19(1)(a) to (d). This issue is left open", it seems quite obvious that, following the main statement, the infringements are evident.

[36] As a matter of fact, the Court also used the technical material and language provided by NACO affidavit – see for example the term "High Risk Group". The affidavit underlined that the secrecy caused by s 377 IPC had negative consequences not only on the homosexuals, but also on the society as a whole.

HIV/AIDS not only in relation to MSM individuals but also with regards to their potential female sexual partners. The compelling state interest demanded that public health measures be strengthened by means of decriminalization of homosexual activity, so that High Risk Groups could be identified and better focused upon[37].

As far as the cultural/traditional issue is concerned, the Court stated that section 377 IPC was based on a moral Victorian principle imported in the Subcontinent during the colonial period by the British law rather than on a core value of the Indian society. This latter traditionally displayed a high degree of inclusiveness. Whenever society displays inclusiveness and understanding, even people perceived by the majority as "deviants" or "different" can be assured of a life of dignity and non-discrimination[38].

With regards to morality, the Court declared that popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21, i.e. right to life, to live with dignity and to privacy. Unlike constitutional morality originating from constitutional values, popular morality is based on shifting and subjective notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality[39].

Furthermore, by quoting two founding fathers of India such as Nehru and Ambedkar[40], the Court shaped a consistent argument in which the various fundamental rights and values were intertwined.

Finally, the Court held as follows:

> We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By "adult" we mean everyone who is 18 years of age and above. […] This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion[41].

The Delhi High Court's decision bears a high ideological importance for the sake of the homosexual people's rights. Nevertheless, it remains only a persuasive authority in the rest of India, insofar it is up to every state's High Court to decide whether to follow it or ignore it. In September 2009, the Central Government decided not to

[37] *Naz Foundation v Govt of NCT Delhi* paras 61-74 and 86.
[38] *Ibid.* at paras 92 and 130.
[39] *Ibid.* at paras 79-81 and 86.
[40] Dr Bhimrao Ramji Ambedkar, the architect of the Indian constitution and India's first law minister, was quoted with regard to the opposition between public and constitutional morality, *ibid.* at para 79. Jawaharlal Nehru, the first Prime Minister of India, was cited on the subject of equality within the Indian Constitution at para 129.
[41] *Ibid.* para 132.

oppose to the Delhi decision and this was perceived as a positive outcome by many Indian activists. At the moment, the Supreme Court is in the process of judging on appeal.

3.4. Peculiar features of the discourse about LGBTs in India

As we have seen, Naz's requests originated from and were aimed at the resolution of a specific question, i.e. the decriminalization of (male) same-sex conduct in private between consenting adults. The challenge was based mainly on HIV/AIDS-related issues and on the public health argument. The focus was on sexual orientation/male homosexual activity, namely on MSM individuals, in the context of the spreading of HIV/AIDS virus. Furthermore, the concept of privacy used by the Naz Foundation was both decisional and zonal[42]. Such a way to conceive privacy required the respect of both a metaphorical space, i.e. the subject's autonomy, and of a physical one, i.e. a private and enclosed space safe from external interferences. In this respect, a problem could arise with all those members of the LGBT community – normally the most vulnerable ones – who use public spaces such as parks to meet and often also to have sex.

The acronym used normally does not include the "I" of "intersex". Instead it is sometimes spelled as LGBT-K or LGBT-*Kothis*, therefore including a traditional definition of alternative forms of sexuality perceived as different than the homosexual ones. This "*kothi*" identity is wider than these latter ones and more deep-rooted within the Indian culture. Gender-identity-related issues are often linked to "traditional" figures, as *kothis* and especially *hijras*[43].

Additional features are an often difficult relationship with other minorities, especially with social-religious communities, as well as highly complex interactions with the public opinion. All this can be easily noticed in considering the vicissitude of the Supreme Court appeal. The first Special Leave Petitions (SLP)[44] have been filed by individuals and groups, mainly religious ones, fearing a decadence in the morality of the country. At the same time, a wide alliance pro-LGBT has originated and groups of academics, doctors and parents of LGBT people are filing their petitions in the Supreme Court, with the aim of the Delhi High Court's decision not be overruled.

[42] For an in-depth analysis of the possible readings of the "privacy" right, see *Lawrence v Texas* (n 14).

[43] On *hijras*, see Serena Nanda, *Neither Man Nor Woman: the* Hijras *of India* (2nd edn, Wadsworth Publishing, Belmont, CA 1999) and Gayatri Reddy, *With Respect to Sex: Negotiating* Hijra *Identity in South India* (University of Chicago Press, Chicago 2005) who analyzes also the Hyderabad-Secunderabad third-gender community. This latter also includes *kothis*, i.e. persons male by birth but whose gender becomes feminine at different degrees.

[44] The SLP, both civil or criminal, is an appeal granted by the Supreme Court on important constitutional or legal issues which only the apex Court can clarify.

4. Similar elements regarding sexual minorities in India and Nepal

4.1. A strong link between sexual minorities and HIV/AIDS-related issues

Unlike in many Western countries, Nepalese and Indian sexual-minority communities present what we can call a post-HIV/AIDS origin. Despite the forced silence on sex issues, by the 1980s problems related to the HIV/AIDS epidemic came into sight.

At the beginning, the ideology that opposes "East" and "West" along the dichotomy "spiritual" and "material" permitted the silencing of the feeble voices of new discourses about sexuality. In that scheme, HIV/AIDS could never become an "Oriental" problem due to the higher morality of East in comparison to the decadent West. Reality was rather different and forced silence about sexual issues provoked a widespread diffusion of the virus. The easier and often the only way to register NGOs aimed at helping sexual-minority groups was to link the aims of the association with the HIV/AIDS epidemic as a problem of public health.

This strategy, however, permitted the creation of some important NGOs, such as BDS in Nepal and the Naz Foundation in India, and the surfacing of new discourses by a wide range of alternative sexualities.

4.2. (Re)constructing an indigenous space for diversity

A by-product of the above mentioned ideological opposition between "East (morality)" and "West (decadence)" is the accusation towards LGBT(I) people of being "westernized" and, as a consequence, also "elitist". In other words, sexual "deviations" and specifically those relating to sexual orientation would be a capricious "importation" coming from abroad.

For that reason, the LGBT(I) communities of nations like India and Nepal feel the need to provide a new and different reading of the ancient cultural history of their countries in order to demonstrate that "hetero" has never been the only possible way to experience sexuality, therefore stating that alternative forms of sex have always existed and that they are deeply rooted within the collective cultural history[45].

This approach leads to a two-edged attitude. On one hand, it allows the re-introduction of the concept of difference into the cultural mainstream and it can be considered as an attempt to shift towards inclusion; on the other hand, it underlines the existence of locally rooted alternatives to heteronormativity as a search for differentiation. Due to the existence of hegemonical and all-encompassing western categories, the above mentioned differentiation can be regarded also as an attempt to confront them.

[45] In recent years, many books have been written on the subject. Amongst the most important, it is worth mentioning Ruth Vanita (ed.), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge, New York 2002) and Nivedita Menon (ed.), *Sexualities* (Zed Books, London 2007).

4.3. The visible presence of "third gender" people as a cultural matter of fact

Both countries present wide and easily recognizable "communities" of transgender/transsexual people.

In Nepal, *meti* is the term used to describe a normally cross-dressing person with a male physiology but a female gender identity.

In India, the traditional transgender community is composed by the *hijras* (or *hijdas*), well known even outside Indian borders because they seem to be a perfect example of the existence of a third gender. This is a very strictly organized community, with hierarchical relationships and specific customs.

It is really important to stress that the existence of a traditional socio-cultural space for these gender "deviances" does imply neither a social acceptance of those specific groups nor a friendly environment for alternative sexualities in general. In actual facts, this traditional setting is often used to include the difference within the mainstream vision of "sex", so that any subversive potential stemming from it may be eliminated. Those traditionally recognized groups are socially very humble and their lack of skills leads most of them to end up in the sex trade. Besides, due to their immediately recognizable or easy-to-know identity, they are often targets of harassment and violence by many actors, from family to police, and of discrimination at different levels.

In other words, the space of identification merges with the sphere of marginalization[46].

5. Conclusions: old problems, new perspectives

In recent years, LGBT(I) rights have undergone important changes all over the world. Sometimes these have been a noteworthy improvement of factual situations, while other times they have weakened the critical potentialities of "sexuality discourses" against heteronormativity.

As previously stated, both in India and Nepal there are traditional groups with their own self-definition and customs, whose identity is normally quite complex and cannot be defined only on the basis of sexuality[47]. They are clearly recognizable and deeply inserted within the social community. In addition to these, there are also new communities, joined by the LGBT(I) acronym, which are somehow linked with the western definition of homosexuality. Unlike traditional groups, these communities use the sexuality feature as the main identifier.

[46] Regarding the recent rise of *hijras'* electoral visibility in the highly sexualized Indian political arena, between emancipation and new forms of marginalization, see Gayatri Reddy, "Men' Who Would Be Kings: Celibacy, Emasculation, and the Re-Production of *Hijras* in Contemporary Indian Politics' (Spring 2003) 70 (1) Social Research 163.

[47] Regarding the concept of *izzat*, "honor", which is frequently used by *kothis* and is referred to as the main preoccupation for *hijra,* see Gayatri Reddy (n 40 and also *ibid.*, ch 2).

Traditional groups as *hijras* normally have their own "mythology", because they have always existed in the cultural space. At the same time, these communities feel the urge of rearticulating their identities in new forms, and of sharing and comparing their visions with those of the "new" groups. In these highly complex contexts, sexual minorities are trying to carve out a niche for themselves and maybe also to reshape the "sexual" division of society utilizing internal and external ideological tools.

Despite the difficulties, it seems that, in these States, the law is following the right direction, linking LGBT(I) rights to human rights and granting wider spaces of equality than before. The current aim should be not to allow the law to limit LGBT(I) identity as well as not to halt the propulsive energy coming from these new discourses, so that no LGBT(I) hegemonic ideology could destroy the diversity of different perspectives.

In the years to come, it will be more evident if and how LGBT(I) people's situation has improved in India and Nepal. Currently, it can only be hoped that the imaginary space claimed by alternative sexualities be as wide and inclusive as possible.

Towards Equality and Justice: Challenges Faced by LGBTI Groups in Their Fight for Rights and Freedoms in the United States Supreme Court

Pawel Laidler

Abstract

Since the 1950s social relations in the United States have evolved resulting in the development of organized movements of certain social groups which aimed at gaining more rights and freedoms from the U.S. government. As the main institution responsible for final adjudication in civil rights cases, the U.S. Supreme Court decided numerous cases concerning racial and gender issues, establishing new scope of various constitutional guarantees of freedom of speech, of religion, the right to privacy, or due process of law. The LGBT groups, however, did not receive any significant protection from the government, as the Court adjudicated in cases which limited the rights of homosexual community. *For example,* in 1986 the Supreme Court upheld the anti-sodomy laws of Georgia stating that homosexuals do not enjoy full protection under the constitution (*Bowers v. Hardwick*). Things have changed recently, when in 1996 for the first time the Justices decided in favor of the LGBTI groups (*Romer v. Evans*), and in 2003 when they overruled the 1986 decision giving the homosexuals equal rights by guaranteeing their right to privacy (*Lawrence and Garner v. Texas*). Despite the change in Court's adjudication, U.S. federal judiciary it is still reluctant to follow some of the state laws which granted the LGBT groups the right to marry. Therefore, today we can observe a double standard in U.S. legal system towards the treatment of LGBTI groups: the states are more liberal than the federal government. The paper addresses the issue of development of the right to privacy of homosexuals in the United States Supreme Court.

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1. Introduction

Lesbian, gay, bisexual and transgender (LGBT, recently LGBTI – including intersex) rights have become an increasingly important issue in American society since the 1950s, when civil rights and human rights movements began to dominate the social and political life of the United States. Most of the legal decisions concerning the status of civil rights in America have been faced by the judiciary, the role of which does not only consist in settling disputes between parties, but also in inter-

preting the existing law and creating binding norms for the future. The judge-made law in the common law system attracts various social and political actors who bring cases to courts in order to seek justice, but also in order to promote their own opinions and values. The story of the fight of LGBT groups for equality and justice is therefore a story of various lawsuits, arguments, failures and successes in courts. The desire to enjoy the same rights as other minority groups in the country forced various LGBT organizations to engage in lawsuits seeking recognition of the right to privacy.

It is important to acknowledge that there has been a lot of case-law regarding LGBT rights on the state level. Many important issues have also been addressed in various decisions of the lower federal courts (district or circuit). But the main purpose of this study is to present the most important LGBT cases decided by the highest judicial instance in the United States, the Supreme Court. The position of the Court in the U.S. governmental system, as well as its highly political role make the institution both attractive and indispensable in the process of shaping social norms in America. The study has been mainly based on analysis of federal case-law regarding LGBT rights, since the 1950s until today, and it aims at finding answers to questions often raised by the homosexual community: why the federal judiciary took so long to broaden constitutional protection of sexual minorities in the United States, and what kind of future awaits LGBT rights in the years ahead – dark or rainbow – considering the current ideological attitude of the Justices of the Court.

2. Development of the right to privacy

LGBT groups are becoming more and more active in American social and political reality, as the topic of sexual minorities' rights is becoming one of the main areas of contemporary American constitutionalism. The 20th century in the United States was full of examples of liberty movements which have had a significant impact on the process of creation of law on both the state and federal level. This situation occurred due to the growth of awareness of American society willing to define the scope of various freedoms and liberties of individuals and groups, as well as an increase of power of the courts, which actively confronted these issues in numerous cases, thus deciding about the meaning of the most crucial constitutional clauses concerning those rights and liberties. Most of these activists very quickly realized that one judicial decision regarding their issues may become far more influential for the future of the movement than traditional means of drawing social attention, such as the press, electronic media or open street protests. Long before the growth of judicial awareness of LGBT groups, other movements forged the path of the constitutional fight for equality within society. It can be observed with relation to African-Americans and the National Association for the Advancement of the Colored People (NAACP), which brought numerous cases to state and federal courts aimed at ending racial segregation. As the controversial separate-but-equal doctrine was estab-

lished by the judiciary, it was the judicial department which determined the unconstitutionality of that doctrine. In 1954, in *Brown v. Board of Education*, the Supreme Court overruled its former precedent thus initiating the process of abolishing racial segregation in the United States[1].

After confronting racial issues, the Court turned to reproductive rights, as various feminist and liberal groups began to actively lobby for judicial determination of such issues as contraceptive rights, mixed marriages, and abortion. As a result, the judiciary established a new category of Constitution-based rights concerning the privacy of an individual. There is no doubt that the liberal interpretation of the Constitution by the Supreme Court in the 1960s and 1970s led to the creation of the modern constitutional approach to civil and human rights, which can be observed in the decisions concerning the right to privacy. Among the most important of the Supreme Court's precedents in this respect were: *Griswold v. Connecticut* (1965), *Loving v. Virginia* (1967), and *Roe v. Wade* (1973). A brief analysis of these is important since they touch upon the issues of privacy and equality, as do most of the LGBT cases, which are the basis of this research.

There is no concrete place within the Constitution that would directly refer to the right to privacy. However, the Justices conducted a broad interpretation of the Bill of Rights issues which led to the creation of such a right and its further protection. Among the first ten amendments to the Constitution, the most often cited source of the right to privacy is the Ninth Amendment which states: "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[2]. The enigmatic meaning of this provision was considered by the Court a reference to so-called un-enumerated rights of the people thus addressing these rights which were not mentioned in the document. There were Justices who related the right to privacy to other constitutional provisions, such as the Third Amendment's prohibition of quartering soldiers in houses without owners' consent or the Fourth Amendment's ban on unreasonable searches and seizures. However, it was the Ninth Amendment that became the basis of the most crucial decisions concerning this right.

The first decision which directly confronted the issue of privacy was made by the Court in *Griswold v. Connecticut* (1965), when the Justices had to determine the constitutionality of the use of contraceptives. A very old law of the state of Connecticut established in 1879 prohibited the use of contraceptives, but it was hardly ever enforced until the beginning of the 1960s. Then, Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, began to give medical advice about birth control to spouses and was convicted on the basis of violation of the state law. The Supreme Court, in a majority opinion (7-2) written by Justice William Douglas, invalidated the Connecticut law and established the con-

[1] 347 U.S. 483 (1954).

[2] Ninth Amendment to the U.S. Constitution of 1787, adopted in the Bill of Rights of 1791.

stitutional protection of the right to privacy. Despite the fact that there is no place in the Constitution mentioning such a right, Justices derived its existence from other constitutional principles and guarantees contained in the First, Third, Fourth, and Ninth Amendments made applicable to the states through the Fourteenth Amendment. Thus Griswold could legally conduct her medical advice because the right to privacy in marital affairs was constitutionally protected[3]. The use of contraceptives was confirmed and even broadened in 1973 in *Eisenstadt v. Baird*, in which the Justices allowed the distribution of contraceptives to unmarried people[4].

The Court's decision in *Griswold v. Connecticut* made it possible to overturn some old precedents regarding the right to privacy which, before 1965, had not been protected. One of these cases, *Loving v. Virginia*, concerned the prohibition of race-based marriage and was decided by the Court two years later. An African-American, Mildred Jeter, married a white-American, Richard Loving, in the District of Columbia, but they later moved to Virginia where such marriages were banned by the Racial Integrity Act. Both spouses were convicted of violating the state law and sentenced to a year of prison or twenty-five years of exile out of Virginia. The Supreme Court in 1967 unanimously determined Virginia's anti-miscegenation law unconstitutional thus protecting the Lovings' right to marriage. Referring to the equal protection clause and the due process clause of the Fourteenth Amendment, the Justices acknowledged the constitutional protection of mixed marriages, ending a long-lasting line of precedents prohibiting such relationships[5]. Similarly, as in *Griswold*, the *Loving* decision encouraged sexual minority groups to more boldly express the constitutionality of their relationships.

There has been hardly any more significant or controversial decision in the U.S. Supreme Court's history than in *Roe v. Wade*. After discovering the constitutional protection of the right to privacy, the Court decided to determine the proper laws concerning abortion, and thus found itself at the center of American political and social problems of the 1970s. Jane Roe (in fact Norma McCorvey) filed a suit against District Attorney Henry Wade, representing the state of Texas and protesting against the state ban on abortion, which was applied even in situations of pregnancy resulting from rape. Roe wanted to have an abortion but under Texas law (and also the law of most of the other states) it was illegal and punishable for both the doctor and patient. In 1973 the Justices, in a majority opinion presented by Justice Harry Blackmun, admitted that the right to abortion was fundamental and originated directly from the Fourteenth Amendment's due process clause and indirectly from the Ninth Amendment to the Constitution. As a result, the state of pregnancy was divided into trimesters and the Court determined the scope of governmental ability to influence a woman's pregnancy in the second and third trimester. During the first

[3] 381 U.S. 479 (1965).
[4] 405 U.S. 438 (1973).
[5] 388 U.S. 1 (1967).

trimester abortion became legal, thus the previous state laws concerning abortion (including Texas provisions) were declared invalid[6]. Almost twenty years after *Roe*, the issue of abortion once again became the center of political and social tensions exciting nationwide attention, when in *Planned Parenthood v. Casey*, the Court once again confirmed the legality of abortion and its constitutional protection[7]. All of the above-mentioned cases played, on one hand, an important role in the growth of awareness of LGBT groups, which believed in the possibility of winning major constitutional cases in the highest judicial instance in the United States. On the other, however, these decisions set principles of "heteronormative supremacy"[8] established by the Court, which were in contrary to homosexual values promoted by the LGBT movement.

3. LGBT and the Supreme Court - the first thirty years

As was mentioned earlier, the success of *Brown v. Board of Education* stimulated various minority groups to initiate legal claims which could be confronted by the courts. It is important to acknowledge, that most of these groups became active on the state level, since it was difficult to pursue their goals on the nationwide level, mainly because of a lack of adequate organization and communication. Such a situation also concerned gay and lesbian activists who started to raise important constitutional questions before state courts in the late 1940s and early 1950s. On the other hand, many of the activists believed that state-by-state initiatives could finally lead to a success on the federal level. Such an approach did not guarantee quick effectiveness, as it usually took many decades to raise an issue from the state to the nationwide level. A good example of this is the suffrage movement, which gained strength in several states beginning in the 1870s, and achieved a full success in 1920 with the establishment of the Twentieth Amendment. Gay and lesbian activists did not intend to wait long to pursue their goals, and very soon after the birth of the movement, the first case was brought to the U.S. Supreme Court.

The issue concerned the character of materials published in a homosexual magazine, *One*, which consisted of articles and essays on the life of homosexuals, as well as fictional stories describing homosexual acts. In the 1950s not only the subject of gays and lesbians was controversial, but also any material which was obscene could not receive judicial protection, as it was not considered constitutional under the First Amendment's freedom of speech. Therefore, it was simply a matter of time before someone attacked the content of the magazine. When Los Angeles postmaster Otto Olesen refused to deliver one of the editions of the magazine, claiming that

[6] 410 U.S. 113 (1973).
[7] 505 U.S. 833 (1992).
[8] Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (UNC Press 2005) 21.

it promoted obscenity and was therefore "non-mailable" and inconsistent with federal law, the company filed a suit against him. Lower federal courts sided with the postmaster, but in 1958 it reached the highest judicial instance and was accepted for review as *One, Inc. v. Olesen*[9]. The Supreme Court did not write an opinion in the case, but the Justices decided in favor of the magazine, determining its content as non-obscene, based on the famous *Roth v. United States* decision reached a year earlier[10]. As a result, a first major LGBT case was won, and even though it did not raise the most important constitutional questions of the status of gay and lesbian rights, it enabled the community to have access to the magazine and protection of their freedom of speech.

A similar case was decided by the Supreme Court in 1962 in *Manual Enterprises, Inc. v. Day*. This time the "non-mailable" materials concerned pictures of near-nude men which were published in three different magazines, which were addressed not only to homosexuals. When the post office blocked delivery of the magazines due to their obscene content, the publisher brought the case to federal court seeking an injunction against the postmaster. When the issue came to the Supreme Court, its Justices decided it in favor of Manual Enterprises, Inc., applying the *Roth* standard and thus stating that the materials were not obscene, and thus could receive protection from the Constitution. The author of the majority opinion, Justice John Marshall Harlan II, emphasized that the photos did not provoke any offensive conduct, and were not "so offensive on their face as to affront current community standards of decency"[11]. In a short period of time, the LGBT community won two major cases in the Supreme Court, both of which concerned freedom of speech issues, and these successes became a light in the tunnel for the movement, which aimed at gaining wider constitutional protection, especially in the area of privacy.

These first, lesser successes were not followed by a major victory, when in 1967 the Court gave an anti-LGBT decision in *Boutilier v. Immigration and Naturalization Service*. According to some of the interpretations of the then-existing federal law, among people excluded from the naturalization process were homosexuals, who were treated as "sex perverts" with psychopathic personalities[12]. When a Canadian native, Michael Boutilier, filed a petition for naturalization as a U.S. citizen, the Immigration and Naturalization Service not only refused, but decided to deport him based on documentation prepared by the Public Health Service. Boutilier was named a sexual deviate with a psychopathic personality because he engaged in sexual relations with numerous male partners. When his case was brought to the highest judicial department in the country, many activist groups were convinced that the Justices would follow the liberal pattern of increasing the rights of homosexuals. But in a 6-3 opinion, the Court confirmed the validity of the deportation of Boutil-

[9] 355 U.S. 371 (1958).
[10] 354 U.S. 476 (1957).
[11] 370 U.S. 478 (1962).
[12] Stein (n 8).

ier, claiming that the federal law treating homosexuals as psychopathic personalities was constitutional[13]. Despite the fact that the case mainly concerned immigration issues, it showed that LGBT groups may confront difficulties on their road to enjoying rights and freedoms equal to other social groups.

When the Court decided the *Griswold* case in 1965 which created the constitutional right to privacy, many LGBT activists believed that it was only a matter of time before homosexuals would receive protection from laws which limited their possibility of entering into sexual acts with same-sex partners. In most states, engaging in homosexual relations was referred to as "sodomy". In the 1970s and early 1980s the issue was raised a few times in lower courts, but not before the Supreme Court, since the Justices did not agree to challenge the constitutionality of certain state laws banning sodomy. Such failed attempts occurred in *Buchanan v. Bachelor*, *Doe v. Commonwealth's Attorney for City of Richmond*, and *Baker v. Wade*[14]. However, in the same year as the last case, the Justices finally decided to confront the issue of sodomy in *Bowers v. Hardwick*.

Michael Hardwick was arrested for violating the Georgia sodomy laws by performing oral sex with another man, which was observed by a police officer who entered Hardwick's house. Although there was no formal accusation, Hardwick decided to challenge the state sodomy laws, which made it impossible for LGBT groups to engage in sexual relationships in private. After two different conclusions made by lower courts (the district court decided in favor of the state, the circuit court in favor of Hardwick), the case was brought to the Supreme Court, which, for the first time in history, agreed to hear it. The case was widely recognized in the whole country, as it concerned not only a Georgia statute, but the laws of many other American states where sodomy was a crime. A possible decision recognizing homosexuals' right to privacy would, on one hand, change the laws of several states, and, on the other, give constitutional protection to LGBT groups. In a majority opinion written by Justice Byron White, the Supreme Court reversed the circuit court's decision, and upheld Georgia sodomy laws, thus not providing constitutional protection of the private sexual conduct of LGBT groups[15]. White additionally declared that the sexual activities of same-sex partners would not be determined as a fundamental right protected by the Constitution, since such acts were not "implicit in the concept of ordered liberty" (citing *Palko v. Connecticut*)[16], nor were "rooted in the Nation's history and tradition" (citing *Moore v. City of East Cleveland*)[17].

The decision in *Bowers* was not only a major defeat for LGBT advocates, but it also meant that the Supreme Court was at that moment too conservative to change

[13] 387 U.S. 118 (1967).
[14] Respectively: 405 U.S. 930 (1972), 425 U.S. 901 (1976) and 478 U.S. 1022 (1986).
[15] 478 U.S. 186 (1986).
[16] 302 U.S. 319 (1937).
[17] 431 U.S. 494 (1977).

its approach towards the rights of sexual minorities. Even though most of the decisions of the 1960s and 1970s concerning the right to privacy were of a liberal character, the Justices were not ready to overrule state laws regarding sodomy. Only choices fundamental to heterosexual conduct warranted constitutional protection: marriage, procreation, child-rearing, and family relationships[18]. The positive aspect for homosexuals was that the *Bowers* majority gathered only five out of nine members of the Court, which meant that a future change of approach from one of the Justices could establish a right to privacy for homosexuals. The negative aspect was connected with future presidential appointments to the Supreme Court, which could possibly be made by Republicans who aimed to turn the Court more conservative. However, before the Court adjudicated in another dispute regarding the constitutionality of sodomy, most states abolished their laws that limited the privacy of homosexuals. Even the Georgia Supreme Court decided to invalidate the statute which was held constitutional by its U.S. counterpart[19].

It is also worth mentioning that, two years before the *Bowers* decision, the Court refused to hear a case concerning the possibility of creating gay student organizations at university campuses. In *Gay Student Services v. Texas A&M University*, the U.S. Court of Appeals for the Fifth Circuit affirmed the protection of homosexual students by the First Amendment to the Constitution, thus ordering recognition of LGBT organizations by University authorities[20]. The lack of a decision from the Supreme Court meant that the Justices agreed with the lower court's ruling, and both the freedom of speech and of association served as a background for a pro-gay community decision.

4. LGBT and the Supreme Court - a change of approach?

After *Bowers*, LGBT groups did not lay down their arms, but continued to lobby cases which raised important constitutional matters concerning their rights. Before the issue of sodomy was once again faced by the Court, two different disputes concerning LGBT matters were decided by the Justices. In 1996, in *Romer v. Evans*, they had to determine the constitutional status of a state law which excluded LGBT groups from any official protection. The state of Colorado adopted a constitutional amendment, approved by a state referendum (Amendment 2), which banned any legislative, executive or judicial actions aimed at protecting sexual minorities. The intent of the legislation was to reject the possibility of special treatment of the LGBT community within the state, but in practice it meant that anyone could discriminate against members of that community without legal boundaries. The Supreme Court,

[18] Jeffrey A. Segal, Harold J. Spaeth, Sara C. Benesh, *The Supreme Court in the American Legal System* (Cambridge University Press 2005) 64.
[19] *Powell v. Georgia*, 270 Ga. 327 (1998).
[20] 737 F. 2d 1317 (1984).

in a 6-3 opinion, decided in favor of LGBT groups, claiming that the Colorado law was unjust since it violated the equal protection clause of the Constitution. According to the majority opinion presented by Justice Anthony Kennedy, the state government did not show legitimate interest in adopting the anti-LGBT amendment, therefore the law should be declared null and void. The Court criticized the way in which Colorado sought to promote equality, since the final result was the opposite – the lesbian, gay and bisexual community was excluded from the kind of protection which was provided for all other minority groups. As a result, Amendment 2 was a pure act of discrimination which denied protection under law to a certain category of people[21]. The decision in *Romer* became the first major victory of the homosexual community in the Supreme Court since the late 1950s, and a basis for future decisions which could broaden the constitutional protection of LGBT individuals.

The second dispute raising issues regarding the homosexual community was decided in 2000. *Boy Scouts of America, et al. v. Dale* addressed the scope of the constitutional right of association and to possibility of revoking membership in an organization due to sexual orientation. James Dale was removed from Boy Scouts of America when the association found out that he was homosexual. He sued the organization, claiming that it promoted discrimination. The Supreme Court, in a narrow-margin decision, decided in favor of Boy Scouts, stating that the freedom of association prevailed over the necessity of admitting minority groups to the organization, emphasizing its private character. Therefore, Boy Scouts could not only promote their own values (i.e. teaching that homosexuality is wrong), but also exclude from their membership anyone who did not share such values[22]. After *Romer*, the Court once again took a stance limiting gay and lesbian rights, though the reason behind it was the need to protect First Amendment guarantees. LGBT groups should not treat *Boy Scouts* as a decision expressly restricting their freedom, but as a precedent broadening the scope of freedom of association. Nevertheless, the division of the votes in the Court suggested that the rights of homosexuals were also at stake: all five conservatives voted against Dale, with only four liberals supporting him.

There is no doubt that the most crucial precedent concerning the rights of gays and lesbians was created by the Court in *Lawrence and Garner v. Texas*. After twice rejecting the possibility of confronting the constitutionality of Texas's sodomy laws (1970, 1986), finally in 2003 the Justices decided to arbitrate in a dispute between the state and two homosexuals, John Lawrence and Tyron Garner, who had a sexual relationship in private and thus violated the Texas sodomy law. In 6-3 opinion delivered by Justice Anthony Kennedy, the Court acknowledged the right of LGBTs to engage in sexual conduct without interference from the government, due to the right to privacy protected by the Constitution. The due process clause served as the

[21] 517 U.S. 620 (1996).
[22] 530 U.S. 640 (2000).

main source for the liberty of individuals to decide about their private sexual relationships[23]. As a result, the *Bowers v. Hardwick* precedent was overruled, thus causing a change of laws in several other states and allowing same-sex relationships in private. Furthermore, the Court cited the European Court of Human Rights decision of 1981, *Dudgeon v. United Kingdom*, proving that Western civilization did not condemn homosexuality. It is important to acknowledge that, for the first time in its history, the U.S. Supreme Court not only cited the decision of an international court, but also decided to adopt its rules in the American legal system, thus not only changing the law but also influencing social relations in the United States. Not all of the Justices had the same approach to the issues presented in the case. Two conservatives in particular, Antonin Scalia and Clarence Thomas, expressed their objection to the Court's ruling in separate dissenting opinions. According to them, there was no general right of privacy, thus LGBT groups were not fully protected by the Constitution, and the Court should not yield to the homosexual agenda[24].

The *Lawrence* decision changed the constitutional status of homosexuals, and showed the willingness of the Court to include them in a wide array of groups protected under the supreme law of the land. Homosexual right to privacy has become a fundamental constitutional guarantee which had to be accepted by all U.S. states. The opinion of the Justices harmonized with the voice of the media, presented among others in *Chicago Daily Herald*: "What two consenting adults do sexually in the privacy of their bedroom is their business, not the government's. Some may not agree with or understand gay people, but we all should agree on our country's commitment to a right to privacy for everyone, no matter their sexual orientation"[25]. Many legal scientists have praised the 2003 precedent as one of the most important in history, since it broke down the wall of homophobia built by various social and political groups in former years. Erwin Chemerinsky observed that "federal judges [we]re no longer persuaded that a moral condemnation of homosexuality justifies government discrimination"[26]. And Laurence Tribe even stated that *Lawrence and Garner v Texas* "may well be remembered as the *Brown v. Board of Education* of gay and lesbian America"[27]. If so, there is another ending to this story: it took years to fully implement the desegregation policy of *Brown*, as many states were unwilling to follow the orders of the Supreme Court. The LGBT community undoubtedly hopes that the effects of *Lawrence* will be observed sooner than later.

[23] 539 U.S. 558 (2003).
[24] *Ibid.*
[25] Gary Mucciaroni, *Same Sex, Different Politics: Success and Failure in the Struggles over Gay Rights* (University of Chicago Press 2008) 100.
[26] 'Federal Judges Embrace LGBT Equality' (2010) 44 *Contemporary Society* 11.
[27] Laurence H. Tribe, 'Lawrence v. Texas: the "Fundamental Right" that Dare Not Speak Its Name' (2004) 117 *Harvard Law Review* 1893, 1894.

5. It's all about politics…

In order to understand the substance of specific Supreme Court decisions and the individual approach of particular Justices towards the right to privacy and LGBT rights, one must fully understand the role of the highest judicial tribunal in the United States, as well as its influence on American society and politics. Despite the mainly legal character of the institution, there is no doubt that many issues decided by the Court, as well as its structure and position in the U.S. governmental system, are highly political. Analyzing the political role of the institution, one must take into consideration three basic functions that the judiciary plays in the United States:

1. Judges are able to create the law by making individual decisions which may be binding in similar cases in the future. These so-called, "precedents" are becoming an important part of the hierarchy of sources of law, when made by the Justices of the Supreme Court. The law-making ability locates the Court at the center of politics, since not only Congress, a typical political body, is responsible for establishing important legal norms and regulations.
2. Federal judges, and especially the Justices of the Supreme Court, are able to interpret the Constitution and give a final word on the meaning of particular clauses and provisions of the supreme law of the land. Therefore, it is not the President, nor Congress, who shapes the final scope of particular social and political aspects of American statehood, but the Court, which is able to point out unconstitutional behavior on the part of the main political actors in the United States. There are, of course, some limitations to the exercise of judicial review, but nevertheless, an active Court may become an active interpreter of the Constitution and an active controller of the direction of U.S. politics.
3. The Justices must adjudicate in various criminal and civil disputes as the ultimate instance in the country, and the Constitution provides for their independence in that respect. However, the process of nominating the federal judges is highly politicized, as the President and Senate play a political game of choosing the best ideologically-fitting candidates. From the perspective of the Supreme Court nominations, every time there is a vacancy in the tribunal, the President is willing to fill it with a person who is not only a distinguished legal practitioner, but above all a faithful follower of conservative or liberal ideology. And despite the fact that the Justices cannot be removed from the bench by the President, and that most of them adjudicate longer than the head of state who chooses them, research has proven that the vast majority of Justices continue to argue cases according to their earlier-established ideology. Therefore the President, as the main political actor of the state, is able to indirectly influence the decision-making process of the Supreme Court, adding to the legal procedure a little bit of political scent[28].

[28] For more on the topic see: Pawel Laidler, 'Friends of the Court or Friends of Their Own In-

The above arguments explain why the Supreme Court, as a political actor, is an attractive addressee of various opinions and arguments given by those who would like to have a direct or indirect influence on the process of legal and political activity in America. Therefore, it is obvious that both LGBT and anti-LGBT approaches have been seen throughout the Court's history, determining particular decisions and opinions made by the Justices. The problem of the ideological impact of various groups and individuals on Supreme Court's decisions may be viewed from different perspectives.

On one hand, the process of appointment of the Justices may indirectly influence the future outcomes of various cases, especially those which confront controversial issues, such as the constitutional status of homosexuals. A careful analysis of all of the major LGBT cases decided by the Supreme Court between 1958 and 2003 may produce a visible pattern of the influence of Justices' ideology on their decision-making process. And this, furthermore, may lead to the assumption that Presidents and senators who choose members of the Court can shape the future direction of its adjudication. The table below indicates the ideology of Justices and their approach towards LGBT issues in seven major cases: *One, Inc. v. Olesen*, *Manual Enterprises, Inc. v. Day*, *Boutilier v. Immigration and Naturalization Service*, *Bowers v. Hardwick*, *Romer v. Evans*, *Boy Scouts of America, et al. v. Dale* and *Lawrence and Garner v. Texas*[29].

Ideology of Supreme Court Justices	*Pro LGBTI decisions*	*Anti LGBTI decisions*
Liberal	29	7
Conservative	9	16

The table shows that liberal Justices have been proponents of broadening the constitutional scope of the right to privacy towards LGBT groups. Out of 36 liberal votes, the vast majority was in favor of homosexuals, whereas the majority of conservatives voted against gays and lesbians. A closer look at the 9 conservative votes in favor of LGBT groups shows that they were made mostly by Justices who are considered "swing voters" on the bench. In the last two decisions, *Romer* and *Lawrence*, the important difference was made by Sandra Day O'Connor and Anthony Kennedy. Both Justices were chosen to the Supreme Court in the 1980s by President Ronald Reagan, who aimed at initiating a "conservative revolution" in the government. However, not all of Reagan's choices were successful in the area of providing a strong conservative legacy for the President and his political party. O'Connor and

terests: Amicus Curiae as a Lobbying Tool of Groups of Interest in the U.S. Supreme Court's Decision-Making Process' (2010) 12 *Ad Americam.*

[29] The table indicates 52 out of 54 possible votes in 6 cases made by the Justices of the Supreme Court. In *Day*, Justices Frankfurter and White did not take part in the decision-making process.

Kennedy became very problematic for Republicans, as they served as swing-voters in major constitutional cases concerning the right to privacy. One of the main reasons for the disappointment lay in the circumstances of their appointments – O'Connor was chosen primarily because she was a woman, and Kennedy was picked by the President after the failure of Reagan's former candidate in the Senate, Robert Bork, who was viewed as ultraconservative[30].

In disputes regarding the status of LGBT groups, O'Connor and Kennedy often joined the liberal wing of the Court, widely contributing to the final success of homosexuals. Historically, conservative Justices have been rather reluctant in increasing constitutional protection of various minority groups, including LGBTs. Therefore, the ideological configuration of the Court may serve as a dominant factor in the direction of judicial decisions concerning the rights of gays and lesbians. In the 1950s and 1960s the highest judicial tribunal in the United States consisted mostly of liberal Justices appointed by Democratic Presidents. Later, Republican Presidents began to fill the Court with conservative Justices. However, not all of them proved conservative enough in order to prevent the "sexual revolution". This revolution was initiated in the late 1950s, but it grew in strength in the last decade of the 20th century. The *Lawrence* decision at the beginning of the new millennium reshaped the constitutional status of LGBT groups. The current composition of the tribunal assures the equal influence of liberal and conservative doctrines, with four Justices on each side of the political barricade, and with one Justice whose vote seems to count the most. Justice Anthony Kennedy seems to play a crucial role in the fight of homosexuals for equality and various freedoms. His judgments in *Romer* and *Lawrence*, as well as other right to privacy cases, indicates his strong conviction of the necessity to treat homosexuals as equally as heterosexual people. In this respect one may claim that Reagan's choice of Kennedy was one of the conservatives' greatest defeats in the last decades.

The political activity of the Supreme Court may not only be observed in the ideological trends of the Justices, but also in the lobbying of various interest groups which may influence the Court's agenda and decision-making process. Lobbying may sometimes take place in the form of direct action of institutions, organizations or individuals highly interested in outcome of particular cases. Direct action may consist of sponsoring cases or filing an amicus brief as a third party of a dispute. A thorough analysis of the LGBT cases brought to the Supreme Court reveals significant activity of various legal and social organizations aiming at achieving concrete outcomes from these cases. Anytime a dispute concerning the constitutional status of LGBT groups reached the highest judicial instance, supporters and opponents of the rights of homosexuals closed ranks in order to play a key role in convincing the Justices of their views and opinions. Among the most prominent and powerful pro-LGBT groups there have been:

[30] Herman Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* (Charles Scribners' Sons 1988) 103-149.

– The American Civil Liberties Union - a nationwide organization promoting human and civil rights in the form of litigation, legislation and education. ACLU devoted a lot of effort to lobbying for the equality of homosexuals. For example, the organization helped in preparing an appeal in *Boutillier*, represented Michael Hardwick in *Bowers v. Hardwick*, and prepared important legal briefs in *Boy Scouts* and *Lawrence*[31].
– The Human Rights Campaign - the largest American civil rights organization aiming at promotion of equality of LGBT groups. For several decades HRC activists have been lobbying for the abolishment of discriminating laws concerning the right to privacy for homosexuals, as well as for the promotion of same-sex marriages on the state and federal level. Above all, they prepared an amicus brief supporting Lawrence and Garner in their fight for the right to privacy in the Supreme Court[32].
– Lambda Legal - a civil rights organization primarily focusing on litigation and educational help concerning the rights of LGBT groups in the United States. Since its establishment at the beginning of the 1970s, Lambda Legal has initiated most of the important homosexual rights' cases in state and federal courts, including two major U.S. Supreme Court decisions in *Romer* and *Lawrence*[33].

The above-mentioned organizations are merely the peak of the iceberg, as there are more than fifty national associations and groups supporting LGBT rights. Since most of them play important roles in increasing the awareness in the society of the rights of homosexuals, some decide to participate in the decision-making process in the Supreme Court by filing amicus curiae briefs. Such briefs may serve both as a support for the petition for writ of certiorari (initial stage), or as an additional argumentation when the Court is deciding a case on its merits (main stage). There has hardly been any important constitutional decision undertaken by the Supreme Court in recent years which was not affected by one or more amicus curiae briefs[34]. Especially in cases raising issues connected with LGBT rights, there have always been several briefs prepared by supporters and opponents of a particular interpretation of the Constitution by the Court. For instance, in *Lawrence and Garner v. Texas*, petitioners were backed by 17 and respondents by 14 amici briefs[35]. Among them were legal associations and professors, religious organizations, civil rights defenders, sexual minority lobbying groups, political organizations, and gender associations. Seventeen years earlier in *Bowers*, there had been "only" 13 amici curiae briefs in total, with Catholic organizations that approved of upholding sodomy laws on one

[31] <www.aclu.org/lgbt-rights> accessed 17 April 2011.
[32] <www.hrc.org> accessed 17 April 2011.
[33] <www.lambdalegal.org> accessed 17 April 2011.
[34] Joseph D. Kearney, Thomas W. Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148 *University of Pennsylvania Law Review* 743.
[35] 539 U.S. 558 (2003).

side, and major LGBT groups claiming these laws unconstitutional on the other[36]. Such statistics show the willingness of various social groups and organizations to participate in the process of shaping the scope of LGBT rights, and they also allow the Justices to become acquainted with various approaches towards an important constitutional issue. Such statistics also prove that contemporary America is at the stage of social, political and legal discussion of the proper treatment of the gay and lesbian community.

6. The future in rainbow colors?

Since *Lawrence and Garner v. Texas* no major constitutional case has been brought to the Supreme Court regarding the rights of LGBT groups. However, from time to time the Justices confront disputes which indirectly concern the problem of discrimination based on sexual orientation. For example, in 2010 the Court adjudicated in *Christian Legal Society v. Martinez*, a case which concerned the possibility of banning university funding of an officially recognized campus group (the Christian Legal Society) which promoted discrimination against LGBT students. The Justices determined, in a 5-4 decision, that universities could block official funding of various student and campus groups which favored a discriminatory policy against any minorities, including sexual minorities[37]. Not surprisingly, four liberal Justices were pro and four conservative Justices against, with Anthony Kennedy as the swing voter deciding the final outcome of the case. The defeat of the Christian Legal Society means that anywhere in the United States public funding of educational groups may be dependent on their approach towards equality, tolerance, and justice. The decision is perhaps not a milestone in the fight of LGBT groups for a better constitutional status, but it proves that the contemporary Supreme Court has a more liberal approach towards these issues. With *Lawrence*, the barricades have fallen and it is only a matter of time before homosexuals gain freedom in desired areas, such as marriage and adoption of children. On one hand it may be difficult, since, according to federal law, the *Defense of Marriage Act*, no state is obliged to recognize same-sex relationships established under the laws of other states[38]. However, as of 2011, District of Columbia and five states – Connecticut, Massachusetts, Iowa, New Hampshire and Vermont – acknowledge the rights of gays and lesbians to marry while several other states have created various unions or domestic partnerships for gay and lesbian couples, and some recognize same-sex marriages performed elsewhere[39].

[36] 478 U.S. 186 (1986).
[37] 130 S. Ct. 2971 (2010).
[38] *Federal Defense of Marriage Act* 110 Stat. 2419 (1996).
[39] For further reading about same-sex marriage see: Sean Cahill, Sarah Tobias, *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families* (University of Michigan Press, 2006); Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* (Bea-

One of the recent state cases concerning the issue of same-sex marriage may become the long-awaited turning point for LGBT groups in their fight for marital rights in the U.S. Supreme Court.

In 2010, in *Perry v. Schwarzenegger*, the U.S. District Court for the Northern District of California ruled that Proposition 8 of the California Marriage Protection Act, which stated that marriage was a relationship only between a man and a woman, was unconstitutional. The state law, which was adopted in a referendum, has been determined null and void, thus granting same-sex couples in California the right to marry[40]. The final success, however, depends on the decision of the Court of Appeals for the Ninth Circuit where the case is pending and, perhaps, on the Supreme Court of the United States, provided that the Justices agree to address the issue. Actually, more and more states are establishing liberal policies towards homosexuals and, as in the case of sodomy, it may be just a matter of time before the highest judicial instance will decide in favor of sexual minorities. According to Matt Coles, a prominent ACLU activist on LGBT issues, "the California marriage decision doesn't come out of nowhere… Thirty-one years of slowly but surely getting the people of California used to LGBT issues and relationships"[41]. From this perspective, other successes of the homosexual community in the Supreme Court may serve as important building blocks in their construction of a house of equality. Unless Republican Presidents have an opportunity to reshape the Court's membership and move it away from a liberal approach to a more conservative one, the future of LGBT rights in the United States may soon be seen in rainbow colors.

con Press 2008); Vanessa A. Lavely, 'The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases' (2007) 55 *UCLA Law Review* 247;

[40] 704 F. Supp. 2d 921 (2010).

[41] Peter A. Newman, '"It's Not About Marriage, It's About Antidiscrimination": the California Supreme Court Decision and the Future of Same-Sex Marriage in the United States. An Interview with Matt Coles, ACLU Lesbian, Gay, Bisexual, Transgender and AIDS Project' (2010) 22 *Journal of Gay and Lesbian Social Services* 183, 186.

III.
SAME-GENDER COUPLES

Essere genitori LGBTI*

Joëlle Long

Riassunto

Il tema dell'omogenitorialità, intesa come assunzione e svolgimento di funzioni genitoriali da parte di una persona omosessuale, costituisce il vero banco di prova per saggiare la portata applicativa del principio di non discriminazione sulla base dell'orientamento sessuale e dell'identità di genere. Tale principio è accolto nell'ordinamento italiano per quanto concerne i casi di "vecchia genitorialità", in cui pre-esiste un rapporto giuridico di filiazione tra la persona omosessuale e la prole concepita o adottata in una precedente fase di vita eterosessuale. Dubbi possono invece essere avanzati sulla conformità al principio di non discriminazione, quantomeno nell'interpretazione datane oggi dalle corti di Strasburgo e del Lussemburgo, della scelta del legislatore italiano di negare in radice alle coppie dello stesso sesso la "nuova genitorialità" mediante adozione o procreazione medicalmente assistita.

Abstract

Same sex parenting, namely the assumption and exercise of parental responsibilities by homosexual persons, is a good test for assessing the effective implementation of the non discrimination principle based on the sexual orientation or gender identity. The analysis of Italian case law shows that this principle is commonly applied by Italian courts in cases of custody of children conceived or adopted in prior heterosexual relationships. However, doubts can be raised on whether the Italian legislator's decision to exclude *a priori* same sex couples from adoption and medically assisted reproduction is consistent with the interpretation of the above mentioned principle given by the European Court of Justice (Case C-267/06 *Maruko* and Case C-147/08 *Römer*) and the European Court of Human Rights (especially *Karner v Austria* and *S. H. and oth. v Austria*).

* * *

1. Un tema complesso

Il tema della genitorialità della persona lesbica, gay, bisessuale, transessuale, intersessuale (in sigla LGBTI) è complesso in quanto le questioni giuridiche che si pon-

* Il presente testo costituisce una versione ridotta e parzialmente diversa dell'articolo 'Omogenitorialità e principio di non discriminazione in base all'orientamento sessuale', pubblicato in *Bioetica*, 2011, n. 2, 211-227.

gono variano secondo la specifica condizione dei soggetti coinvolti, secondo l'esistenza o meno di un rapporto giuridico di filiazione tra le parti, secondo il quadro normativo di riferimento.

Nell'ordinamento italiano, anzitutto, ogni discussione sulla "nuova genitorialità", cioè sul rilievo di una condizione personale, ivi compreso l'orientamento sessuale e l'identità di genere, ai fini dell'accesso alla genitorialità, *concerne pressoché esclusivamente le coppie*. Il nostro legislatore, infatti, ha tendenzialmente escluso dalla possibilità di *diventare* genitori le persone singole, indifferentemente dall'identità di genere, dall'orientamento sessuale e dalle modalità di attribuzione del sesso (alla nascita o a seguito di rettificazione degli atti dello stato civile disposta dall'autorità giudiziaria). La legge 19 febbraio 2004, n. 40 consente l'accesso alle tecniche alle sole "*coppie* di maggiorenni di sesso diverso, coniugate o conviventi" (art. 5, corsivo mio); la legge 4 maggio 1983 n. 184 ammette solo in casi limitati l'adozione da parte di una persona singola[1].

Tale peculiarità della situazione italiana spiega peraltro perché sia in gran parte priva di impatto sul nostro ordinamento la sentenza della Corte europea dei diritti dell'uomo *E. B. c. Francia*[2]. In essa, infatti, i giudici europei affermano che viola il divieto di discriminazioni sulla base dell'orientamento sessuale lo Stato membro *che consenta per legge al singolo di adottare* ma escluda sistematicamente in concreto un soggetto dall'adozione a causa della mancanza nel potenziale nucleo di accoglienza di un riferimento genitoriale appartenente al sesso opposto a quello dell'aspirante genitore adottivo.

L'ordinamento italiano, inoltre, si caratterizza per l'esclusione delle coppie dello stesso sesso, indifferentemente formate da persone cui il sesso sia stato attribuito alla nascita o in cui per uno o entrambi vi sia stata successiva rettificazione degli atti dello stato civile[3], da ogni possibilità di diventare genitori. Essendo il matrimonio limitato ai partner di sesso diverso ed essendo il modello principale di adozione riservato ai coniugi (cfr. art. 6 legge n. 184/1983), infatti, le coppie omosessuali non possono adottare. La legge sulla procreazione medicalmente assistita, inoltre, consente l'accesso alle tecniche di fecondazione solo ai partner coniugati o conviventi "di sesso diverso" (art. 5 n. 40/2004). L'esclusione delle coppie dello stesso sesso dalla "nuova genitorialità" non significa tuttavia che la condizione omosessuale

[1] La prima ipotesi è quella della separazione personale tra i coniugi affidatari intervenuta nel corso dell'affidamento preadottivo (art. 5 comma 5° legge n. 184/1983). La seconda è l'adozione disposta in un Paese straniero che consenta al singolo l'adozione, a istanza di un cittadino italiano che dimostri al momento della pronuncia di aver soggiornato continuativamente e risieduto da almeno due anni in tale Paese (art. 36 comma 4° legge n. 184/1983). La terza è l'adozione di minori che non abbiano potuto essere adottati con adozione legittimante (art. 44, lett. c, d, legge n. 184/1983).

[2] Corte EDU, 21 gennaio 2008, in *Nuova giur. civ. comm.*, 2008, I, 667 con mia nota.

[3] In forza della legge 14 aprile 1982, n. 164, la persona transessuale che, previamente autorizzata dal tribunale, si sia sottoposta a interventi chirurgici per rendere il proprio corpo "di nascita" conforme alla propria identità di genere può, com'è noto, ottenere una sentenza di rettificazione di attribuzione di sesso.

escluda di per sé la genitorialità: i rapporti giuridici e di fatto con un figlio minore concepito o adottato in una precedente fase di vita eterosessuale o bisessuale non vengono certamente meno per effetto del *coming out* del genitore (sul tema cfr. *infra* par. 3).

In conseguenza della modifica degli atti dello stato civile, la persona transessuale di orientamento eterosessuale potrà – su un piano di completa parità con i soggetti il cui sesso biologico corrispondesse già alla nascita con l'identità di genere – contrarre matrimonio con un individuo di sesso opposto al proprio e, con esso, presentare poi domanda di adozione di un bambino abbandonato (cfr. art. 6 legge n. 184/1983)[4]. Il divieto di impiego di tecniche di procreazione medicalmente assistita di tipo eterologo (art. 4 comma 3° legge n. 40/2004) preclude invece, com'è evidente, l'accesso alla fecondazione assistita alle coppie in cui uno dei componenti sia persona transessuale. Con riferimento a una relazione di filiazione già esistente, la condizione di transessualità del genitore è formalmente irrilevante, ma può assumere rilievo sostanziale se e in quanto pregiudichi in concreto l'interesse della prole[5].

Sostanzialmente analoga alla condizione di transessualità è, dal punto di vista della genitorialità, la situazione del soggetto intersessuale. Il soddisfacimento del desiderio di genitorialità è di per sé precluso nel caso in cui la persona intersessuale abbia una relazione di coppia con un soggetto che abbia lo stesso sesso attribuitole alla nascita nei registri dello stato civile. In tale eventualità, infatti, il matrimonio e dunque l'adozione sono esclusi e lo è anche la procreazione medicalmente assistita.

[4] La giurisprudenza ha avuto molto di chiarire che ai fini dell'adozione la condizione di transessualità di uno dei membri della coppia che chiede l'adozione è formalmente irrilevante: il compito del giudice, infatti, è valutare l'attitudine genitoriale dei partner ("la loro capacità di amore e di altruismo verso un bambino straniero in stato di abbandono") e non "riscontrare una sessualità normale e adeguata dei coniugi" (Trib. min. Perugia, decreto 22 luglio 1997, in *Dir. fam. e pers.*, 1998, 593). Per un approfondimento si consenta il rinvio a J. Long, 'Essere genitori transessuali' (2008) *Nuova giur. civ. comm.* II, 236.

[5] Corte EDU, sentenza 30 novembre 2010, *P. V. c. Spagna*, in *Dr. famille*, 2011, alerte 3 obs. M. Bruggeman e Trib. min. Torino, 20 luglio 1982, *Giur. it.*, 1982, 2, 625. Nel primo caso i giudici europei riconoscono che la limitazione del diritto di visita paterno si fonda sul cambiamento di sesso di quest'ultimo, ma affermano che non c'è violazione del diritto di questi al rispetto della vita familiare perché la decisione delle autorità nazionali appare motivata sulla base del fatto che l'instabilità emotiva della ricorrente conseguente al suo cambiamento di sesso pone in concreto a rischio l'integrità psico-fisica e lo sviluppo della personalità della prole. In senso sostanzialmente analogo si erano già espressi negli anni Ottanta i giudici torinesi che avevano vietato, *ex* art. 333 cod. civ., i contatti tra il figlio minore e un padre che, dopo anni di separazione dalla famiglia, era ricomparso nella vita del figlio di dieci anni dopo aver assunto identità femminile causando un grave turbamento al figlio che non accettava una così sconcertante figura di padre-madre con fisico e abbigliamento femminili e dedito alla professione di spogliarellista.

2. Il ruolo del principio del superiore interesse del minore nella battaglia per il riconoscimento di rilevanza giuridica alla relazione di coppia omosessuale

Il tema dell'omogenitorialità, intesa come assunzione e svolgimento di funzioni genitoriali da parte di una persona omosessuale, costituisce a mio parere il vero banco di prova per saggiare la portata applicativa del principio di non discriminazione sulla base dell'orientamento sessuale e dell'identità di genere[6].

Perfino con riferimento alla regolazione della relazione di coppia tra persone dello stesso sesso (e dunque con riferimento a rapporti *tra adulti*), infatti, si invoca l'argomento del superiore interesse del minore per giustificare l'ingerenza nel diritto degli omosessuali al rispetto della vita familiare. Secondo un'opinione abbastanza diffusa, la limitazione dei diritti delle coppie dello stesso sesso sarebbe necessaria per la tutela dei diritti dell'eventuale prole alla corretta formazione dell'identità anche sessuale, nonché a un doppio riferimento genitoriale.

Attenta dottrina ha tuttavia evidenziato che occorre separare le questioni relative ai rapporti tra genitore omosessuale e figlio minore da quelle interne alla relazione di coppia, cioè concernenti la regolazione di rapporti giuridici tra adulti[7]. La questione dell'ammissibilità di una tutela giuridica si pone infatti solo per le relazioni "orizzontali" tra i membri della coppia; le relazioni tra genitori e minori invece sono ispirate al principio del superiore interesse del minore, con la conseguenza che l'ingerenza dello Stato nella vita familiare del nucleo familiare è legittima solo se e in quanto necessaria a proteggere il minore stesso.

Mi pare evidente che il diritto dei minori a crescere in un ambiente idoneo non risulterebbe leso dall'apertura del matrimonio alle persone omosessuali in quanto l'ordinamento prevede meccanismi di controllo sull'idoneità all'esercizio delle funzioni genitoriali. Le coppie che desiderino adottare un minore sono sottoposte a una valutazione dell'idoneità "affettiva" e della capacità "di educare, istruire e mantenere i minori che intendono adottare" (art. 6 comma 1° l. n. 184/1983) prima dell'abbinamento con il minore e del suo inserimento nel loro nucleo familiare, con la conseguenza che ove il giudice ritenesse che l'orientamento sessuale degli aspiranti genitori adottivi possa in concreto costituire pregiudizio per l'adottando, dovrebbe ritenere la coppia non idonea all'adozione. La procreazione medicalmente assistita è espressamente preclusa alle coppie che non siano "di sesso diverso" (art. 5 l. n. 40/2004).

[6] La dottrina italiana che si è occupata specificamente del tema è ancora scarsa: cfr. G. Oberto, 'Problemi di coppia, omosessuali e filiazione', in *Dir. fam. e pers.*, 2010, 802; E. Falletti, 'Genitore omosessuale e affidamento condiviso' (2009) *Giur. it.* 1164; J. Long, 'Omogenitorialità e principio di non discriminazione sulla base dell'orientamento sessuale' (2011) *Bioetica*, n. 2, 211. Per una prospettiva comparata v. F. Caggia, 'Convivenze omosessuali e genitorialità: tendenze, conflitti e soluzioni nell'esperienza statunitense', in Moscati e Zoppini (eds.), *I contratti di convivenza* (Giappichielli 2002), 243.

[7] In questo senso B. Pezzini, 'Dentro il mestiere di vivere: uguali in natura o uguali in diritto?', in R. Bin et al. (eds.) *La "società naturale" e i suoi "nemici"* (Giappichelli 2010), 16; A. Lorenzetti, *Matrimonio e filiazione: legame indissolubile?*, *ivi*, 225.

3. "Vecchia genitorialità"

Nella sentenza *Salgueiro da Silva Mouta c. Portogallo*, la Corte europea dei diritti dell'uomo condanna lo Stato convenuto per violazione del combinato disposto degli artt. 8 e 14 della Convenzione europea dei diritti dell'uomo (CEDU) con riferimento al peso determinante attribuito dai giudici nazionali alla condizione di omosessualità del padre nella determinazione, in sede di rottura della relazione coniugale dei genitori, delle modalità di affidamento della prole avuta durante una precedente fase di vita eterosessuale[8]. Secondo i giudici europei, infatti, non si poteva ritenere ragionevole il rapporto di proporzionalità esistente tra la scelta di affidamento esclusivo della figlia alla madre e il fine legittimo perseguito, cioè il superiore interesse della figlia stessa.

Nell'ordinamento italiano, il divieto di discriminazioni sulla base dell'orientamento sessuale appare sostanzialmente accolto nel caso di relazioni con minori specificamente individuati e già legati all'adulto omosessuale da un rapporto giuridico di filiazione. Il riferimento, com'è evidente, è a figli concepiti o adottati durante una precedente fase di vita eterosessuale.

Essendo il criterio guida l'interesse morale e materiale della prole (art. 155 comma 2° cod. civ.), l'autorità giudiziaria dovrà valutare in concreto se le caratteristiche soggettive del genitore (ivi compreso l'orientamento omosessuale) pregiudichino o rischino di pregiudicare l'interesse della prole. Solo qualora l'omosessualità di un genitore si rivelasse *in concreto* pregiudizievole per il minore, dunque, il giudice non solo potrebbe ma dovrebbe attribuire rilievo sostanziale a tale condizione dell'adulto, limitandone o addirittura escludendone i poteri e le facoltà genitoriali.

Proprio in applicazione di tale principio di diritto, il Tribunale di Bologna ha accolto il ricorso di un padre omosessuale che chiedeva la modifica in affidamento condiviso del provvedimento di affidamento esclusivo alla madre emesso nel vigore del diritto previgente, affermando che "nel caso di specie non si ravvisano elementi ostativi all'applicazione del regime ordinario di affidamento stabilito dal legislatore a tutela dell'interesse del minore… il semplice fatto che uno dei genitori sia omosessuale… non giustifica e non consente di motivare la scelta restrittiva dell'affidamento esclusivo"[9]. In senso conforme si è recentemente espresso il Tribunale di Nicosia, secondo cui "l'eventuale relazione omosessuale della madre, laddove non comporti un pregiudizio per la prole, non costituisce ostacolo all'affidamento condiviso dei minori e alla individuazione della dimora degli stessi presso l'abitazione della genitrice, stante la tenera età dei bambini"[10].

[8] Corte EDU, sentenza 21 dicembre 1999, *Salgueiro da Silva Mouta c. Portogallo*. Si tratta del primo caso in cui la Corte di Strasburgo affronta la questione dei diritti delle persone omosessuali dal punto di vista della vita familiare. Fino ad allora infatti la prospettiva scelta era sempre stata la "vita privata".

[9] Trib. Bologna, decr. 15 luglio 2008, in *Giur. it.*, 2009, 1164, con nota di E. Falletti, 'Genitore omosessuale e affidamento condiviso'.

[10] Trib. Nicosia, ord. 14 dicembre 2010, in <www.minoriefamiglia.it>.

4. Quale riconoscimento della genitorialità sociale?

Più rari sono invece, quantomeno in Italia, i casi di prole adottata dall'altro partner o da questi concepita mediante l'impiego di tecniche di procreazione medicalmente assistita nell'ambito di un progetto procreativo comune della coppia dello stesso sesso. Il fatto che dal 2004 l'impiego della fecondazione eterologa sia per legge vietato e che l'adozione del bambino abbandonato sia di regola preclusa alle coppie dello stesso sesso, infatti, non impedisce che nella pratica tali nuclei familiari si formino: non sono poche le coppie che scelgono di rivolgersi all'estero.

In questi casi, in applicazione delle norme del nostro codice civile, il rapporto giuridico di filiazione può esistere solo nei confronti di uno dei membri della coppia, quello biologico, cioè il padre gay che ha fornito il seme per la fecondazione della donna che ha ceduto gratuitamente o verso corrispettivo il proprio utero o la mamma lesbica che è stata fecondata con lo sperma di un donatore anonimo o noto alla coppia e ha poi partorito il figlio.

La tutela della genitorialità sociale omosessuale, inoltre, è assicurata solo in casi molto limitati. In situazioni transnazionali (e dunque nei casi di residenza all'estero o almeno di cittadinanza straniera di uno dei soggetti coinvolti), anzitutto, le coppie dello stesso sesso potrebbero probabilmente ottenere il riconoscimento in Italia di un provvedimento straniero di adozione disposto, *lege fori*, a favore del partner[11]. Nel caso di contrasto tra i partner, inoltre, potrebbe essere chiesto al tribunale per i minorenni un provvedimento limitativo della potestà del genitore che con il suo comportamento pregiudichi l'interesse del figlio minore (cfr. art. 333 cod. civ.). Non essendo tuttavia il genitore "sociale" parente del minore, gli sarà preclusa la possibilità di adire direttamente l'autorità giudiziaria, con la conseguenza che dovrà limitarsi a segnalare la situazione al pubblico ministero minorile che deciderà se e quale provvedimento chiedere al giudice.

Un'interessante pronuncia milanese, che costituisce a oggi, a mia conoscenza, l'unico precedente giudiziario in materia, ha rigettato la richiesta del pubblico ministero di un provvedimento *ex* art. 333 contro la madre biologica di due minori concepiti con procreazione medicalmente assistita di tipo eterologo a seguito di un

[11] Cfr. *mutatis mutandis* una recente sentenza della *Cour de Cassation* francese che ha riconosciuto l'efficacia in Francia di un'adozione statunitense pronunciata con riferimento a una coppia binazionale franco-statunitense e riguardante l'adozione del figlio biologico di uno dei partner della coppia dello stesso sesso, affermando espressamente che in questo modo si permetteva alle due donne di esercitare congiuntamente l'autorità parentale, cosa che risultava conforme all'interesse del minore che costituisce uno dei principi fondamentali del diritto francese: *Cour de cassation, arrêt n° 791 du 8 juillet 2010*. È stata invece rifiutata per contrarietà all'ordine pubblico la trascrizione nei registri dello stato civile francese dell'atto di nascita californiano che indicava, conformemente alle legge di tale Paese, due uomini quali genitori di una minore da essi procreata con l'impiego della maternità surrogata: TGI Nantes, 10 févr. 2001, n. 10/06276, in *Droit de la famille*, 2011, n. 7-8, note C. Neirinck.

progetto procreativo comune della donna e della sua ex compagna[12]. Secondo quest'ultima, cui viene consentito di partecipare al procedimento[13], la madre biologica le precludeva dopo l'intervenuta rottura della relazione di coppia ogni contatto con i bambini con i quali essa aveva tuttavia durante la convivenza *more uxorio* sviluppato un rapporto affettivo significativo di tipo sostanzialmente paragenitoriale. Il procedimento viene tuttavia archiviato poiché, secondo i giudici, "non sono ravvisabili comportamenti della madre tali da giustificare una limitazione della potestà genitoriale… in particolare non vi è l'insuperabile necessità di disporre oggi la ripresa della relazione tra X e X (i minori NdA) e X (l'ex partner della madre NdA) non essendo emerso che l'assenza di rapporti tra gli stessi sia causa di quel grave pregiudizio che solo giustificherebbe l'intervento del TM ai sensi degli artt. 330 ss. c.c."[14].

5. "Nuova genitorialità"

Dubbi possono invece, a mio parere, essere avanzati sulla conformità al principio di non discriminazione, quantomeno nell'interpretazione datane oggi dalle corti di Strasburgo e del Lussemburgo, della scelta del legislatore italiano di negare in radice alle coppie dello stesso sesso la "nuova genitorialità", mediante adozione o procreazione medicalmente assistita.

In tali casi, a differenza della "vecchia genitorialità, la valutazione dell'idoneità affettiva e della capacità di educare, istruire e mantenere i minori dell'aspirante genitore è astratta e preventiva rispetto ai contatti con il potenziale "figlio", cioè precedente alla venuta a esistenza di quest'ultimo (procreazione medicalmente assistita) o all'abbinamento tra aspirante adottante e minore (adozione del minore abbandonato). Il termine di paragone utilizzato dai legislatori nazionali per individuare i requisiti legali per le genitorialità "artificiali" è un modello ideale e astratto di famiglia di accoglienza ritenuto idoneo a offrire a loro giudizio le migliori garanzie per la crescita del minore e storicamente informato al canone dell'*imitatio naturae*. Spesso i requisiti richiesti per l'adozione sono più stringenti di quelli richiesti per l'accesso alle tecniche di procreazione medicalmente assistita: la *ratio* deve rinvenirsi nel fatto che i minori adottati vengono ritenuti meritevoli di una protezione speciale, e dunque si richiede un livello di capacità genitoriali più alto, poiché essi sono di per sé particolarmente vulnerabili avendo tutti, seppur con tempi e modalità diversi, sperimentato il trauma dell'abbandono.

La più recente giurisprudenza delle Corti di Strasburgo e del Lussemburgo induce, a mio avviso, a dubitare che l'esclusione da parte del legislatore italiano *delle coppie* omosessuali dalla possibilità di presentare dichiarazione di disponibilità

[12] Trib. min. Milano, 20 novembre 2009, in <www.tribunaleminorimilano.it>.

[13] Lo stesso Tribunale per i minorenni chiarisce di essere "consapevole del fatto che, dal punto di vista strettamente legale, non vi è alcuna possibilità di riconoscimento di una *legitimatio ad causam* di un soggetto non legato da vincolo alcuno al minore": Trib. min. Milano, 20 novembre 2009, cit.

[14] *Ibid*.

all'adozione e dall'accesso alle tecniche di procreazione medicalmente assistita possa ritenersi conforme al divieto di discriminazione sulla base dell'orientamento sessuale e dell'identità di genere.

Il primo contributo in materia delle fonti di origine internazionale, e precisamente della giurisprudenza della Corte di Giustizia, è la rimeditazione del termine di paragone alla luce del quale valutare l'esistenza di un trattamento discriminatorio della coppia dello stesso sesso. Nei *casi Maruko e Römer* la Corte di Giustizia ha affermato che tale termine di paragone non è costituito necessariamente dagli individui di pari status (cioè i conviventi *more uxorio* di sesso diverso) bensì dalle coppie che si trovino in una situazione sostanzialmente analoga e quindi *dalle coppie coniugate eterosessuali* qualora la situazione della coppia dello stesso sesso appaia, in concreto, assimilabile a quella dell'unione coniugale[15].

Poiché non paiono esistere studi scientifici che indichino che lo svolgimento di funzioni genitoriali da parte di una persona omosessuale sia di per sé pregiudizievole per la prole e anzi alcune ricerche, seppur a oggi condotte su scala ancora ridotta e con oggetti circoscritti, sembrano dimostrare che essere cresciuti da coppie dello stesso sesso non determina significative differenze nello sviluppo cognitivo, nei rapporti sociali e nella presa di coscienza e gestione della propria sessualità e dei propri sentimenti rispetto all'allevamento in contesti eterosessuali[16], occorre a mio avviso concludere che l'orientamento sessuale dei partner di una coppia genitoriale debba essere, da un punto di vista formale, irrilevante. In conseguenza di tale ragionamento, in un ordinamento quale quello italiano in cui i partner dello stesso sesso sono esclusi dal matrimonio, il termine di paragone alla luce del quale accertare l'esistenza di un differente trattamento con riferimento alle scelte procreative della coppia dello stesso sesso è l'unione coniugale eterosessuale.

Con riferimento all'ordinamento italiano, tale conclusione appare di grande rilevanza con riferimento all'adozione dei minori abbandonati che, come già evidenziato, possono essere adottati dalle sole coppie coniugate (art. 6 legge n. 184/1983) e quindi, stante il divieto di matrimonio per le coppie dello stesso sesso, solo da eterosessuali. Nel caso della procreazione medicalmente assistita, invece, la questione si pone in termini parzialmente diversi perché le coppie di sesso diverso possono

[15] Corte di Giustizia, Grande sezione, 1° aprile 2008, C 267/06, *Maruko c. Versorgungsanstalt der deutschen Bühnen*, in *Fam. e dir.*, 2008, 653, con nota di M. Bonini Baraldi, Corte di Giustizia, Grande Sezione, 10 maggio 2011, C 147/08, *Jürgen Römer c. Freie und Hansestadt Hamburg*.

[16] Cfr. M. Rosenfeld, 'Nontraditional Families and Childhood Progress through School' (2010) 47 *Demography* 755; N. Gartrell and H. Bos, 'US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents' (2010) 126 *Pediatrics* 28; S. Golombok and F. Tasker, 'Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families' (1996) 32 *Developmental Psychology* 3. Per un'analisi secondaria cfr. N. Anderssen, C. Amlie, EA Ytterøy, 'Outcomes for children with lesbian or gay parents. A review of studies from 1978 to 2000', (2002) 43 *Scandinavian Journal of Psychology* 335; J. G. Pawelski and oth., 'The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children' (2006) 118 *Pediatrics* 349.

accedere alle tecniche sia se coniugate sia se conviventi, con la conseguenza le coppie dello stesso sesso sono discriminate sia rispetto alle coppie coniugate eterosessuali sia rispetto alle coppie conviventi *more uxorio* eterosessuali.

Poiché è indubbio che l'ordinamento italiano si caratterizzi per la diversità di trattamento tra coppie conviventi *more uxorio* e unioni coniugali quanto alle scelte procreative, occorre accertare il carattere giustificato o meno di tale disuguaglianza.

Secondo i giudici di Strasburgo, le differenze di trattamento fondate sull'orientamento sessuale sono conformi alla CEDU (Convenzione Europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali) solo se se ne dimostra la necessità per il perseguimento di un fine legittimo, nonché la ragionevolezza rispetto al sistema considerato nel suo complesso.

Nel caso *Karner c. Austria*, per esempio, lo Stato convenuto è stato condannato per violazione degli artt. 8 (che garantisce tra l'altro il rispetto al proprio "domicilio") e 14 CEDU, poiché non aveva dimostrato che l'esclusione dei conviventi *more uxorio* omosessuali dalla successione di diritto nel contratto di locazione dopo la morte del convivente conduttore fosse "necessaria" per raggiungere il fine legittimo della "protezione della famiglia intesa in senso tradizionale"[17].

La recente sentenza *S. H. e altri c. Austria*, inoltre, ha riconosciuto il diritto della coppia a non subire ingiustificate ingerenze in ambito procreativo[18]. Secondo i giudici europei, infatti, non vi è alcun obbligo per gli Stati di ammettere la procreazione medicalmente assistita[19] ma, qualora decidano di farlo, essi potranno limitare l'uso delle tecniche eterologhe da parte della coppia solo se ciò sia necessario per il perseguimento di fini legittimi e solo nella misura in cui la restrizione risulti proporzionata a tali fini[20].

In applicazione di tali principi se, come già detto, non paiono esservi studi che dimostrano che l'omogenitorialità sia di per sé pregiudizievole per il figlio minore,

[17] *Karner c. Austria*, cit., par. 41.

[18] Corte EDU, sentenza 1° aprile 2010, *S.H. e altri c. Austria*, in *Fam. e dir.*, 2010, 977. La vicenda riguardava due coppie che si erano viste negare l'accesso a tecniche di fecondazione assistita eterologa, segnatamente la fecondazione in vitro mediante sperma di un donatore e la donazione di ovulo. Non richiamo invece la sentenza *E. B. c. Francia* (sentenza 22 gennaio 2008), in cui la Corte EDU ha condannato lo Stato convenuto per aver considerato una persona *single* inidonea all'adozione in ragione della sua omosessualità, operando così un sostanziale *revirement* rispetto a quanto affermato sei anni prima nella sentenza *Fretté c. Francia* (sentenza 26 febbraio 2002), poiché il caso, come già accennato nel par. 1, pur riguardano l'accesso delle persone omosessuali all'adozione, non appare qui pertinente essendo riferito unicamente all'adozione da parte di persona singola (sconosciuta nell'ordinamento italiano, salve limitate ipotesi). Secondo i giudici europei, infatti, la consolidata opinione delle autorità amministrative francesi secondo cui la persona singola omosessuale sarebbe inidonea all'adozione in quanto impossibilitata a offrire al minore un nucleo familiare dotato di un riferimento genitoriale materno e paterno, sarebbe illegittima in quanto la scelta di uno Stato membro di consentire per legge al singolo di adottare presuppone l'idoneità del nucleo monogenitoriale all'accoglienza di un minore.

[19] *S. H. e altri c. Austria*, cit., par. 74.

[20] *Ibid.*, par. 76.

occorre a mio avviso concludere che, in un ordinamento quale quello italiano in cui alle persone dello stesso sesso è precluso il matrimonio, il principio di non discriminazione impone di equiparare le coppie conviventi *more uxorio* dello stesso sesso alle coppie coniugate eterosessuali riconoscendo loro la possibilità di essere sottoposte a valutazione dell'idoneità all'adozione di minori.

Il diritto a essere valutati idonei all'adozione senza subire discriminazioni in ragione della propria omosessualità, com'è evidente, non implica il diritto a ottenere un minore in adozione. Tutti i Paesi di matrice culturale europea prevedono infatti che l'abbinamento tra gli aspiranti adottanti e i minori adottabili debba avvenire nell'interesse di questi ultimi. In Italia è il tribunale per i minorenni a scegliere "tra le coppie che hanno presentato domanda quella maggiormente in grado di corrispondere alle esigenze" del minore (art. 22, comma 2°, l. n. 184/1983). Dovendo individuare la coppia "migliore" e considerando il (fortunatamente) basso numero di minori adottabili, occorrere dunque preferire in concreto l'aspirante adottante che abbia caratteristiche tali da garantire meglio il benessere di quel minore. In quest'ottica sarebbe probabilmente legittimo preferire un aspirante adottante sano rispetto a uno che, pur ritenuto idoneo all'adozione, sia portatore di un handicap fisico di rilievo tale da condizionare in modo determinante la vita familiare; ciò malgrado il divieto costituzionale di discriminazioni sulla base delle «condizioni personali». Sarebbe inoltre probabilmente legittimo preferire la coppia eterosessuale qualora per esempio l'adottando sia già grandicello e abbia in passato vivacemente rifiutato i contatti con un genitore omosessuale. Illegittimo sarebbe invece un diniego di abbinamento sulla base della considerazione che per il minore adottato da un omosessuale l'integrazione sociale sarebbe più difficile.

Per quanto concerne l'adozione internazionale mi limito a osservare che l'interesse del minore all'abbinamento deve essere valutato dalle competenti autorità del Paese di origine secondo il diritto locale: in considerazione del fatto che la pressoché totalità dei Paesi di origine dei minori esclude gli omosessuali dall'adozione, l'apertura di alcuni Paesi di accoglienza all'adozione da parte delle persone omosessuali è di fatto limitata alle sole adozioni nazionali.

Più complesso è l'esame dell'impatto dell'interpretazione europea del principio di non discriminazione sull'accesso alle tecniche di procreazione medicalmente assistita. L'ordinamento italiano, in effetti, è coerente sul piano interno perché vieta ogni tipo di fecondazione eterologa (art. 4 comma 3° legge n. 40/2004). Dubbi potrebbero tuttavia, a mio parere, essere avanzati sulla necessarietà del divieto delle tecniche eterologhe per il perseguimento delle finalità pur astrattamente legittime perseguite dal legislatore. Proprio nella sentenza *S. H. e al. c. Austria*, per esempio, la Corte EDU afferma che la moltiplicazione delle figure genitoriali conseguente all'utilizzo di tecniche eterologhe non costituisce ragione sufficiente per giustificare l'esclusione di tali tecniche in quanto esistono strumenti giuridici che consentono di attribuire comunque al minore uno status familiare certo (per esempio, la presunzione di paternità del coniuge della madre per i figli da essa partoriti durante il matrimonio).

The Rights of the Care of the Child As Well As Maternity, Paternity and Parental Leave in Stable LGBTI Family Units

Marco Bracoloni

Abstract

The aim of this study is to investigate the legal solution that allows the members of stable LGBTI family units, who are not biological parents, the entitlement to maternity and paternity leave – parental leave in a broad sense. The attempt by the European legislature, aimed at reducing the discrimination which does not allow stable LGBTI family units to exercise their rights to use such leave, has not led to convincing results. A new approach is required, which is no longer based on disciplines aiming to eliminate gender discrimination: this will consider the parent as the person who takes a new member, the child, into his or her family and to whom he wants to give love, well-being and care, contributing this way both to the child's growth and to the productive development of society. Shifting the discussion to the possibility of identifying provisions allowing for the care of the children remains the most easily usable tool to allow even non-biological parents of stable LGBTI units to obtain paid parental leave. In conclusion, we must recognize the child's right to have a proper care regime, regardless of the parents' gender. The child must be considered as a subject of law and not only the object of the parents' rights.

* * *

1. Maternity and paternity leave: parental leave of stable LGBTI family units

1.1. Legal context: Community policy and the recognition of equal rights between traditional families and stable LGBTI family units regarding leave

The relationship between the members of stable LGBTI family units[1] (also called LGBTI families) and their right to the care of the children who are part of those families, is one of the issues discussed in relation to sexual orientation and gender identity. This study examines the rights conferred to and exercised by the members

[1] Stable LGBTI family units are formed from family components LGBTI (Lesbian, gay, bisexual, trans and intersex) which last for over two years (in apparent contrast with "open" families), envisage mutual fidelity, represent a stable point family values based on values that transcend sexual orientation, do not represent an obvious ostentation, and is not subjective based on personality rights (with the word gayfamily/omogenitoriale or Rainbow family is usually the family consists of parents of the same sex).

of stable LGBTI family units in case of absence from work for maternity, paternity or parental leave. The objective is to investigate the feasibility of a legally valid way to allow couples who form stable LGBTI units to vindicate the right of the care of the child. In particular, this study focuses on a delicate and little explored aspect: the ability to care for the child which could be recognized to the parent who is not related to the child by a biological or adoptive filiation. The Member States of the European Union show significant differences in their respective employment and social policies. It is precisely the specifics of each State to determine the mixture of the elements that characterise the relationship between the labour market and the care of the child (i.e., the ratio between the hours dedicated to work and time devoted to the family). Therefore, the parents' choice on how to take time off work and make use of maternity, paternity and parental leave – be it paid or not[2] – to take care of their children, is dictated at the same time both by the general community rules and by the more detailed internal rules of their own country. The experience of a domestic policy that provides a flexible labour market, allowing part-time or the interchangeability between parents to take leave, and therefore influential even in the parenting roles, showed a reduction in gender discrimination and a greater chance of access to employment for women with a high level of education. A positive impact was noted both on the labour market, consisting in a greater integration of gender, and on an easier accessibility to children's care. Maternity, paternity and parental leave each followed their own historical and normative pattern of development, all characterized by a common goal: the elimination of gender discrimination. In fact, the community policy has included among its main objectives the reduction and elimination of discrimination through the introduction of the principle of equality[3], pursued through the adoption of targeted actions to its achievement. In terms of employment, since the signing of the Treaty of Rome on the 25th March 1957[4] and its amendment with the Treaty of Amsterdam of the 2nd October 1997, it has been established that each State should guarantee equal pay to each worker regardless of the worker's sex. Starting from this pronouncement, it can be affirmed that it is up to each worker to recognize and exercise the rights arising from the employment relationship, with regards to both those arising from the synallagma performance/pay

[2] The discipline that regulates subjective situations giving rise to the worker that the continuation of employment in the absence of performance work, both paid and unpaid, which results in a temporary suspension of the provision of job, including maternity, paternity and parental leave for all to see Antonio Vallebona, *Istituzioni di diritto del lavoro* (sixth edn, CEDAM, 2008) 353 ff.

[3] The reconstruction policies of inequality starting from the analysis of the conditions of legitimacy of differential treatments are contained in Stefania Scarponi, Eleonora Stenico, 'Le azioni positive: le disposizioni comunitarie, le luci e le ombre della legislazione italiana', in Marzia Barbera (ed.), *Il nuovo diritto antidiscriminatorio, il quadro nazionale e comunitario* (Giuffrè 2007).

[4] The art. 141 of the Treaty establishing the European Community stipulates that «each Member State shall ensure the application of the principle of equal pay between men and women …. without discrimination».

and those which can be exercised when[5] a temporary suspension of the work occurs, be it paid or unpaid, and in any case contractually disciplined and planned. These rights include maternity, paternity and parental leave, which should be granted to working parents whether they are biological parents or adoptive parents. The considerable diversity that characterizes the countries of the European Union, and the even more marked difference with non-European legislations, requires an approach that should be based on the combined provisions of the legislation governing maternity, paternity and parental leave, and the one which allows people living with the biological or adoptive parent to be recognized as "parents", in the attempt to ensure an equal treatment between traditional families and stable LGBTI family units.

In order to talk about subjects entitled to make use of these rights of leave, it is necessary to clarify the relationship that binds the child, as the object of the right, to the leave assignable to a non-biological parent or adoptive parent, cohabitating with the parent who has the legal bond of legitimate or natural filiation. By virtue of such relationship, the non-biological or adoptive parent is entitled to use such leave. European regulations indicate some possible solutions in the rules that recognize the right to family reunification or that implement the principle of equal opportunities and equality between men and women in employment and occupation matters. Starting from the Community rules governing maternity, paternity and parental leave, it is appropriate to draw first, and without claiming to be exhaustive, the evolution that has undergone the compulsory maternity protection[6]. At the beginning (reference is made to the Institution of the European Communities) the focus was on pursuing equality of treatment between men and women in accessing employment, remuneration, working conditions, social protection and professional development. The rules that allowed a working mother to use maternity leave were aimed at protecting the health of the mother: there were rules which specifically prohibited the employment of pregnant women for physically demanding and dangerous jobs. Subsequently, the focus shifted to a policy aimed at solving the gender discrimination, discussing also the fact that gender discrimination policies can allow the protection of sexual orientation and gender identity. In the case of biological filiation, Community directives on compulsory maternity leave have reached a certain homogeneity among the internal regulations of individual States in Europe, guaranteeing to all working mothers a minimum period of paid absence (the only distinction found in the regulations of the Member States relates to the different economic treatment which favours permanent employees over temporary ones).

[5] The article No. 142 of the Treaty establishing the European Community imposes «on Member States' efforts to maintain the existing equivalence in paid leave schemes».

[6] Directive 92/85/EEC obliges Member States to introduce into legislation a mandatory maternity leave, aimed at improving worker safety and health at work. In Italy, the maternity leave is regulated in chapter III of the Legislative Decree No. 151 of 26 March 2001, *Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'art. 15 della legge 8 March 2000, no. 53, dall'art. 16 all'art. 27.*

The situation is different when it comes to mandatory paternity leave[7], since it has only been recently proposed[8] that, in the case of biological parentage, an individual, subjective right, should be attributed to and directly exercisable by the working father (and therefore no longer a surrogated, alternative right to the one intended for the mother). The current legislation in case of adoption, both at Community level and at national level, for instance as in Italy[9], includes a discipline that places the mother and the adoptive father on an equal level with respect to the possibility of resorting to mandatory maternity/paternity leave. The maternity and paternity leave, in case of adoptive filiation, has achieved a good level of homogenization among the internal rules of the European countries. The turnover between a working father and a working mother in the exercise of the right to maternity or paternity leave acknowledged in the case of adoption is definitely the best example of how it should be also in the case of biological filiation[10].

With regards to parental leave[11], which is optional, the directive 2010/18/EU has sanctioned the attribution of the right to be absent from work for both parents for a defined period, which is exercisable alternately by both the mother and the father (each of them are entitled to a minimum period which is non-transferable to the other parent[12]). Parental leave has been rarely used by fathers in most European countries. Positive data come from some European countries where legislation to incentive its use has been put in place: in the Scandinavian countries, for example, and in particular in Sweden, where the change of mindset necessary to encourage greater participation of both parents to equal family responsibilities has already happened.

[7] On October 21, 2010, a proposal for a directive of the European Parliament which provides for the establishment of compulsory paternity leave was approved. Up to now, paternity leave has only known the internal discipline of individual States, which have chosen differently from one another. In Italy, paternity leave is regulated in articles No. 28, 29, 30 and 31 of Legislative Decree No. 151 of 2001, *Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'art. 15 della legge 8 marzo 2000, no. 53.*

[8] For an in-depth study, see Marco Bracoloni, 'Il congedo di paternità', in [2010] LPO, Lavoro e Previdenza Oggi 1249; and also Laura Cafalà, *Sull'autonomia del congedo di paternità del lavoratore subordinato* [2010] *Rivista Giuridica del Lavoro* 323.

[9] The Italian legislation governing maternity and paternity is an autonomous law for each of the two parents to practice independently within the meaning of art. 26 (replaced by art. 2 paragraph 452, of law No. 244 of December 24, 2007) and article No. 31 of Legislative Decree No. 151 of 2001 and article No. 31.

[10] For a brief commentary on the interpretation given by the jurisprudence in the judgments of the Italian Constitutional Court N.°385/2005, N.°285/2010, refer to Bracoloni (n 8) 1271-1275.

[11] Covered by Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the CES, OJ L 145 of 19 June 1996, the Directive repealed by Directive 2010/18/EU of 8 March 2010 implementing the revised framework agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and the CES.

[12] The Italian legislation governing parental leave with the Legislative Decree No. 151 of 2001, Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'art. 15 della legge 8 March 2000, no. 53, artt. 32 and ss.

Maternity, paternity and parental leave are perfectly usable by members of the stable LGBTI family units in States where there is legal recognition of LGBTI family, which binds with a legal obligation of civil marriage and its components as for example in the Netherlands since 2001, Belgium since 2003, Spain since 2005, Sweden since 2009. The situation is different in countries that offer a recording for same-sex couples (defined by each State in a different way, such as legal contract or civil solidarity pact) as only a few cases recognize the same treatment granted to civil marriages. Among these states are Denmark (which also allows adoptions), Iceland, Germany, and France (which recognizes economic rights but not recourse to adoptions). In States where there is not a provision[13] to recognize the existence of a family that is not the traditional one, there is not the recognition of the rights connected with parentage for components of stable family units, which are usually recognized only for the LGBTI partners related to the child from a biological or adoptive filiation (often existing in the formation of stable LGBTI family units). Ultimately, it is difficult to obtain a legal forecast according to which components of stable LGBTI family units, which are not biological or adoptive parents of children forming part of the stable core (as biological or adoptive children of another component), may recur to the protection of the child's care and time off from work because of the possible exercise of rights. Currently only a few European countries, including Spain, Belgium, Holland, Sweden and United Kingdom show more favorable policies in terms of family, including stable LGBTI family units, with positive impact on the world of work and on leave granted to parents for the care of their children. An opposite attitude is that of Italy, where it is not permitted to celebrate marriages between persons of the same sex, reinforced by the last amendment of the Ordinance No. 4 of 2011 of the Constitutional Court which considers legitimate the prohibition (Art. No.29 of the Constitution refers to the notion of civil code defined marriage as a Union between persons of different sex) on same-sex couples contracting civil marriage. Also the Czech Republic, Slovakia and Slovenia support the traditional family model, while Latvia supports the employment of women by facilitating services for the care of children paid by households rather than focus on parental leave. Understanding whether there is a chance to gain recognition in the exercise of the right to leave is necessary to investigate whether the rules are legally binding or non-legally binding instruments (coming from European institutions and bodies) of protection of LGBTI people and part of stable LGBTI family units. Standards and acts which express the need to adopt, by the Member States, legislation that protects from discriminatory conduct based on sexual orientation[14] at work.

[13] Parliament adopted on 16 March 2000 a resolution urging the EU nation to grant same-sex couples a substantial and formal equality with traditional couples. Please note though that recommendation, contained in a report on human rights, is not binding.

[14] See art. No.8 of the European Convention on human rights and fundamental freedoms (CEDU/ECHR), which brings the case-law of the ECHR in case of infringement cases in which the

Article No. 13 of the Treaty establishing the European Community, as amended, gives the Council of Ministers, on a proposal from the Commission and after consulting the European Parliament, the ability to take appropriate action to combat all forms of discrimination, including those based on sex and sexual orientation. The Charter of Nice of 2000 introduces a prohibition against discrimination on the basis of sexual orientation, taken from Art. No. 21 of the European Charter of fundamental rights in 2003, and the right of same-sex couples to the recognition and equality in comparison to traditional ones. This forecast seems to be willing to establish a uniform regulation of filiation relationships. The need to protect the full equality of the components of stable LGBTI family units compared to traditional household components has been repeatedly reaffirmed by the European Parliament through the adoption of numerous Resolutions[15] aimed at recognizing and establishing civil Union contracts by suppressing discrimination suffered by homosexuals in matters of tax law, civil rights, labour law, insurance law, and matrimonial property regimes. An important role is recognized by the European Parliament's Recommendations, which include those of 16th March 2000, which calls on European countries to ensure that same-sex couples have equal rights with respect to traditional couples and families, and of January 2006, which sought to ensure that persons are protected from violence as well as LGBTI and homophobic hate. Among the binding acts, a major importance at Community level should be attributed to Directive 2000/43/EC of 29th June 2000 which implements the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation, prohibiting the direct or indirect discrimination based on sexual orientation. Unfortunately such acts that involve and require the elimination of discrimination on grounds of sexual orientation are a limit to the possibility of obtaining the recognition of the rights related to motherhood and fatherhood in view of the lack of legal constraint that must bind the child's biological or adoptive parent's partner to another partner living together in the LGBTI family unit.

All the acts, both directives as well as recommendations, calling for equal rights between traditional and non-traditional families, foresee a long process for their implementation[16]. Notwithstanding specific references in the Treaty Establishing the

guidelines are in relief or sexual identity of applicants, in particular in the case of respect for his private and family life rather than a reference to article No.14 relating to the prohibition on States to carry out discrimination of individuals in the enjoyment of rights and freedoms.

[15] Remember: resolutions of 8 February 1994 "*On equal rights for homosexuals in the community*"; of 17 September 1996 "*on respect for human rights in the European Community*".

[16] See the report of 17 January 2003 of the European Parliament calls on Member States to recognize the same rights to all cohabitating couples, including homosexuals. The final vote resulted in a non-binding nature for the Member States to adopt the proposal, but is still a legal reference

European Union to banning discrimination based on sexual orientation, some European States still refuse to recognize not only the opportunity to celebrate civil marriages but also those celebrated in another European State.

Given the difficulty of finding in the short term an effective solution to enable the stable core component LGBTI tied to the biological or adoptive parent by a Union to take care of the child (Union not legally recognized by domestic law, even in cases of family reunification or of free movement and residence or settlement[17]), it is necessary to establish a new approach to the problem.

2. The right of the care of the child and the right to maternity, paternity and parental leave

2.1. From the attempt to eliminate gender discrimination to the detection of the holder of the right to maternity, paternity and parental leave

The efforts to eliminate discrimination based on both gender and sexual orientation undertaken so far by the Community legislature have proved to be scarcely effective in ensuring parents-components of stable LGBTI family units the possibility of exercising their rights to use maternity, paternity and parental leave. The results emerged by comparing experiences in countries where there is a large and full recognition of nontraditional households to those States which do not recognize the parental role, not even to people who are not biological or adoptive parents but part of a family and therefore core components of a stable unit, highlight a notable difference among the European States. This difference cannot be overcome by simply pursuing a "classical" anti-discrimination policy, also by virtue of the fact that the Europe Strategy 2020 shows a marked setback of the priorities pursued in previous strategic guidelines. In fact, equality and gender mainstreaming do not appear in the integrated guidelines of the strategic policy of Europe 2020[18] and it is foreseen that

point. Also on 11 February 2003 the European Parliament was back on the subject, asking for the recognition of the rights for those who contracted marriage, the legalization of *de facto* unions between same-sex couples (recognition of a Union without there being a civil wedding). The process of adaptation of domestic legislation of individual States in Europe will be long, because the marriage between persons of the opposite sex is recognized throughout the European Union and the same sex is not recognized in all European countries.

[17] Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the territory of the Member States, has been the subject of December 2005, a critical report adopted by the European Commission that assessed negatively the laws of the Member States to improve administrative practices in order to avoid harm to the rights of EU citizens. Member States should comply with the directive by the deadline of 30 April 2006. Currently only Cyprus, Greece, Finland, Portugal, Malta, Luxembourg and Spain have adopted the provisions of the directive correctly.

[18] See CEC (2010°), "Communication from the Commission, Europe 2020. A strategy for smart, sustainable and inclusive growth". COM (2010) 2020. In <http://ec.europa.eu/eu2020/pdf/

their impact will be less significant in future policy Europe 2030. It is also for this reason that the Parliamentary Assembly of the Council of Europe (PACE) adopted on the 29th April 2010 a resolution on discrimination based on sexual orientation and gender identity. A few weeks earlier, on the 31st of March 2010, the Committee of Ministers of the Council of Europe unanimously adopted a Recommendation aimed at combating discrimination based on sexual orientation or gender identity. Its main points range over several violations including, for the purpose of this study, those involving the complete denial of LGBTI families' rights, requiring Member States to tackle this issue through the legal recognition of these families. Unfortunately, the resolution does not prescribe States that do not have legislation which recognizes LGBTI families to introduce one, but just to eliminate any barrier that discriminates against non-traditional families. Another point relates to parents and the ability to secure a shared responsibility between the partners, whether they are part of a traditional family or of a stable LGBTI family unit. The result should ensure the protection of the interests of children. This premise generates the alternative idea about who should be the subject entitled to maternity, paternity and parental leave. To further discuss this idea, we must shift the debate from discrimination based on sexual orientation and gender identity to parental responsibility. The Charter of the rights of the child[19] therefore becomes the instrument through which we can begin to assert that it is necessary to start discussing the parents' responsibility. The Convention stipulates that all parents and responsible adults must know the document (the Charter of the rights of the child) in order to ensure that children are not only objects of protection but subjects of law. It is useful to recall some of the passages in the Charter: *"the State must ensure the necessary care for the child's well-being"; "States must respect the people who look after the child"; "Member States must help the child grow"; "The child has the right to remain with its family"; "The child has the right to go to any State to join its parents"; "Parents or legal guardians must care for the upbringing and development of the child. The State must help them by making their task easier "; "The State must assist the child who cannot be with its family by entrusting him/her to somebody else"; "Member States must permit the adoption in the interest of the child. The adoption must be authorized by the authorities with the consent of the child's relatives. If the adoption cannot take place in the child's original country, it can be done in another State".* These statements stimulate a further reflection which leads to the conclusion that the child should in effect be considered

COMPLET%20en%20BARROSO%20%20%20007%20-%20Europe%202020%20-%EN%20version.pdf>; e CEC (2010b), "Europe 2020. Integrated Guidelines for the economic and employment policy", European Communities, Brussels. In <http://ec.europa.eu/eu2020/pdf/Brochure%20Integrated%20Guidelines.pdf>.

[19] The Convention on the rights of childhood and adolescence has been approved by the Assembly of the United Nations in New York on 20 November 1989 and was ratified by Italy and made enforceable on May 27, 1991 through the approval of law No. 176

a citizen[20] and as such entitled to legal rights. A brief analysis of the Italian Constitution allows the different provisions for the protection of the rights of the child (see articles 30, 31 and 34 of the Italian Constitution) to be translated into the rules of family law. We must, however, take an additional step: the concept of parental responsibility should be replaced by the community concept of "responsibility" attributed to those who actually take care of the child and therefore give recognition to the cohabitant of the (biological or adoptive) father or mother those rights that would otherwise not be exercisable. In theory, non-attribution of maternity, paternity and parental leave involves a double discriminatory violation. On the one hand, it is discrimination based on sexual orientation and gender identity, and on the other it is discrimination against the child, who is not guaranteed the protection required for its well-being. In a regulatory environment considered as a whole (both community and national), the legal solution is not simple, even if the Italian law could provide an example in the figure of the guardian (governed by article No. 357 of the civil code). The guardian is the person who is entrusted with the care of the minor, represents the child in all civil acts and administers its assets. If this definition also included the responsibility to deal with the actual care of the child, its growth and its well-being, besides its economic interests, it could possibly streamline the development and subsequent implementation of the community's process which aims to recognize the validity of non-traditional families. In conclusion, it seems necessary to locate a legal provision that will easily and directly allow people (who have the parental role for to all intents and purposes) to take care of the child. These people will then be able to properly love, look after and take care of the child, thus contributing to its growth and the productive development of our society. Recognizing the right of the child to have a proper care regime, independent of its parents' gender or the adults looking after him/her, it will automatically lead to the recognition of the right of the stable core component of the LGBTI unit (including the partner of the biological or adoptive parent) to take maternity, paternity or parental leave from work. The child must be considered as a subject of law and not only the object of the parent's right to take absence from work.

[20] For an examination of rights, citizenship and minority see Luigi Fadiga, '*Il bambino è un cittadino: minore età e diritti di cittadinanza*', in *Le Istituzioni del Federalismo* (Supplemento n. 3, Maggioli 2008).

Les droits successoraux des couples homosexuels en Europe : étude comparative

Anne-Laure Nachbaum-Schneider

Résumé

Les droits successoraux des couples homosexuels en Europe sont extrêmement variés, montrant ainsi qu'il existe, dans certains pays, des discriminations entre couples hétérosexuels et couples homosexuels.

Dans de nombreux pays d'Europe, l'époux ou le partenaire enregistré homosexuel bénéficie des mêmes droits légaux, dans la succession de son conjoint ou partenaire décédé, que les époux hétérosexuels. Il s'agit des pays ayant ouvert le mariage aux couples de même sexe ou ayant créé un partenariat enregistré de type institutionnel.

Dans d'autres pays d'Europe, le partenaire enregistré ou le concubin homosexuels ne bénéficient d'aucuns droits successoraux légaux. Les concubins ou partenaires doivent alors rédiger un testament l'un en faveur de l'autre, afin de transmettre leur patrimoine au survivant d'entre eux. Cependant, ce testament se heurtera au décès à la réserve des descendants et dans certains pays à la réserve des ascendants. Il s'agit des pays ayant institué des partenariats de type contractuel ou ne reconnaissant pas du tout le couple homosexuel.

Abstract

Inheritance rights of gay couples in Europe are extremely diverse, showing that there is, in some countries, discrimination between heterosexual and homosexual couples.

In many European countries, the spouse or the registered gay partner enjoys the same legally protected rights in the succession to the assets of his deceased spouse or partner as heterosexual spouses. These are the countries that have opened marriage to same-sex couples or have created registered partnerships on an institutional level.

In other European countries, homosexual registered partners and cohabitants enjoy no legally protected rights of inheritance. There, cohabitants or partners must write a will for one another to transfer their wealth to the survivor of them. However, at death, this testament will face the forced heirship of the descendants and in some countries the forced heirship of the ascendants. These are the countries that have established partnerships based on a contract and the countries where gay couples are not legal recognized at all.

* * *

L'examen des droits successoraux des couples homosexuels, dans les différentes législations européennes permet de mettre au jour les discriminations entre couples hétérosexuels et couples homosexuels.

Le couple est l'union formée par deux personnes entre lesquelles existent des relations charnelles et en général une communauté de vie. Ces personnes peuvent être mariées, dans les liens d'un partenariat enregistré, ou vivre hors mariage[1].

Avant les années soixante-dix, les couples homosexuels ne bénéficiaient d'aucune forme de reconnaissance légale. Puis, de nombreux pays européens ont pris en compte la cohabitation de ces couples et leurs ont progressivement reconnu des droits, grâce au partenariat enregistré. Ce partenariat enregistré est un acte d'enregistrement formel dont il résulte un certain nombre de droits et d'obligations légaux[2]. Selon les pays, ces partenariats enregistrés sont plus ou moins similaires au mariage. Ils sont ouverts soit aux couples hétérosexuels et homosexuels soit réservés aux couples homosexuels[3].

Par la suite, la reconnaissance des couples homosexuels a connu une avancée significative dans les années 2000. Depuis 2001, sept pays d'Europe ont modifié leur législation pour autoriser le mariage entre deux personnes de même sexe.

Le mariage et le partenariat enregistré ont dans certains pays entraîné l'octroi de droits successoraux légaux entre leurs membres, tandis qu'auparavant, seule la succession testamentaire leur permettait de transmettre leur patrimoine à leur concubin de même sexe.

Il est important de rappeler la différence entre ces deux successions qui coexistent dans chaque pays d'Europe. La succession légale ou *ab intestat* est la transmission du patrimoine du défunt aux successibles prévus par la loi. La succession légale est réglée par la loi et le patrimoine du défunt est transmis directement aux personnes que la loi désigne comme héritières. La succession légale a plusieurs fondements, variables selon les législations. Ainsi, ces personnes peuvent être celles pour lesquelles le défunt est présumé avoir eu le plus d'affection. Ou encore, la succession légale peut vouloir sauvegarder les droits de la famille. Dans toutes les législations européennes, le premier ordre d'héritier est constitué des descendants du défunt. En règle générale, le conjoint survivant fait également partie de cet ordre d'héritier ou vient en concours avec les descendants.

A l'inverse, la succession testamentaire est la dévolution choisie par le défunt dans son testament. Le patrimoine est attribué selon la volonté du défunt aux personnes qu'il aura nommées héritières dans son testament. Le défunt peut décider d'avantager ou de désavantager certains héritiers, ou de transmettre son patrimoine à un tiers. Néanmoins, la succession testamentaire n'est pas libre dans la grande majorité des pays d'Europe. Les règles de la réserve héréditaire limitent la liberté testamentaire et imposent au défunt de laisser une quote-part de son patrimoine à certains successibles.

[1] Définition adaptée de M. Gérard Cornu dont la vision du couple est traditionnelle puisque composé d'un homme et d'une femme, Gérard Cornu (dir.), Association Henri Capitant, *Vocabulaire juridique* (8ème éd. P.U.F. coll. Quadrige, 2009).

[2] Kees Waaldijk, Eric Fassin, *Droit conjugal et union de même sexe - Mariage, partenariat et concubinage dans neuf pays européens* (édition PUF, 2008) 16.

[3] Kees Waaldijk, Eric Fassin, *Droit conjugal et union de même sexe - Mariage, partenariat et concubinage dans neuf pays européens* (édition PUF, 2008) 10.

Les droits successoraux dans les couples homosexuels sont très variables d'un pays d'Europe à un autre. Nous allons tout d'abord nous intéresser à la succession *ab intestat* ou légale afin de vérifier si la loi prévoit des droits successoraux en faveur du survivant des membres du couple. Si le survivant ne bénéficie d'aucuns droits successoraux légaux dans la succession de son aimé, nous nous pencherons sur la succession testamentaire en nous demandant dans quelle mesure les membres du couple peuvent rédiger un testament en faveur l'un de l'autre et de quelle manière la loi restreint leur capacité de disposer.

Deux groupes de pays se détachent dans cette étude. Tout d'abord, certains pays européens réservent les mêmes droits successoraux légaux aux couples homosexuels qu'aux époux hétérosexuels, grâce au mariage et au partenariat enregistré. Tandis qu'il existe encore des pays dans lesquels les couples homosexuels ne bénéficient d'aucuns droits successoraux légaux ou de droits restreints. Nous analyserons alors la législation interne de ces pays pour déterminer quelle quotité du patrimoine peut être transmise par testament.

1. Les pays européens réservant les mêmes droits successoraux légaux aux couples homosexuels et hétérosexuels

Dans certains pays d'Europe, le conjoint ou partenaire survivant homosexuel bénéficie des mêmes droits successoraux légaux que le conjoint survivant hétérosexuel. C'est notamment le cas dans les pays autorisant le mariage homosexuel. Mais pas seulement. En effet, dans d'autres pays, le partenariat enregistré a été créé pour donner aux partenaires le statut du mariage avec ses droits et ses obligations, notamment en matière successorale, sans toutefois leur accorder le droit au mariage[4].

1.1. Les droits successoraux légaux découlant du mariage homosexuel

Le mariage homosexuel existe dans sept pays européens : les Pays-Bas[5], la Belgique[6], l'Espagne[7], la Norvège[8], la Suède[9], le Portugal[10] et l'Islande[11]. Ces pays ont, en règle

[4] Frédérique Granet-Lambrechts, 'Les législations européennes relatives à l'enregistrement des couples hors-mariage' [2005] Droit de la famille, étude 2.

[5] Loi du 21 décembre 2000.

[6] Loi du 13 février 2003.

[7] La loi 13/2005 du 1er juillet 2005 modifie le Code civil sur les conditions du mariage et fait disparaître la condition de différence de sexe comme condition du mariage. L'article 44 du Code civil espagnol déclare dans son 1er alinéa que « *l'homme et la femme ont le droit de contracter mariage* » et l'alinéa suivant : « *le mariage sera soumis aux mêmes conditions et mêmes effets, que les époux soient de même sexe ou qu'ils soient de sexe différent* » in Béatrice Jaluzot, 'Le mariage entre personnes de même sexe - Etude pour la Cour de cassation' (2008) *RIDC*, pages 418-431.

[8] Loi du 27 juin 2008.

[9] Loi d'avril 2009.

[10] Loi du 1er mars 2010.

[11] Loi du 26 juin 2010.

générale, simplement supprimé la mention du sexe dans l'article de leur Code civil traitant du mariage. Ainsi, les droits civils découlant du mariage s'appliquent indifféremment à tous les époux, quel que soit leur sexe.

Les époux homosexuels ont ainsi strictement les mêmes droits en matière successorale *ab intestat* que les époux hétérosexuels.

Ces droits dépendent des héritiers en concours dans la succession. Le conjoint survivant peut ainsi venir en concours avec un enfant ou descendant commun[12], un enfant ou descendant du défunt ou des ascendants du défunt.

Ainsi, au Portugal, la succession du défunt est dévolue à parts égales entre le conjoint et les descendants du défunt. Néanmoins, le conjoint reçoit toujours au minimum un quart de la succession, les trois quarts restants sont divisés entre les descendants du défunt[13].

En Belgique, le conjoint survivant se voit attribuer toute la succession en usufruit s'il vient en concours avec des descendants du défunt. A défaut de descendants et en présence d'autres successibles, il recueille la pleine propriété de la part de communauté du défunt et l'usufruit de ses biens propres ainsi que le droit au bail de l'immeuble commun et l'usufruit des biens faisant l'objet d'un droit de retour[14] légal[15].

Aux Pays-Bas, la succession est dévolue à parts égales entre le conjoint et les enfants du défunt. Néanmoins, le conjoint reçoit tous les actifs de la succession. Les enfants ont droit à une certaine somme d'argent représentant leur part successorale

[12] L'adoption conjointe et/ou l'insémination artificielle pour les époux de même sexe est possible dans plusieurs pays d'Europe, notamment la Suède, l'Espagne, la Belgique, l'Islande, les Pays-Bas, la Norvège et la Suède. Seul le Portugal ne permet ni l'adoption par le second parent, ni l'insémination artificielle avec donneur.

[13] 'Droit des successions au Portugal : Qui hérite et de combien en cas d'absence de testament' (*Successions en Europe - Le droit des successions de 27 pays européens*, 27 avril 2010) <http://www.successions-europe.eu/fr/portugal/topics/in-the-absence-of-a-will_who-inherits-and-how-much/> accès le 19 avril 2011.

[14] Le droit de retour est « *un droit en vertu duquel une chose échappe au aux règles successorales ordinaires pour revenir à la personne de qui le de cujus la tenait, ou parfois aux descendants de cette personne* » Gérard Cornu (dir.), Association Henri Capitant, *Vocabulaire juridique* (8ème éd. P.U.F. coll. Quadrige, 2009).

[15] Article 745 bis du Code civil belge: *« Lorsque le défunt laisse des descendants, des enfants adoptifs ou des descendants de ceux-ci, le conjoint survivant recueille l'usufruit de toute la succession.*
Lorsque le défunt laisse d'autres successibles, le conjoint survivant recueille la pleine propriété de la part du prémourant dans le patrimoine commun et l'usufruit du patrimoine propre du défunt.
Lorsque le défunt ne laisse aucun successble, le conjoint survivant recueille la pleine propriété de toute la succession.
§2. le conjoint survivant a en outre l'usufruit des biens soumis au droit de retour légal, prévu aux articles 366, §1 et 2, 747 et 766, à mois qu'il n'en ait été décidé autrement dans l'acte de donation ou dans le testament.
§3. le conjoint survivant recueille seul, à l'exclusion de tous les autres héritiers, le droit au bail relatif à l'immeuble affecté à la résidence commune au moment de l'ouverture de la succession ».

mais elle ne peut leur être délivrée qu'en cas de faillite de l'époux, de règlement de ses dettes personnelles, ou à son décès[16]. Si le défunt n'a pas d'enfant, la loi prévoit que la succession soit entièrement attribuée au conjoint survivant[17].

En Suède, le conjoint survivant, en concours avec les enfants communs[18], recueille la totalité de la succession comme héritier grevé, tandis que les enfants sont héritiers subséquents[19]. S'il existe un enfant d'un autre lit, l'enfant hérite de la totalité de sa part. S'il n'y a que des enfants d'un autre lit, les enfants héritent de tout et le conjoint ne recueille rien. Néanmoins, le conjoint a droit à une certaine somme indexée chaque année qui correspond pour l'année 2011 à 18770 €. Il peut exiger d'avoir un patrimoine égal à cette somme. Pour calculer ce patrimoine, on déduit ses biens propres. Le reliquat est prelevé en priorité sur la succession[20]. S'il n'y a pas de descendants, le conjoint se voit attribuer la totalité de la succession[21].

Ainsi, dans ces pays, les époux homosexuels et hétérosexuels bénéficient d'une égalité parfaite en matière successorale. Il en est de même dans les pays ayant institué un partenariat de type institutionnel.

1.2. Les droits successoraux légaux découlant du partenariat enregistré institutionnel

Certains pays d'Europe n'ont pas souhaité modifier la condition de sexe différent dans le mariage, tout en reconnaissant la réalité des couples homosexuels. Ils ont alors créé des partenariats enregistrés de type institutionnel. Ces partenariats ont pour but de suppléer à l'interdit du mariage entre personnes du même sexe. Ils offrent un cadre institutionnel à leur couple, une sorte de quasi-mariage puisque ce partenariat a, à peu de chose près, les mêmes conséquences que le mariage.

En matière successorale, le partenariat enregistré prévoit des conséquences identiques à celles du mariage ou au moins équivalentes. Ainsi, les partenaires ont les mêmes droits successoraux légaux ou *ab intestat* que les époux. En outre, les règles fiscales s'imposant aux époux s'appliquent également aux partenaires. Le partenaire enregistré paie donc le même montant d'impôt sur les successions que l'époux, sur la part de succession qui lui revient *ab intestat.*

Ce type de partenariat enregistré existe notamment en Allemagne[22], en Autriche[23],

[16] Article 4:13 du Code civil néerlandais.
[17] Article 4:10 du Code civil néerlandais.
[18] L'adoption conjointe et l'insémination artificielle sont ouvertes aux couples homosexuels. Le conjoint qui a consenti à l'adoption ou à l'insémination sera reconnu comme parent de l'enfant.
[19] Article ÄB 3 kap §1.
[20] ÄB 4kap §1.
[21] Le conjoint sera héritier subséquent, tandis que les ascendants et leurs descendants seront héritiers grevés.
[22] Loi du 16 février 2001 relative au Lebenspartner-Schaftgesetz entrée en vigueur le 1er août 2001.
[23] Loi du 30 décembre 2009.

au Danemark[24], en Suisse[25], en Hongrie[26], en Irlande[27], au Royaume-Uni[28], en République Tchèque[29] et en Slovénie[30].

De manière étonnante, ce partenariat enregistré institutionnel existe toujours en Finlande[31], en Islande[32], en Norvège[33] et aux Pays-Bas[34] tandis qu'en Suède, il n'est plus permis d'en contracter un depuis la promulgation de la loi permettant le mariage homosexuel.

Ainsi en Allemagne, la loi relative au partenariat enregistré précise que les partenaires sont assimilés aux conjoints en matière de droits successoraux[35]. Les règles successorales *ab intestat* prévoient qu'en présence de descendants, le partenaire reçoit un quart de la succession. En l'absence de descendants et en présence d'ascendants ou de leurs enfants, le partenaire recueille la moitié de la succession[36]. En outre, si les partenaires ont adopté le régime légal du partenariat enregistré[37] équivalent au régime matrimonial légal de la participation aux acquêts, cette part est augmentée d'un quart[38]. Le partenaire a également droit, par préciput, aux objets mobiliers ainsi qu'aux cadeaux offerts à l'occasion de la célébration du partenariat. Néanmoins, s'il vient en concours avec les descendants, les objets mobiliers sont limités à ceux, nécessaires à la conduite du ménage[39]. Enfin,

[24] Lov om registered partnerskab (lov. nr. 372 af 7/ 6 / 1989, promulgué nr 938 du 10/10/2005).
[25] La loi sur le partenariat enregistré suisse, le Lpart, est entrée en vigueur le 1er janvier 2007.
[26] 2009. évi XXIX. törveny a bejegyzett élettársi kapcsolatról, az ezzel összefüggő, valamint az élettársi viszony igazolásának megkönnyítéséhez szükséges egyes törvények módosításáról (en vigueur depuis le 1er juillet 2009).
[27] Civil Partnership and Certain Rights and Obligations of Cohabitants Bill 2009 du 26 juin 2009.
[28] Civil Partnerships Act 2004 du 18 novembre 2004.
[29] Loi du 26 janvier 2006.
[30] Zakon o registraciji istospolne partnerske skupnosti (Ur.l. RS, št. 65/2005).
[31] Laki rekisteröidystä parisuhteesta» 9.11.2001/950.
[32] loi du 4 juin 1996 entrée en vigueur le 27 juin 1996.
[33] Loi du 30 avril 1993 entrée en vigueur le 1er août 1995.
[34] Loi instituant le partenariat: loi du 5 juillet 1997 entrée en vigueur le 1er janvier 1998.
[35] Frédérique Granet-Lambrechts, 'Les législations européennes relatives à l'enregistrement des couples hors-mariage' [2005] Droit de la famille, étude 2.
[36] § 1931 BGB : « *Der überlebende Ehegatte des Erblassers ist neben Verwandten der ersten Ordnung zu einem Viertel, neben Verwandten der zweiten Ordnung odenr neben Grosseltern zur Hälfte der Erbschaft als gezetzlicher Erbe berufen. Treffen mit Grosseltern Abkömmlinge von Grosseltern zusammen, so erhält der Ehegatte auch von der anderen Hälfte den Anteil, der nach §1926 den Abkömmlingen zuffallen würde* ».
[37] Ausgleichsgemeinschaft.
[38] § 1371 alinéa 1er du BGB : « *Wird der Güterstand durch den Tod eines Ehegatten beendet, so wird der Ausgleich des Zugewinns dadurch verwirklicht, dass sich der gesetzliche Erbteil des überlebenden Ehegatten um ein Viertel der Erbschaft erhöht ; hierbei ist unerheblich, ob die Ehegatten im einzelnen Falle einen Zugewinn erzielt haben* ».
[39] § 1932 du BGB : « *Ist der überlebende Ehegatte neben Verwandten der zweiten Ordnung oder neben Großeltern gesetzlicher Erbe, so gebühren ihm außer dem Erbteil die zum ehelichen Haushalt gehörenden Gegenstände, soweit sie nicht Zubehör eines Grundstücks sind, und die Hochzeitsge-*

le partenaire survivant pourra prétendre à la continuation du bail portant sur le logement commun[40].

L'Autriche offre également les mêmes droits successoraux aux époux qu'aux partenaires[41]. Le partenaire recueille ainsi, en présence de descendants du défunt, le tiers de la succession. En l'absence de descendants et en présence d'ascendants et de frères et sœurs du défunt, il recueille les deux tiers de la succession[42]. Le partenaire bénéficie également, dans tous les cas, d'un droit de préciput légal portant sur le droit d'habitation du domicile conjugal ou les biens meubles faisant partie du ménage[43].

Au Royaume-Uni, le Civil partnership Bill assimile le partenaire à l'époux survivant. Ainsi, en Angleterre et au Pays de Galles, le partenaire recueille tous les biens mobiliers du défunt ainsi qu'un héritage prévu par la loi d'au maximum 250 000 Livres. Le reliquat est détenu en trust au bénéfice du partenaire survivant, de son vivant.

En l'absence d'enfant mais en présence d'un autre successible, le partenaire reçoit tous les biens mobiliers, un héritage de 450 000 livres ainsi que la moitié du reliquat, détenu en trust, à son profit.

En Ecosse, il est attribué au partenaire du défunt, le domicile conjugal dans la limite d'une valeur de 300 000 livres, les meubles meublants le domicile conjugal dans la limite de 24 000 livres, une somme fixe de 42 000 livres ainsi qu'un tiers des biens mobiliers du défunt. En l'absence d'enfant, et en présence d'un parent ou frère et sœur ou leurs descendants, le partenaire rajoute au domicile conjugal et meubles meublants ce domicile, dans les limites précitées, la somme de 75 000 livres et la moitié des biens mobiliers.

En Irlande du Nord, le conjoint survivant reçoit les biens meubles, 250 000 livres et la moitié du reliquat si le défunt a un enfant ou le tiers s'il a plusieurs enfants. En

schenke als Voraus. Ist der überlebende Ehegatte neben Verwandten der ersten Ordnung gesetzlicher Erbe, so gebühren ihm diese Gegenstände, soweit er sie zur Führung eines angemessenen Haushalts benötigt ».

[40] Article 563 du BGB : « *Der Ehegatte, der mit dem Mieter einen gemeinsamen Haushalt führt, tritt mit dem Tod des Mieters in das Mietverhältnis ein. Dasselbe gilt für den Lebenspartner* ».

[41] § 537a ABGB: *« Die für Ehegatten maßgebenden und auf das Eherecht Bezug nehmenden Bestimmungen dieses Hauptstücks sowie des Neunten bis Fünfzehnten Hauptstücks sind auf eingetragene Partner und eingetragene Partnerschaften sinngemäß anzuwenden* ».

[42] Article 757 ABGB : « *Der Ehegatte des Erblassers ist neben Kindern des Erblassers und deren Nachkommen zu einem Drittel des Nachlasses, neben Eltern und Geschwistern des Erblassers oder neben Großeltern zu zwei Dritteln des Nachlasses gesetzlicher Erbe. Sind neben Großeltern Nachkommen verstorbener Großeltern vorhanden, so erhält überdies der Ehegatte von dem restlichen Drittel des Nachlasses den Teil, der den Nachkommen der verstorbenen Großeltern zufallen würde. Gleiches gilt für jene Erbteile, die den Nachkommen verstorbener Geschwister zufallen würden. In den übrigen Fällen erhält der Ehegatte den ganzen Nachlass* ».

[43] Article 758 ABGB : « *Sofern der Ehegatte nicht rechtmäßig enterbt worden ist, gebühren ihm als gesetzliches Vorausvermächtnis das Recht, in der Ehewohnung weiter zu wohnen, und die zum ehelichen Haushalt gehörenden beweglichen Sachen, soweit sie zu dessen Fortführung entsprechend den bisherigen Lebensverhältnissen erforderlich sind* ».

l'absence d'enfant, et en présence d'un parent ou frère et sœur ou leurs descendants, le partenaire reçoit les biens meubles et 450 000 livres[44].

En Suisse, tout comme l'époux, le partenaire survivant a droit à la moitié de la succession s'il vient en concours avec les descendants, aux trois-quarts s'il vient en concours avec les ascendants et à la totalité à défaut de descendants ou d'ascendants[45].

En Espagne, de par la régionalisation de l'Etat espagnol, il existe plusieurs législations sur les partenariats enregistrés. En effet, chaque communauté autonome a légiféré sur le sujet et les partenariats sont très divers. La Navarre, le Pays Basque et la Catalogne ont mis en place un partenariat de type institutionnel dans lequel les partenaires bénéficient des mêmes droits successoraux *ab intestat* que les époux. Ces droits varient en fonction des législations des communautés autonomes[46].

Les pays dont nous venons d'étudier les législations offrent, en matière successorale, une parfaite égalité entre couples homosexuels et hétérosexuels. Il n'en est pas de même dans toute l'Europe.

2. Les pays déniant la reconnaissance de droits successoraux légaux aux membres du couple homosexuel

Il existe encore des pays en Europe, dans lesquels les couples homosexuels ne bénéficient d'aucuns droits successoraux *ab intestat.* Soit parce que le partenariat enregistré ne prévoit pas de droits légaux en matière successorale. Ou alors parce qu'il n'y existe pas de partenariat enregistré.

Dans ces pays, seule la succession testamentaire permet aux couples homosexuels de se transmettre une partie de leur succession.

2.1. L'absence de droits successoraux légaux découlant du partenariat enregistré contractuel

Dans ces pays, le partenariat n'est pas de type institutionnel mais contractuel. Les partenaires doivent rédiger une convention portant sur leurs relations pécuniaires, lors de la conclusion du partenariat. Mais, sont toujours exclus de cette convention les conséquences en matière successorale, qui ne peuvent être réglées que par la loi.

[44] 'Successions au Royaume-Uni : qui hérite et de combien en cas de testament' (*Successions en Europe - Le droit des successions de 27 pays européens,* 23 avril 2010) <http://www.successions-europe.eu/fr/united-kingdom/topics/in-the-absence-of-a-will_who-inherits-and-how-much> accès le 19 avril 2011.

[45] Article 462 du Code civil suisse : « *Le conjoint ou le partenaire enregistré survivant a droit : 1. en concours avec les descendants, à la moitié de la succession ; 2. en concours avec le père, la mère ou leur postérité aux trois-quarts ; 3. à défaut du père, de la mère ou de leur postérité, à la succession toute entière* ».

[46] Frédérique Granet-Lambrechts, 'Les législations européennes relatives à l'enregistrement des couples hors-mariage' [2005] Droit de la famille, étude 2.

Or, la loi de ces pays ne prévoit, en règle générale, aucuns droits successoraux légaux, ou alors, parfois, des droits très restreints. Les partenaires seront ainsi dans la même situation que des concubins lors de la succession de l'un d'eux.

Ces couples trouveront leur salut dans la succession testamentaire. Ils doivent veiller à rédiger un testament en faveur de leur partenaire afin de se laisser leur patrimoine. Mais la succession testamentaire est toujours, dans ces pays, limitée par la réserve héréditaire réservée à certains héritiers. Seule la quotité disponible peut être transmise à la personne de son choix.

C'est notamment le cas en France[47], au Luxembourg[48], en Croatie[49] et en Hongrie[50]. Un partenariat de type contractuel existe également en Belgique[51] et au Portugal[52].

Ainsi, en France, la loi sur le pacte civil de solidarité ne prévoit pas de droits successoraux *ab intestat*. Le partenaire survivant bénéficie uniquement de la jouissance gratuite pendant une année du logement qu'il occupe au moment du décès à titre d'habitation principale et appartenant au couple ou dépendant de la succession du défunt, ainsi que du mobilier garnissant ce logement. Si le logement est assuré au moyen d'un bail à loyer, la succession doit lui rembourser les loyers pendant un an[53].

La succession testamentaire, quant à elle, est limitée par la réserve héréditaire. Celle-ci varie en fonction des héritiers présents et du nombre d'enfant. Si le partenaire défunt a des descendants, la quotité disponible sera limitée à la moitié de la succession lorsque le défunt a un enfant, un tiers, s'il en a deux et un quart s'il en a trois ou plus[54]. En revanche, en l'absence de descendant, les partenaires sont libres de se transmettre tout leur patrimoine. Ces règles s'appliquent également aux concubins. Le partenariat offre un avantage, celui de se voir appliquer les règles fiscales en matière de succession entre époux. Ainsi le partenaire sera exonéré de droits de succession sur la part qu'il reçoit de son partenaire, tandis que le concubin survivant se verra prélever une taxe de 60%[55] de la valeur de la succession recueillie.

Le Luxembourg ne prévoit aucuns droits successoraux légaux entre partenaires

[47] Loi n° 99-944 du 15 novembre 1999 relative au pacte civil de solidarité.

[48] Loi du 6 août 2004 relative aux effets légaux de certains partenariats.

[49] Zakon o istospolnim zajednicama, Narodne Novine Nr. 166/2003. Ce partenariat est réservé aux homosexuels.

[50] Entré en vigueur le 1er juillet 2009.

[51] Loi du 23 novembre 1998 sur la cohabitation légale entrée en vigueur le 1er janvier 2000 (article 1475 à 1479 CC.).

[52] União de Facto, Loi 7/2001», du 11.5.01.

[53] Article 515-6 du Code civil français : « *Lorsque le pacte civil de solidarité prend fin par le décès d'un des partenaires, le survivant peut se prévaloir des dispositions des deux premiers alinéas de l'article 763* ».

[54] Article 913 du Code civil français : « *Les libéralités, soit par actes entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant ; le tiers, s'il laisse deux enfants ; le quart, s'il en laisse trois ou un plus grand nombre* ».

[55] Article 777 du Code général des impôts.

enregistrés. En revanche, l'article 11 de la loi dispose que les partenaires sont libres de se gratifier par acte entre vifs ou testamentaire mais dans les limites des dispositions du titre II du livre 3ème du Code civil, soit de la réserve héréditaire. La quotité disponible est de la moitié des biens du disposant s'il laisse un enfant, le tiers s'il en laisse deux et le quart s'il en laisse trois ou plus. A défaut de descendant, le partenaire ou concubin est libre de transmettre tout son patrimoine à la personne de son choix.

En Belgique la loi sur la cohabitation légale interdit de contrevenir à l'ordre légal des successions *ab intestat* dans la convention. Mais le cohabitant survivant recueille tout de même l'usufruit de l'immeuble affecté durant la vie commune à la résidence de la famille, ainsi que des meubles qui le garnissent[56]. Si le logement est loué au moyen d'un bail, le cohabitant survivant recueille le droit au bail de l'immeuble affecté à la résidence de la famille à l'ouverture de la succession ainsi que l'usufruit des meubles garnissant le logement.

La Belgique, le Portugal et certaines communautés autonomes d'Espagne offrent ainsi trois niveaux de conjugalité, le concubinage, le partenariat enregistré de type contractuel et le mariage, avec des effets croissants. Les couples, homosexuels ou hétérosexuels ont ainsi un véritable choix, sans discrimination aucune.

En revanche, les pays ayant institué un partenariat de type contractuel sont minoritaires en Europe. En matière successorale, ils sont proches des pays dans lesquels il n'existe aucune reconnaissance du couple homosexuel.

2.2. L'absence totale de reconnaissance du couple homosexuel

Il existe encore des pays européens dans lesquels les partenariats enregistrés n'existent pas ou sont réservés aux hétérosexuels. C'est ainsi le cas en Italie, en Grèce, à Malte, au Lichtenstein ainsi qu'à Chypre. En Europe de l'Est, le partenariat enregistré homosexuel n'existe pas en Roumanie, Slovaquie, Pologne, Lituanie, Estonie, Lettonie, Biélorussie, Ukraine, Moldavie, Albanie, Arménie, Bulgarie, Bosnie et Monténégro.

Bien évidemment, en l'absence de reconnaissance du couple homosexuel, ses membres ne bénéficient d'aucuns droits successoraux légaux.

Les concubins devront veiller à rédiger un testament afin de transmettre une partie du patrimoine du défunt au survivant. Mais comme nous l'avons déjà vu, la réserve héréditaire limite leur capacité de disposer.

On peut remarquer que les pays n'offrant aucun mode de conjugalité aux homosexuels sont également ceux dans lesquels la famille lignagère joue un rôle important

[56] Article 745 octies du Code civil belge: « *Quels que soient les héritiers avec lesquels il vient à la succession, le cohabitant légal survivant recueille l'usufruit de l'immeuble affecté durant la vie commune à la résidence commune de la famille ainsi que des meubles qui le garnissaient.*
Le cohabitant légal survivant recueille seul, à l'exclusion de tous les autres héritiers, le droit au bail relatif à l'immeuble affecté à la résidence commune de la famille au moment de l'ouverture de la succession du cohabitant légal prédécédé et recueille l'usufruit des meubles qui le garnissent ».

en matière successorale. En effet, tous les pays étudiés ci-après accordent une réserve aux descendants et aux ascendants du défunt.

Ainsi, en Italie, le concubin ne peut disposer en faveur de son concubin survivant que de la moitié de sa succession s'il laisse un enfant et d'un tiers s'il laisse deux enfants ou plus[57]. Si le défunt ne laisse pas d'enfant mais des ascendants, il ne pourra pas disposer de plus de deux tiers de sa succession[58].

En Grèce, le défunt ne peut disposer que de la moitié de sa succession s'il a des enfants ou des ascendants.

En Bulgarie, le défunt peut disposer de la moitié de sa succession s'il a un enfant et d'un tiers seulement s'il a deux enfants. S'il n'a pas d'enfant, ses ascendants ont une réserve d'un tiers[59].

La situation en Europe est disparate, de l'égalité parfaite à la négation absolue. Même si la succession testamentaire permet de transmettre une partie de sa succession à son concubin ou son partenaire homosexuel, il est discriminatoire que les membres d'un couple homosexuel soient dans l'obligation d'effectuer un acte positif pour pouvoir hériter l'un de l'autre. Combien de couples se disent qu'ils sont jeunes, qu'ils ont le temps… et oublient de faire un testament? En outre, l'indivision créée entre le survivant du couple homosexuel et les héritiers réservataires est source de conflit.

On peut espérer que tous les pays reconnaîtront bientôt la réalité des couples homosexuels et leur accorderont *a minima* un partenariat enregistré institutionnel leur ouvrant des droits successoraux légaux.

[57] Article 537 du Code civil italien : « *Salvo quanto disposto dall'articolo 542, se il genitore lascia un figlio solo, legittimo o naturale, a questi è riservata la metà del patrimonio.*
Se i figli sono più, è loro riservata la quota dei due terzi, da dividersi in parti uguali tra tutti i figli, legittimi e naturali.
I figli legittimi possono soddisfare in denaro o in beni immobili ereditari la porzione spettante ai figli naturali che non vi si oppongano. Nel caso di opposizione decide il giudice, valutate le circostanze personali e patrimoniali ».

[58] Article 538 du Code civil italien : « *Se chi muore non lascia figli legittimi né naturali, ma ascendenti legittimi, a favore di questi è riservato un terzo del patrimonio, salvo quanto disposto dall'articolo 544.*
In caso di pluralità di ascendenti, la riserva è ripartita tra i medesimi secondo i criteri previsti dall'articolo 569 ».

[59] 'Successions en Bulgarie : Limites à la liberté de disposer de sa succession par testament (parts réservataires)' (*Successions en Europe - Le droit des successions de 27 pays européens*, 23 avril 2010) <http://www.successions-europe.eu/fr/bulgaria/topics/restrictions-on-the-freedom-to-dispose-of-ones-succession-by-will> accès le 19 avril 2011.

IV.
GENDER IDENTITY

Gender Diversity and Human Rights Treaty Bodies: Is there a Role for the Committee on the Rights of Persons with Disabilities?

Carole J. Petersen[*]

Abstract

This essay considers the extent to which the Convention on the Rights of Persons with Disabilities (CRPD) can play a role in promoting the rights of persons who are gender diverse. Transgender persons experience discrimination in every aspect of life, including family law, health care, education, and employment. Given the lack of a specific human rights treaty in this field, it is essential that all of the existing treaty bodies pay close attention to the rights of persons who are gender diverse. The Yogyakarta Principles facilitate this process by providing guidance on how to apply international human rights law to issues of sexual and gender diversity. However, the Yogyakarta principles were drafted before the CRPD came into force and states parties may neglect to provide information on minority communities when drafting their initial reports to the Committee on the Rights of Persons with Disabilities. Should NGOs ask governments to report on transgender issues in the context of the CRPD? Should NGOs working for the rights of transgender persons prepare alternative reports and participate in the CRPD reporting process? These are difficult questions because of the damage done by misguided attempts to "cure" sexual and gender diversity. Yet many transgender persons also experience disability discrimination and some domestic laws include "gender dysphoria" as a covered disability. Moreover, the CRPD has soundly rejected the medical approach to disability in favor of the social and human rights models. Thus the CRPD does not seek to define "disability" in medical terms or to exclude persons from its protection. Rather, the CRPD focuses upon certain core principles, including respect for diversity, inclusion, reasonable accommodations, and substantive equality. Thus the Committee on the Rights of Persons with Disabilities could become an important ally in the movement to break away from medical discourses and to depathologize transgender identities.

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1. Introduction

In this essay, the term "transgender" refers to individuals who experience and may express their gender differently from stereotypical gender norms – including individuals who are transsexuals, cross-dressers, transitioning, or otherwise gender non-conforming. The term can include a broad range of persons who express their gender identity in a way that differs from what was recorded on their birth certificates, regardless of whether they have taken steps to change their biological sex[1]. Transgender persons experience discrimination in virtually every field, including family law, access to health care, education, and employment. Researchers have also documented numerous cases of official torture and hate crimes against transgender persons[2]. These are not isolated incidents but rather reflect systemic patterns of discrimination[3].

Although transgender individuals make a range of decisions regarding their bodies and how to express their gender, a large percentage seek medical or surgical transition services as a means of facilitating gender expression. A 2010 study conducted in the United States reported that 62% of respondents had obtained hormonal therapy and that 23% hoped to obtain it. Three quarters of the transgender women and a majority of the transgender men reported that they had also obtained or would like to obtain some form of transition surgery[4]. Thus, for a significant percentage of transgender individuals, full expression of gender will entail fairly regular interaction with the health-care system. Unfortunately, discrimination in the health-care system is rampant and severe. Indeed, many transgender persons are refused care due to their gender non-conforming status while others postpone care when injured or sick in order to avoid discrimination[5].

Although some jurisdictions have enacted laws that prohibit discrimination on

[1] This definition is borrowed from the Human Rights Campaign Foundation, Transgender Americans: A Handbook for Understanding (2008) 5 <http://www.hrc.org/issues/1500.htm> accessed 10 April 2011.

[2] Jeremy D. Kidd and Tarynn M. Witten, 'Transgender and Transsexual Identities: The Next Strange Fruit - Hate Crimes, Violence and Genocide Against the Global Trans-Communities' (2007) 6(1) Journal of Hate Studies 31-63; and Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207, 208-214.

[3] Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, 'Injustice at Every Turn: A Report of the National Transgender Discrimination Survey' (National Center for Transgender Equity and National Gay and Lesbian Task Force, February 2011) <http://www.thetaskforce.org/reports_and_research/ntds> accessed 20 April 2011.

[4] Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, 'National Transgender Discrimination Survey Report on Health and Health Care: Findings of a Study by the National Center for Transgender Equality and the National Gay and Lesbian Task Force' (October 2010) <http://transequality.org/> accessed 20 April 2011.

[5] *Ibid*. See also Tarynn M. Witten and Stephen Whittle, 'TransPanthers: The Greying of Transgender and the Law' (2004) 9(2) Deakin Law Review 503, 512-15.

the ground of gender identity[6], there is still no binding international treaty that expressly requires states to enact such laws. To some extent, the nonbinding Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender (hereinafter the Yogyakarta Principles) help to fill this gap by providing guidance on how existing human rights treaties should be interpreted in relation to sexuality and gender identity[7]. However, the Yogyakarta Principles were drafted in 2006, before the Convention on the Rights of Persons with Disabilities (CRPD) had opened for ratification[8]. As the CRPD is now in force and the Committee on the Rights of Persons with Disabilities is beginning to review the initial reports of state parties, it is an opportune time to assess the potential value of the treaty.

Part 2 of this essay briefly reviews the role of human rights treaty bodies and the importance of NGO reports, which can inform members of the treaty-monitoring committees of issues that governments may try to ignore in their official reports. Part 3 reviews the movement to depathologize gender variation, which arguably raises concerns regarding the wisdom of using the CRPD as an advocacy tool. Part 4 then introduces the social model of disability and the "paradigm shift" that has been made by the CRPD[9]. I argue that transgender issues can be brought to the Committee on the Rights of Persons with Disabilities without undermining efforts to depathologize gender variation. Moreover, given that at least some domestic laws on disability discrimination can be interpreted to prohibit transgender discrimination, it would be unfortunate if the CRPD did not become an additional tool in the movement to recognize and respect gender diversity.

2. Human Rights Treaty Bodies and the Reporting Process

There are currently nine "core" treaties in the UN human rights system, each of which requires states parties to report regularly on steps taken to comply with treaty obligations and barriers to implementation. Reports are submitted to the relevant

[6] For example, in the United States, numerous state and local laws have expressly included transgender in the scope of their anti-discrimination legislation. For a summary of this legislation, see Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws (National Gay and Lesbian Task Force Transgender Law and Policy Institute 2008) <http://www.thetaskforce.org/reports_and_research/transgender_inclusive_laws> accessed 21 April 2011.

[7] For additional information, see Yogyakarta Principles <http://www.yogyakartaprinciples.org/> accessed 10 March 2011.

[8] For the CRPD and the Optional Protocol (containing an individual complaints procedure and an inquiry procedure), see <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Convention.aspx#35> accessed 15 March 2011.

[9] Tara J. Melish, 'Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify' (2007) 14 Human Rights Brief 37 (Winter).

treaty-monitoring body, a panel of experts who serve in their personal capacities. For example, the Human Rights Committee monitors the International Covenant on Civil and Political Rights (ICCPR); the Committee on Economic, Social and Cultural Rights monitors the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Committee Against Torture monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Committee on the Elimination of Racial Discrimination monitors the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Committee on the Elimination of Discrimination against Women monitors the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Committee on the Rights of the Child monitors the Convention on the Rights of the Child (CRC). The Committee on the Rights of Persons with Disabilities is the newest committee to become operational. The monitoring body for the International Convention for the Protection of All Persons from Forced Disappearance will be created after the first meeting of states parties in May 2011[10].

Once a treaty body receives a periodic report, it schedules a formal review session (in some cases after requesting and receiving supplementary information). The treaty body then issues concluding observations advising the state party on how to better implement the treaty. Although this is fundamentally a non-coercive enforcement process, it constitutes a significant departure from traditional views on state sovereignty. By binding itself to report to a monitoring body, each state party concedes that the international community has a legitimate interest in ascertaining whether it respects and enforces international norms within its sovereign territory. The international reporting process also gives civil society an opportunity to participate because NGOs present written reports on the implementation of the treaty and alleged violations. An NGO report is generally called a "shadow" or "alternative" report, because it shadows the government report and provides alternative points of view. NGO reports are more effective in states with a high degree of freedom of expression. However, even if local NGOs do not enjoy freedom of speech, international human rights organizations (such as Amnesty International) can submit alternative reports critiquing the government report. NGOs also sometimes present their information orally, either during pre-sessional working group meetings or formal sessions of the treaty-monitoring body. In some cases, members of a treaty monitoring body will also hold informal meetings with NGO representatives. Committee members can then ask the government delegation to respond to the issues that have been raised by the NGO representatives. The information derived from these NGO submissions can also influence the content of treaty bodies' concluding recommendations.

[10] For general information on the nine core treaties and the committees that monitor their implementation, see Office of the United Nations High Commissioner for Human Rights, 'Monitoring the Core International Human Rights Treaties' <http://www2.ohchr.org/english/bodies/treaty/index.htm> accessed 20 March 2011.

Given the evidence of discrimination against persons who are gender diverse, there should be an international treaty that expressly addresses their rights and a monitoring committee that is knowledgeable in the field. However, this is unlikely to occur any time soon, despite the growing support among certain members of the UN. In 2006, 55 member states joined a statement calling for dialogue on sexual orientation and gender identity within the UN Human Rights Council (HRC). In 2008, 68 nations endorsed a statement affirming that human rights treaties apply to all persons, regardless of sexual orientation or gender identity[11]. The United States was the only Western nation that did not endorse the latter statement (and it finally joined the statement in early 2009, after the Obama administration replaced the Bush administration). However, an opposing statement was signed by 57 member nations, including all 27 nations of the Arab League[12]. In 2011, more than 80 nations endorsed a resolution in the HRC that called upon states to take steps "to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity"[13]. Nonetheless, it is clear that the UN is still divided on these issues and it is unlikely to adopt a new treaty that expressly addresses the rights of persons who are sex and gender diverse. Even if such a treaty were adopted, it would not be ratified by the states where it is most urgently needed. The Convention on the Rights of Migrant Workers (CMW) illustrates the potential consequences of adopting a treaty that does not enjoy widespread support. Although admirable in its goals, the CMW has acquired only 44 states parties since it was adopted in 1990. Thus, the Committee on Migrant Workers only reviews a few state reports during each session and has limited impact on domestic laws and policies[14]. In contrast, the CRPD has acquired 100 states parties in only four years, including many countries that have been unwilling to expressly endorse sexual and gender diversity[15].

[11] See, for example, Letter dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations addressed to the President of the General Assembly, Sixty-third session, Agenda item 64 (b), A/63/635. For a summary of these initiatives, see the website of the French Permanent Mission to the United Nations <http://www.franceonu.org/spip.php?article4092> accessed 20 March 2011.

[12] For discussion, see Reuters US Edition, 'In turnaround, U.S. signs U.N. gay rights document' <http://www.reuters.com/article/2009/03/18/us-rights-gay-usa-idUSTRE52H5CK20090318> accessed 20 March 2011.

[13] For commentary, see LGBT Weekly, 'UN gay rights resolution signed by 85 countries' <http://lgbtweekly.com/2011/03/31/un-gay-rights-resolution-signed-by-85-countries/> accessed 25 March 2011.

[14] For a list of state reports reviewed by the Committee on Migrant Workers since its inaugural session, see <http://www2.ohchr.org/english/bodies/cmw/sessions.htm> accessed 23 May 2011.

[15] For a list of states parties to the CRPD, see United Nations Treaty Collection, Status of Treaties, Ch IV(15) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> accessed 24 May 2011.

The lack of a specialist treaty makes it all the more important that existing international and regional human rights instruments are fully applied. This process has been facilitated by the Yogyakarta Principles, which moved beyond the right to private life and affirmed that persons who are sex and gender diverse enjoy the full range of human rights. Although not legally binding, they provide guidance on how international human rights treaties should be interpreted in relation to sex and gender diversity. Even if a government does not expressly accept the Yogyakarta Principles, the committees that monitor compliance with existing human rights treaties can refer to them when reviewing governments' periodic reports, when drafting concluding observations, and when developing general recommendations interpreting treaty obligations. In this manner, treaty-monitoring bodies can hopefully persuade governments to expand their understanding of human rights and be more respectful of sexual and gender diversity.

The International Commission of Jurists (ICJ) facilitates this process by publishing a regularly updated collection of relevant court decisions, general recommendations, and concluding observations by treaty bodies that are relevant to sex and gender diversity[16]. The ICJ also produces a practitioners' guide to assist lawyers representing clients who are sex and gender diverse[17]. These collections indicate that the Human Rights Committee has had the most influence among the human rights treaty-monitoring bodies, in part because the ICCPR protects the right to privacy and because it prohibits discrimination on a broad range of grounds, including "other status". It has also been argued that human rights advocates could make greater use of Article 19 of the ICCPR (freedom of expression) to advance the rights of persons who are sex and gender diverse. Framing sexual and gender diversity as a form of expression can shift the focus away "from fitting people into binary categories of sex and gender" and towards greater respect for choice[18].

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also provides an interesting example of how a treaty body can apply existing law to issues of sex and gender diversity. On its face, CEDAW is inadequate for transgender persons because the main state obligation is to ensure equal treatment of women and men. However, the CEDAW Committee examines the full range of women's human rights and is paying increased attention to the situations of lesbian and transgender women. In 2010 the Committee issued General Recommen-

[16] International Commission of Jurists, 'Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System' (4th ed. 2010) <http://www.icj.org/default.asp?nodeID=423&langage=1&myPage=Others> accessed 10 April 2011.

[17] International Commission of Jurists, 'Sexual Orientation, Gender Identity, and International Human Rights Law: Practitioners Guide No. 4' (2010) <http://icj-usa.org/publications/> accessed 10 April 2011.

[18] Sarah Winter, 'Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity' (2009) 15(1) Australian Journal of Human Rights 151, 167.

dation (GR) 28 on Article Two of CEDAW, noting, at paragraph 18, that discrimination against women is "inextricably linked with other factors that affect women, such as… sexual orientation and gender identity" and that states parties "must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them". GR 28 essentially invites NGOs to submit alternative reports that inform the CEDAW Committee of violations of the rights of lesbians and transgender women. In 2010 the Committee received an NGO report describing incidents of torture and extortion by the Uganda police[19]. The CEDAW Committee responded by urging the government of Uganda to "decriminalize homosexual behavior and to provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive antidiscrimination" laws[20]. This is but one example of the role of NGO reports in helping the treaty-monitoring bodies to apply the Yogyakarta Principles to their respective treaties.

Clearly, the ability of the Committee on the Rights of Persons with Disabilities to promote the rights of transgender persons will also depend on whether relevant issues are raised in the reporting process under the CRPD. It is, however, possible that NGOs will not raise transgender issues in reports to this Committee, on the theory that doing so will undermine the movement to depathologize transgender identities. This issue is analyzed in the next two sections of the essay.

3. Depathologizing Gender Diversity

In 1973 the American Psychiatric Association (APA) removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM) and this was considered an important step in the campaign for the civil rights of gay and lesbian citizens. The DSM is widely used in North America and also influences the International Statistical Classification of Diseases and Related Health Problems published by the World Health Organization. Virtually all major professional mental health organizations have since affirmed that homosexuality is not a mental disorder[21].

In contrast, Gender Identity Disorder (GID) was added to the DSM in 1980. The diagnosis has been strongly criticized and there is a growing international cam-

[19] Freedom and Roam Uganda and IGLHRC, 'Shadow Report to the CEDAW Committee: Violation of the Rights of Lesbian, Bisexual, and Transgender (LBT) and Kuchu People in Uganda' (September 2010) <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/1241.html> accessed 5 March 2011.

[20] Committee on the Elimination of Discrimination Against Women, Forty-seventh session, Concluding Observations: Uganda, CEDAW/C/UGA/CO/7, 5 November 2010, para 44.

[21] For a summary of events leading to the amendment, see American Psychiatric Association, 'Sexual Orientation' <http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx> accessed 18 March 2011.

paign to persuade the APA and the WHO to remove or revise it. For example, the World Professional Association for Transgender Health (WPATH) maintains that gender variance is a common and culturally-diverse human phenomenon which should not be judged inherently pathological, as this renders transgender people "more vulnerable to social and legal marginalisation and exclusion" and increases risks to mental and physical well-being[22]. WPATH also criticizes governments that make surgery or sterilization a condition for changing one's gender identity in legal documents[23]. Similarly, GID Reform Advocates (a group of medical professionals, caregivers, researchers, and activists) has argued that the DSM stigmatizes transgender persons as "mentally deficient" and has urged the medical professions to affirm that "difference is not disease, nonconformity is not pathology, and uniqueness is not illness"[24]. It should be noted, however, that not everyone in the transgender rights movement wants the diagnosis to be removed entirely. It has been suggested, for example, that the medical professions could recognize the legitimacy of cross-gender identity while distinguishing "gender dysphoria" as a serious condition that is treatable with medical procedures. Some advocates are lobbying for diagnostic criteria that will "serve a clear therapeutic purpose, are appropriately inclusive, and define disorder on the basis of distress or impairment and not upon social nonconformity"[25].

Why not abandon the diagnosis entirely? For some activists this would be the logical continuation of the movement towards greater freedom of expression of sexuality and gender[26]. However, transgender persons do often seek medical and surgical transition services and there is concern that access to these services would become more limited in some countries if the diagnosis were removed. For example, insurance companies in the United States generally require a DSM-coded diagnosis. Without it, an insurance company (or public health care provider) may refuse to fund treatment on the ground that it is elective or cosmetic. Similarly, employers may refuse to provide medical leave or other accommodations to a transitioning employee unless there is a diagnosis demonstrating that the transition services are necessary for the employee's health.

The debate on this issue has attracted increased attention recently because the APA is drafting the fifth edition of the DSM, to be completed in 2013. The pre-

[22] World Professional Association for Transgender Health (WPATH), Press Release, 26 May 2010 <http://www.wpath.org/> accessed 10 March 2011.

[23] World Professional Association for Transgender Health (WPATH), Press Release, 16 June 2011 <http://www.wpath.org/> accessed 10 March 2011.

[24] GID Reform Advocates, 'The Vision of GID Reform' <http://www.transgender.org/gidr/> accessed 28 April 2011.

[25] Ibid.

[26] See, for example, Spanish Network for Depathologization of Trans Identities (ed.), 'Best Practices Guide to Trans Health Care in the National Health Care System' (2010) <http://www.stp2012.info/old/en> accessed 12 April 2011.

liminary draft revisions have been published for public comment[27]. Some activists believe that the revised diagnosis would only perpetuate discrimination and intolerance[28]. Interestingly, WPATH described the draft as a "commendable attempt to depathologize" but noted that it was so broad that "almost any transgender person could meet the criteria for a mental disorder regardless of whether or not they experience clinically significant distress and desire or need intervention"[29]. This is particularly worrying for children who may be pressured to undergo "treatments" designed to make a child conform to a particular gender. On the other hand, it is also arguable that a broad diagnosis may benefit transgender youth who seek hormonal treatments to assist in expressing their gender identity.

The question of how to conceptualize transgender identities is also evident in the drafting and application of anti-discrimination laws. There is often disagreement, even within domestic legal systems, on whether transgender persons can (or should) seek to rely upon disability discrimination laws. This debate has been particularly controversial in the United States because a clause was inserted into the federal Americans with Disabilities Act (ADA) that expressly excludes "gender identity disorders" not resulting from physical impairments from the scope of protection[30]. On the other hand, certain states in the United States have rejected the narrow scope of the federal ADA and deemed transgender persons eligible for protection under their state disability laws, although this is generally dependent upon a medical diagnosis[31]. While the ultimate goal is to enact laws expressly prohibiting transgender discrimination (which some legislatures have done), in the absence of such legislation a broadly interpreted disability discrimination law can also prove valuable.

Hong Kong is another example of a jurisdiction where the Disability Discrimination Ordinance (DDO) defines disability in broad language, which has been interpreted to include "gender dysphoria" as a covered disability[32]. However, it does not appear that Hong Kong's transgender community is eager to rely upon the DDO, perhaps because they feel it would undermine the movement to depathologize trans-

[27] American Psychiatric Association, 'DSM-5 Development: Proposed Revisions/Gender Dysphoria' <http://www.dsm5.org/ProposedRevision/Pages/GenderDysphoria.aspx> accessed 28 March 2011.

[28] See, for example, the International Network for Trans' Depathologization <http://www.stp2012.info/old/en/manifesto> accessed 20 April 2011.

[29] World Professional Association for Transgender Health (WPATH), 'Response to the Proposed DSM 5 Criteria for Gender Incongruence' <http://www.wpath.org/> accessed 10 March 2011.

[30] 42 U.S.C. 12211 (b)(1) (2006).

[31] For a summary of cases in which transgender persons have successfully relied upon disability discrimination laws at the state level, see Abby Lloyd, 'Defining the Human: Are Transgender People Strangers to the Law?' 20 Berkeley Journal of Gender, Law & Justice 150, 182-86.

[32] The Church of Jesus Christ of Latter-Day Saints Hong Kong Ltd v. Steward J.C. Park AKA Jessica Park, HKCA1167/2001 (8 November 2001) (interpreting the Hong Kong DDO to include gender dysphoria as a disability).

gender identities[33]. For example, in one recent case, a post-operative transgender woman sought judicial review of a decision by the Hong Kong Registrar of Marriages to deny her application to marry her male partner[34]. The plaintiff argued that the Registrar of Marriages had violated her right to privacy and her right to marry (both of which are protected by Hong Kong's regional constitution) but she did not rely upon the DDO. Unfortunately, she lost in the Court of First Instance (and has since appealed to the Hong Kong Court of Appeal). While I disagree with the decision of the Court of First Instance and anticipate that it may be overturned on appeal, I also believe that the plaintiff could have strengthened her case by relying upon the DDO and the right to equality[35]. At least one other commentator has made a similar argument[36]. Regardless of the final outcome, the case illustrates the choice that the transgender community faces. Hong Kong is bound by the CRPD (by virtue of China's ratification) and the Committee on the Rights of Persons with Disabilities will commence its review of the initial reports of Hong Kong and China in late 2011[37]. The Hong Kong government has ignored transgender issues in its initial report to the Committee but discriminatory policies (including the policy applied by the Registrar of Marriages) could still be raised by Hong Kong NGOs in their shadow reports[38]. The question, which is addressed in the next section of this essay, is whether NGOs that support transgender rights will want to raise transgender issues before this Committee.

[33] See, for example, Robyn Emerton, 'Finding a Voice, Fighting for Rights: The Emergence of the Transgender Movement in Hong Kong' (2006) 7 Inter-Asia Cultural Studies 243, 255 (noting that bringing a case under the DDO would present a dilemma, because it "relies on the unpalatable argument that transgender persons have a disability".

[34] *W v. Registrar of Marriages* [2010] 6 HKC 359.

[35] For an introduction the Hong Kong's law on disability discrimination, see Carole J. Petersen, 'China's Ratification of the Convention on the Rights of Persons With Disabilities: The Implications for Kong Law' (2008) 38 Hong Kong Law Journal 611; and Carole J. Petersen, 'A Progressive Law with Weak Enforcement? An Empirical Study of Hong Kong's Disability Law, (2005) 25(4) Disability Studies Quarterly (Fall).

[36] Kelley Loper, '*W v. Registrar of Marriages* and the Right to Equality in Hong Kong Law', forthcoming in (2011) 41 Hong Kong Law Journal 89. (This issue of the Hong Kong Law Journal will also contain additional articles critiquing the decision of the Court of First Instance in *W v. Registrar of Marriages*.)

[37] The Hong Kong government's initial report has been published in Chinese and English and the list of issues for review will be adopted by the Committee on the Rights of Persons with Disabilities in its sixth session in September 2011 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx> accessed 20 May 2011.

[38] For a general analysis of issues faced by transgendered persons in Hong Kong, see Robyn Emerton, 'Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong' (2004) 34 HKLJ 515.

4. The CRPD and the Depathologization of Disability

4.1. The Drafting Process for the CRPD

The CRPD was drafted and brought into force with remarkable speed, largely due to the widespread support it enjoyed among governments and NGOs. Although previous instruments (such as the UN Standard Rules on the Equalization of Opportunities for Persons With Disabilities[39]) set useful standards they were not legally binding. The human rights treaties discussed earlier in this paper are, of course, fully applicable to persons with disabilities. However, the monitoring committees did not always pay sufficient attention to disability issues and lacked expertise[40]. A specialist treaty was also considered necessary because so many persons with disabilities still live in deplorable conditions, with extremely low rates of education and employment.

The first World NGO Summit on Disability was held in Beijing in 2000, generating the Beijing Declaration on the Rights of People with Disabilities in the New Century. The Declaration called for the adoption of an international treaty to "promote and protect the rights of persons with disabilities, and enhance equal opportunities for participation in mainstream society"[41]. The UN later established an Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection of the Rights and Dignity of Persons with Disabilities, to consider proposals for a treaty[42]. The Ad Hoc Committee held a total of eight sessions from 2002-2006[43]. The drafting process was considered historic in that it was highly inclusive and not dominated by diplomats. This was largely because the disability rights movement insisted on participating – thus living the slogan *nothing about us without us*. More than 400 NGO representatives registered for some of the Ad Hoc Committee meetings and many other NGOs submitted comments, which were widely publicized on the Ad Hoc Committee's website[44]. Thus, the CRPD became

[39] Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the United Nations General Assembly, 20 December 1993, 48th session, resolution 48/96, annex. <http://www.un.org/esa/socdev/enable/dissre00.htm> accessed 15 April 2011.

[40] Gerald Quinn and others, 'Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability' (United Nations 2003).

[41] Beijing Declaration on the Rights of People with Disabilities in the New Century, adopted 12 March 2000 at the World NGO Summit on Disability <www.icdri.org/News/beijing_declaration_on_the_right.htm> accessed 1 April 2011.

[42] General Assembly Resolution 56/168: Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities, adopted 19 December 2001 <www.un.org/esa/socdev/enable/disA56168e1.htm> accessed 1 April 2011.

[43] See the website of UN Enable for drafts, submissions, lists of attendees, and other documents from the Ad Hoc Committee <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm> accessed 1 April 2011).

[44] Don MacKay (Chair of the Ad Hoc Committee from 2005 onwards), 'The United Nations

"the first [human rights treaty] to emerge from lobbying conducted extensively through the Internet"[45].

The drafting was completed in less than five years, a short period given the large number of submissions and comments on the various drafts. By the end of 2006, the UN General Assembly had approved the text and the CRPD was opened for ratification on 30 March 2007. Eighty-two nations immediately signed the treaty, which is probably the largest number ever recorded for a human rights treaty signing ceremony. However, the real test was whether governments were willing to ratify the treaty; the CRPD obtained its twentieth ratification (by Ecuador) in April 2008 and entered into force in May 2008. The CRPD now has 100 states parties, including many countries that are members of the Arab League (such as Algeria, Egypt, Jordan, Morocco, Oman, Qatar, Saudia Arabia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yeman). Thus, a significant number of countries that are unlikely to adopt legislation that expressly prohibits transgender discrimination will need to adopt and enforce laws prohibiting disability discrimination. The question is whether those disability laws might be used to help promote respect for gender diversity and to prevent discrimination against transgender persons. To a large extent, this depends upon whether the new domestic laws fully embrace the social model of disability, which is discussed in the next section of this essay.

4.2. Embracing the Social and Human Rights Models of Disability

In addition to its inclusive drafting process, the CRPD is also historic for rejecting the medical and welfare approaches to disability. The medical model focused on the "affliction" and the need for treatment, while the welfare model focused on the need to care for or protect "disabled" individuals. In contrast, the social model locates the experience of disability in the social environment[46]. It thus views disability as a form of social oppression that must be addressed by laws and policies that affirm and implement the principal goals of the treaty – capability, inclusion, and the removal of physical and attitudinal barriers. The human rights model is similar to the social model in that it views people who live with impairments as rights holders and recognizes that they are often more disabled by physical and attitudinal barriers than by any particular condition. In short, the CRPD seeks to

Convention on the Rights of Persons with Disabilities' (2007) 34 Syracuse Journal of International Law and Commerce 323, 327-8.

[45] Kofi Annan, 'Secretary-General Hails Adoption of Landmark Convention on the Rights of Persons with Disabilities' (13 December 2006) <http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm> accessed 1 April 2011).

[46] Rosemary Kayess and Phillip French, 'Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 Human Rights Law Review 1, 5-8; and Arlene S. Kanter, 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2007) 34 Syracuse Journal of International Law and Commerce 287, 291-292.

depathologize disability and to demonstrate that it is an inherent part of the human condition. When the CRPD is seen in this light, it is highly arguable that the campaign to depathologize transgender would not be undermined by participation in the CRPD reporting process.

Because of their commitment to the social model, the drafters of the CRPD struggled with the question of whether and how to define disability. Some delegates and NGO representatives wanted a detailed definition because they feared that governments would otherwise exclude people with certain types of disabilities from the protection of national laws. Others argued that any medical definition would undermine the treaty's commitment to the social model of disability. Eventually the drafters agreed on a compromise, but one that is largely committed to the social model: there is no definition of "disability" in the definitions section of the treaty but Article One states that the purpose of the convention is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities…" and that "[p]ersons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others (emphasis added)". Thus, the CRPD does not try to define the full scope of the term "persons with disabilities" but it does make it clear that certain groups of people must be protected by a national law implementing the treaty. It also articulates the principle that it is not simply "impairments" that hinder full participation but rather the manner in which socially constructed barriers tend to interact with our individual conditions.

The CRPD does define the *discrimination* that it seeks to redress, stating that "discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. This is comparable to the definitions of discrimination in the ICERD and CEDAW treaties, except that the CRPD goes on to state that discrimination includes "denial of reasonable accommodation" which it defines as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". A community's understanding of what is necessary and appropriate will evolve as the social model of disability exerts more influence. Thus wheelchair ramps and accessible bathrooms were once considered major "accommodations" but are now standard in many countries, enabling a greater number of persons to attend school, work, and participate in public life. Similarly, a transgender person who elects to pursue medical or surgical transition services might benefit from modifications to the standard "male" and "female" bathroom facilities and this could fall within the definition of a "reasonable accommodation", the denial of which could constitute discrimination. Under the CRPD, the *disability*

created by that denial of accommodation would not be the condition of the transgender person's body but rather the interaction of the social environment with that individual.

4.3. A Holistic Approach to Rights, including Civil and Political Rights

People who are not familiar with the CRPD often assume that it primarily promotes economic and social rights, such as increased access to education and employment. In fact, the CRPD embraces the full range of rights. The CRPD also reveals the false dichotomy between "first" and "second" generation rights, which has tended to dominate international discourses on rights since the adoption of the ICCPR and the ICESCR (the two separate treaties that translated the Universal Declaration of Human Rights into enforceable obligations when the international community failed to agree upon one unified treaty). The CRPD embraces a holistic view of what human rights mean for persons with disabilities, which typically involves a combination of rights that were previously set forth in separate treaties[47]. For example, Article 21 affirms that people with disabilities enjoy freedom of expression, which is sometimes categorized as a "negative right" on the theory that the state can fulfil the right simply by not interfering with citizens' rights to express opinions and access information. However, in the CRPD, freedom of expression and access to information are not simply "negative rights" because the state has an affirmative duty to promote sign language and accessible technologies.

The civil and political aspects of the CRPD may prove challenging for certain governments, especially those that have not ratified the ICCPR. China provides an interesting case study because it has filed its initial report to the Committee on the Rights of Persons with Disabilities but does not appear to be paying much attention to the civil and political rights in the treaty[48]. China and some other states parties will likely attempt to interpret Article 21 as simply requiring accessible technologies to facilitate communication. However, the Committee will almost certainly interpret it more broadly and ask governments about general freedom of expression, which has all too often been denied to persons with disabilities[49]. As mentioned earlier in

[47] See generally, Frédéric Mégret, 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 12(2) International Journal of Human Rights 261; and Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 Human Rights Quarterly 494.

[48] China's initial report is available on the website of the Committee on the Rights of Persons with Disabilities. <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx> accessed 20 May 2011.

[49] China and Hong Kong submit separate reports to the treaty bodies under the one country two systems model and Hong Kong does a far better job of protecting freedom of expression than Mainland China. See generally Carole J. Petersen, 'Embracing Universal Standards? The Role of International Human Rights Treaties in Hong Kong's Constitutional Jurisprudence' in Fu Hualing, Lison Harris, and Simon N. M. Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007).

this paper, freedom of expression also has special significance for transgender persons because gender identity is such an important aspect of individual expression.

Article 29 of the CRPD provides that persons with disabilities have the right to participate in political and public life and thus the Committee may also ask about police harassment. For example, the Beijing Aizhixing Institute is a grassroots NGO working on AIDS issues in China, including AIDS prevention among vulnerable groups[50]. Another organization, the Beijing Yirenping Center assists persons with disabilities to litigate against unlawful discrimination[51]. Unfortunately, both organizations have experienced official harassment, as do the lawyers who represent plaintiffs in disability discrimination and human rights cases in China[52]. For example, in 2010, Wan Yanhia, an AIDS activist and head of the Beijing Aizhixing Institute, felt compelled to flee to the United States to escape persecution[53]. In many countries, transgender individuals experience extensive harassment from the authorities. Clearly, any official intimidation of individuals and groups seeking to exercise their rights under the CRPD would constitute a serious violation of the CRPD and should be investigated by the Committee on the Rights of Persons with Disabilities.

Article 14 of the CRPD is also important because it protects liberty and security of the person. Persons with disabilities must not be arbitrarily deprived of their liberty and the existence of a disability alone must not be used to justify detention. This provision is potentially significant in countries that detain transgender persons on the ground that they require "corrective" treatment or counselling. Similarly, Article 13 of the CRPD provides that persons with disabilities must have access to justice. These provisions allow the Committee to question governments on a broad range of potential violations, including civil commitment proceedings, compulsory medical treatment, and conditions inside medical and detention facilities.

The CRPD is also very firm on the right to personal autonomy, particularly in matters relating to family law and it condemns any state-sponsored sterilization. For example, Article 23 provides that states parties shall "eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships". This provision could be very useful for transgender persons who are denied the right to marry or to form a family. It further states that all

[50] Beijing Aizhixing, 'Open Letter to Global Fund' (9 July 2010) <http://www.aizhi.net/en/> accessed 1 August 2010.

[51] For information on Yirenping's advocacy and reports of harassment, see its English language website, <http://www.yirenping.org/english/index.htm> accessed 1 August 2010.

[52] See, for example, Human Rights Watch, 'Walking on Thin Ice: Control, Intimidation and Harassment of Lawyers in China', <http://www.hrw.org/en/reports/2008/04/28/walking-thin-ice-0 accessed 1 April 2011, and Human Rights in China, HRIC Condemns Growing Harassment against HIV/AIDS Petitioners, <http://www.hrichina.org> accessed 1 August 2010.

[53] For reports, see 'AIDS Activist Leaves China for U.S., Citing Pressure', The New York Times, 11 May 2010 <http://www.nytimes.com/2010/05/11/world/asia/11beijing.html> accessed 1 August 2010; and 'China's Crackdown on Nonprofit Groups Prompts New Fears Among Activists', Washington Post, 11 May 11, 2010.

persons with disabilities shall "retain their fertility on an equal basis with others" which means that governments have an obligation to reform laws and policies that impair the fertility of persons living with disabilities[54]. Thus the Committee would very likely object to any law that requires transgender persons to undergo surgery (which often includes sterilization) before being legally recognized in the gender of their choice. Transgender groups seeking to reform such laws and policies could obtain support from the Committee on the Rights of Disabilities if they submit shadow reports on this issue when their governments are being reviewed[55].

4.4. Conclusion

This essay has highlighted only a few of the many provisions in the CRPD that may prove useful for the transgender movement, provided that it can escape the outdated notion that "persons with disabilities" represents yet another stigmatized category of persons who are not entitled to the full range of human rights. An additional reason for engaging with the CRPD reporting process is that a certain number of persons who experience transgender discrimination will also experience disability discrimination, particularly as they age and are compelled to interact more frequently with health care systems. This discrimination is intersectional in that transgender persons with disabilities are more likely to experience mistreatment when they enter a hospital than persons with disabilities who easily fit within the traditional categories of male and female.

Many transgender individuals live in countries that are far from adopting laws that expressly prohibit discrimination on the ground of gender identity but have an obligation to enact laws prohibiting disability discrimination, in order to comply with the CRPD. By participating in the CRPD reporting process, NGOs can help to ensure that transgender persons are not denied the protection of these laws and not ignored when the Committee on the Rights of Persons with Disabilities reviews national laws and policies. Moreover, the transgender and disability rights movements can hopefully support each other by simultaneously embracing the diversity of gender identities and the social model of disability. In this manner, we can fully acknowledge both the universality of gender variation and the experience of disability, as being inherent within the human condition.

[54] I have previously analyzed this issue in the context of China. See Carole J. Petersen, 'Population Policy and Eugenic Theory: Implications of China's Ratification of the United Nations Convention on the Rights of Persons with Disabilities' (2010) 8 China: An International Journal 85.

[55] It is not uncommon for national laws to require transgender persons to obtain a medical diagnosis and/or undergo transitional surgery in order to obtain legal recognition of their chosen gender. For a comparative analysis of the legal frameworks of various European states, see European Agency for Fundamental Rights, Lesbian, Gay Bisexual and Transgender Rights <http://fra.europa.eu/fraWebsite/lgbt-rights/lgbt-rights_en.htm> accessed 20 May 2011.

The Protection of Transsexual's Rights by the European Court of Human Rights: a True Breakthrough or a New Risk?

Céline Husson-Rochcongar

Abstract

In 2002, the Strasbourg Court selected to change its position radically regarding the situation of the transsexuals, asserting that their "unsatisfactory situation […] is no longer sustainable". This quite innovative solution is based on the use made by European judges of dignity and of freedom, values which they deem fundamental to democratic societies. This jurisprudence may present an obvious interest for the claims presented by the LGBTI community but, by replacing legal arguments with axiological considerations, characteristic of a compassionate approach, it also entails certain risks. Direct reference to values itself raises an issue by introducing a particular rhetorical element in an already complex jurisprudence. Moreover, the selection of the aforementioned values proves just as problematic. Thus, querying the evolution of the recognition of the rights of the members of the LGBTI community imposes not to be limited to superficial examination of the jurisprudential solutions, but far more to seek the true motivations thereof.

* * *

Since its creation, the European Court of Human Rights – and, before, the Commission which had served as a filter up to 1998 for examining the admissibility of the requests – had to peruse several tens of cases regarding transsexuals' rights. As it is often the case in Strasbourg – particularly when dealing with burning issues – the evolution of the jurisprudence was rather slow, progressing especially by a kind of sedimentation, several successive breakthroughs leading gradually to the elaboration of principled solutions. Thus, whether considering sexual conversion surgery, changing birth certificate, right to marriage or family relationships, the European authorities have gradually elaborated a jurisprudence around the quite specific situation of individuals who, although rejecting their belonging to their biological sex, find it hard to have their change of sexual identity legally recognised.

However, whereas the Commission was willing to accede to the request of transsexuals in the early days, the Court, for its own part, has long shown a kind of principled opposition to a disturbing situation. Indeed, as is frequently the case when the issues on which it has to rule are in debate within the Member States, the Court has long hummed and hawed before opting for a more radical approach, since of course a jurisdiction, especially a supra-state jurisdiction, is not entitled to set behav-

ioural standards. Still, these issues are particularly tricky when involving, rightfully so or not, considerations associated with moral conceptions. Thus, with regard to transsexualism, control has been partially compromised since the Court has often neglected to seek whether the interference of the State in protected law was effectively justified by a legitimate concern, whereas it would rather check whether the lack of State intervention was in violation of the Convention or not. This difficulty clearly shows that the aim of the Court which deals both with States and individuals was to determine the rights it intended to recognise to transsexuals.

In face of this tricky issue, it has sometimes elected to adopt a disputable argumentation, wherein moral implications were only imperfectly masked by scientific arguments, simply emphasising that transsexualism raised "complex scientific, legal, moral and social issues"[1] or that "the law appears to be in a transitional stage"[2]. However, in 2002, it embarked on a new approach and finally asserted that "the unsatisfactory situation [of post-operative transsexuals] is no longer sustainable"[3]. A thunderclap through which the Court seemed to discard twenty-five years of case-law, this about turn still raises a few questions, both through its style and construction, and leads one to wonder whether the protection thus offered only provides a real breakthrough in the protection of transsexuals' rights, or whether it also implies a new type of risk. Indeed, leaving aside its slow initial progression for a radical assertion that the situation should be taken into consideration (1), the Strasbourg jurisprudence especially translates into the implementation of a compassionate rhetoric to the detriment of argumentation (2).

1. A slow progression up to radical assertion for dealing with a tricky situation

The European case-law relative to transsexualism may be viewed through a double relational dimension: the relation to oneself (1.1) and the relation to others (1.2). Of course, the relevant criterion here is not to determine whether the transsexual is placed in a relation with others (she or he always is) but rather whether he or she is the only person directly affected by the right for which she or he demands recognition. On both these aspects, whereas the Court showed great distrust against the possibility of drawing all the consequences of recognising true rights to private life and marriage for transsexuals, the Commission immediately proved more progressive.

[1] *X, Y and Z v. the United Kingdom* App no 21830/93 (ECHR GC, 22 April 1997, para. 52) and *Sheffield and Horsham v. the United Kingdom* App. no 22985/93 and no 23390/94 (ECHR GC, 30 July 1998, para. 58).

[2] *Rees v. the United Kingdom* App no 9532/81 (ECHR J, 17 Oct. 1986, para. 37).

[3] *Christine Goodwin* and *I. v. the United Kingdom* resp. App no 28957/95 and no 35680/94 (ECHR GC, 11 July 2002, para. 90 and para. 70).

1.1. The relation to oneself

Here, both the sexual conversion and the recognition of marital status ought to be considered – which, by extension, also includes issues deriving from the absence of recognition[4], regardless whether dealing with a differentiated treatment[5] or a reduced refund of the medical costs associated with medical treatment for transsexualism[6]. Globally, the issue hence lies in the possibility for an individual to claim a sex different from one's biological sex and to have the authorities recognise the consequences thereof.

In fact, for drawing consequences from the authorisation of surgical treatments, the control authorities have always ruled in consideration of actual physical modifications, *i.e.* only post-operative transsexuals could claim to exercise the fullness of their rights as belonging to their non-biological sex. Conversely, they ruled that the fact that an applicant may have benefited from treatments in a *state* hospital would not systematically imply a first form of State acceptance of the applicant's condition. In reality, the Court even considered that it was protecting transsexuals by not taking on board "too widely" arguments concerning the State's involvement in the medical treatment so that the public authorities would not be tempted to reject any treatment in order to evade any possible future complaints[7]. By introducing a dichotomy between taking into consideration the general interest and taking into consideration the individual interest of the applicant, such reasoning is undoubtedly problematic.

However, as the Court finally stated in 2002, at the end of a convoluted jurisprudential evolution, it was most concerned about the consequences *of the transsexual condition*, the strongest being the official recognition of this new condition, whereas the applicants agreed to consider social recognition as an essential element of the process of sexual conversion through the secret of intimacy, often challenged by administrative hassle. Thus, in terms of civil status[8], as early as 1977, the Commission implicitly acknowledged that refusing to grant official recognition of the *new sex* of a transsexual was a private matter, just like the consequences thereof[9]. The

[4] In the *Van Oosterwijck v. Belgium* decision, the Commission mentioned "identity checks […] issuance of public records […] examination of candidacies for a public or private job" (App no 7654/76, 9 May 1978).

[5] See *Goodwin*, *I.* and *Grant v. the United Kingdom* App no 32570/03 (ECHR dc, 19 May 2005, J, 23 May 2006).

[6] *Van Kück v. Germany* App no 35968/97 (ECHR dc, 18 Oct. 2001 and J, 12 June 2003).

[7] *Rees* (ECHR J, para. 45) and *Van Kück* (ECHR J, para. 77).

[8] As regards the duration of proceedings for changing civil status and first name, see *D.P. v. France* App no 24109/94 (ECHR dc, 18 May 1995, dc, 12 Apr. 1996, rep., 21 Jan. 1997, no violation due to the complexity of the facts) and *Juchault v. France* App no 25202/94 (ECHR dc, 12 Apr. 1996, violation due to a five-year period).

[9] *X. V. R.F.A.* App no 6699/74 (ECHR dc, 15 Dec. 1977): "[T]he refusal of the German authorities to give formal recognition to the applicant's situation causes her various problems which seriously affect her private life". This "highly embarrassing and prejudicial" situation justified in

following year, it resorted to Article 8[10] to establish that in addition to an obligation of abstention, the State had to meet positive obligations, judging

> hardly compatible with the obligation to respect private life, to impose upon a person who, further to medical recommendation and through law-abiding treatment, has taken on the appearance and to a vast extent the features of the opposite sex to that mentioned on his/her birth certificate, to carry identity papers in blatant contradiction with his/her appearance (para. 46)[11].

Emphasising that the State treated the applicant "as an ambiguous being, an "appearance", [by] trapping him in a sex which was hardly his any longer", it declared "that the respect for private life was truly undermined" (para. 52), in violation of Articles 8 and 12 of the Convention.

In the same perspective, in 1984, in the *Rees* case, the Commission admitted, with the applicant, that "sex is one of the essential elements of human personality" and considered that

> medical recognition of the necessity to assist the applicant in the fulfilment of one's identity also [ought] to be looked upon as an additional argument in favour of the legal recognition of the change of one's sexual identity (para. 48).

Considering conversely that there was no actual community of views and that the "law appeared to be going through a transition phase", the Court for its own part granted a wide margin of appreciation to the State. Acknowledging that most European States "did not offer (as yet) […] the transsexuals the faculty to change their civil status so as to adapt it to their newly acquired identity", it refused to make the supposed interest of the applicant prevail over a kind of "public interest" (para. 44) while considering that "the condition of a fair balance [between general and individual interests] will not compel the United Kingdom […] to revamp its civil status system from top to bottom" (para. 42), as if it rested its case here on the fact that the State and its citizens were adamant to have the present civil status maintained. However, it went on to add that it was "fully aware of the severity of the issues" and of the "feeling of helplessness" of transsexuals and, reminding that the Convention "always ought to be construed and applied in the light of the present conditions", it asserted the necessity of a "constant examination in view of, in particular, the evolution of science and of society" (para. 47), seemingly opening the door to subsequent evolution of its position.

particular the applicant to be released from the obligation of exhausting domestic remedies (also see: report, 11 Oct. 1979).

[10] It had declared it applicable while considering that "the undue disclosure or the dissemination by de facto third parties pertaining to physical condition, health, personality, [might] violate the applicant's intimacy and jeopardise its private life" (*Van Oosterwijck,* ECHR dc, para. 44).

[11] *Van Oosterwijck* ECHR rep. (1st March 1979, para. 60).

As soon as 1989, the Commission attempted to harmonise the solutions at hand, but the Court did not go along, and asserted that to the best of its knowledge "no significant scientific developments […] have occurred" since the *Rees* judgment and emphasised that a sexual conversion surgery "does not result in the acquisition of all the biological characteristics of the other sex" (!), to again refuse to find a violation of the Convention, in spite of otherwise promising argumentation[12]. Indeed, blowing hot and cold, it asserted first of all that, without being bound by its prior rulings, it "usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law". It then stressed that "this would not prevent [it] from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so", especially to guarantee "that the interpretation of the Convention reflects societal changes and remains in line with the present-day conditions" (para. 35). Despite "certain developments […] in the law of some of the member States", it nevertheless concluded to "the same diversity of practice as obtained at the time of the *Rees* judgment" (para. 40)[13]. Thus, it was only in 1992 that the Court ruled for the first time that Article 8 had been violated by a lack of recognition of a transsexual's sex change, as the French system neither allowed the rectification of the civil status registers, nor the modification of first names[14]. However, this finding of a violation did not prevent the Court from asserting paradoxically that "there is as yet no sufficiently broad consensus between the member States […] to persuade the Court to reach opposite conclusions to those in its *Rees* and *Cossey* judgments" (para. 48)[15].

Until its disappearance, the Commission went on for its own part to defend a progressive position, declaring a violation of Article 8 by taking into account both the evolution of medical knowledge and a "clear tendency, within the contracting States, in favour of legal recognition of sexual conversion"[16]. In the *Sheffield et Horsham* case, it even seemed prepared for jurisprudential evolution by asserting that "there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter".

[12] *Cossey v. the United Kingdom* App no 10843/84 (ECHR rep., 9 May 1989 and J, 27 Sept. 1990).
[13] Several judges emphasised that "[t]his negative attitude towards transsexuals is based on deeply rooted moral and ethical notions which, nevertheless, seem to be slowly changing in European societies" (Diss. op. Palm, Foighel and Pekkanen, pt. 5).
[14] *B. V. France* App no 13343/87 (ECHR dc, 13 Feb. 1990, rep., 6 Sept. 1990 and J, 25 March 1992).
[15] The Commission had declared that Article 8 had been violated, with seventeen votes against one.
[16] *X, Y and Z.* (ECHR rep., 27 June 1995, para. 67), *Sheffield* (ECHR rep., 21 Jan. 1997, para. 52) and *Horsham* (ECHR rep., 21 Jan. 1997, para. 53). In the *Sheffield* and *Horsham* case, it thus declared that Article 8 had been violated, contrary to the Court which considered that "the applicants have not shown that since the date of adoption of its *Cossey* judgement in 1990 there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism" (ECHR GC, para. 56).

1.2. The relation to others

As part of the relation to others, issues relating to *couple* and those regarding *children* and family relationships ought to be mentioned here, two aspects which, for various reasons, have quite significant moral implications.

As soon as 1979, the Commission considered that internal law "shall not authorise the States to deprive absolutely a person or a category of persons from the right to get married"[17]. It thus rejected the argument bearing upon the incapacity to procreate[18], asserting that

> by opposing aforehand to any marriage request an indirect objection based solely on the items of the birth certificate and of the general theory governing the rectification of Civil status records, without further examination, the Government [had] underrated […] the applicant's right to get married and to start a family (para. 60).

The Court, for its own part, chose a conservative approach as early as the *Rees* judgment: it emphasised that

> by securing the right to get married Article 12 concerns traditional marriage between two people of different biological sex […] the aim being essentially to protect marriage as the keystone of family life (para. 49).

It asserted later on that "the traditional [marriage] concept provided sufficient grounds for applying biological criteria so as to determine the sex of a person for marriage purposes"[19], such an argument would hardly open the way to possible evolution since one may wonder when the above-mentioned biological criteria could be disregarded.

Besides, in addition to the requests bearing upon the prohibition for a transsexual to marry someone of the same biological sex, some of them would pertain to the case of post-operative transsexuals seeking to remain married to the partner they had before their sexual conversion, a request frequently rejected by the national authorities on the grounds that authorising the applicants to remain married would amount to the authorisation of homosexual marriage[20]. For the Court, the fact that certain

[17] *Van Oosterwijck* (ECHR rep., para. 56).

[18] "If marriage and family are effectively associated in the Convention as in the national laws, nothing however enables to deduce therefrom that the ability to procreate would be a fundamental condition of marriage, nor even that the procreation is an essential aim in itself" (para. 59). It went on to say that "the evolution of medical knowledge leaves a few doubts on the absolute validity of the [morphological criterion noted at birth]".

[19] In the *Cossey* judgment, not taking into account the fact that request was nothing but hypothetical since, contrary to M. Rees, the female applicant was engaged, the Court noted that "the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage".

[20] *R. and F. v. the United Kingdom and Parry v. the United Kingdom*, resp. App no 35748/05 and

States authorised homosexual marriage did not mean nevertheless that such a right could be derived from the interpretation of the Convention. It hence rejected as paradoxical requests which it considered as on a par with claiming the benefit of advantages associated with both sexes, refusing to draw all the consequences of the solution described in the *I.* and *Goodwin* judgments: emphasising that "the historical and social value" of the institution of marriage and its "affective importance" accounted for the applicants to wish to stay married, it noted that it was precisely that value, as recognised in national law, which excluded them from that institution, whereas such precision put in evidence that the central issue pertained to the *function of marriage* in European society and, consequently, to a *moral conception of family*[21].

Such a conception can be also seen in the way the Court considers the relationships of a post-operative transsexual towards children *whom he or she might have had before his or her operation or towards those he or she might want to have after said operation* since the interests of the children and of the social structures would overlap the interests of the transsexual, by preserving various aspects of civil law but also those of the family as the basic social unit. In this respect, it believed that "adopt[ing] or impos[ing] [a] single point of view" was not in its province[22]. However, instead of focusing directly on the right of the *transsexual parent*, it chose to query the adverse effects which might ensue for children with a transsexual parent.

Confronted with *paternity recognition* by a male transsexual of his concubine's child conceived by *artificial insemination with a sperm donor*, the Commission declared that Article 8 was violated whereas the Court, on the contrary, stated that said Article had not been violated, since a wide margin of appreciation prevailed[23], considering once again that "the law appears to be in a transitional stage" and that "the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront" (para. 44).

Uncertainty favoured the preservation of the previous situation[24] but, paradoxi-

42971/05 (ECHR dc, 28 Nov. 2006). Although Law had compelled the female applicant to chose to "sacrifice her gender or her marriage", the Court considered that its effects had not been "disproportionate", since her relationship could be pursued "in all its current essential" and be granted a legal status which provided the same rights and obligations as marriage, thanks to the civil union contract. To declare that the right to marriage had not been violated, it put forward the protection of *children* and the *safety of the family surrounding*, which was rather surprising as it noted that the applicants *did not have any children*…

[21] The Court seems to consider that each State should be responsible for determining the conditions of validity of a marriage in relation to what the institution represents for its citizens.

[22] *X., Y. and Z.* (ECHR GC, para. 51).

[23] For want of a "common European standard with regard to the granting of parental rights to transsexuals" or of a "generally shared approach […] 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" (*ibid.*).

[24] Refusing to authorise the same person to cumulate statutes associated with both sexes, it still did not query directly the possibility for a transsexual to start a family after his/her operation and did not

cally, it was hence precisely because the relationships they maintained were similar to those supposedly existing within a family deemed as "normal", that the applicants found themselves deprived of the possibility of *being* legally considered as such… As for the issue of *keeping the parental rights secured prior to the operation*[25], the Commission looked at it through a conventional proportionality control and the legitimate aims of "children's health and rights protection", simply asserting that "it is not its task to take the place of the competent national courts and make a fresh examination of all the facts and evidences"[26].

However understandable it may be, the reinforced protection granted to the child on account of his/her particular vulnerability thus gives rise to difficulties, either because his/her interests are "torn apart" between *the child as applicant* and *as a potential victim* or because they can rarely be protected in a similar way, depending on whether the change in their parent's sexual identity took place *before the child was born* or when he or she was *already a teenager*.

These cases may regrettably not have opened a wide debate as to how to establish an optimal balance between a transsexual's interest and his or her children's. But it ought to be stressed that such a debate would undoubtedly thrown the Court into an undammable maelstrom of moral considerations, all the more so because it was difficult to reach a true consensus at the time, as testified by the reading of separate opinions[27]. Thus, from systematic refusal to assimilate transsexuals with individuals of the opposite biological sex to a converse stance, the radical change in stance adopted by the Court may be explained by switching from *a dissimulated moral* to *emphasising values* corresponding to the implementation of a compassionate rhetoric.

2. The dangers of a compassionate rhetoric overriding the argumentation

> Since there are no significant factors of public interest to weigh against the interest of th[e] applicant in obtaining legal recognition of her gender re-assignment, […] the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant[28].

take into account the attitude of the State (which had authorised the surgical treatment of X and the artificial insemination of Y). Foreboding the jurisprudential about turn of 2002, this intermediate position was heftily criticised by dissident judges. However, with the recent recognition of a true "right to respect for both the decisions to become and not to become a parent", this perspective could eventually evolve. See *Evans v. the United Kingdom* App no 6339/05 (ECHR GC, 10 Apr. 2007, para. 71) or *Dickson v. the United Kingdom* App no 44362/04 (ECHR GC, 4 Dec. 2007, para. 66).

[25] Soon, undoubtedly, the issue of a possibility of adoption will also be on the agenda, as shown by the case-law relative to homosexuality.

[26] *L.F. v. Ireland* App no 28154/95 (ECHR dc, 2 July 1997).

[27] For instance, in the *X., Y. and Z.* case, see the opinions of judges Pettiti, de Meyer and Foighel.

[28] *Goodwin* (ECHR GC, para. 93) and *I.* (ECHR GC, para. 73). Also see the *Grant* judgment regarding the right to pension.

It is with these words that the European Court of Human Rights chose to disintegrate the margin of appreciation it had acknowledged so far to the States in cases of transsexualism. After years of status quo, one can only be pleased to see that "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable" is clearly asserted[29]. However, enthusiasm has rapidly been replaced with the bitter impression that such evolution may not be as fully positive after all. Indeed, the sacrifice of the "traditional" juridical argument on the altar of the efficiency of the protection offered undoubtedly raises problems (2.1), especially insofar as the Court seems to prefer a rhetoric based on axiology (2.2).

2.1. The juridical argument sacrificed on the altar of efficiency

The spectacular judgments of 11 July 2002 lead to query the argumentation implemented as well as the vocabulary used, since what then springs to mind is first of all the *tone* adopted by the European Court of Human Rights, obviously desirous to assert its willingness to come to grips with the problems of the transsexuals so as to put an end to their sufferings. So as to transform these judgments into principled proclamation, it then elected quite a compassionate vocabulary, with a *sentimental* rather than truly legal vision of the problem. Still, such an excess of compassion may reach beyond the purely legal scope towards the temptation of a kind of *moral order*. Indeed, in pointing to the "abnormal situation" of the transsexuals or to their "great personal cost", noticing "dramatic changes […] in the field of transsexuality" or proclaiming that "this unsatisfactory situation […] is no longer sustainable", the Court gives the impression of throwing a few home truths rather than demonstrating a state of fact, thereby projecting its own subjectivity into over-assertions, finally to prove pointless.

Indeed, such a style supports a modification of the argument itself, in which the Court forsakes all the criteria it hitherto deemed valid in favour of a previously rejected standard: far from any proportionality control, the traditional elements of European jurisprudence have seemingly been superseded with an argumentation based on a value judgment, *the situation is no longer sustainable*! Built on a succession of paradoxa, the judgments bear out the fact that the Court, with a view to modify its jurisprudence, has not built its judgment according to its usual logical progression but rather on a case-to-case basis, whereas it did not seek so much to back up a detailed argumentation but rather to undermine successively all the arguments in its way. Still, although its approach is known for being purposeful, it is generally no less stringent which is quite far from being the case in this matter in judgments whose principle scope is nonetheless indisputable.

Thus, underscoring the existence of "a conflict between social reality and law aris[ing] which places the transsexual in an anomalous position" (resp. para. 77 and para. 57) and asserting that it is "not persuaded therefore that the state of medical

[29] *Ibid.*, resp. para. 90 and para. 70.

science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals" (para. 83 and para. 63), the Grand Chamber starts with ruling out specialist debates, skating on thin ice with medical tools so as to impose its solution. Then, in spite of the absence of "a common European approach" it readily emphasises, it chose to divest the Member States of their margin of appreciation, using strangely circular reasoning to assert that the absence of European consensus was in fact "hardly surprising", in view of the "widely diverse legal systems and traditions" (para. 85 and para. 65), and relying on the principle of subsidiarity to suggest that it was its responsibility to twist the arms of those who had so far unacceptably refused to reach a consensus, although the prospect looked difficult enough. To that end, evoking a vague "international trend", it maintained that "[a]lready at the time of the *Sheffield and Horsham* case, there was an emerging consensus within the Contracting States […] on providing legal recognition following gender re-assignment" (para. 84 and para. 64). Still, why assert that a consensus "was coming to light" four years previously at European level (without drawing any consequence at the time) and rely here on a simple "trend" (what is more, an "international trend") in favour "not only of increased social acceptance of transsexuals but of legal recognition of th[eir post-operative] new sexual identity" (para. 85 and para. 65)? The argument is rather a cause for dismay. Considering that "there are no significant factors of public interest to weigh against the interest of th[e] applicant" any longer, it hence disregarded any search for conciliation between the transsexual's interests and that of the community, asserting that henceforth "the fair balance, that is inherent in the Convention now tilts decisively in favour of the applicant" (para. 93 and para. 73)[30]. Finally, noting that Article 12 "refers in express terms to the right of a man and woman to marry", it again criticised the validity of the biological criterion so as to determine the sex of an individual, taking up the longstanding argument put forward by transsexuals according to which it would be

> artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex[31].

[30] Since then, the Court has asserted that "determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition", insisting on the incompetence of the internal jurisdiction in medical terms whereas it had not even sought in 2002 to take into account the convergent advices of the specialists. Apparently, it did not realised that it was then imposing its own vision of transsexualism, relying on "most intimate feelings and experiences" (*Van Kück*, ECHR, paras 54 and 81). Evoking the "right to respect for […] sexual self-determination as one of the aspects of [the] right to respect for [one's] private life", it declared that such right had been violated, after having curiously noted that the procedure had unfolded "at a time when the condition of transsexualism was generally known" (paras 78 and 76), which was hardly disputable since the first sexual reassignment surgical operations date back to the beginning of the twentieth century.

[31] Resp. paras 100-101 and paras 80-81. The Court also evoked Article 9 of the Charter of funda-

Refusing to consider that a State might go as far as to prohibit in practice "any exercise of the right to marry" (para. 103 and para. 83), it also divested it of its margin of appreciation within the framework of Article 12 by confining it to a verification role.

Consequently, with a view the better to protect transsexuals' individual freedom through the principle of free disposition of the body, it is its entire case-law – patiently built hitherto (biological criterion, medical arguments, legal arguments…) – which the Court wilfully blew to pieces. Thus, whereas previously public order considerations had rather prevented the recognition of the transsexuals' status by reason of the noticeable modifications it might bring about, the reference to the public order was here used *a contrario*, which contributed to further cloud the solution. Truthfully, this unusual reasoning process especially appeared to be the fruit of an axiological referential.

2.2. A doubly problematic choice of reference values

In the *Goodwin* and *I.* judgments, *everything unfolds as if* the evocation of the values enabled the Court to break free from the constraints of reasoning it had to cope with. Frequently employed by the Strasbourg authorities, resorting to values is a jurisprudential technique which enables them, by referring to the key notions in the preamble of the Convention, to impose a tricky solution, to strengthen its argumentation or to highlight the symbolic character thereof in certain fields deemed especially important. Here, it seems that the Grand Chamber wanted to tackle all these objectives. Indeed, it's the assertion according to which "the very essence of the Convention is respect for human dignity and human freedom", which does not leave any room for counter-arguments, which enables it to assert without further ado that

> [i]n the twenty first century, the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved (resp. para. 90 and para. 70).

However, although this technique obviously aims to assert the principle of a strengthened protection, it undoubtedly weakens the jurisprudential corpus in parallel.

The Universal Declaration of Human Rights has been mentioned as a "burst of universal awareness for defending all the human values around the word 'freedom'"[32].

mental rights of the European Union, which nevertheless ascribes States a wide margin of appreciation.

[32] A speech by Henri Laugier, former deputy-secretary general of the UNO, before the Commission of Human Rights during its first session in 1947, quoted in Éric Pateyron, *La contribution française à la rédaction de la Déclaration universelle des droits de l'homme. René Cassin et la Commission consultative des droits de l'homme* (La documentation française, 1998) 171.

Along the same line, the European Court and the European Commission sometimes refer to the preamble of the Convention, in order to remind of the ideals which ruled over their elaboration and to seek how its interpretation could evolve harmoniously. This reference to values therefore essentially reflects the juridicalisation of the *human rights* concept, thereby concreting a *philosophical ideal* into a *legal objective*, from the 1948 Declaration (which claims itself to be "a common standard of achievement for all peoples and all nations") to all the legally-binding International Conventions. Thus, quite often, the Court only employs values to reinforce the symbolic aspect of a solution which has besides been established through more conventional argumentation, touching for example upon dignity and freedom to assert that the rape of a woman by her husband is just as monstrous as a rape committed by a third party[33].

Still, one may wonder why the Court chose to rely on dignity and freedom whereas it might have chosen apparently more suitable values such as *equality* and *justice*. Truthfully, if the notion of justice is sometimes directly mentioned in the case-law, it is only in combination with the notion of peace, so as to fight against the claims presented by authors of negationist speeches and to declare their requests inadmissible[34]. In parallel, international human rights law has little time for the concept of equality, which freezes situations in a kind of origin fiction and only imperfectly enables one to take into account the inevitable differences among individuals. Indeed, the specificity of this law, which claims to be a reaction to Nazi crimes and, more widely speaking, a means to fight against intolerance, consists in paying heed (and indeed addressing) directly to *the individual*, *as an individual,* in his/her singularity. In this ultimate perspective, the aim is, thus, to prevent everyone to be purely and simply "assimilable" to another, since it is precisely this attitude which led to total depersonalisation of individuals, to the tattooing of numbers of sinister memory. Difficult to handle, escaping legal argument too easily, the concept of equality is hence hardly employed in the jurisprudence, which grandly postulates the equality of all as the starting point of reflection but in reality claims to be the contrary of a happy medium since at the end of the day, the aim is to provide the best suitable answer to multiple situations.

As regards the *non-legal* concept of dignity, it obviously lends itself to various usages according to whether the individual is considered on his own or *as an incarnation of Humanity*. One of the rare examples combining its use to that of freedom, the *I.* et *Goodwin* judgments outline this paradoxical character: as a *fundamental dignity*, it constitutes a form of limitation, epitomizing what Society cannot tolerate and opposes the concept of *freedom*, but as an *embodied dignity*, it contributes on

[33] *C.R. v. the United Kingdom* and *S.W. v. the United Kingdom* App no 20190/92 and no 20166/92 (ECHR J, 22 Nov. 1995).

[34] For example, *Remer v. Germany* App no 25096/94 (ECHR dc, 6 Sept. 1995): "the applicant's publications ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace".

the contrary to the *reinforcement* of this freedom, through the principle of *free will*. Here, invoking this principle alongside with freedom hence leads to reinforced individualism, based on "the notion of personal autonomy"[35], which essentially corresponds to the principle of free disposition of one's body, and allows to recognise the transsexuals' status. Admittedly, the issue of transsexualism lends itself easily to the implementation of the principle emphasised by the Court according to which "[p]rivate life […] includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity"[36]. But such a use of values may also bring about a few less positive consequences. First of all, to what extent does this process really prove relevant? Then, what would happen if, all of a sudden, this protection were fulfilled on account of different values, values which wouldn't be *ours*?

Indeed, who would seriously maintain that transsexuals should not be entitled, as well, to have their dignity and their freedom recognised? Stamped with the seal of hatred, the argument would simply be indefensible. Thus, such an assertion is not only hardly binding but, all the more so, it annihilates any other possibility of choice: relying on dignity and freedom as on an unstoppable argument, the Court therefore appears to be free to assert what it wishes. Evocation of these values instead of truly legal arguments may then bring about adverse consequences for the protection of transsexuals' rights since, even if the principle proclamation by the Grand Chamber appears to some as the just consecration of the unremitting efforts of the LGBTI community for the acknowledgement of the fundamental rights of its members, one may also notice that the way the Court chooses to assert such recognition does not show the same rigour as when backing up its most important statements.

Here, the use of values of course seems satisfactory in the sense that it refers to the roots of the Convention and to the spirit of tolerance and justice which supposedly characterise the entire European protection system, thereby seemingly proclaiming the importance of the recognised rights. Conversely, such recourse to axiology also contributes to undermine the implemented reasoning, by depriving it of a kind of "cold implacability" of legal rigour to the benefit of a "softer" rhetoric, which is more malleable… and, thus, easier to dispute: on the one hand, since it may be emphasised that the reasoning process of the European Court is highly wanting

[35] According to the Court, it enables "the personal sphere of each individual [to be protected], including the right to establish details of their identity as individual human beings". See *Goodwin* (ECHR GC, para. 90) and *I. v. the United Kingdom* (ECHR GC, para. 70).

[36] *Mikulić v. Croatia* App no 53176/99 (ECHR 7 Feb. 2002, para. 53). Judge Martens had already mentioned this aspect in the *Cossey* case: "The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual […] is prepared to shape himself and his fate. […] After these ordeals, as a post-operative transsexual, he turns to the law and asks it to admit the fait accompli he has created" (diss. op., 2.7).

in the way its blatant enthusiasm attempts to make up for its weak argumentation; on the other hand, and even more seriously, since one may only query the type of protection which would be granted to the transsexuals' rights if the inclination of the Court towards them eventually changes. Should we not fear that what it could do once so easily could be *undone* with the same flippancy? Thus, even if the protection offered by the Court entirely rests on its interpretation of fuzzy values such as dignity and freedom, what will happen if its interpretation changes? Is there not a risk of seeing the jurisprudence of the Court again evolve spectacularly, merely because it may believe that "the time is ripe"? Of course, one may say these statements are pointlessly alarmist… But, as long as the Court brushes aside its usual rigour to the benefit of a compassionate approach to problems, such risk does exist in numerous domains with, obviously, the resurgence of the old ghost of the "government of judges".

Although regarding in essence the most intimate sphere of one's personality, transsexualism is however characterised for causing repercussions in the public space, especially because the recognition of post-operative sex has consequences on the civil status records, which represent a kind of memory and of collective "family tree". Up to the 2002 jurisprudential about turn, any moral consideration was essentially implicit. From now on, it seems to find a place in its own right at the heart of the reasoning process adopted by the Court, in the particular form of a recourse to the values of dignity and freedom. Thus, even if one can only be pleased to see that some criteria which were evidently obsolete and based upon second thoughts have at last been abandoned, one can conversely only deplore the fact that the underlying reasoning is itself doubtful. Since, by departing from painstakingly earned neutrality and "scientificity", the international human rights law runs the risk of losing a portion of its legitimacy, which might have disastrous consequences for the protection of fundamental freedoms and rights throughout the world. From this perspective, the LGBTI community may hence simply be looked on as a sample of humanity.

Transgender Discrimination As Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law

Bruno Mestre

Abstract

The purpose of this paper consists in a contextual comparative analysis of American and European Courts' case law on transgender discrimination. We focus on the legal techniques and difficulties that both jurisdictions have felt to integrate transgendered individuals under "*sex*" as a prohibited discrimination ground, the extension of the protection and the possible exemptions. We conclude that the integration of transgendered individuals in "sex" was dictated by reasons of substantive equality, to afford protection in situations of blatant discrimination, but which has been accepted with hesitation, making its implementation more difficult. We argue that legislators should follow the example of the British Equality Act 2010 and create the category of "sexual identity" or "gender" as a suspect discrimination ground to protect all forms of gender expression.

* * *

1. Introduction

The German Federal Anti-Discrimination Agency has recently published an empirical study on the discrimination of transgendered individuals; the international data gathered by the authors of this study led them to conclude that transgendered individuals suffered worldwide massive discriminations in nearly every aspect of their daily lives; their situation is particularly delicate in the labor market, where they suffer from several difficulties spanning from the entry into the labor market, career chances, rejection, harassment and lower wages[1]. This general awareness on the difficult situation of transgendered persons would suggest that they would have no difficulty finding protection in the courts under the cover of anti-discrimination statutes; the reality has – unfortunately – proven otherwise. The protection of

[1] J. Franzen and A. Sauer, 'Benachteiligung Von Transpersonen Insbesondere Im Arbeitsleben', (Antidiskriminierungsstelle des Bundes, 2010).

transgendered individuals in courts has been a difficult struggle and albeit judges have increasingly been sensible to punish blatant cases of discrimination with the existing anti-discrimination statutes, their reasoning is far from linear and – in particular – remote from a general consensus. The main problem consists in knowing "*where to fit*" transgendered individuals in the generally accepted discrimination grounds – in particular sex. This becomes particularly evident if we compare the reasoning applied in European and American courts' case law; whereas European courts do not seem to distinguish between sex and gender, using these words interchangeably, American courts appear to adopt the psychological construction of gender as something distinct from sex, in particular with the "*sex stereotype*" theory; recent legislative developments in Europe have tended to distinguish between "*gender*" and "*sex*" although the extension of the protection does not seem to be as far-fetched as American courts. The lessons from the case law are particularly important because the protection of this extremely vilified group has been mainly a judicial conquest, which has spun developments at the legislative levels. The purpose of this article consists in a contextual and comparative analysis of the protection of transgendered individuals in North-American and European courts and the reasoning employed to extend the existing statutes in order to protect this group. We will begin by analyzing the problematic surrounding the protection within the existing discrimination statutes, proceed to examine the fundamental North-American and European case law, debate the politics of "*sex*" and "*gender*" in this case law, reflect on the difficult problem of finding an adequate comparator and finish with a reflection on the limits of the existing law; the final part will present the conclusion.

2. Introductory concepts: sex, gender and transgender and the limits of the law

If we want to understand the problematic concerning the protection of transgendered individuals in Courts, it is necessary to take some fundamental concepts into consideration. Psychologists have tended to distinguish between "*sex*" and "*gender*" in the construction of the identity of an individual: *"sex"* refers to the biological conception of the term in the sense of the chromosomes that define a person as anatomically male or female; "*gender*" refers to a social construction of how a men or woman ought to behave; it may be best described as a constellation of physical, psychological, behavioral and social attributes; it corresponds to the construction of an identity, of a perception of oneself as a man or a woman within a given cultural context. The main difference between "*sex*" and "*gender*" arises from the fact that "*sex*" is an innate thing and "*gender*" results from the interaction with the social context; it is a mental construction heavily linked to the culture, the ways that a person is raised and the social expectations from the person; an individual gradually builds its identity in the process of growing up, which includes gender-identity in the sense of identifying oneself as a man or as a woman. As a last word, we must

say that "*gender*" does not exclude biological elements; it simply cannot be reduced to them[2].

A transgendered individual consists in a person who has an intense identification with the opposite gender to the point of wanting to assume the role of that same gender[3]. It is important to distinguish between wanting to assume some tasks and roles usually associated with the opposite gender within a given context and being a transgender: it is perfectly possible for a biological male to want to assume the task of house-keeping and child-raising – tasks stereotypically associated with females within the Western cultural context – or a biological female to like football without being a transgender. A transgender does not simply want to assume the external characteristics stereotypical of the opposite gender (such as clothing, activities and behavioral patterns); it truly wants to be recognized in its full extension as a person of the opposite gender in every dimension of his/her life[4].

Both US and EU Law prohibit discrimination on grounds of sex against an individual: the protection in the US is afforded both at the federal level by Title VII of the Civil Rights Act 1964 (42 U.S. Code §2000e) and at the State level by several anti-discrimination statutes; in the EU, the protection against discrimination on grounds of sex is afforded by art. 157 TFEU and Directive 2006/54 (Recast Directive); the latter provisions have been the object of an extensive and far-reaching interpretation by the Court of Justice of the European Union, which provided them with a reach that was not originally apparent in its wording. The problem with transgender discrimination lays in the interpretation of the concept of "*sex*" that is used in both statutes. There are no difficulties of interpretation when "*sex*" and "*gender*" coincide, i.e.: when a biological male or female living in accordance with the gender roles that their particular social context assigned to them suffer detrimental action based – directly or indirectly – upon their sex. The fundamental problem lays in

[2] J.T. Weiss, 'Transgender Indentity, Textualism and the Supreme Court: What Is The "Plain Meaning" Of "Sex" In Title Vii of the Civil Rights Act of 1964', *Temple Political and Civil Rights Review*, 18/2 (2009), 573-649.

[3] The DSM-IV, elaborated by the American Psychiatric Association and the International Classification of Diseases (ICD-10), classify transexualism as a disease/disorder. I would like to state that I do not endorse the classification of transgenderism as a disorder/disease and that my enunciation of these characteristics had a sole didactic purpose of attempting to define transgenderism as a phenomenon. I would also like to make present that there has been intense pressure from prestigious Human Rights activists in the sense of eliminating transgenderism from the international classification of disorders/diseases, as it occurred with homosexuality, in line with the Principles 3 and 18 of the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. Mr. Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, has also denounced, in a statement dated from 31.08.2010, the persistence of the classification as a "*disorder*" of the act of wanting to live in accordance with one's true gender as a possible violation of basic human rights.

[4] Julian De Ajuriaguerra, *Manuel De Psychiatrie De L'enfant* (Paris: Masson et Compagnie, Editeurs, 1970).

determining if these provisions also protect those situations in which the biological sex and the assumed gender do not coincide: is discrimination based upon gender non-conformity also discrimination "*because of sex*", is it because of "*sexual orientation*" or are transgendered individuals a distinct class worthy of their own protection ground? There is currently no debate on the need to protect transgender individuals from discrimination[5]: the brief for *amici curiae* of the New York Supreme Court stated exemplarily in the case *Winn-Ritzenberg*[6] (concerning a requirement of a medical certificate to legally change one's name to reflect one's gender) that "*gender identity classifications*" bear all the hallmarks of suspect classifications because (1) there is a long history of transgender discrimination, (2) gender identity bears no relation to the ability to contribute to society, (3) transgender persons are a politically powerless minority and (4) gender identity is akin to an immutable trait. The problem lies not in the conclusion but in the paths to reach that conclusion.

3. The reasoning of the Courts: different approaches to the same problem

3.1. North-American Courts: the "sex stereotyping" hypothesis

The protection of transgendered individuals in North-American courts followed a curious evolution. North-American Anti-Discrimination Law is built upon an exhaustive number of suspect grounds of discrimination; this means that, unlike in many Continental European Constitutions, there is no "*general principle of equality*" to afford protection in grounds not directly provided for in the statutes. North-American Courts initially construed the term "*sex*" strictly limiting the protection to the binary world of anatomical males and females. This became particularly evident in the ruling *Grossmann v Bernards TWP Board of Education*[7] in which the court denied protection to a male-to-female transsexual teacher who was dismissed for having undergone sex-reassignment surgery because – in Judge Barlow's view – the plaintiff had not been discharged "*because of sex*" but because of a "*change of sex*"; the dismissal had no connection to any stereotypical impressions on the ability of females to perform a certain job and if the legislator had wanted to protect transgendered individuals as a class, it would have said so expressly; he concluded that the term "*sex*" contained in the federal statutes should be narrowly construed. These reasons were latter restated in different words but with the same meaning in the four most often quoted rulings that denied protection to transgendered individuals: *Ulane v. Eastern Airlines Inc*, *Holloway v. Arthur Andersen*, *Sommers v. Budget Marketing* and *Dobre v. Amtrak*[8]. The common denominator of these rulings consists in

[5] See the groundbreaking book by Stephen Whittle, *Respect and Equality. Transexual and Transgender Rights* (Cavendish 2002).

[6] *Matter of Winn-Ritzenberg* [2009] NY Slip Op 29442.

[7] *Grossmann v Bernards TWP Board of Education* [1976], 538 F2d 319.

[8] *Ulane v Eastern Airlines Inc* [1985], 471 U.S 1017; *Ramona Holloway v Arthur Andersen &*

the fact that the Courts limited the protection to the biological sex and gender was protected simply when it was an emanation of the cultural patterns associated with the biological sex (protecting women because they are women). This is extremely important because common law countries usually place a great emphasis on the freedom of contract and do not see anything inherently wrong with discrimination unless it is expressly forbidden. This explains the strict interpretation of the statutes and why transsexuals were devoid of any protection even in blatant cases of discrimination.

This line of cases suffered a great turn with a groundbreaking ruling, which – curiously – had nothing to do with transgendered individuals. In *PriceWaterhouseCoopers v Hopkins*[9], a woman who had no transgender issues was denied partnership in a firm because she was not "*feminine enough*": she was advised to "*take courses in charm school*", walk and talk more femininely, have her hair styled and wear jewelry. The US Supreme Court stated that federal anti-discrimination statutes also protected against the so-called "*sex stereotyping*", i.e.: when a person exhibited behaviors not corresponding to the traditional role expected of a person of that biological sex. The Court's words are categorical:

> …we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with that group, for […] Congress intended to strike an entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

This ruling opened the doors for the protection of transsexuals under federal anti-discrimination statutes in courts based upon the "*sex stereotype*" theory. In *Nichols v Azteca Restaurants*[10], the court stated that an employee had been discriminated against on grounds of sex stereotypes by being subject to a relentless campaign of vulgarities during an extended period – which included referring to him as "*fucking female whore*" – because he allegedly walked, talked and carried his tray like a woman; in *Schwenk v Hartford*[11], the court ruled that a male-to-female transsexual inmate who had been the victim of several sexual assaults from a prison guard had been discriminated on grounds of sex because – in the court's words – "*sex*" and "*gender*" *had become interchangeable terms after the decision in Hopkins*[12]; in *Oilver*

Company [1977] 566 F.2d 659; *Audra Sommers v Budget Marketing Inc* [1982] 667 F.2d 748; *Andria Adams Dobre v Amtrak* [1993] 850 F. Supt. 284.

[9] *Pricewaterhousecoopers v Hopkins* [1989] 490 U.S. 228.

[10] *Nichols v Azteca Restaurant Entreprises Inc* [2001] 256 F.3d 864.

[11] *Schwenk v Hartford* [2000] 204 F.3d 1187.

[12] This case deserves a more elaborate explanation; the plaintiff complained on the basis of Title VII and the Gender Motivated Violence Act; the problem lay in determining if the aggressor's actions had been motivated because of sex; this is problematic because this was an act of violence exercised between biological males. The court's emphasis on equating sex and gender demonstrates that anti-discrimination statutes equally protect gender.

v Winn-Dixie[13], the court considered that a male employee had been discriminated against based upon sex stereotypes when he was dismissed for having been seen wearing women's clothes off-duty on several occasions, although he made perfectly clear that he had been diagnosed with gender identity disorder and he had no intention of transitioning or dressing as a woman while working; in *Schroer v Billington*[14], the Court concluded that there had been sex discrimination when a candidate, who passed all the requirements of the selection procedure, was refused employment (alleging that she would not "*fit in*") after she informed her future employer that she intended to undergo sex-reassignment surgery to become a woman; finally, in *Smith v. City of Salem*[15], the court concluded that a firefighter who had worked for seven years without incidents in his department had been discriminated on grounds of sex stereotypes when he was dismissed after informing his superiors of his intention to undergo sex-reassignment surgery to live his life in full as a female; it is important to stress that she was dismissed on the basis of insubordination for refusing to undergo a psychological exam with physicists chosen by the employer and that the process was coined by one his her co-workers as a "*witch-hunt*"[16].

This short overview of the evolution of the case law in North-American courts reveals that Courts appear to distinguish between "*sex*" and "*gender*" and that both of them are protected under an expansive reading of the term "*sex*"; although it is customary that gender is an extension of a person's biological sex, a person cannot suffer adverse actions for failure to conform with the gender that is expected of that sex. This appears to be true independently of any trans-issues by the person affected; *Hopkins* was not a transsexual yet she could not be discriminated for failing to act as a woman ought to act in that particular cultural context; *Oilver*, *Schroer* and *Smith* were transsexuals and they could not be discriminated for failing to act as biological men were expected to act (i.e.: not being transsexuals). The Court implicitly recognized the right to live in accordance with one's gender independently of his/her biological sex. In Comparative Constitutional Law, this could be equated with the fundamental right to freely develop one's personality recognized in many Constitutions[17], which encompasses the right to live in accordance with one's true gender. However, this approach is not without criticisms even from trans-advocates, as we'll see further on.

[13] *Oilver v Win-Dixie Louisiana, Inc* [2002], n.° 00-3114.
[14] *Diane J. Schroer v J. H. Billington* [2007], n.° 05-1090.
[15] *Smith v City of Salem* [2004] 378 F.3d 566.
[16] Melinda Chow, 'Smith V. The City of Salem: Transgendered Jurisprudence and an Expanded Meaning of Sex Discrimination under Title Vii' (2005) 28 Harvard Journal of Law and Richard Bales, 'Transgender Employment Discrimination' (2008) 17 UCLA Women's L. J. 243; Jillian T. Weiss, 'Transgender Indentity, Textualism and the Supreme Court: What Is The "Plain Meaning" Of "Sex" In Title Vii of the Civil Rights Act of 1964'.
[17] Most notably recognised in §2 of the German Constitution and art.° 26 of the Portuguese Constitution.

3.2. The CJEU - difficulties with comparators

The CJEU has had the opportunity to deal with the question of transsexuals on three distinct occasions; its reasoning was rather linear albeit not very clear, mainly due to a certain confusion on the concrete comparator used. In *P. v S.*, a manager in an educational institution was dismissed after she informed her superior of the intention to undergo sex-reassignment surgery; the CJEU stated that that the protection of the right not to be discriminated on grounds of sex is not limited to Directive 76/207, it amounts to a fundamental human right and an expression of the principle of equality; consequently, the protection should not be limited to those situations in which a person is of one or the other sex, it should equally cover all discriminatory behaviors underpinned *mainly in the sex of the person concerned*, as it occurs when a person is treated less favorably on grounds of gender reassignment *by comparison with persons of the sex that she was deemed to belong before the reassignment*. In *KB v. NHS Pensions* (a case heavily influenced by human rights case law), the NHS Pensions refused to recognize the partner of an employee as a widower based on the fact that the partner was a transsexual female-to-male and consequently – at that time – was unable to fulfill the marriage requirement to become a widower because the new gender was not recognized under British Law (in breach of Human Rights law); the CJEU considered this to be direct discrimination on grounds of sex in breach of art.° 157 TFEU because the protection afforded by the provision also covered situations in which the person changed sex. In *R. v Secretary of State for Work and Pensions*, a transsexual male-to-female claimed discrimination because she was unable to retire at the normal age that women could retire (at that time 60) and was required to retire at the same age as men (65). The CJEU considered that the refusal to recognize a transgendered person as a woman for retirement age purposes amounted to discrimination on grounds of sex, in contradiction with Directive 79/7 implementing the principle of equal treatment between men and women in Social Security[18].

The reasoning employed by the CJEU in these cases reveals considerable differences in relation to the North-American case law briefly analyzed above. Firstly, the CJEU considers that the prohibition of discrimination on grounds of sex is simply an expression of the overarching principle of equality, which is a fundamental human right whose observance the court ensures. This means that the interpretation of the prohibition of discrimination was made in the light of the principle of equality and the intention of the legislator when it approved the provisions. This is hardly unexpected because the CJEU has consistently used teleological elements of interpretation in order to reach concrete objectives in its rulings; it appears to be more appropriate to read in the words of the CJEU that the principle of equality (as such) op-

[18] Case 13/94 *P. v S. and Cornwall City* [1996]; Case 117/01 *KB v NHS Pensions Agency* [2004]; Case 423/04 *R. v Secretary of State for Work and Pensions* [2006]. Dagmar Schiek, Lisa Waddington, and Mark Bell, *Cases, Materials and Text on National, Supra-National and International Non-Discrimination Law* (Hart 2007), Aileen McColgan, *Discrimination Law. Text, Cases and Materials* (Hart 2005), Paul Craig and Grainne De Búrca, *Eu Law. Text, Cases and Materials* (Oxford 2007).

posed to such a degrading treatment of a human being and that the principle of prohibition of discrimination on grounds of sex was simply a means to achieve that protection. Secondly, the CJEU does not seem to distinguish between "*sex*" and "*gender*" in its rulings: the court seems to simply state that adverse action undertaken against a transsexual is "*because of*" that persons' sex due to the fact that if the person had not changed sex, it would not have suffered discrimination. This is an important statement because it quickly eliminates two cynical arguments that are often pointed out in transgender discrimination cases: the argument that the discriminator is not against men or women but simply against transgendered individuals as such (which would remove them from the protection of the discrimination ground) and the "*equal misery*" argument claiming that if it had been a woman transitioning to become a man, it would have suffered the same adverse treatment. These formalistic arguments would render the protection afforded by anti-discrimination statutes void and endorse degrading treatments of human beings. The discriminatory behavior was clearly colored by the person's sex (in the sense of sex reassignment) and not by the person's ethnicity, belief or age. Thirdly, the CJEU still used the "*but for*" methodology in its rulings but the comparator is not evident: the CJEU stated that the transgendered person had been treated unfavorably in comparison with the persons of the sex that (s)he was deemed to belong before the surgery. This means that the comparison is not between men and women (in general or in particular) but between men/women who transition and those of the sex that they belonged to before transitioning. This is a rather strange methodology because the correct comparison would be with a person whose sex was not the result of sex reassignment; the end result would have been the same because – in the court's words – the person would still have been discriminated on "*grounds of sex*" read in the light of the principle of equality and human dignity. The reasoning seems to rely more of the protection of gender than sex; although the CJEU always referred to the plaintiffs in their assumed gender throughout the cases, it never referred to them as men or women; the CJEU appears to have been more concerned with the protection of "*gender identity*" as a component of "*sex*" in general than with a Community definition of sex, which would need to have a uniform interpretation in the national legal orders. The CJEU appears to have stated that a person's "*gender*" would always be protected from discriminatory treatments based upon sex even if the person's gender does not correspond to the anatomical sex assigned at birth.

4. The politics of Sex and Gender in the Courts

This brief description of the evolution in North-American and European case law reveals distinct approaches to the same problems and a divergent integration of the concept of "*sex*" and "*gender*" in Anti-discrimination statutes. The evolution of the American case law is exemplary in this concern because it went through a considerable evolution since *Hopkins*. The main idea behind the American case law seems to

be that a person is discriminated "*because of*" sex if the expression of his gender does not correspond his anatomical sex. This reliance on the concept of "*sex stereotype*" corresponds to a deeply individualistic perception of discrimination law that opposes to the classification of human beings in societal groups; it is heavily influenced by an individual justice model. This approach has precedents in other discrimination cases: the US Supreme Court famously stated in the ruling *L.A Department of Water v Manhart* that "*[Title VII]'s focus on the individual is unambiguous. It precludes the treatment of individuals as simply components of a racial, religious, sexual, or national class*"[19]. Consequently, a person is discriminated against on the basis of sex if it refuses to adopt the lifestyle and behavioral patterns usually associated with his/her anatomical sex within a given social context. The problem with this approach lays in the fact that it appears to have transformed a normative stereotype into a statistical stereotype and refuses to recognize the true nature of a transgendered individual. A *normative stereotype* is based on a general consensus about how members of a social group ought to behave to conform appropriately to the norms associated with the membership of a specific group (e.g.: women love children); a *statistical stereotype* consists in a characteristic associated with a certain group that is underpinned in figures but that may not be true for all members of the group (e.g.: women are weaker than men). The problem with the approach followed in the North-American Courts consists in the fact that they in fact have transformed transgendered individuals into men who like to wear dresses: although it is generally true that men ought not wear dresses (*normative stereotype*), if a man chooses to do so because it corresponds to its true gender, it may not be discriminated against because this would amount to discrimination *because of sex* against anatomical women who opted to wear dresses (*statistical stereotype*); if his anatomical sex (male) had not been considered, he wouldn't have been discriminated because of his behavior. This "*sex-flipping*" analysis transformed the normative stereotype into a statistical stereotype! Although it is undeniable that it has the merit of affording protection to a heavily discriminated group, it still falls short of the true purpose of discrimination law and transgender advocacy: to recognize a transgender as a woman for all purposes and not simply as a man who adopted a "*female persona*". The former paragraphs revealed that a transgender does not simply want to assume tasks stereotypically associated with the opposite sex: a transgender wants to become socially recognized as a person of the opposite sex in every domain of social life. On the other hand, the inclusion of transgendered individuals in the "*sex discrimination*" ground also avoids creating a new category of discrimination that would politically empower a minority social group. Consequently this protection, no matter how worthy, still falls short of the true objectives of protecting transgendered individuals against discrimination[20].

[19] *L.A Depart. of Water v Manhart* [1978] 435 U.S. 702.

[20] Anna Kirkland, 'What's at Stake in Transgender Discrimination as Sex Discrimination?', *SIGNS,* (2006), 83 ff, Elizabeth M. Glazer and Zachary A. Kramer, 'Transitional Discrimination', *Legal Studies Research Paper Series* (Hofstra University - School of Law, 2009), L. Camille

The approach in the CJEU appears to have been more expansive and this seems to have been so due to the concern to protect human dignity. The CJEU appears to have equated "*sex*" and "*gender*" considering that a discriminatory treatment was "*because of*" sex if the "*change of sex*" was a relevant element in the decision-making process of the discriminator. This approach avoids discussions about the role of stereotypes and political minorities. The CJEU appears to have been heavily influenced by the principle of human dignity and Human Rights Law, in particular the protection of transgender rights in the ECHR. The CJEU's constant reference to the principle of equality in the light of which the principle of equal treatment of men and women should be read provides us with a hint that it was more concerned with the general principle of equality than with equal treatment of men and women as such. The problem lays in the fact that, at the time in which the decisions were taken, the number of suspect grounds of discrimination accepted in EU Law was very strict and the CJEU had to undertake a very expansive interpretation of the provisions in order to each substantive equality. Consequently it had to fit transgender discrimination into sex discrimination or transgendered individuals would be deprived of any protection under EU Law. One may reasonably ask if the decision would be the same today because art.° 21 Charter of Fundamental Rights EU expressly recognizes a general principle of equality, which would help punishing and dissuading these behaviors. There is also a considerable difference between the CJEU's approach and North-American approach. Although the CJEU always referred to the plaintiffs in their preferred gender throughout the cases, it never expressly stated that they would be considered as women/men in the light of EU Law. Although this may be debated, we believe that one may infer from the reasoning of the CJEU that the CJEU considered these individuals in their true – as opposed to anatomical – gender. One may infer this from the comparator used and the solution provided for in the cases. In *P. vs. S.*, the comparison was with the sex that the plaintiff was deemed to belong before the surgery therefore implying that the plaintiff no longer belongs to that sex; on the other hand, in *KB v NHS Pensions* and *R. v Secretary of State*, the plaintiffs were fully recognized as male/female under national law at least for the purposes of being considered as entitled to a pension under the same conditions as a person possessing the anatomical sex corresponding to the plaintiffs gender.

This short analysis reveals that the protection of transgenders in North-American and European case law goes well beyond formal methods of statutory interpretation and is heavily influenced by a political option on the integration of gender in sex. The European case law appears to be more protective and promotes human dignity because it is not limited to the protection of "*men who wear dresses*" and "*women who act as men*"; it rather extends to the social recognition of the person in its true gender independently of his/her anatomical sex.

Hébert, 'Transforming Transexual and Transgender Rights' (2009) 15 Wm & Mary J Women & L. 535.

5. Discrimination in relation to whom? The comparator problem

The protection of transgendered individuals raises a distinct problem consisting in the identification of the appropriate comparator. As a preliminary word, it must be said that both the North-American courts and the CJEU used the "*but for*" methodology in the identification of a discrimination. The difference lies in relation to whom the comparison was established. The comparison used by North-American courts was exemplarily described in *Doe v City of Belleville*[21]: this ruling – which concerns same-sex sexual harassment against an effeminate male employee stated that the harassment was "*because of*" sex because had the effeminate person not been a man, it would not have suffered the harassment: the harasser is not against effeminate people as such but simply against effeminate men. This means that the comparison was established between an effeminate man and an effeminate woman. This is the logical consequence of the "*sex stereotype*" concept adopted in *Hopkins* because the main idea seems to be to distinguish gender from sex and reprove violence against persons whose gender does not match the anatomical sex in comparison with persons whose gender matches the anatomical sex and are not subject to the same violence. This raises the formal argument that discrimination lawyers have frequently pointed out, which consists in the "*equal misery*" argument: one may argue that the treatment would have been the same if a person of the opposite sex exhibited behaviors not corresponding to their anatomical sex. North-American courts seem to cunningly avoid this question by establishing a comparison between effeminate/"macho" men and effeminate/"macho" women although this appears to be a rather fallacious argument: the discriminator is not against personality traits as such but against those that do not match the anatomical gender. This formal argument reveals that North-American courts appear to have had a very clear objective in mind, which is to outlaw discrimination against transgendered individuals independently of the constraints of the law; this appears to be every aspect a judicial construction to overcome statutory and political limitations. The transposition of the argument into religious discrimination helps to understand the ridiculous results of a blind application of the subject: if a person were discriminated because (s)he converted from religion X to religion Y, would it be lawful to discriminate the person claiming that the discriminator is not against religion X nor religion Y but simply against converts as such? This would completely empty the protection afforded by discrimination law[22].

This "*comparator problematic*" becomes even more evident in the CJEU's case law. The CJEU starts by putting aside the "*equal misery*" argument by stating that the discriminatory action was "*because of*" sex due to the fact that a "*change of sex*"

[21] *Doe v City of Belleville* [1997] n.° 94-3699.

[22] Glazer and Kramer, 'Transitional Discrimination', Richard F. Storrow, 'Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination' (2003) 55 Main e LR 117 ff., Whittle, *Respect and Equality. Transexual and Transgender Rights*.

is still "*sex*" and – likewise in the religious discrimination argument against converts – one cannot reasonably say that hatred against transgendered individuals is not based upon their sex. This – in itself – could finish the discussion and spare the need for a comparator. But the Court then proceeds to compare the transgendered individual, in order to establish a discrimination on grounds of sex, with persons of the sex that (s)he was deemed to belong before the surgery. If a person transitions from male to female and suffers discrimination, the comparison is not established with women who have not transitioned but with men who have not transitioned. This is precisely the opposite approach of the one followed in North-American Courts and becomes quite curious if we take into account identification between "*sex*" and "*change of sex*". This is significant because we believe that it may truly entail the legal recognition of the person's gender: *P.*, *KB* and *R.* were legally recognized in their chosen gender because if they had remained in their previous gender/sex, they would not have suffered discrimination. If they had been compared with anatomical women/men then they would still be recognized as "*men*" and "*women*" with another gender. The choice of the comparator is therefore significant[23].

This discussion reveals that the choice of the appropriate comparator in discrimination cases is not innocent and cannot be reduced to a simple formal operation: the particular case of transsexuals reveals that it may amount to a true political decision of the recognition of a person's sex in their true gender. The approach of the CJEU appears to be more progressive than the North-American Courts; the influence of the principle of the protection of human dignity and the general principle of equality may have had an important role in this matter. This approach also appears to have had influence at the national level; in *A. v. West Yorkshire Police*[24], a British case concerning the expulsion of a transsexual police officer from the body of constables on the basis that she would have to perform intimate searches, the House of Lords rejected the *General Occupational Requirements* defense and considered that, in the light of with human rights case law and the case law of the CJEU, a transsexual must be fully recognized as a person of the true gender in all circumstances.

6. The limits of the protection

The final question deals with the limits of the protection in transgender discrimination cases. This is a *vexata quaestio* dealing with the issue of transvestites and other gender non-conform behaviors, which do not go to the extreme point of transitioning in the sense of a sex-reassignment surgery. North-American Courts have been

[23] Mccolgan, *Discrimination Law. Text, Cases and Materials*, Schiek, Waddington, and Bell, *Cases, Materials and Text on National, Supra-National and International Non-Discrimination Law*.
[24] *A. v West Yorkshire Police* [2004] UKHL 21.

discussing the integration of these individuals in the "*sex stereotype*" theories. There are some rulings that denied protection to these individuals: in *Oilver v Winn-Dixie Louisiana*[25], the Court denied protection under the "*sex stereotype*" theory to an employee who had been dismissed for wanting to cross-dress publicly as a woman and assume a female persona in her workplace after being diagnosed with "*transvestitic fetichism*" and "*gender identity disorder*". The Court distinguished these forms of "*gender non-conform behavior*" from situations of transsexuals who undergo sex-reassignment surgery or when women/men are discriminated for not being sufficiently "*feminine/masculine*" within a given social pattern. The Court stated that the "*sex stereotype theory*" did not protect men who wore women's clothing. In *James v Ranch Mart Hardware*[26], the Court denied protection to a male employee who wanted to begin wearing women's clothes on the basis of an "*equal misery*" argument claiming that they would also discriminate against a woman who wore men's clothes. These rulings reveal that the reach of the "*sex stereotype*" theory used at the North-American Courts is not so large as to expand to every type of gender non-conform behavior: it simply seems to be more of a means of affording protection to a heavily vilified group – "*full*" transgendered individuals and effeminate men/macho women – then to all types of gender non-conforming behavior. This becomes particularly evident if we analyze the decisions applied to grooming standards: North-American courts have upheld different grooming standards for men and women, including the mandatory use of make-up for women and the prohibition of long hair and ostensive jewelry for men, as long as these requirements do not overburden one sex or place it in a degrading situation (such as requiring women to dress as Playboy bunnies) (*Tavora v NY Mercantile Exchange* and *Carroll v Talman Fed. Sav. & Loan Associat.*)[27].

The CJEU has not had the opportunity to rule on these situations; consequently we may only hypothesize. We saw above that the CJEU seems to equate "*sex*" and "*gender*"; this equalization seems to be stretching to other areas of EU policy-making in which the EU has increasingly been avoiding the use of the word "*sex*" towards the use of "*gender*"(such as "*gender mainstreaming*"). These developments seem to have had reflexes at the national level: the new British Equality Act 2010 classified "*gender*" as a specific discrimination ground distinct from sex and subjected the justification of discriminatory treatments to the *general occupational requirements* defense, removing them from the far stricter justifications for direct sex discrimination; the Constitutional revision that is being currently undertaken in Portugal plans to introduce "*gender*" as a specific prohibited discrimination ground in the Constitution, which implies that is something distinct from sex. Could this be

[25] *Oilver v Win-Dixie Louisiana, Inc* [2002], n.° 00-3114.
[26] *James v Ranch Mart Hardware* [1994], n.° 94-2235.
[27] *Tavora v NY Mercantile Exchange* [1996] 101 F.3d 907; *Carroll v Talman Fed. Sav. & Loan Associat*. [1979], n.° 78-1458 and Marybeth Herald, 'Transgender Theory: Reprogramming Our Automated Settings', (Thomas Jefferson School of Law, 2006), 101.

an indication that transvestites and other gender non-conform behaviors are unprotected by EU Law? This is something that only the CJEU may answer and the direction of its rulings is not certain: although it is extremely progressive in some situations, in others it takes a more conservative position (as in *Grant v Southwest Trains*)[28]. In addition, grooming requirements have traditionally been dealt with at the national level in the light of employees' fundamental rights instead of discrimination law; the only exception is the UK, where clothing and appearance rules have led to some judicial decisions. However, there is a surprising degree of convergence between both legal systems in the sense that it is considered as admissible that men and women may be subject to distinct clothing requirements in the workplace as long as the specific dress-code does not burden excessively one sex; the difficulty lies in the comparator because very few grooming requirements may be applied indistinctly to both sexes. Consequently, a transvestite or a woman who appreciates using a more masculine outfit does not seem to enjoy the protection of discrimination law or fundamental rights in the workplace because courts and lawmakers have tended to give prevalence to entrepreneurial needs and not the individuals' gender preference unless the person is – in fact – a true transgender in the sense of wishing to assume the full role of the other sex[29].

7. Conclusion

The analysis of the protection of transsexuals in North-American and European case law reveals that although both jurisdictions protect transgendered individuals under the ground of "*sex*", there are substantial differences in terms of the reasoning employed and the political views underpinning them. Several conceptual doubts remain on the extension of the protection. We argue that it would be more appropriate to create a separate suspect ground of discrimination on the basis of gender, likewise it has occurred in Germany and in the UK, which could adequately protect these individuals and determine its extent.

[28] Case C-249/96 *Grant v Southwest Trains* [1998] ECR I-621.

[29] Júlio Vieira Gomes, *Direito Do Trabalho* (Coimbra, 2007), Aileen McColgan, *Discrimination Law. Text, Cases and Materials*.

Etat civil et transidentité en droit français. Etat des lieux et perspectives d'évolution

Philippe Reigné

Résumé

Le droit français relatif au changement d'état civil des personnes transidentitaires est d'origine prétorienne. La modification de la mention du sexe sur les registres d'état civil est subordonnée à la réunion de quatre conditions : un traitement médico-chirurgical, le diagnostic du syndrome du transsexualisme, une apparence physique et un comportement social correspondant au sexe dont l'indication sur l'acte de naissance est sollicitée. Ce sont les deux premières conditions qui divisent aujourd'hui les juges du fond. Ceux-ci admettent que la rectification des actes d'état civil peut être ordonnée dès lors que le traitement suivi a produit des effets irréversibles ; une réassignation sexuelle complète n'est plus exigée. De même, la condition tirée du diagnostic du transsexualisme a été abandonnée par une cour d'appel, mais maintenue par une autre. Ces évolutions, encore inachevées, mettent-elles la France à l'abri d'une nouvelle condamnation par la Cour européenne des droits de l'homme ? L'affirmative ne s'impose pas avec évidence. Les conditions posées au changement d'état civil des personnes transidentitaires par le droit français peuvent, en effet, apparaître comme disproportionnées pour décider de l'appartenance d'une personne à un sexe ou à un autre.

Abstract

French law relating to the change in civil status of transgender persons originates from judge-made rules. Under these rules, four conditions must be met in order for a change to be made to the gender recorded on civil status records: medical and surgical treatment, diagnosis of transsexual syndrome, physical appearance and social behaviour corresponding to the gender to be recorded on the requested birth certificate. Trial court judges are currently divided on the first two conditions. They admit that the rectification of civil status records may be ordered if the treatment followed has led to irreversible effects; complete sex reassignment surgery is no longer required. Similarly, the condition based on the diagnosis of transsexualism has been abandoned by one Court of Appeal, but maintained by another. Would these changes, which have yet to be completed, protect France from any further adverse decision by the European Court of Human Rights? It is not evident that they would: The conditions laid down by French law for a change of civil status for transgender persons may indeed appear to be disproportionate in order to decide on whether a person belongs to one gender or another.

* * *

Dans les années 1950, naissait aux Etats-Unis, des travaux de John Money, psychologue attaché au Johns Hopkins Hospital de Baltimore, et de Robert Stoller, psychiatre et psychanalyste, professeur à l'Université de Californie, la théorie du genre. Voici comment, en 1968, Stoller en exposait les linéaments :

> Le genre est un terme qui a des connotations psychologiques ou culturelles, plus que biologiques. Si les termes appropriés pour sexe sont " mâle " et " femelle ", les termes correspondants pour le genre sont " masculin " et " féminin " ; ces derniers peuvent être totalement indépendants du sexe biologique. Le genre est la quantité de masculinité ou de féminité que l'on trouve dans une personne […] L'*identité de genre* commence avec la connaissance et la perception, conscientes ou inconscientes, que l'on appartient à un sexe et non à l'autre […] Le *" rôle " de genre* est le comportement manifeste que l'on révèle en société, le rôle que l'on joue, en particulier avec d'autres personnes, pour établir sa position avec eux, dans la mesure où, en ce qui concerne le genre, leur appréciation et la sienne sont en jeu[1].

Une personne transidentitaire – ou transgenre dans l'acception générale donnée à ce terme – est une personne dont l'identité de genre n'est pas en harmonie avec le genre qui lui a été assigné à la naissance d'après son sexe génital[2]. Afin de résoudre ce conflit, elle peut chercher à faire coïncider, plus ou moins complètement, ponctuellement ou continûment, son rôle de genre avec son identité de genre, voire refuser les catégories du genre, selon les circonstances et la perception qu'elle a d'elle-même.

Le droit français ne reconnaît cependant l'identité de genre des personnes transidentitaires – par la modification de la mention du sexe dans leur acte de naissance – qu'à travers le prisme du transsexualisme. Encore convient-il de relever que la Cour de cassation, avant comme après la condamnation de la France par la Cour européenne des droits de l'homme[3], est restée attachée à la réalité biologique[4], alors que la juridiction européenne, au contraire, interprétant l'article 12 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, a déclaré n'être plus convaincue « que l'on puisse aujourd'hui continuer d'admettre […] que le sexe doive être déterminé selon des critères purement biologiques » ; d'autres éléments sont à prendre en compte, tels que l'offre de traitements médicaux ou le comportement social de la personne[5]. Seul le

[1] Robert Stoller, *Recherches sur l'identité sexuelle à partir du transsexualisme* (Gallimard, 1978, trad. de *Sex and Gender*, vol. 1, Science House, New York, 1968) p. 28 et 29.

[2] V. Thomas Hammarberg, *Droits de l'homme et identité de genre* (oct. 2009 pour la version française) p. 5 ; Assemblée parlementaire du Conseil de l'Europe, *Discrimination sur la base de l'orientation sexuelle et de l'identité de genre*, résolution n° 1728 (2010) n° 1.

[3] CEDH, 25 mars 1992, n° 3343/87, B. c. France, A232-C : JCP G 1992, II, 21955, note T. Garé ; D. 1993, jurispr. p. 101, note J.-P. Marguénaud.

[4] V. Cass. 1re civ., 21 mai 1990 : J.C.P., éd. G, 1990, II, 21588, rapp. J. Massip, concl. F. Flipo (4 arrêts) ; Cass. ass. plén., 11 déc. 1992 : JCP G 1993, II, 21991, concl. M. Jéol, note G. Mémeteau.

[5] CEDH, 11 juill. 2002, n° 28957/95, Goodwin c. Royaume-Uni, § 100 : D. 2003, jurispr. p. 2032, note A.-S. Chavent-Leclère ; Personnes et famille novembre 2002, p. 14, note A. Leborgne ;

droit au respect de la vie privée permet à la Cour de cassation de concilier la possibilité du changement d'état civil et la conception biologique du sexe.

Les règles qui gouvernent la matière sont d'origine prétorienne. Après la condamnation de la France[6], M. Michel Jéol, premier avocat général à la Cour de cassation, avait estimé qu'il n'était pas souhaitable d'attendre l'intervention du législateur aux motifs, d'une part, que le Parlement risquait d'être débordé par la complexité et l'ampleur de cette question et, d'autre part, qu'une consécration légale contribuerait à développer « un phénomène qui doit rester marginal[7] ». La Haute Juridiction, dans deux arrêts d'Assemblée plénière rendus le 11 décembre 1992[8], avait suivi cette suggestion et soumis la modification de la mention du sexe sur les registres de l'état civil, hors les cas d'erreur, à de strictes exigences :

> Attendu que lorsque, à la suite d'un traitement médico-chirurgical, subi dans un but thérapeutique, une personne présentant le syndrome du transsexualisme ne possède plus tous les caractères de son sexe d'origine et a pris une apparence physique la rapprochant de l'autre sexe, auquel correspond son comportement social, le principe du respect dû à la vie privée justifie que son état civil indique désormais le sexe dont elle a l'apparence.

Quatre conditions sont ainsi posées, tirées, d'une part, du diagnostic et du traitement du syndrome du transsexualisme et, d'autre part, de l'apparence physique et du comportement social, qui doivent correspondre au sexe dont l'indication sur l'acte de naissance est sollicitée.

Ces conditions doivent-elles être réunies lorsqu'un simple changement de prénom est requis sur le fondement de l'article 60 du code civil ? La Cour de cassation n'a pas eu l'occasion de répondre précisément à cette question[9] ; ce qui explique la diversité des solutions adoptées par les juges du fond. Pour les uns, le diagnostic du transsexualisme constitue l'intérêt légitime exigé par la loi[10], la demande ne pouvant être accueillie en son absence[11] ; pour d'autres, il faut que le prénom sollicité corresponde à l'apparence extérieure actuelle[12] ; pour d'autres encore, une transformation irréversible est nécessaire, sans que l'on sache clairement s'il s'agit d'une transformation physique ou psychique[13].

CEDH, 11 juillet 2002, n° 25680/94, I. c. Royaume Uni, § 80 ; v. aussi CEDH, 24 juin 2010, n° 30141/04, Schalk et Kopf c. Autriche, § 59.

6 CEDH, 25 mars 1992, préc.

7 Concl. JCP G 1993, II, 21991, p. 44.

8 Cass. ass. plén., 11 déc. 1992, préc. ; adde Cass. 1re civ., 18 oct. 1994, n° 93-10.730.

9 V. Isabelle Corpart-Oulerich, 'Transsexualisme et prénom' Petites Affiches 28 juill. 1993 p. 45 ; rappr. Cass. 1re civ., 16 déc. 1975 : D. 1976, jurispr. p. 397, note R. Lindon (2e esp.) ; Cass. 1re civ., 21 mai 1990, préc. (4e esp.).

10 CA Toulouse, 3 août 2000 : JurisData n° 2000-128346.

11 CA Montpellier, 18 janv. 2010 : JurisData n° 2010-004283.

12 CA Aix-en-Provence, 20 févr. 2008 : JurisData n° 2008-365850.

13 CA Nancy, 14 nov. 2003 : JurisData n° 2003-234864.

Selon les arrêts d'Assemblée plénière du 11 décembre 1992[14], la modification des actes de naissance des personnes transidentitaires est ordonnée à l'issue de la réassignation du sexe qui suit le diagnostic du transsexualisme. Il en résulte que le changement d'état civil est réservé à un faible nombre de personnes et intervient tardivement. Ce régime est très rigoureux, voire dissuasif.

Ce constat autorise-t-il pour autant à conclure à la condamnation de la France par la Cour européenne des droits de l'homme en cas de saisine de celle-ci ? Pour répondre à cette question, il convient de tenir compte de la possibilité, pour les Etats, de limiter l'exercice des droits garantis par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. Il faut aussi prendre en considération l'évolution récente du droit français qui affecte à la fois l'exigence juridique du diagnostic (1) et la condition tirée du traitement médical (2).

1. L'exigence du diagnostic du transsexualisme

Le changement d'état civil du chef du sexe suppose l'établissement d'un diagnostic du transsexualisme. Le décret n° 2010-125 du 8 février 2010 ayant retiré de la liste des affections psychiatriques de longue durée les troubles précoces de l'identité de genre, le transsexualisme n'est plus considéré, selon la réglementation française, comme une maladie mentale. Le diagnostic exigé par la jurisprudence n'est donc plus que « différentiel » ; il doit ainsi permettre « d'écarter d'éventuelles pathologies confondantes » comme « un trouble mental de type schizophrénie, avec idées délirantes à thème de métamorphose sexuelle[15] ».

Sans doute la direction des affaires civiles et du sceau du ministère de la justice autorise-t-elle, dans sa circulaire du 14 mai 2010, le ministère public à formuler un avis sur le fondement des « diverses pièces, notamment les attestations et comptes rendus médicaux fournis par le demandeur à l'appui de sa requête », sans exiger systématiquement une expertise judiciaire. Toutefois, en réservant le recours aux expertises pour le cas où « les éléments fournis révèlent un doute sérieux sur la réalité du transsexualisme du demandeur », la Chancellerie maintient expressément la nécessité d'un diagnostic pour toute modification de la mention du sexe dans l'acte de naissance[16].

Cette exigence n'était d'ailleurs pas discutée et le droit positif était fermement établi en ce sens jusqu'à deux arrêts rendus dans des espèces différentes par la cour

[14] Préc.

[15] V. Haute Autorité de Santé, *Situation actuelle et perspectives d'évolution de la prise en charge médicale du transsexualisme en France* (nov. 2009) p. 94 et 97.

[16] Circ. DACS, n° CIV/07/10, 14 mai 2010 relative aux demandes de changement de sexe à l'état civil : NOR : JUSC1012994C ; v. Philippe Roger, 'L'avenir de l'expertise judiciaire en matière de transsexualisme' Experts n° 89, avril 2010, p. 18.

d'appel de Nancy le 11 octobre 2010 et le 3 janvier 2011[17]. L'arrêt rendu le 11 octobre 2010 par la juridiction nancéienne est une décision avant dire droit ; la cour fait injonction à la demanderesse de justifier du « caractère irréversible du changement de sexe ou de genre », mais n'exige pas la preuve de la réalité du transsexualisme. De même, dans leur décision du 3 janvier 2011, les juges nancéiens rejettent la demande de changement d'état civil au seul motif que la requérante ne démontre pas « le caractère irréversible du processus de changement de sexe ». La condition tirée du diagnostic du transsexualisme n'est reprise dans aucun de ces arrêts.

En revanche, la cour d'appel de Paris souligne la nécessité du diagnostic dans une décision du 27 janvier 2011[18] ; il faut, selon la juridiction parisienne, qu' « un transsexualisme authentique, syndrome médicalement reconnu, et insusceptible de traitement, [soit] rigoureusement diagnostiqué[19] ».

Les demandes de changement d'état civil formulées par les personnes transidentitaires sont accueillies sur le fondement du droit au respect de la vie privée[20]. C'est sur ce fondement que la France a été condamnée par la Cour européenne des droits de l'homme[21]. Les changements d'état civil du chef du sexe sont encore aujourd'hui décidés par les juges du fond en application de ce principe[22].

L'exigence d'un diagnostic du transsexualisme porte-t-il atteinte au droit au respect de la vie privée garanti par l'article 8 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ? Il faut rappeler que le second alinéa de cet article permet aux Etats de restreindre le droit au respect de la vie privée. Ces restrictions doivent être prévues par la loi, poursuivre l'un des buts légitimes énumérés au texte et être nécessaires dans une société démocratique. Dans l'exercice de son pouvoir de contrôle, le juge européen reconnaît cependant aux Etats une marge d'appréciation dont l'étendue varie principalement selon la nature du droit en cause, le but de l'ingérence et l'existence de principes communs aux systèmes juridiques des Etats. Ainsi, dans l'affaire Parry c. Royaume-Uni, la Cour considéra que la loi anglaise subordonnant au divorce la complète reconnaissance d'une nouvelle appartenance sexuelle n'était pas contraire au droit au respect de la vie privée et familiale ; l'existence d'un partenariat civil « emportant pratiquement les mêmes droits et obligations que le mariage », sans condition de différence sexuelle, lui a permis de constater l'absence de démonstration, d'une part, d'une ingérence disproportionnée dans le droit au respect de la vie privée et familiale et, d'autre part, d'un déséquilibre entre l'intérêt général et les intérêts de l'individu[23].

[17] CA Nancy, 11 oct. 2010 : JCP G 2010, 1205, note Ph. Reigné ; CA Nancy, 3 janv. 2011 : JCP G 2011, 480, note Ph. Reigné (1re esp.).
[18] CA Paris, 27 janvier 2011 : JCP G 2011, 480, note Ph. Reigné (2e esp.).
[19] CA Paris, 27 janv. 2011, préc.
[20] V. *supra*.
[21] V. CEDH, 25 mars 1992, préc.
[22] V. par exemple TGI Toulouse, 10 décembre 2010, inédit.
[23] CEDH, 28 nov. 2006, n° 42971/05.

Dans son rapport consacré à la situation des personnes transgenres au sein des pays membres du Conseil de l'Europe, M. Thomas Hammarberg, commissaire aux droits de l'homme près le Conseil de l'Europe, relève qu'un diagnostic de troubles mentaux peut devenir un obstacle à l'exercice des droits fondamentaux des personnes transidentitaires, « notamment lorsqu'il sert à limiter leur capacité juridique[24] ». Cette observation conserve sa pertinence quoique le transsexualisme ne fasse plus partie, en droit français, de la catégorie des affections psychiatriques, puisque l'exigence juridique d'un diagnostic « différentiel » subsiste. Cette exigence conduit en effet tribunaux et auteurs à décider qu'il faut réserver la possibilité d'obtenir la modification de la mention du sexe à l'état civil aux « transsexuels vrais[25] », par opposition, notamment, aux « non-transsexuels », personnes souvent décrites – dans des termes peu flatteurs – comme « des travestis, des pervers sexuels ou des individus relevant vraisemblablement de la psychiatrie[26] ».

M. Hammarberg montre que cette solution ignore la diversité des personnes transgenres :

> Bien que comptant peu de membres, la communauté transgenre est d'une grande diversité. En font partie des transsexuels déjà ou pas encore opérés, mais aussi des personnes qui choisissent de ne pas subir d'opération ou qui n'ont pas accès à la chirurgie. Il peut s'agir de personnes transgenres femme-vers-homme ou homme-vers-femme, qui ont – ou non – subi une intervention chirurgicale ou un traitement hormonal, et aussi de travestis et d'autres personnes qui n'entrent pas strictement dans les catégories homme ou femme. Il semble que dans de nombreux pays, le cadre juridique ne tienne compte que des transsexuels et laisse de côté une importante partie des personnes transgenres[27].

On peut en effet se demander si l'exigence d'un diagnostic du transsexualisme, aussi étroitement entendue, ne constitue pas une ingérence disproportionnée dans l'exercice du droit au respect de la vie privée, comme le révèle l'arrêt rendu le 27 janvier 2011 par la cour d'appel de Paris[28]. En l'espèce, la demanderesse produisait un certificat médical établissant qu'elle était suivie par un endocrinologue pour une dysphorie de genre. La juridiction parisienne ne tient cependant aucun compte de cette pièce, qui ne contient pas le diagnostic d'un « transsexualisme authen-

[24] Rapp. préc., p. 7 et 23.

[25] V. par exemple CA Paris, 28 juin 2001 : JurisData n° 2001-149456 et, en dernier lieu, CA Paris, 27 janv. 2011 : JCP G 2011, 480, note Ph. Reigné (2e esp.) ; Jean-Paul Branlard, *Le sexe et l'état des personnes* (LGDJ 1993) n° 1488.

[26] Michèle Gobert, 'Le transsexualisme ou de la difficulté d'exister' JCP G 1990, I, 3475, n° 11 ; comp. Jean-Paul Branlard, *op. cit.*, nos 1459 et s.

[27] Rapp. préc., p. 5 ; rappr. Cristina Castagnoli, *Les droits des personnes transgenres dans les Etats Membres de l'Union européenne* (Parl. europ., Départ. thém. C, 2010) p. 5.

[28] Préc.

tique », la notion de dysphorie de genre étant plus large que celle de transsexualisme. Le changement d'état civil est donc refusé.

Sans doute l'exigence d'un diagnostic médical peut-elle être considérée comme une mesure nécessaire à la protection de la santé au sens du second alinéa de l'article 8 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales dès lors qu'à ce diagnostic est associé un traitement. Toutefois, ce diagnostic, en « permettant de s'assurer de la volonté du patient à s'engager dans les étapes ultérieures de la prise en charge thérapeutique[29] », peut présenter un caractère dissuasif à l'égard des personnes transidentitaires qui ne souhaitent pas entrer dans la voie d'une conversion sexuelle complète. En outre, on peut se demander si la simple constatation, par un médecin ou un psychologue, d'une discordance entre l'identité de genre et le sexe biologique ne serait pas suffisante, sans qu'il fût nécessaire de caractériser un quelconque syndrome.

A la condition tirée du diagnostic du transsexualisme s'ajoute celle de l'irréversibilité de la conversion sexuelle entreprise, affirmée aussi bien par la juridiction parisienne que par la juridiction nancéienne.

2. La condition du traitement du transsexualisme

Dans le système issu des arrêts d'Assemblée plénière du 11 décembre 1992[30], la modification des actes d'état civil est conçue comme l'aboutissement d'un processus de réassignation hormono-chirurgicale du sexe. Une décision rendue par la cour d'appel de Poitiers le 20 décembre 2006 illustre parfaitement les insuffisances d'un pareil système[31]. En l'espèce, la demanderesse sollicitait d'être désignée du sexe féminin sur son acte de naissance, mais ne pouvait assumer le coût du traitement chirurgical sur ses organes génitaux en raison des « difficultés d'insertion sociale rendant difficile son accès à un emploi rémunérateur » et dues à « l'inadéquation de son apparence et de son état civil » ; elle fut ainsi empêchée de passer son permis de conduire, l'administration lui ayant demandé soit de « remplacer les photos d'identité du dossier par des photos de vous sous des traits masculins, de les faire tamponner par la préfecture et de vous présenter aux examens en tenue masculine », soit « d'attendre que vous ayez changé officiellement votre état civil et modifié tous les documents vous concernant dont votre demande de permis ». Les juges poitevins considérèrent qu'il convenait de mettre fin à cette atteinte à la vie privée et ordonnèrent la modification de l'acte de naissance, en dépit de l'inachèvement de la conversion sexuelle entreprise[32].

[29] Haute Autorité de Santé, rapp. préc., p. 97.

[30] Préc.

[31] CA Poitiers, 20 déc. 2006 : JurisData n° 2006-330972.

[32] V. aussi CA Rennes, 26 oct. 1998 : D. 1999, jurispr. p. 508, note M. Friant-Perrot : état de santé – séropositivité – incompatible avec une intervention chirurgicale.

Consciente de ces difficultés, la direction des affaires civiles et du sceau du ministère de la justice, se fondant tant sur l'évolution de la jurisprudence des juges du fond que sur le rapport de la Haute Autorité de Santé[33], invite, dans sa circulaire du 14 mai 2010, le ministère public à :

> donner un avis favorable à la demande de changement d'état civil lorsque les traitements hormonaux ayant pour effet une transformation physique ou physiologique définitive, associés, le cas échéant, à des opérations de chirurgie plastique (prothèses ou ablation des glandes mammaires, chirurgie esthétique du visage…) ont entraîné un changement de sexe irréversible, sans exiger pour autant l'ablation des organes génitaux[34].

Selon la direction des affaires civiles et du sceau, en effet, « certaines juridictions du fond considèrent que les exigences posées par la Cour de cassation visent essentiellement à démontrer le caractère irréversible du processus de changement de sexe ». Or, la Haute Autorité de Santé souligne que les effets des traitements hormonaux, notamment sur la fertilité, sont susceptibles d'irréversibilité[35]. Il suffirait donc d'un traitement hormonal aux effets irréversibles pour que le juge ordonnât la modification de l'acte de naissance du chef du sexe ; le juge interviendrait ainsi plus tôt.

La lecture du rapport de la Haute Autorité de Santé révèle que cette solution est tirée d'une interprétation de la recommandation de l'Assemblée parlementaire du Conseil de l'Europe relative à la condition des transsexuels. D'après cette recommandation, « dans le cas de transsexualisme irréversible […] la mention concernant le sexe de l'intéressé devrait être rectifiée dans le registre des naissances, ainsi que dans ses pièces d'identité[36] ». La Haute Autorité de Santé relève que « la recommandation invite les états signataires du traité à réglementer cette modification [des actes d'état civil] dans le cas de *« transsexualisme irréversible ».* A partir de ce constat, elle articule l'argumentation suivante :

> Tout tourne autour de cette notion, laissée cependant à l'appréciation des Etats. Qu'entend-on par *transsexualisme irréversible* ? La réponse à cette question se situe ici sur un plan médical, et non plus juridique. Certains spécialistes parlent de *transsexualisme irréversible* à partir de la mise en place de l'hormonosubstitution de dévirilisation/déféminisation, ce traitement gommant certains aspects physiologiques, notamment la fécondité, d'une façon qui peut être irréversible. Une telle interprétation de la recommandation offrirait la possibilité d'obtenir le changement de la mention du sexe dans l'état civil sans aller jusqu'à l'opération de réassignation sexuelle[37].

[33] Préc.
[34] Préc.
[35] Rapp. préc. p. 47 et 114 ; *adde* rép. min. n° 14524 : JO Sénat Q, 30 déc. 2010, p. 3373.
[36] Recomm. n° 1117 (1989), n° 11.
[37] Haute Autorité de Santé, rapp. préc., p. 47.

Ce raisonnement suscite la perplexité. Ne repose-t-il pas sur une confusion entre le diagnostic et le traitement du transsexualisme ? La définition donnée de celui-ci par l'Assemblée parlementaire du Conseil de l'Europe prête peut-être à cette confusion en faisant – selon une analyse répandue – de la demande de conversion sexuelle un des caractères du transsexualisme :

> Considérant que le transsexualisme est un syndrome caractérisé par une personnalité double, l'une physique, l'autre psychique, la personne transsexuelle ayant la conviction profonde d'appartenir à l'autre sexe, ce qui l'entraîne à demander que son corps soit « corrigé » en conséquence[38].

M. Jean-Paul Branlard, dans sa thèse sur le sexe et l'état des personnes, rattache cependant l'irréversibilité au diagnostic du transsexualisme, qui supposerait que la conviction transsexuelle fût irréversible[39]. Il remarque aussi que « l'irréversibilité est double » : « Elle a trait à la conviction du sujet et à la modification du corps. La première conditionne la seconde et la réponse du juge[40] ». Les juges du fond ne distinguent pas toujours entre l'irréversibilité psychique et l'irréversibilité physique, se bornant parfois à relever que « la situation est […] devenue irréversible » pour ordonner la modification de la mention du sexe à l'état civil[41] ; ce qui est plutôt un indice d'une confusion entre le diagnostic et le traitement du transsexualisme.

Pour la cour d'appel de Nancy, la condition tirée de l'irréversibilité du « processus de changement de sexe » s'évince du principe de l'indisponibilité de l'état des personnes et a pour finalité d'assurer « la cohérence et la sécurité des actes de l'état civil[42] ».

Toutefois, l'indisponibilité de l'état n'implique pas l'irréversibilité du changement d'état. Le mariage n'interdit pas le divorce et le divorce le remariage, le cas échéant avec la même personne. On peut aussi changer de prénom plusieurs fois et même reprendre son prénom d'origine[43]. L'indisponibilité n'est pas l'immutabilité[44] et encore moins l'irréversibilité. Le principe d'indisponibilité n'interdit pas de prendre en compte les changements successifs affectant l'état d'une personne, eussent-ils même pour origine la volonté de celle-ci ; « la volonté est bien présente en matière d'état des personnes », remarquent M. François Terré et M^me^ Dominique

[38] Recomm. préc., n° 1.

[39] V. Jean-Paul Branlard, *op. cit.*, n° 1489 et n^os^ 1506 et s.

[40] Jean-Paul Branlard, *op. cit.*, n° 1506.

[41] V. par exemple CA Agen, 2 févr. 1983 : Gaz. Pal. 1983, 2, jurispr. p. 603, note G. Sutton (1^re^ esp.) ; TGI Thionville, 28 mai 1986 : Gaz. Pal. 1987, 1, somm. p. 105.

[42] CA Nancy, 11 oct. 2010, préc. ; CA Nancy, 3 janv. 2011, préc. L'arrêt du 11 octobre 2010 n'invoque que le principe de l'indisponibilité de l'état des personnes ; l'arrêt du 3 janvier 2011 y ajoute la cohérence et la sécurité des actes de l'état civil.

[43] V. Cass. 1^re^, 2 mars 1999 : JCP G, 1999, II, 10089, note T. Garé.

[44] François Terré et Dominique Fenouillet, *Droit civil. Les personnes. La famille. Les incapacités* (7^e^ éd., Dalloz, 2005) n° 128 ; CA Paris, 27 janvier 2011, préc.

Fenouillet[45], qui avancent même l'idée de mutabilité contrôlée de l'état des personnes[46]. En matière de transsexualisme, la Cour de cassation n'a expressément fait référence au principe de l'indisponibilité de l'état des personnes que dans trois décisions, l'une rendue en 1975 et les autres en 1992 ; dans la première, elle a décidé que ce principe interdisait le changement d'état civil[47] ; dans les secondes, elle a jugé l'inverse[48], après la condamnation de la France par la Cour européenne des droits de l'homme[49]. Dans l'intervalle, elle s'est abstenue d'invoquer ce principe[50]. Ce silence révèle que la Haute Juridiction n'avait pas considéré l'indisponibilité de l'état des personnes comme un fondement suffisamment solide pour refuser la modification de l'acte de naissance du chef du sexe.

Quant à la cohérence et la sécurité des actes de l'état civil, on voit mal comment l'irréversibilité de la conversion sexuelle est apte à les assurer, sauf à considérer que cette condition exprime la crainte de devoir reconnaître, un jour, qu'un enfant puisse naître de deux mères ou de deux pères, selon les indications portées sur l'acte de naissance des parents.

On peut difficilement soutenir que le droit français respecte les recommandations formulées en 2009 par M. Hammarberg[51] et en 2010 par l'Assemblée parlementaire du Conseil de l'Europe[52]. En effet, celle-ci appelle les Etats membres à garantir dans la législation et la pratique les droits des personnes transgenres « à des documents officiels reflétant l'identité de genre choisie, sans obligation préalable de subir une stérilisation ou d'autres procédures médicales comme une opération de conversion sexuelle ou une thérapie hormonale[53] ». Cette préconisation fait écho, en la précisant, à la quatrième recommandation formulée par M. Hammarberg :

> Les Etats membres du Conseil de l'Europe devraient […] dans les textes encadrant le processus de changement de nom et de sexe, cesser de subordonner la reconnaissance de l'identité de genre d'une personne à une obligation légale de stérilisation et de soumission à d'autres traitements médicaux[54].

Ce n'est donc pas seulement l'irréversibilité des effets d'un traitement médical – chirurgical, hormonal ou autre – qu'il conviendrait d'éviter d'ériger en condition

[45] François Terré et Dominique Fenouillet, *op. cit.*, n° 130.
[46] *Op. cit.*, n° 128.
[47] Cass. 1re civ., 16 déc. 1975 : D. 1976, jurispr. p. 397, note R. Lindon (1re esp.).
[48] Cass. ass. plén., 11 déc. 1992, préc.
[49] CEDH, 25 mars 1992, préc.
[50] V. Cass. 1re civ., 30 nov. 1983 : D. 1984, jurispr. p. 165, note B. Edelman ; Cass. 1re civ., 3 et 31 mars 1987 : D. 1987, jurispr. p. 445, note P. Jourdain ; Cass. 1re civ., 7 juin 1988 : Bull. civ. I, n° 176 ; Cass. 1re civ., 10 mai 1989 : Bull. civ. I, n° 189 ; Cass. 1re civ., 21 mai 1990, préc. (4 arrêts).
[51] *Droits de l'homme et identité de genre*, préc.
[52] *Discrimination sur la base de l'orientation sexuelle et de l'identité de genre*, résolution préc.
[53] Résolution préc., n° 16.11.2.
[54] Rapp. préc., p. 43.

de modification de la mention du sexe sur les actes d'état civil ; c'est le traitement lui-même.

Le risque d'une condamnation par la Cour européenne des droits de l'homme sur le fondement de l'article 8 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales n'est pas négligeable. La Haute Autorité de Santé relève, en effet, que, parmi les principales conséquences irréversibles d'un traitement hormonal, figure l'infertilité[55]. M. Hammarberg remarque à ce propos :

> L'impossibilité d'accéder à la reconnaissance officielle de l'identité de genre sans ces traitements [chirurgicaux ou hormonaux] place les personnes transgenres dans une impasse. On ne peut que s'alarmer du fait que ces dernières semblent former le seul groupe en Europe soumis à une stérilisation prescrite légalement et imposée en pratique par l'Etat[56].

Il faut rappeler, à cet égard, que la vie privée, au sens de l'article 8, « recouvre l'intégrité physique et morale de la personne[57] ». La restriction ainsi apportée au droit au respect de la vie privée des personnes transidentitaires pourraient être considérée comme disproportionnée par rapport au but légitime poursuivi ; il est, en effet, douteux que la stérilité soit nécessaire pour décider de l'appartenance d'une personne à un sexe ou à un autre[58], alors qu'il est possible de retenir d'autres critères, cumulativement ou alternativement (comportement social, opérations de chirurgie plastique, etc.). Il est, de surcroît, difficile d'expliquer comment le droit au respect de la vie privée peut dépendre, dans son application, du métabolisme de chacun.

L'évolution que connaît le droit français est inachevée. La Cour de cassation n'a pas eu l'occasion de se prononcer depuis un arrêt de sa première Chambre civile du 18 octobre 1994[59] reprenant les principes posés par ses décisions d'Assemblée plénière de 1992[60] ; elle interviendra tôt ou tard pour mettre fin à la division des juges du fond sur le diagnostic du transsexualisme et déterminer l'époque de la conversion sexuelle à partir de laquelle le changement d'état civil pourra être accordé. Il faut espérer qu'à cette occasion, elle fixera un régime plus respectueux de la personne humaine.

[55] Rapp. préc., p. 47 et 114.
[56] Rapp. préc., p. 18.
[57] CEDH, 26 mars 1985, X et Y c. Pays-Bas, série A, n° 91, § 22. Le droit de fonder une famille, garanti par l'article 12, pourrait aussi être invoqué (comp. Thomas Hammarberg, rapp. préc., p. 20).
[58] V. Thomas Hammarberg, rapp. préc., p. 18.
[59] Préc.
[60] Préc.

V.
MUTUAL RECOGNITION AND FREE MOVEMENT

LGBT Rights and Economic Migration: Will the Liberalization of the Movement of Persons in Economic Integration Agreements Increase the Need for Common Regional Standards Regarding Civil Status Rights?

Andreas R. Ziegler[*]

Abstract

More and more jurisdictions allow same-sex couples access to marriage, or at least a similar scheme. At the same time, adoption or access to artificial methods of procreation by same-sex couples is a reality in a growing number of States. At the same time, the fact that individuals enjoying a particular status; i.e., marriage, civil partnership, or parenthood, are able to move between States, can lead to questions when the recognition of this civil status differs amongst States. When States elect to favour the exchange of persons through a liberalization of the access to their labour markets, or even the *free* movement of their citizens, the necessity to harmonize respective standards increases, and/or a greater need arises to provide and implement specific rules on mutual recognition. Specific rules on mutual recognition may lead to reverse discrimination and increased movement to obtain a specific civil status in another country. Such problems are relatively well-known in the European Union and other groups of countries governed by the free movement of persons, or within federal States where these questions are not completely harmonized at the federal level, such as the United States. To a lesser extent, such questions govern rights granted to individuals in the context of economic integration agreements. Economic integration agreements tend to fall short of free movement of persons in that they only favour the movement of persons in the context of the provision of services, to facilitate trade, or to promote investment, such as is the case in many modern BITs and FTAs.

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1. Introduction

More and more States allow same-sex couples access to marriage, or at least a similar scheme. At the same time, adoption or access to artificial methods of procreation

[*] I would like to thank Natasha Skupsky (BA, JD, LLM in International and European Economic and Commercial Law, University of Lausanne) for her very valuable assistance in the writing of this contribution.

by same-sex couples is a reality in a growing number of States. This leads to the question of whether this development could create regional standards that would serve to influence the legal system of other States – at least in a specific region.

LGBT rights continue to differ tremendously amongst nations worldwide. Those States providing access to marriage (or at least civil union) and adoption for same-sex couples are still a very small minority of all States globally.

There are only very few international and regional instruments that address the treatment of LGBT persons in general, and deal directly with same-sex couples in particular The Yogyakarta Principles of 2006 are an example of the latter. Even less of these instruments include concrete obligations (e.g. prohibition on discriminate on the basis of to sexual orientation) or oblige States to legislate in a specific way (e.g. provide legal protection for same-sex relationships). A world-wide harmonization in this area seems impossible and politically unwanted at this time[1].

Each State may recognize and categorize the civil status of persons in different manners, and these differing perspectives lead to debates amongst governments on the acceptance of varying standards when it comes to the issue of the migration of persons. With regard to the legal recognition of same-sex relationships, and adoption by homosexuals and/or gay couples, this absence of an international consensus has been a reality for decades. Normally, domestic immigration laws will only agree to consider the legality of same-sex relationships, and adoptions by the latter, once the domestic family laws allow for them. As there are very few accepted international obligations with regard to immigration, this leaves a lot of room for strong variation. This may even be the case within large federal systems in which divergences prevail[2]. The question of refugees and immigration caused by political or economic hardship is closely related, but will not be treated in this context, as it is normally kept entirely separate from economic integration considerations in international agreements[3].

[1] For an overview and the development over time, see: Eric Heinze, *Sexual Orientation: A Human Right*, (Martinus Nijhoff Publishers 1994); Douglas Sanders, 'Human Rights and sexual orientation in international law' [2002] 25:1 International Journal of Public Administration 13-44; Ignacio Saiz, 'Bracketing Sexuality: Human Rights and Sexual Orientation - A Decade of Development and Denial at the UN' [2004] 7:2 Sexuality, Human Rights, and Health 48-80; Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles' [2008] 8:2 Human Rights Law Review 207-248; Aeyal M. Gross, 'Review Essay, Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law' [2008] 21 Leiden Journal of International Law 235-253; Joke Swiebel, 'Lesbian, gay, bisexual and transgender human rights: the search for an international strategy' [2009] 15:1 Contemporary Politics 19-35; Kelly Kollman and Matthew Waites, 'The Global politics of lesbian, gay, bisexual and transgender human rights: An introduction', [2009] 15:1 Contemporary Politics 1-17.

[2] For an interesting account regarding the situation in the United States see Human Rights Watch (ed.), *Family Unvalued - Discrimination, Denial, and the Fate of Binational Same-Sex Couples under US Law* (HRW 2006).

[3] See, for example, the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (UNHCR, Geneva, 21 November 2008).

Migration is an important reality in today's world, and more and more regional agreements provide for specific rights for the citizens of their Member States to migrate between the territories of these States. Often, such rights are originally justified for economic reasons in order to attract skilled labourers, or to overcome any shortage that may arise in a domestic labour market. Immigration may also be important for investment flows and technology transfer, and the remittances sent home by immigrants can be a welcome factor in fostering economic development in their home country. Normally, such immigration rights will also have a political component to create greater regional coherence, and overcome nationalist rivalries.

The differences with regard to the recognition of the civil status of persons between one State and another (e.g. same-sex couples and their adopted children) becomes particularly relevant when these differences impede on persons wishing to immigrate into a country with their family, in particular if individuals in a family-by-marriage/adoption have no independent right to migrate because they are third country nationals. While taking human rights into consideration, specifically the right to a family life, may influence the respective legal assessment, most modern economic integration agreements will also allow for family reunification with regard to the movement of workers and self-employed individuals. Therefore, the most important remaining question in this regard revolves around the determination of "family member" for the purposes of immigration. While this issue was, for a long time, mostly discussed within the framework of the "ever closer union" among what today are most European States, it becomes of increasing relevance as more and more regional economic integration agreements are negotiated.

2. LGBT Rights in Multilateral Instruments

2.1. Overview

Of course, some international and regional legal instruments – in particular, the ones especially dedicated to a human rights instrument[4] – have a direct impact on LGBT rights when it comes to discrimination, and the right to respect for a person's private and family life. This process can be even stronger where international courts and other treaty bodies are available[5]. Here, international standards and their interpretation by international and domestic courts have led to striking changes in recent years, when it comes to the treatment of LGBT behaviour under criminal law, and with regard to their individual treatment compared to other individuals.

[4] See Human Rights Watch, Important International Jurisprudence Concerning LGBT Rights, available at <http://www.hrw.org/en/news/2009/05/25/jurisprudence-about-lgbt-human-rights#_United_Nations>, accessed 6 April 2011.

[5] For an overview see Phillip Tahmindjis, 'Sexuality and International Human Rights Law' [2005] 48:3/4 Journal of Homosexuality 9-29, or Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law' [2004] 71 University of Chicago Law Review 1689-720.

At the same time, crucial questions relating to the right to a family, in particular the right to marriage and adoption remain controversial, although the existing catalogues of rights might lend themselves to an interpretation that would provide access to these institutions for LGBT individuals.

2.2. The Yogyakarta Principles

On 26 March 2007, an informal group of human rights experts adopted the so-called Yogyakarta Principles[6]. These Principles were developed in November 2006, in the Indonesian town of the same name, and represent what is likely today's most comprehensive universal attempt to describe a standard of human rights protection relating to sexual orientation and gender identity. They can be interpreted as a concretization of existing human rights obligations to this particular vulnerable group. The principles are accompanied by specific recommendations for implementation at the national level. In view of the global situation, the main focus lies on the fight against homophobic violence and criminal prosecution of homosexuals and transsexuals. In view of the participating personalities, this document seems particularly likely to be taken into account by political bodies world-wide. Other statements, with a similar vocation to the Yogyakarta Principles, made by large groups of NGOs exist, however these statements lack the same acceptance in the political process[7].

Principles 22 and 23 address Freedom of Movement and Asylum. In particular, with respect to the free movement of persons, Principle 23 states: "Everyone lawfully within a State has the right to freedom of movement and residence within the borders of the State, regardless of sexual orientation or gender identity. Sexual orientation and gender identity may never be invoked to limit or impede a person's entry, regress or return to or from any State, including that person's own State. States shall: a) Take all necessary legislative, administrative and other measures to ensure that the right to freedom of movement and residence is guaranteed regardless of sexual orientation or gender identity". According to the Principles 24-26 (Rights of Participation in Cultural and Family Life) – and by reference to a respective decision of the UN Human Rights Committee – States have an obligation not to discriminate between different-sex and same-sex relationships in allocating partnership benefits, such as survivors' pensions[8].

[6] See, for example, David Brown (2009), 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles', Michigan Journal of International Law, 31, 821-879, or Ryan Richard Thoreson (2009) 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name', Journal of Human Rights, 8: 4, 323-339.

[7] See, for example, the Declaration of Montreal, which is a set of principles adopted by an important number of scholars and activists present at the 2006 Montreal OutGames, available at: *http://www.declarationofmontreal.org* (last visited on 6 April 2011).

[8] For details consult: <http://yogyakartaprinciples.org/> or the Activist's Guide to the Yogyakarta Principles as published by several NGOs and available online at <http://www.ypinaction.org/content/activists_guide>, accessed 6 April 2011.

The content of these Principles show a relatively cautious approach with respect to the question of migration. Migration is mainly addressed under the aspect of direct discrimination against LGBT persons, and within the issue of a right to asylum. The question of the admittance of same-sex couples and (adopted) children as part of the family of a LGBT person, may possibly be derived from a combination of the right to participation in family life, and the right of non-discrimination of persons with regard to movement between States, however it is not as yet addressed as such.

2.3. United Nations

Within the United Nations, the discussion of LGBT rights remains controversial. France and the Netherlands coordinated an LGBT equality rights statement in the General Assembly in December 2008. It was delivered by a representative of Argentina. Sixty-six States sponsored the statement. The initiative prompted a counter-statement, presented by Syria, and sponsored by fifty-seven states. Sixty-nine States did not join either statement[9]. There was no vote. More recently in 2010, during the 65th Session of the UN General Assembly, a report by the Special Rapporteur on the Right to education led to a heated debate on the right to sexual education. In the Third Commission of the GA, African and Arab States managed to delete a passage relating to the protection of LGBT persons in the draft Resolution against arbitrary, summary, and extra-judicial killings in Autumn 2010. It was due to the intensive lobbying by NGOs and the intervention of the Secretary General, as well as to the United States, which allowed the deleted passage to be reinstated.

In 2002, the Human Rights Commission addressed the issue for the first time. In 2003, Brazil had tabled a resolution, within this governing body, supporting LGBT rights. The massive opposition of African and Islamic States led to Brazil's dropping of the motion in 2005. Later, on the 1st of December 2006 in the new Human Rights Council, Norway made a statement that was supported by fifty-four States. This statement asked that the United Nations be more proactive with regard to the human rights relating to sexual orientation and gender identity, and create respective organs[10]. Further statements were made in the Human Rights Council by the Czech Republic, Switzerland, and Norway, on behalf of the Nordic States in March 2007, by the Foreign Minister of the Netherlands on 3 March 2008, and by Ireland and Slovenia on behalf of the European Union on 5 March 2008[11]. The last such state-

[9] See Douglas Sanders, The Role of the Yogyakarta Principles, available online at: <http://www.ypinaction.org/files/70/Background_on_the_Principles__Sanders__Douglas__The_Role_of_the_Yogyakarta_Principles.pdf>, accessed 6 April 2011.

[10] Human Rights Council, 3rd Session (2006), Norway: Joint Statement on human rights violations based on sexual orientation and gender identity on behalf of the following 54 States, including 18 members of the Human Rights Council, document available at <http://www.ilga-europe.org>, accessed 6 April 2011.

[11] See for the texts <http://www.ypinaction.org/content/human_rights_council_documents>, accessed 6 April 2011.

ment was delivered to the Council on 16 March 2011 by Columbia, and co-sponsored by a total of 84 States.

Since 1994 (in its landmark decision *Toonen v. Australia*) the Human Rights Committee has regularly questioned countries on their laws and policies on sexual orientation discrimination. Other treaty bodies, including the Committee on the Elimination of Discrimination against Women, also question governments on this basis[12]. Several UN Agencies and experts have made respective statements. In 2010, the Special Rapporteur for the Right to health, *Anand Grover*, caused tensions when he addressed the effects of the criminalization of same-sex sexual intercourse, and homosexuality in general, and how this lifestyle choice relates to the incidence of HIV/AIDS. The groups of African States and Islamic States criticized the choice of this topic as lacking universal recognition. Similarly, the 2009 reports by the Special Rapporteurs on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Protection of human rights and fundamental freedoms while countering terrorism, referred to the Yogyakarta Principles[13]. The Universal Periodic Review Process was repeatedly used to address the compliance of States with the Yogyakarta Principles[14].

Within the UN, the main focus of the debate remains upon the evaluation of the cause and level of violence against LGBT persons, and criminal prosecution for respective behaviour. The question of same-sex marriages, adoption, and migratory rights has so far not been treated in detail, in view of the strong resistance to more basic needs.

3. LGBT Rights in Regional Instruments in General

3.1. Council of Europe

Since the beginning, human rights have been at the core of the work of the Council of Europe. Since its' inception in 1981, the Parliamentary Assembly of the Council of Europe has passed a number of Recommendations, and a Resolution supporting LGBT rights[15].

[12] See Douglas Sanders, note 9.

[13] See for references <http://www.ypinaction.org/content/special_procedures_documents>, accessed 6 April 2011.

[14] See for references <http://www.ypinaction.org/content/universal_periodic_review_docume>, accessed 6 April 2011.

[15] In particular: Parliamentary Assembly of the Council of Europe, Recommendation 924 (1981) - on discrimination against homosexuals; Opinion No. 216 (2000) - Draft Protocol No. 12 to the European Convention on Human Rights; Recommendation 1470 (2000) - Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe; Recommendation 1474 (2000) - Situation of lesbians and gays in Council of Europe member states; Recommendation 1635 (2003) - Lesbians and gays in sport; Resolution 1728(2010) - Discrimination on the basis of sexual orientation and gender identity; Recommendation 1915 (2010) - Discrimination on the basis of sexual orientation and gender identity.

The Council of Europe's Committee of Ministers adopted a Recommendation on 31 March 2010 that supported the fight against discrimination relating to sexual orientation and gender identity[16]. This instrument is considered to be the first international legally binding instrument that explicitly addresses the discrimination of LGBT persons, although it is basically a concretization of the existing rights in the ECHR.

The Commissioner for Human Rights has made several contributions to LGBT rights[17].

3.2. OSCE

Although not an international or regional organization whereby States take on legal obligations upon joining, the OSCE is a political organization that seeks to exercise authority through political pressure on those States whom fall short of a dedicated commitment to upholding respect for human rights and the rule of law. According to ILGA Europe, the OSCE's relevance to LGBT rights has increased in the past years, as the OSCE has taken on an expanded mandate in the area of tolerance and non-discrimination. LGBT rights are normally addressed at the OSCE Human Dimension and Implementation Meetings (HDIM)[18].

3.3. Organization of American States (OAS)

In Asia and Africa, the debate is more difficult. In (Latin) America however, the role played by human rights bodies and political organizations is slightly more encouraging. On 3 June 2008, the General Assembly of the Organization of American States (OAS) adopted, by consensus, a Resolution that condemns any human rights violations based on sexual orientation and gender identity[19]. In parallel, the discussion of an Inter-American Convention against racism and any other form of discrimination continues[20]. The current proposal includes references to sexual orientation and gender identity.

[16] 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, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies.

[17] Such as by Thomas Hammarberg, Human Rights and Gender Identity, Issue Paper (Council of Europe Commissioner for Human Rights 2009) available online at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1476365>, accessed 6 April 2011.

[18] For more details see: <http://www.ilga-europe.org/home/guide/osce>, accessed 6 April 2011.

[19] General Assembly of the Organization of American States, AG/RES. 2435 (XXXVIII-O/08): Human rights, sexual orientation and gender identity, 3 June 2008, text presented originally by Brazil, available online at: *www.oas.org/dil/AGRES_2435.doc* (last visited on 6 April 2011).

[20] Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance, available at <http://www.oas.org/OASpage/Events/default_ENG.asp?eve_code=2>, accessed 6 April 2011.

4. Economic Movement of Persons and LGBT Rights in the EU

4.1. Introduction

In particular, the fact that individuals enjoying a particular civil status, such as marriage, civil partnership, or parenthood, may move between States as a family unit with increasing regularity, creates an urgent need to answer questions with regard to differing recognitions of this civil status when it comes to LGBT relationships. Normally, such questions are addressed by the domestic laws that serve to regulate the admission and presence of foreigners onto the territory of a State[21].

Generally, any elimination of barriers between various components of an economic integration area (including an internal market) must be based on both the progressive elimination of direct barriers, such as discriminatory treatment based on explicit access prohibitions or hindrances (quotas, import tariffs etc.), and, on the other side, the elimination of technical obstacles, such as differences in the applicable regulations. The latter is usually done through either harmonization or mutual recognition[22].

These issues are well studied when it comes to trade in goods and services, but less so when applied to the movement of persons. Traditionally, most States have access limitations in place, such as quotas for foreigners entering the labour market. Also, the non-recognition of diplomas or terms and regulations within social security systems may constitute technical barriers. In a similar way, the non-recognition of a person's civil status, and thereby the non-recognition of certain persons as family members that do constitute family members in the home State, may constitute a technical barrier to the (free) movement of persons. In cases where harmonization is not possible (or does not seem desirable), mutual recognition is often a preferred mechanism for creating a common economic integration area.

Normally, such an obligation to recognize legal decisions of another State are accompanied by an exception rule for a narrow number of cases where the goal of mutual recognition is balanced against the specific needs of each jurisdiction. Probably the most famous example of this balancing principle is the "mandatory requirements" contained in the Treaty of the European Union, with respect to the internal market. In the area of goods, this balancing principle is often referred to as "Cassis de Dijon" – a reference to the famous leading case establishing the obligation of mutual recognition, coupled with the possibility of preventing the market entry of a product that has been admitted in another Member State, by utilizing the safeguard of mandatory requirements of the importing State[23].

[21] For an example from Switzerland see: Alberto Achermann and Martina Caron, 'Homosexuelle und heterosexuelle Konkubinatspaare im schweizerischen Ausländerrecht' [2001] SZIER 125-141, or Martin Bertschi and Thomas Gächter, 'Der Anwesenheitsanspruch aufgrund der Garantie des Privat- und Familienlebens' [2003] ZBl 225-271.

[22] See e.g. Andreas R. Andreas Ziegler, Droit international économique de la Suisse - une introduction (Stämpfli, 2009).

[23] European Court of Justice, Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für*

While this terminology normally applies to products and not to the movement of persons, the idea is that the differences in foreign regulations regarding admissibility into a domestic labour market ought to be analyzed in a similar manner as are regulations that govern the access of goods and services into a foreign market. Many international private law instruments provide for the mutual recognition of civil status decisions and documents[24]. Here, it is normally the notion of "public policy" or "public order" – often expressed by using the French "ordre public (international)" – that allows States to depart from the general rules included in these treaties or under domestic law[25]. In a certain way, these references to domestic values and considerations of morality have the same functions as mandatory requirements (Cassis-de-Dijon Principle), and/or exceptions in the area of trade. If these value judgments or differences in domestic perception do make the exchange of production factors or goods and services too difficult, then there is an argument for harmonization, assuming there is sufficient political will, and it is feasible for the Parties to overcome the obstacles that arise from differing values[26].

In States that choose to favour the exchange of persons through a liberalization of the access to their labour markets, or even the free movement of their citizens, the necessity to harmonize the respective standards increases, and/or the State must provide specific rules on the mutual recognition of these standards. Moreover, any mutual recognition rules may lead to reverse discrimination and increased movements to obtain a specific status in another country. The fact that many States prefer not to address human rights issues, or even general questions relating to migration in economic integration agreements, leads to a certain scarcity of rules relating to the movement of persons and their family status. However, future demographic developments and increased levels of economic integration will certainly increase the debate regarding these issues.

4.2. Protection against Homophobia and Non-Discrimination

In the European Union (EU) the issue of LGBT rights and, in particular, the treatment of same-sex couples and (adopted) children, is very much characterized by the

Branntwein [1979] ECR 649ff. But see also, Article XX GATT and Article XIV GATS in the framework of the WTO.

[24] Most famously, the instruments elaborated by the Hague Conference on Private International Law – operating since 1893. For example, the Convention on Celebration and Recognition of the Validity of Marriages (*concluded 14 March 1978*) Article 5: "The application of a foreign law declared applicable by this Chapter may be refused only if such application is manifestly incompatible with the public policy ("*ordre public*") of the State of celebration". And Article 14: "A Contracting State may refuse to recognise the validity of a marriage where such recognition is manifestly incompatible with its public policy ("*ordre public*")".

[25] See, for an early explanation: Gerhart Husserl, 'Public Policy and Ordre Public' [1938-1939] 25 Virginia Law Review, 37ff.

[26] See, for example, Susanne K. Schmidt, 'Mutual Recognition as a new mode of governance' [2007] 14:5 Journal of European Public Policy, 667-681.

general development of the EU's approach to human rights in general, family law, and the free movement of persons[27].

For a long time, the absence of a competence for the unification of family rights, and a lack of clear references to human rights in the treaties, led to no direct implication of the EU institutions in the debate. This was the time when the EU was mostly perceived as an internal market based on the idea that economic integration would eventually allow for more political integration. There was no EU Member whom allowed for civil unions or same-sex marriage until 1989, when civil unions were introduced in Denmark, and 2001, when the Netherlands opened marriage to same-sex couples. The absence of allowances for same-sex civil unions and marriages in any EU Member State caused a delay to the debate. Even today, the situation regarding same-sex relationships and adoption rights remains strongly heterogeneous among EU Member States[28].

Article 19.1 (ex Article 13 TEC) on the Functioning of the European Union sets out:

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation [emphasis added]*.

The protection against discrimination and violence against LGBT persons was addressed as early as 1994 in the European Parliament, and continues to be addressed to the present[29]. Since 1994, various organs and institutions within the EU have made statements in this area. Besides the judgments of the European Court of Justice regarding human rights protection within the European Union, the existence of the Charter of Fundamental Rights of the European Union, 2000 (incorporated into the treaties in 2009), and the creation of an EU Agency for Human Rights in 2007, are important steps towards increasing the role of the EU in terms of how it protects the human rights of its' citizens.

[27] For an overview consult: Kees Waaldijk and Andrew Clapham (eds.), *Homosexuality: A European Community Issue, Essays on Lesbian and Gay Rights in European Law and Policy*, (Martinus Nijhoff 1993), or Anne Weyembergh and Sinziana Carstocea (eds.), *The gays' and lesbians' rights in an enlarged European Union*, (Editions Université de Bruxelles, 2006).

[28] For an account of the developments see Katharina Boele-Woelki and Angelika Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe*, (Intersentia 2003); Robert Wintemute and Mads Andenas (eds.), *The Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, (Hart Publishing 2001); Jürgen Basedow and others (eds.), *Die Rechtsstellung gleichgeschlechtlicher Lebensgemeinschaften*, (Mohr Siebeck 2000).

[29] See European Parliament: Resolution of 8 February 1994 on equal rights for homosexuals and lesbians in the EC (A3-0028/94, OJ C 61, 28 February 1994, 40-43); for later developments see <http://www.ilga-europe.org/home/guide/eu/lgbt_rights/european_parliament>, accessed 6 April 2011.

For example, the EU Agency for Fundamental Rights (FRA) has dedicated an important study to the topic of homophobia, and compared the situation in the twenty-seven Member States of the EU. The study took place during the first part of July 2008, and the second part of March 2009. The first section of the study led to a decision by the European Commission, on 2 July 2008, to adopt a new draft Resolution regarding non-discrimination. According to the study, the treatment of this group still differs tremendously amongst EU Member States. Also, EU law, as it currently stands, does not sufficiently address these issues. The FRA requested, in a press release of 30 June 2008, clarifications and amendments of existing law relating to same-sex relationships with regard to the free movement of persons, and recognition and family reunification according to international human rights standards.

Today, the focus within the European Union clearly lies with the general question of discrimination against LGBT persons. This is evident from the current debate on the Proposal for a Council Directive that was launched in 2008, implementing the principle of equal treatment between persons, irrespective of religion or belief, disability, age, or sexual orientation[30].

4.3. (Economic) Migration within the EU

The relation of economic migration and economic integration, and how this relationship affects the rights of LGBT families, is best studied by using the EU as the subject of analysis[31]. Here, the existence of an "internal market"[32], and with today's

[30] COM/2008/0426 final available online at <http://eur-lex.europa.eu>, accessed 6 April 2011.

[31] See, for example, Hans Ulrich Jessurun d'Oliveira 'Lesbians and Gays and the Freedom of Movement of Persons' in: Kees Waaldijk and Andrew Clapham (eds.), Homosexuality: A European Community Issue - Essays on Lesbian and Gay Rights in European Law and Policy, (Martinus Nijhoff 1993) 289-316; Kees Waaldijk, 'La libre circulation des partenaires de même sexe' in: Daniel Borrillo (ed.), Homosexualités et Droit. De la tolérance sociale à la rteconnaissance juridique, (2nd edn., Presses Universitaires de France 1999) 210-30; Heather Hunt, 'Diversity and the European Union: Grant v. SWT, the Treaty of Amsterdam, and the Free Movement of Persons' [1998-1999] 27 Denver Journal of International Law and Policy 633ff.; Mark Bell, 'We are Family? Same-Sex Partners and EU Migration Law' (2002) 9 Maastricht Journal of European and Comparative Law 335-55; Andrew Stumer, 'Homosexual Rights and the Free Movement of Persons in the European Union' [2002] 7 International Trade and Business Law 205 ff.; Helen Toner, 'Partnership Rights, Free Movement, and EU Law' (Oxford, 2004); Mark Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partners within the European Union' [2004] European Review of Private Law, 613ff.

[32] It should be noted that LGBT discrimination, as such, may also affect other aspects of economic integration, such as discrimination of workers or discriminatory rules with regard to the offering of services and goods, on this see: Mark Graham, 'LGBT Rights in the European Union: a Queer Affair?', in: Ellen Lewin and William L. Leap (eds.), *Out in Public: Reinventing Lesbian/Gay Anthropology in a Globalizing World* (Wiley-Blackwell 2009), ch. 16; Kees Waaldijk and Matteo Bonini Baraldi (eds.), Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive, (TMC Asser Press 2006); for a particular emphasis on Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for

notion of an "area of freedom, security, and justice", allows for differences between the family laws of individual Member States. The fact that the family laws of States can vary quite drastically leads to a situation that is, at least, comparable to that of federal States with important residual powers of the States relating to family law, such as the United States. Although it may be difficult to completely separate the questions of human rights protection and non-discrimination on one side, and economic access and treatment guarantees on the other, there is clear evidence that the desire to promote migration, particularly for economic reasons, may lead to a need for mutual recognition and/or harmonization of the treatment of persons, including LGBT and their families[33].

Already, the Treaty on European Union provides, in Article 3.2, that "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". With regard to the free movement of persons, in its' current state EU law allows citizens of the European Union to basically move freely and reside within the territory of the Member States of the European Union. Exceptions based on public interest, such as protection against criminals, abuse of social security, or health dangers, are granted on a very restrictive basis; i.e., Article 21 of the Treaty on the Functioning of the European Union. With regard to third-country nationals, Article 79 of the Treaty on the Functioning of the European Union provides a competence to establish measures that affect family reunification; i.e., Article 79, paragraph 2(a). Furthermore, according to Article 81.2, "[t]he Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgements and of decisions in extra-judicial cases". However, according to Paragraph 3 of Article 81.2, "measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure".

The main source of EU law regarding the migration of EU citizens is currently Directive 2004/38/EC of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[34]. The Directive was borne through the long process of the creation of the

equal treatment in employment and occupation [2000] OJ L303/16, see: Dimitry Kochenov, 'Gay Rights in the EU: A Long Way Forward for the Union of 27' [2007] 3 Croatian Yearbook of European Law and Policy, 469-490.

[33] For a comparison, see: Adam Weiss, 'Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union' [2007] 41 Columbia Journal of Law and Social Problems, 81ff.

[34] On the situation regarding closely associated States like Switzerland, see: Christine Kaddous, 'La situation des partenaires de même sexe en droit communautaire et dans le cadre de l'Accord sectoriel sur la libre circulation des personnes entre la Suisse et l'Union européenne' [2001] 1 Revue suisse de droit international et de droit européen (RSDIE), 143-172.

"internal market" and the "area of freedom, security, and justice"[35], by merging all of the important points in the previously existing legislation on the right of entry and residence for Union citizens into a single legal instrument.

The Directive governs the European citizen and his or her family members. The definition of the family member is the crucial issue when it comes to LGBT families – here the existing divergences in regulations (and values) had to be taken into account[36]. Therefore the definition of family members in Article 2.2 of the Directive reads as follows:

> "Family member" means: (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).

Two particular problems exist with regard to same-sex couples and adopted children (of same-sex couples or LGBT persons). Firstly, countries which do not (yet) know a form of same-sex marriage or registered partnership, or recognize the same in only a very limited form, are not required to recognize the civil status of immigrant people that is recognized in their country of former residence, and/or extend the same benefits as are related to that civil status[37]. Secondly, in order to be treated as family members, specific documents must be produced. Here, experience has shown that the recognition of such documents may cause difficulties. Both aspects are ultimately linked to the divergence of private law and related procedural law in the Member States. This divergence is technically a typical issue of private international law[38], and thus ought to be addressed on this level in an attempt to

[35] For the details of this Directive and its relevance for LGBT issues, see: ILGA-Europe, EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process, October 2005, available at <http://www.ilga-europe.org>, accessed 6 April 2011.

[36] Under the former legislation, the European Court of Justice had found that that the term "spouse" only covered married partners. In this case the unmarried, opposite-sex partner of a British man working in the Netherlands argued that she was entitled to a residence permit because she should be treated as his 'spouse' (ECR, Case 59/85 *Reed v Netherlands* [1986] 1283).

[37] This problem is widely discussed. With regard to the specific issue of social security see: Simon Roberts and Maija Sakslin, 'Some are more equal than others: the impact of discrimination in social security on the right of same-sex partners to free movement in the European Union' [2009] 17:3 Benefits, 249-261.

[38] See, in this respect, Mateusz Jozef Pilich, 'The Problem of Recognition of the Same-Sex Relationships in Poland in the Light of the EU Law and the New Polish Act on Private International Law', electronically available at <http://ssrn.com/abstract=1779289>, accessed 6 April 2011; Ian Curry-Sumner, *All's Well that Ends Registered? The Substantive and Private International Law*

avoid the fundamental debate on the underlying values[39]. According to a recent green paper of the European Commission, civil status records raise a question of quite a different magnitude concerning, not the actual documents themselves, but their effects[40]. Although the European Commission accepts that the EU has no competence to intervene in the substantive family law of Member States, this green paper states that the Commission supports the usefulness of facilitating recognition of the effects of civil status records legally established in other EU Member States (page 13).

The easiest would be mutual recognition, but of course this is closely related to the variety of nationally accepted concepts, and how these concepts constitute the definition of a civil status. As a matter of fact, certain NGOs have already warned that:

> However, the simplistic audit of the issues involved – as conducted by the Commission in its Green Paper – leads to an even greater issue: that of compelling EU Member States to recognize same-sex civil unions (or same-sex adoption) even when this goes against their national laws and public morality (and despite the fact that Member States are theoretically protected against such coercion by Article 81.3 of the Treaty on the Functioning of the European Union). Since family law is a competency of each Member State – and not of the EU – the imposition of a recognition of civil unions and other practices that contradict their domestic public morality would constitute a serious infringement of national sovereignty and a violation of the principle of subsidiarity. This is precisely the danger posed by the idea of "automatic mutual recognition" of public documents, as the European Commission seems to suggest[41].

Therefore the Commission suggests:

Aspects of Non-Marital Registered Relationships in Europe, (Intersentia 2005); Dagmar Coester-Waltjen, 'Das Anerkennungsprinzip im Dornröschenschlaf?', in Heinz-Peter. Mansel and others (eds.), *Festschrift für Erik Jayme*, Vol. 1 (Sellier 2004), 120ff; Dagmar Coester-Waltjen', Anerkennung im Internationalen Personen-, Familien - und Erbrecht und das Europäische Kollisionsrecht' [2006] 4 IPRax, 392-393; or Johan Meeusen, 'The Grunkin and Paul Judgment of the ECJ, or How to Strike a Delicate Balance between Conflict of Laws, Union Citizenship and Freedom of Movement in the EC' [2010] 1 ZEuP, 197ff.

[39] For a comparative approach in this respect, looking at the United States and Europe, see: Vanessa Abballe, 'Comparative Perspectives of the Articulation of Horizontal Interjurisdictional Relations in the United States and the European Union: The Federalization of Civil Justice' [2009], 15 New England Journal of International and Comparative Law 1 or Curry-Sumner, (note 36).

[40] See European Commission, Green Paper, Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, Brussels, 14.12.2010, COM(2010) 747 final, 1.

[41] Statement by "European Dignity Watch" of 25 February 2011, available online at: <http://www.europeandignitywatch.org/reports/detail/article/tell-the-european-commission-no-forced-eu-wide-recognition-of-same-sex-marriage.html>, accessed 6 April 2011.

> This recognition would also have the advantage of providing the legal certainty which citizens can expect when they exercise their right to freedom of movement It can be argued that legal uncertainty and the various problems a citizen could encounter in terms of recognition of the legal situation established in the Member State the citizen is leaving should not act as a disincentive or constitute an obstacle preventing the exercise of European citizens' rights
> In this case, this possibility should, however, be accompanied by a series of compensatory measures to prevent potential fraud and abuse and take due account of the public order rules of the Member States Moreover, automatic recognition might, where appropriate, be better suited to certain civil status situations such as the attribution or change of surnames This might prove to be more complicated in other civil status situations such as marriage[42].

A related problem regarding the differences in civil status laws between the Member States is currently being discussed in the context of a Proposal for a Council Regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions regarding the property consequences of registered partnerships[43]. Here, again in the interest of an area of freedom, security and justice, the Commission proposes that, "the law of the Member State where the partnership was registered will apply to all the partners' property, even if this law is not the law of a Member State" (Recital 18), but adds that, "the courts of the Member States should be allowed to set aside the foreign law in a given case where its application would be manifestly incompatible with the public policy of the forum" (Recital 20). Recital 21 concludes that, "the courts must not be able to invoke overriding mandatory provisions or public policy as exceptions in order to set aside the law of another Member State or to refuse to recognise or enforce a decision… where application of such an exception would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21, which prohibits all forms of discrimination. Nor may these courts set aside the law applicable to registered partnerships merely on the grounds that the public policy of the forum does not recognise registered partnerships". Finally, one should notice that the importance of national "public order" considerations within the EU was recently confirmed by the Court in a judgment involving differing views among the Member States about titles of nobility[44].

As an illustration of the insecurity prevailing in this field – especially with regard to public order concerns – it can be noted that on 24 February 2011, the Cour d'Appel de Paris (Paris Court of Appeal) has effectively legalized the adoption of a child by same-sex couples, through two different decisions; i.e., a joint adoption pronounced in Canada, and a joint adoption pronounced in the United Kingdom, both cases involving a male couple. These two decisions follow an earlier decision

[42] At page 13.
[43] COM(2011) 127/2 presented on 16 March 2011.
[44] ECJ, Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010.

of the Court of Cassation on 8 July 2010, which had recognized the validity of the adoption by the second parent, partner of the biological mother, pronounced in United States[45]. These decisions are surprising, as the French law on adoption of 1966 is considered to prohibit the adoption of a child by a same-sex couple, and the recognition of foreign adoptions of this kind therefore leads to reverse discrimination[46]. At the same time, the Paris Court of Appeal has refused to recognize surrogate mother contracts, and the registration of the parents recognized by foreign law[47].

5. Lesser Forms of Economic Integration (FTAs, BITs etc.)

5.1. Introduction

Immigration rights granted to individuals in the context of economic integration agreements are less dynamic and complex than the immigration rights found in EU law, in that they simply favour the movement of persons in the context of the provision of services, the facilitation of trade, or the promotion of investment. Examples of these types of immigration rights are found in many modern Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs).

Customary international law leaves States with complete freedom regarding the admission of foreigners, with the exception of certain humanitarian admissions (e.g. refugees). With regard to the admission of foreigners to the domestic labour market, most States have instituted important barriers to protect the domestic work force from competition. In times of economic growth, this can lead to shortages with regard to certain types of (skilled) workers[48].

Regionally, a certain integration of labour markets has been achieved by a number of countries[49]. Apart from very specific agreements regarding certain quotas in

[45] Arrêt n° 791 du 8 juillet 2010 (08-21.740) - Cour de cassation - Première chambre civile: "… Attendu que le refus d'exequatur fondé sur la contrariété à l'ordre public international français de la décision étrangère suppose que celle-ci comporte des dispositions qui heurtent des principes essentiels du droit français; qu'il n'en est pas ainsi de la décision qui partage l'autorité parentale entre la mère et l'adoptante d'un enfant…".

[46] See also Stefania Ninatti, "Adjusting Differences and Accommodating Competences: Family Matters in the European Union" (Jean Monnet Working Paper no. 6/10), available online at <http://centers.law.nyu.edu/ jeanmonnet/papers/10/100601.html>, accessed 6 April 2011.

[47] See Arrêts n° 369 (09-66.486), 370 (10-19.053) et 371 du 6 avril 2011 (09-17.130).

[48] See Asif Qureshi and Andreas R. Ziegler, *International Economic Law*, (2nd edn. Sweet and Maxwell 2007), Para. 15-002.

[49] See, for example, Aderanti Adepoju, 'Fostering free movement of persons in West Africa' [2002] 40 International Migration, 3-28; or Christopher J. Cassise, 'The European Union v. the United States under the NAFTA: A Comparative Analysis of the Free Movement of Persons within the Regions' [1995-1996] 46 Syracuse Law Review, 1343ff.

specified professions[50], these agreements, generally speaking, do not go very far. The reason for this stems from the general fears associated to opening labour markets, such as the threat this brings to the job security of the domestic population, as well as general concerns regarding cultural changes that increased immigration may bring. The discussions above have highlighted the most famous examples of how the European Union has managed the specific problems that have arisen in regards to differing recognitions of civil status amongst Member States.

5.2. WTO-GATS

In the context of the multilateral trading system, the issue of migration was first discussed within the context of the integration of services into the WTO. The provisions dealing specifically with trade in goods of the GATT of 1947, and later agreements, never included any rules relating to the trans-border movement of persons. While a comprehensive regulation of migratory flows is obviously politically impossible, the concept of service supply through the temporary presence of foreign workers on the territory of another Member State leads to the need to address the issue. Mode 4 of the GATS defines supply of a service, "as by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member" (Article I:2(d) GATS). A specific Annex[51] makes clear that this particular aspect of the trade in services is intended to be of limited scope, especially limiting the access to a market of temporary presence. It does not concern persons seeking access to the employment market in the host Member, nor does it affect measures regarding citizenship, residence, or employment on a permanent basis.

As it is for all services-commitments under the WTO, any opening for the presence of natural persons is subject to an explicit opening of the respective sector through commitments in the respective national schedule. In most instances, Members have scheduled an initial "unbound" commitment; i.e., no binding of access conditions, and then qualified it by granting admission to selected categories of persons, with a marked bias towards persons linked to a commercial presence (e.g., intra-corporate transferees), and highly skilled persons (e.g., managers, executives, and specialists).

States are normally under an obligation to grant most-favoured-nation (MFN) treatment. They can, however, lodge specific exceptions, especially for regional integration arrangements, such as the EU. In addition, States can grant national treatment (NT) when they grant specific market access commitments, but are not obliged to do so. The issues of civil status and sexual orientation are obviously not addressed in these provisions. However, when a WTO Member does not provide

[50] See, for example, the 'Memorandum of Understanding signed between the Philippines and the United Arab Emirates (UAE)' on 11 April 11 2007; or the Japan-Philippines Economic Partnership Agreement (JPEPA), including an important part on the movement of labour (Filipino nurses and other care-givers working in Japan's welfare institutions), signed on 9 September 2006.

[51] Annex on Movement of Natural Persons Supplying Services Under the Agreement.

for specific exceptions from the MFN status, and does grant NT in a specific sector, one could claim that he has to treat the natural persons providing a service in a specific sector in a non-discriminatory way, with regard to its own nationals and foreigners providing such services. One can interpret this as including the obligation to allow the entry of service providers without discrimination relating to their sexual orientation or civil status, although for the time being the GATS does not provide for any rights of a service provider to bring along his or her family members.

The GATS further allows WTO Members to apply measures that are necessary to, inter alia, protect public morals or maintain public order as well as to protect human, animal or plant life or health (Article XIV). One cannot dismiss the possibility that such an exception may be invoked to exclude persons due to their sexual orientation, although this has not been reported so far, and it could be argued that such an exclusion should not be considered necessary or non-discriminatory, in view of the presence of a domestic LGBT population.

5.3. Mercosur

Probably among the regional integrations schemes that exist today world-wide, the Mercosur is the second most comprehensive (leaving aside the attempts in Africa to simulate the European Union). The founding Treaty dates from 1991, and a number of consecutive treaties have led to a continuous deepening of the "Common Market of the South"[52]. In this context, the four current full Members of Mercosur (Argentina, Brazil, Paraguay and Uruguay)[53], as well as the associated Members (Bolivia and Chile), established, in 2002, an Area of Free Residence with the Right to Work (*Área de Libre Residencia con derecho a trabajar*). It is meant to allow all nationals of the countries involved to take up work in any other Member State. The only requirements with respect to this Area of Free Residence and the Right to Work are the proof of nationality, and the absence of a criminal record. A health certificate may be requested. The legal basis is found in the respective Agreement signed in Brasilia on 6 December 2002 (Articles 1 and 4)[54]. All citizens of the Members of this area are initially entitled to a simplified residence permit procedure for a stay of up to two years (Article 4). This simplified residence permit is also available to naturalized persons five years after they obtain citizenship. Furthermore, the temporary residence permit can be exchanged for permanent residency upon proving sufficient means to support the petitioner and his family (Article 5). The permit gives a right to take up employment and be self-employed under the same conditions as nationals (Article 8). This is a major achievement with respect to the integration of labour markets, although it does not yet go as far as the free movement of persons within

[52] Treaty of Asunción of 26 March 1991.

[53] Venezuela's full accession (as signed in 2006) is still pending – due to the missing ratification by Paraguay – at the writing of this Chapter.

[54] Spanish: Acuerdo sobre Residencia para Nacionales de los Estados Parte del Mercosur, Bolivia y Chile firmado el 6 de diciembre de 2002 / Portuguese.

the European Union, which is an ultimate goal of the parties (found in the Preamble of the Agreement). At a summit in June 2008, the Members confirmed their willingness to facilitate border crosses among the Members, as well as Columbia, Ecuador and Peru – very much like the original Schengen system in Europe.

Family reunification (even with non-nationals of a Mercosur Member State) is expressly provided for as a human rights component of the agreement (Article 9:2). Furthermore, the agreement expressly guarantees access to schools for a migrant's children (Article 9:6). The Treaty speaks of the "Grupo familiar convivente/grupo familiar de convívio" (Article 5, Sub-paragraph d) and of the "familia" (Article 9) of a petitioner.

In Argentina, marriage and adoption has been open to same-sex couples since 22 July 2010. Civil unions were recognized in four jurisdictions of Argentina, for the first time in Buenos Aires as of 2002. On 1 January 2008, Uruguay had become the first Latin American State to have a national civil union law (*Ley de Unión Concubinaria*). In September 2009, homosexual civil unions were given the right to adopt children in Uruguay, and finally, on 5 April 2011, the Uruguayan Parliament started the debate about following Argentina's example by introducing a law legalizing same-sex marriage. In Brazil, adoption by same-sex couples – as practised since 2005 – is legal according to a Supreme Federal Court decision of 27 October 2010, but no civil union or right to marriage exists so far for same-sex couples in Brazil[55], as is the case in Chile, Bolivia, and Paraguay. The recognition of marriage and civil unions, as well as adoption by gay couples, thus varies widely amongst the Members of this economic integration area.

Article 2 of the Treaty of Asunción, provides that "[t]he common market shall be based on reciprocity of rights and obligations between the States Parties"[56]. According to Susana Vieas, a professor at the University of Brasilia, this should lead the authorities in the Member States of Mercosur to recognize marriage certificates (as well as adoption certificates) by other Mercosur Members[57]. This seems a rather

[55] On 5 May 2011 the Brazilian Constitutional Court has decided, unanimously, that same-sex couples, who live in a union that is continuous, public, and lasting, legally qualify as a family unit, in the same way as a different-sex couple living in the same kind of union qualify under Article 1273 of the Brazilian Civil Code (2002). It remains to be seen whether this will also be used with regard to Mercosur residents applying for residence and work permits under the Mercosur system.

[56] Spanish: "El Mercado Común estará fundado en la reciprocidad de derechos e obligaciones entre les Estados Partes" / Portuguese: "O Mercado Comum estará fundado na reciprocidade de direitos e obrigações entre os Estados Partes".

[57] "Para um documento internacional ter validade no Brasil, é preciso que ele esteja dentro de parâmetros brasileiros, o que não ocorre com as uniões homoafetiva… De início pode haver problemas em situações onde a certidão de casamento é um documento obrigatório, como para solicitar residência permanente ou para viajar com crianças, mas com o tempo as autoridades brasileiras devem se adaptar e a situação se normalizar", Interview reported on 27 July 2010 online at <http://www.portalg.com.br/mostra_ultimas.php?id=461>, accessed 6 April 2011.

daring interpretation of a standard clause in an international agreement that does not directly refer to the recognition of civil status documents in the Member States – especially when one remembers the complicated situation in the European Union as described above. In particular, it should be noted that the Mercosur Agreement in its Article 8 refers to any prior commitment made in the context of the Latin American Integration Association (ALADI). Article 50 Letter a of the Treaty Establishing the Latin American Integration Association (Treaty of Montevideo of 12 August 1980) provides in its Article 50 explicitly that Member States may take measures that violate the agreement if these are taken in order to safeguard the public order[58].

At least in Brazil, the report on same-sex marriage by the Federal Supreme Court, expected for April 2011, may make the mutual recognition easier. It should also be noted that there is more common ground between Mercosur countries when it comes to the issues of homophobia, and violence and discrimination against LGBT persons. Various working groups and conferences, established by the Mercosur Members, have addressed these issues and have called upon the Members to take appropriate action[59].

5.4. BITs and FTAs

Some countries have also entered trade-related obligations with respect to certain types of temporary entry of foreigners, especially business visitors, in their bilateral agreements. These obligations are normally found in Free Trade Agreements (FTAs) and/or Bilateral Investment Agreements (BITs), although today they are often located in other documents in view of political goals, such as Association Agreements of Economic Partnership Agreements in the case of the EU.

Typical examples of migration-related rules contained in such agreements are the obligations entered into by NAFTA States, or by the members of other agreements modelled after NAFTA (e.g. the bilateral Canada-Chile Free Trade Agreement CCFTA)[60]. Chapter Sixteen of NAFTA provides for temporary entry for business persons. According to Article 1601, these rules are based on the "desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and

[58] "Artículo 50: Ninguna disposición del presente Tratado será interpretada como impedimento para la adopción y el cumplimiento de medidas destinadas a la: a) Protección de la moralidad pública…" This coresponds of course to the system found in Article XX of the GATT.

[59] See Ryan Richard Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm That Dare Not Speak Its Name' [2009] 8:4 Journal of Human Rights 323-339; David Brown, 'Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles' [2010] 31 Michigan Journal of International Law, 276ff.; Pinar Ilkkaracan and Susie Jolly, *Gender and Sexuality: Overview Report* (2007), available at: *www.bridge.ids.ac.uk/reports/CEP-Sexuality-OR.pdf* (last visited on 6 April 2011).

[60] See also Cassise (note 49).

to protect the domestic labour force and permanent employment in their respective territories". Under Article 1603, "[e]ach Party shall grant temporary entry to business persons who are otherwise qualified for entry under applicable measures relating to public health and safety and national security…".

With regard to business persons from Mexico, NAFTA originally limited the number of permits to 5500, and declared not to take into account, "the entry of a spouse or children accompanying or following to join the principal business person". This avoids the discussion on the term spouse, although in view of the current legislation in the United States it seems clear that this cannot be easily interpreted as covering same-sex partners. Some authors have tried to argue that at least a cross-cultural influence; i.e., Canadian openness to same-sex marriage, may influence the United States, however this is certainly not due to the current legal rules on migration under NAFTA.

Similar provisions can be found in many bilateral investment treaties (BIT) of combined trade and investment agreements, where the temporary presence of investors and so-called 'key personnel' is a very common feature. A typical example would be the following provision from the BIT between Australia and Argentina of 1997[61]:

Article 6 Entry and sojourn of personnel: 1. A Contracting Party shall, subject to its laws and regulations relating to the entry and sojourn of non-citizens, permit natural persons who are investors of the other Contracting Party and personnel employed by companies or legal persons of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities connected with investments. 2. A Contracting Party shall, subject to its laws and regulations, permit investors of the other Contracting Party who have made investments in the territory of the first Contracting Party to employ within its territory key technical and managerial personnel of their choice regardless of citizenship.

Here again, it is evident that it is not yet common to find any provisions to allow for the temporary immigration of family members of the key personnel. An interesting exception can be found in certain newer agreements, like the *FTA concluded between the EFTA States and Singapore* in 2002[62]:

Article 45:3. The Parties are encouraged to grant, subject to their laws and regulations, temporary entry and stay to the spouse and minor children of an investor of another Party or of key personnel employed by such investors, who has been granted temporary entry, stay and authorization to work.

Again, neither the term "spouse", nor the term "child", of the investor or key personnel is defined. As the whole provision is merely hortatory, and additionally subjects the granting of permits to domestic laws and regulations, it does not go very far and remains of rather symbolic value.

[61] Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol (Canberra, 23 August 1995), Entry into force: 11 January 1997.

[62] Agreement between the EFTA States and Singapore of 26 June 2002.

6. Conclusion

This paper gives an overview of existing international instruments that address this field, and focuses on the new questions relating to the recognition of civil status rights granted to LGBT individuals and couples in other States. This paper also considers the question of how common institutions address these differences amongst States, and whether modern economic integration agreements can properly deal with these issues.

The above analysis shows that, normally, traditional agreements for the liberalization of trade and investment; i.e., FTAs, BITs, or combinations thereof, do not include provisions allowing for extended or permanent movement of persons leading to a right of family reunification. This can be explained by the traditional caution to include migration and human rights aspects in these types of agreements. Therefore, the right of a person to be considered as "key personnel" in a BIT, will normally not allow him or her to take a spouse or children along and hence no rights can be derived for civil partnerships and adopted children of same-sex couples.

At the same time, the above analysis shows that any agreement that attempts to achieve a common or internal market will most likely have to address these questions. If the internal market concept is designed to allow for longer or permanent residence of foreign workers and self-employed individuals, then it must address the issue of family reunification. In these circumstances, the existence of differing regulations regarding the civil status of persons – and hence the definition of what constitutes a family – will cause obstacles to the realization of the basic integration goal. The developments in the European Union (as well as its' closely associated partner States such as Switzerland) and Mercosur, are typical examples. While the parties to agreements may not endeavour to harmonize their respective legislations, the political pressure to either mutually recognize or have similar, if not identical standards, does normally increase.

Mutual Recognition of Same-Sex Marriages from an EU Immigration Law Perspective

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Abstract

The aim of this article is two-fold. Firstly, to explore the situation of same-sex married couples within European Union (EU) immigration rules; and secondly, to propose a way forward for the development of European family law in order to ensure more equality for same-sex spouses, specifically in the area of immigration. For this purpose, the article begins with a section illuminating the relationship between the concept of family and immigration law. This section clarifies the relevance of scrutinizing the situation of same-sex spouses from an immigration law perspective. Then, this article focuses on the family reunification and European Union legislation on long-term residents[1]. The negative repercussions of the EU not taking enough notice of the issue of same-sex couples are investigated from an immigration law point of view. In this context, the extent to which immigration rights of same-sex spouses are hindered is considered. After having laid down the immigration-related problems which same-sex married couples face under the EU immigration legislation, and before making suggestions as to the recognition of same-sex marriages, the article describes the current state at the European level of the rights of same-sex couples to a family. This section will serve as the basis for the following section on mutual recognition of same-sex marriages as it will put this debate in a context. Finally, the article proposes a solution which entails the utilization of the principle of mutual recognition in family law issues within EU law. This section corresponds to the second aim of the article as indicated above. Recognizing that, even at national level, developments in family law have always occurred in numerous phases, the proposed solution represents a first step approach. Mutual recognition in family law matters therefore corresponds to the first step in achieving a regime where immigration rights and right to family life is not only safeguarded for heterosexual couples.

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1. Immigration Law and the Family

Sooner or later every immigration lawyer arrives at a point where he/she has to explore the uncharted waters of family law. This exploration is always a challenging

[1] The ideas presented under the titles 'family reunification' and 'long-term residents' have previously been discussed in Türkan Ertuna Lagrand, *Immigration Law and Policy: the EU Acquis and Its Impact on the Turkish Legal Order* (Wolf Legal Publishers 2010).

one as the textures of these two areas of law are as different as are their tools. The challenge becomes bigger when the subject matter is taken on at the European level due to the fact that the level of harmonization in immigration law and family law is not identical, to put it mildly. However, as challenging as it may be, in order to answer the most basic question of 'who can migrate' in terms of EU law, family law needs to be investigated.

Due to rules on free movement, people and their families move from one EU Member State to the other. Indeed, the first time 'family' was defined under EU law was in Regulation 1612/68[2] that aimed at promoting and facilitating the 'mobility of migrant workers which necessitated extending the right of residence and other valuable social rights to members of their family who would be accompanying them'[3]. Since the adoption of Regulation 1612/68, the scope of the 'family' concept has been the subject of alterations. Nevertheless, one category has always stayed the same, as the least controversial family member when it comes to immigration: the spouse. Obviously, when it comes to 'who shall be given access to family reunification and who shall be able to make use of free movement rules within the EU' at first sight no one seems to have objections that it should primarily be the 'spouse'.

It is precisely at this point of 'complete' consensus where we witness how the 'absence of harmonized family law creates an obstacle to the free movement of persons and the creation of a truly European identity and an integrated European legal space'[4]. The question as to what extent same-sex couples who have been married in the Netherlands, Belgium, Spain, Sweden or Portugal – the EU Member States currently recognizing same-sex marriage[5] make use of free movement rules, very closely relates to the extent to which the EU actually is the area of justice, freedom and security that it claims to be.

Waaldijk explains that discrimination in the field of migration towards same-sex couples may take place in at least four categories: '1) to married (opposite-sex) spouses than to unmarried partners; 2) to married opposite-sex spouses than to registered same-sex partners; 3) to married opposite-sex spouses than to married same-sex spouses; 4) to unmarried opposite-sex partners than to unmarried same-sex partners'[6]. Among all these possible levels in which same-sex couples are being discriminated within immigration rules, in this article emphasis is placed on the 3rd

[2] Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] *OJ L257/2, art 10.*

[3] Helen Stalford, 'Concepts of Family Under EU Law - Lessons from the ECHR' (2002)16 International Journal of Law, Policy and the Family410-434.

[4] Katharina Boele-Woelki, 'The Principles of European Family Law: Its Aims and Prospects' (2005) 1Utrecht Law Review160-168.

[5] In addition to these Member States in which same-sex marriage is recognized, the list of Member States recognizing same-sex registered partnerships is as follows: Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, Slovenia, the United Kingdom.

[6] Kees Waaldijk, 'After Amsterdam: Sexual Orientation and the European Union', Guide published by ILGA-Europe (September 1999).

kind. Hence, the instances are examined where rights normally accorded to married couples under immigration laws are not extended to same-sex married couples. The reason is, as mentioned above, that throughout the development of European immigration law the position of the 'spouse' in having right to migrate as a family member has never been contested[7].

2. Family Reunification

The existence of a right to family reunification for foreigners was, for a long time, not accepted under international law[8]. Even though, most European countries have acknowledged, in their national laws, the right to family reunification for third country nationals, this consensus was not reflected in international instruments[9]. The right to respect for family life which is covered by Article 8 of the ECHR does not go as far as to recognize the right to family reunification. In family reunification matters, the European Court of Human Rights (ECtHR) has traditionally taken the principle of state sovereignty as a starting point and has applied a wide margin of appreciation[10]. The European Union has adopted a similar view when it first embarked upon family reunification in 1993 with the adoption of the Resolution on the harmonization of national policies on family reunification[11].

The groundbreaking step came from the Commission in 1999, as the Proposal for a Council Directive on the Right to Family Reunification[12] defined family reunification as a right. Even though the Proposal was amended twice until the Council Directive on the Right to Family Reunification[13] was adopted in 2003, Article 1 still stated that the purpose of the Directive is to determine the conditions for the exercise of the 'right' to family reunification by third-country nationals residing lawfully in the territory of Member States. Nevertheless, the conditions of exercising family reunification, such as the ones explained below, create confusion as to whether the EU truly considers family reunification as a right. The discussion below principally

[7] I would hereby like to stress that this article does not intend to hamper the assertions for more rights for unmarried partners in general.

[8] Kay Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International 2000) 279.

[9] Ryszard Cholewinski, 'Family Reunification as a Constitutional Right?' in Joanna Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (Edward Elgar Publishing 2004) 260.

[10] Sarah van Walsum, 'Comment on the Sen Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification?'(2003) 4 European Journal of Migration and Law 511-520; Kees Groenendijk, 'Family Reunification as a Right under Community Law'(2006) 8 European Journal of Migration and Law 215-230.

[11] Document SN 282/1/93 WGI 1497 REV 1.

[12] COM (1999) 638 final.

[13] Council Directive 2003/86 of 22 September 2003 [2003] OJ L251/12.

deals with Directive 2003/86. Where relevant, information is also provided concerning 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[14].

A much debated aspect of Directive 2003/86 involves the question of with whom the sponsor[15] can be 'reunified', or, in other words, who are considered to be 'family'. The lack of a European definition of the 'family'[16] results in the adoption of a narrow scope for the concept by the Directive. The 'spouse' is the first category of family members that can be reunified with the sponsor[17]. The 'spouse' is also listed as the first category of family members in Directive 2004/38 who will reside and move freely within the Member States together with the Union citizen[18].

The original Proposal for a family reunification directive and the first amended version of this Proposal did not differentiate between the spouse and unmarried partner with whom the immigrant has a durable relationship provided that the relevant Member State treated unmarried couples as corresponding to married couples[19]. The regimes applying to married and unmarried partners have been separated in the third Proposal and it was made optional for Member States to admit unmarried partners[20]. According to the Directive, the Member States may authorize family reunification with the unmarried partner of the sponsor if the sponsor is in a duly attested stable long-term relationship with him/her[21]. Any reliable means of proof shall be examined by the Member States in determining family relationship such as a common child, previous cohabitation and registration of the partnership[22]. The optional character of whether or not to allow reunification also applies in situations where the sponsor has a registered partnership with the person who applies to join him/her in the Member State[23].

The fact that allowing for the entry and residence of unmarried partners is not obligatory for Member States has negative repercussions for same-sex couples. Hav-

[14] Council Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.

[15] The 'sponsor' is a concept which replaced the 'applicant' in the earlier versions of Directive 2003/86 as proposed by the Commission. The preferred wording suggests economic and financial implications. See Joanna Apap and Sergio Carrera, 'Towards a Proactive Immigration Policy for the EU?', CEPS Working Document no198 (December 2003) 8.

[16] Gisbert Brinkmann, 'Family Reunion, Third Country Nationals and the Community's New Powers' in Elspeth Guild and Carol Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing 2001) 242.

[17] Directive 2003/86, art 4(1)(a).

[18] Directive 2004/38, art 2(2)(a).

[19] Art 5(1)(a) of COM(1999) 638 final of 01.12.1999 and COM(2000) 624 final of 10.10.2000.

[20] Art 4(3) of COM(2002)225 final of 02.05.2002 and Council Directive 2003/86.

[21] Directive 2003/86, art 4(3)(1).

[22] Directive 2003/86, art 5(2)(3).

[23] Directive 2003/86, art 4(3)(2).

ing said that, in the case of same-sex couples even a marriage tie does not guarantee family reunification[24]. There is no clarification as to whether same-sex spouses can also enjoy the right to family reunification. The same situation reoccurs concerning EU nationals in Directive 2004/38. Despite two years of negotiations on whether or not to include same-sex spouses within the definition of 'family' the question has also been overlooked in Directive 2004/38[25]. Ironically, this issue represents one of the few similarities concerning the approach towards family members of EU citizens and third-country nationals.

In any event, as confirmed by the Commission, the EU does not recognize that same-sex spouses have the same rights as 'traditional' spouses for the purposes of Community law[26], as a result of which the Directive on family reunification does not see it necessary to clarify the situation of same-sex spouses in relation to family reunification demands with Member States which allow same sex marriages. Even if the granting of family reunification rights to same-sex spouses would proceed without problems in the Member States which do recognize same-sex marriages, the silence of the Community law on the issue[27] creates immense problems for such couples when they would like to move to a Member State which does not recognize same-sex marriages or any form of recognition of same-sex couples for that matter[28]. The issue of same-sex marriages is simply being ignored by the EU concerning their immigration rights.

3. Long-Term Residents

For a long time, the residence rights of third-country nationals legally residing in the territory of Member States only had Community relevance as long as they had some type of connection to an EU citizen[29]. Otherwise it was the national law that regu-

[24] It must be clarified that this same problem also exists for EU nationals due to the provision of art 2(2)(b) of Directive 2004/38 of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.

[25] Art 2(2) of the mentioned Directive defining a 'family member' lists 'the spouse' as the first group of family members, however does not mention whether this will include the same sex spouse. See Helen Toner, 'Immigration Rights of Same-Sex Couples in EC Law' in Katharina Boele-Woelki and Angelika Fuchs (eds.), *Legal Recognition of Same-Sex Couples in Europe* (Intersentia 2002) 178-193.

[26] Communication from the Commission on free movement of workers - achieving the full benefits and potential, COM(2002)694 final, 8.

[27] Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, [2003] OJ L338/1, deals with mutual recognition of divorces but not of marriages.

[28] See Mark Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002) 88-120.

[29] Kees Groenendijk, 'Security of Residence and Access to Free Movement for Settled Third Country Nationals under Community Law' in Elspeth Guild and Carol Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart Publishing 2001) 228.

lated the residence rights of third-country nationals. With respect to their rights, an important aspect is to grant special treatment for those who have resided legally in the territory of a state longer than a certain period.

This situation of rights of third-country nationals legally resident within the EU being left to the competence of Member States has changed following the adoption of the Treaty of Amsterdam. It is with the Treaty of Amsterdam that the Community acquired competence in regulating the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States[30]. The call of the Tampere European Council – to grant third-country nationals holding a long-term residence permit a uniform set of rights which are as near as possible to those enjoyed by EU citizens[31] – found its response in the Proposal for a Directive on the status of long-term residents of 2001[32].

The Directive on long-term residents[33] adopted in 2003 as the watered down version of the original Proposal, regulates the terms for granting and withdrawing long-term residence status and the rights it entails in the Member State which granted the status and the terms of residence in Member States other than the one which granted the long-term resident status (the 'second Member State')[34].

The highlight of Directive 2003/109 is without hesitation the fact that it introduces certain rights which shall be enjoyed by the long-term resident in the 'second Member State'[35]. The second Member State is described by the Directive as 'any Member State other than the one which for the first time granted long-term resident status to a third-country national and which that long-term resident exercises the right of residence'[36].

Before the Directive, third-country nationals holding a long-term residence permit did not have the possibility to move to a second Member State as a right ensured by EU law. Consequently, if they wished to settle in another Member State they were not subject to any privileged treatment and had to go through all the formalities imposed on first time immigrants[37]. Directive 2003/109 grants the right of residence in another Member State to long-term residents under certain conditions[38]. Those

[30] EC Treaty ex art 63(4).

[31] Presidency Conclusions of the Tampere European Council of 15-16 October 1999, Section III, point 21.

[32] Proposal for a Council Directive concerning the status of third country nationals who are long term residents, COM(2001) 127 final, 13.03.2001.

[33] Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] OJ L16/44.

[34] Directive 2003/109, art 1.

[35] As opposed to the first Member State 'which for the first time granted long term resident status to a third-country national'. See Directive 2003/109, art 2(c).

[36] Directive 2003/109, art 2(d).

[37] Explanatory Memorandum of the Proposal for a Council Directive concerning the status of third country nationals who are long term residents, COM(2001)127 final, Section 5(7).

[38] It must, however, be said that whereas the title of the relevant chapter in the Proposal referred

long-term residents who fulfill the conditions laid down in the Directive may reside in a second Member State for a period longer than three months in order to exercise an economic activity in an employed or self employed capacity; to pursue studies or vocational training; or for any other purpose[39].

Provided that the family was already formed in the first Member State the family members have the possibility to accompany the long-term resident to the second Member State. It is exactly at this point where a *lacuna* exists concerning the same-sex spouse. A distinction is made between two different categories of family members. The Directive secures the right to accompany the long-term resident for those 'family members' who fulfill the conditions laid down in Article 4(1) of Directive 2003/86 on family reunification[40]. Member States have no discretion concerning whether to accept such family members into their territory to reside with the long-term resident. For 'family members' other than those referred to in Article 4(1) of Directive 2003/86, Member States maintain the capacity to decide whether to authorize their accompanying the long term resident[41]. According to this categorization, the 'spouse' should be allowed to accompany the long-term resident with no discretion permitted to the second Member State. This is because the 'spouse' is the first family member listed in Article 4(1) of Directive 2003/86.

However, the issue of family members accompanying the long-term resident takes another turn when it comes to same-sex couples. If the long-term resident has married a third-country national from the same-sex in the first Member State which recognizes same-sex marriage or if such a Member State has authorized the family reunification of a same-sex married couple and the very couple decide to move to a second Member State which does not recognize same-sex marriage, the issue of whether the second Member State will allow the same-sex spouse to accompany the long-term resident arises. The Community legal regime does not contain any safeguard as to making sure same-sex spouses enjoy the same immigration rights within the Union as opposite-sex spouses, while it is the same legal regime which grants the 'spouse' the right to accompany the long-term resident to the second Member State

to a 'right of residence in the other Member States' the reference to a right of residence was omitted in the final version of the Directive. See Proposal for a Council Directive concerning the status of third country nationals who are long term residents, COM(2001)127 final, Chapter III.

[39] Directive 2003/109, art 14(2). Nevertheless, concerning long term residents who wish to reside in a second Member State to exercise an economic activity, the Directive identifies some restrictive measures Member States can take. It follows that Member States are allowed to take the situation of their labor market and their labor market policies into consideration and consequently give preference to other groups of persons or apply their national procedures regarding requirements for exercising economic activity on an employed or self employed basis. See Directive 2003/109, art 14(3). Additionally, according to art 14(4) Member States may continue to limit the total number of persons entitled to be granted right of residence as long as these limitations were already present in national legislation at the time of the adoption of the Directive.

[40] Directive 2003/109, art 16(1).

[41] Directive 2003/109, art 16(2).

without conferring any discretion to this second Member State on whether or not to allow the spouse to reside in its territory by relying on Directive 2003/109.

4. Right of Same-Sex Couples to a Family

It would be possible for Member States which do recognize forms of same-sex registered partnership to allow the same-sex spouse by treating them as registered partners. But apart from the fact that this would be a solution which is limited to those Member States recognizing same-sex registered partnerships only, it is not really a solution which can wholeheartedly be embraced at this day and age and especially within the European Union, the self-proclaimed Area of Justice, Security and Freedom. If the Community right of family reunification cannot be secured for same-sex spouses, can we talk about their right to family under European Law?

Ever since the European Parliament took on the issue of equal rights for lesbian, gay, bisexual, trans and intersex(LGBTI) persons in the Resolution on equal rights for homosexuals and lesbians in the EC[42], a lot has been achieved at the European level in fighting discrimination based on sexual orientation. These developments led eventually to the Charter of Fundamental Rights of the European Union that prohibits any discrimination based on sexual orientation[43]. However, when it comes to prohibition of sexual orientation discrimination in general, and rights of same-sex couples in specific, the first place to look in order to follow the full-range of developments in this area in Europe is the case law of the European Court of Human Rights (ECtHR). Even though the European Convention on Human Rights (ECHR) does not specifically mention the prohibition of discrimination based on sexual orientation like the Charter does, the Court has been much more influential in this area, as well as in the family law arena[44], compared to the organs of the European Union.

It is as important as much as it is relevant to study the case law of the ECtHR in order to draw conclusions as to the state of prohibition of discrimination on grounds of sexual orientation in Europe. Apart from the EU accession to the European Convention of Human Rights and the fact that all EU Member States are signatories to the ECHR, the European Court of Justice (ECJ) has referred on various occasions to the ECHR provisions, especially to Article 8, as a frame of reference in a number of cases before it in enhancing the status of family members under Community law[45].

[42] [1994] OJ C61/40.

[43] Art 21(1).

[44] Jens M. Scherpe, 'Families in Europe - European Family Law?', A discussion paper for the conference The Treaty of Rome (A Golden Anniversary - 50 Years On?), British Centre for English Legal Studies, Warsaw University March 9/10 <http://www.cels.law.cam.ac.uk/events/Scherpe.pdf> accessed 24 May 2011.

[45] Helen Stalford, 'Concepts of Family Under EU Law - Lessons from the ECHR'(2002) 16 International Journal of Law, Policy and the Family 410-434.

As mentioned above, even though discrimination based on sexual orientation is not explicitly included within the scope of Article 14 of the ECHR on prohibition of discrimination, the ECtHR has held that discrimination based on sexual orientation is covered by Article 14 and is not acceptable[46]. As for the situation of same-sex couples, after holding for many years that long-term same-sex relationships only constituted 'private life'[47] the Strasbourg Court has given a revolutionary judgment in *Schalk and Kopf v. Austria* by recognizing that same-sex couples can enjoy 'family life' for the purposes of Article 8[48]. In the same judgment, the ECtHR furthermore quashed the main argument of those who oppose same-sex marriage, namely that marriage should be between a man and a woman. Those in opposition to same-sex marriage often cited ECHR Article 12 which secures the right to marry to 'men and women of marriageable age' and ECtHR's confirming case law in demonstrating that only those of opposite sex were to marry[49]. However, the Court itself, in *Schalk and Kopf v. Austria* has ruled that it 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[50]. The ECtHR based its decision mainly on two factors: first of all, the increasing number of Member States having granted same-sex couples equal access to marriage, and having passed some kind of legislation permitting same-sex couples to register their relationships; and secondly, Article 9 of the Charter of Fundamental Rights of the European Union which deliberately dropped the reference to men and women concerning right to marry[51].

For the time being, the ECtHR has left the question of whether or not to allow same-sex marriage to be answered by the national law of the Contracting States. The same approach is adopted by the European Union in the Charter of Fundamental Rights, as Article 9 affirms that the right to marry shall be guaranteed in accordance with the national laws of Member States. Consequently, it seems like both the ECtHR and the EU recognize the right for same-sex couples to marry, though not really. Both institutions, while recognizing that marriage can no longer be limited to persons of the opposite sex, propose to wait for the natural course of evolution of law to play its part until most of the Member States recognize same-sex marriage without contemplating at all on what to do with the injustices which will take place in the meantime. This approach of both institutions, hints at a change at the European level when more European states recognize same-sex marriage and seems to suggest that we are in a 'transitional period' in which the right of same-sex couples to marry is recognized at the European level, but cannot be safeguarded yet. There-

[46] *Salgueiro da Silva Mouta v. Portugal* ECHR 1999 no 33290/96.
[47] *Mata Estevez v. Spain* ECHR 2001 no 56501/00.
[48] *Schalk and Kopf v. Austria* ECHR 2010 no 30141/04.
[49] *Mata Estevez v. Spain* ECHR 2001 no 56501/00.
[50] *Schalk and Kopf v. Austria*, para 61.
[51] See the relevant part of the Commentary of the Charter as cited by the EctHR in *Schalk and Kopf v. Austria*, para 25.

fore, there is need at the European level to safeguard the rights of same-sex couples who have married and who are seeking to make use of their community rights, such as free movement. It also seems like, with the acknowledgment displayed at European level as to the right to family of same-sex couples, the momentum is right to reach a solution for this transitional period in order to uphold the community rights of same-sex married couples.

5. Mutual Recognition of Same-Sex Marriages as a Solution in the Transitional Period

Owing to the lack of competence of the EU in the area of family law, the development, albeit limited, has taken place within the framework of judicial co-operation in civil matters as provided for in Article 81 (ex Article 65 TEC) of the EU Treaty. According to this provision, in civil matters having cross-border implications, the Union shall develop judicial co-operation based on the principle of mutual recognition particularly when necessary for the proper functioning of the internal market. Indeed, Paragraph 3 of Article 81 indicates the specific procedure to be followed when adopting measures concerning family law with cross-border implications. An example to such a measure would be the Council Regulation commonly referred to as the Brussels II *bis*[52], which applies in civil matters relating to divorce, legal separation or marriage annulment as well as to the attribution, exercise, delegation, restriction or termination of parental responsibility[53].

'It is generally acknowledged that to date in cross-border situations people cannot rely on the continuity of their family relationships when changing residence'[54]. Neither the Brussels II *bis* Regulation, nor any other regulation, regulates the mutual recognition of marriages within the European Union. Thus the loss of legal status experienced by two women married in the Netherlands who wish to move to a Member State not recognizing same-sex relationships is left unsolved, even though this situation falls obviously under civil matters having cross-border implications which hinders the proper functioning of the internal market. It follows that the European Union does have competence to enact measures in this area[55].

[52] Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, [2003] OJ L338/1.

[53] Regulation 2201/2003, art 1(1).

[54] Katharina Boele-Woelki, 'The Principles of European Family Law: Its Aims and Prospects' (2005) 1 Utrecht Law Review 160-168.

[55] Jens M. Scherpe, 'Families in Europe - European Family Law?', A discussion paper for the conference The Treaty of Rome (A Golden Anniversary - 50 Years On?), British Centre for English Legal Studies, Warsaw University March 9/10 <http://www.cels.law.cam.ac.uk/events/Scherpe.pdf> accessed 24 May 2011.

In the lack of harmonized rules concerning European family law, the principle of mutual recognition is the way forward in overcoming the barriers to free movement of persons due to the non-recognition of same-sex marriages in some EU Member States and thus ending the discrimination same-sex married couples are facing in this area. Emerging out of the ECJ Judgment of *Cassis de Dijon*, the principle of mutual recognition originally stipulated that there is no valid reason why goods lawfully produced and marketed in one Member State should not be introduced into any other Member State[56]. Eventually, by the time the Lisbon Treaty came into effect, mutual recognition was already at the heart of what the EU is trying to achieve in the Area of Justice, Security and Freedom[57]. With the Treaty of Lisbon, the principle of mutual recognition is even made the basis of judicial cooperation in criminal matters[58]. In this context, mutual recognition indicates that decisions lawfully made in one Member State are to be recognized in other Member States.

Adapted to the area of immigration law of the EU, the principle of mutual recognition would ensure that for the purposes of family reunification a marriage act lawfully entered into in one Member State is to be recognized in other Member States. While not entirely sufficient to overcome the discrimination same-sex couples face within the EU, the use of the principle of mutual recognition in the area of immigration law would be the appropriate first step to take. The first reason for this is that it will not oblige Member States to change their national family law, which for the time being EU does not have competence for[59] and in any event could not be realistically expected from all EU Member States when it comes to granting equal rights to same-sex couples[60]. It will 'simply' require Member States to observe whether the act of marriage has been lawfully entered into according to the laws of the Member State in which the same-sex couple have married. Secondly, setting the scope of the use of the principle of mutual recognition as family reunification cases will maintain the debate primarily at the well-functioning of the internal market as it concerns the free movement of persons. Consequently, the resis-

[56] *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* Case 120/78 [1979] para14.

[57] Johan Meeusen, 'System Shopping in European Private International Law in Family Matters' in Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds.) International Family Law for the European Union (Intersentia 2007) 239-278; House of Commons Justice Committee, 'Justice Issues in Europe' <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/162/16204.htm> accessed 24 May 2011.

[58] Art 82(1) (ex art 31 TEU) of the EU Treaty.

[59] Maarit Jänterä-Jareborg, 'Unification of International Family Law in Europe - A Critical Perspective' in Katharina Boele-Woelki (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 194-216.

[60] There is reluctance to harmonize European family law even concerning non-controversial aspects of family law. See: Masha Antokolskaia, 'the 'Better Law' Approach and the Harmonisation of Family Law' in Katharina Boele-Woelki (ed.) *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Intersentia 2003) 159-182.

tance cannot be as severe as would be the case if the subject matter had been directly set as anti-discrimination caused by the national laws of some Member States. Further, limiting the use of mutual recognition to immigration purposes will not scare off Member States at this stage in relation to further demands of equal rights for same-sex couples regarding social and economic benefits married couples receive in the respective Member State. Certainly, in order to reach results concerning the marriage rights of same-sex couples, the debate should not be burdened with tangential issues such as tax revenues, the burdens of social security, the finances of pension funds etc[61].

As a result of the principle of mutual recognition, the problems concerning same-sex married couples arising out of Directive 2003/109 on long-term residents could be solved to a certain extent. The long-term resident third-country national and his/her spouse of the same sex may make use of the possibility introduced in Directive 2003/109 and move to a second Member State without the fear of their marriage not being recognized in the second Member State. Furthermore, the immigration rights of a same-sex couple who has married outside of the European Union and who has moved into a Member State recognizing same-sex marriage by making use of the family reunification Directive 2003/86 and subsequently wish to move to a second Member State making use of Directive 2003/109 may also be safeguarded by mutual recognition as the second Member State would have to recognize the first Member State's decision as to recognizing the same-sex marriage. Realizing this first step in achieving equality in immigration rights for same-sex couples will pave the way for further steps.

Indeed, the principle of mutual recognition does not solve the problem which same-sex couples face if they have been married in a country which is not a member of the EU and if they would like to make use of Directive 2003/86 on family reunification. In this case, the Member State in which the third-country national would like to be united with his/her spouse will assess the application in accordance with its national laws. The problem remains unsolved if the married couple happens to be of the same-sex and if the Member State happens to be a state which does not recognize same-sex marriages. However, as stated above, the use of the mutual recognition principle as the first step will still be useful in paving the way for further steps in eliminating discrimination based on sexual orientation in other aspects of immigration law and in general within the EU. This assumption is based on Waaldijk's 'law of small change' which dictates that 'any legislative change advancing the recognition and acceptance of homosexuality will only be enacted, if that change is either perceived as small, or if that change is sufficiently reduced in impact by some accompanying legislative 'small change' that reinforces the condemnation of homosexuality'[62].

[61] Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Wintemute and Andenæs (eds.) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001) 437-464.

[62] Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Neth-

The 'law of small change' applies to both the introduction of the principle of mutual recognition as a means to get the Member States not recognizing same-sex marriage to afford immigration rights to such spouses and to the consequences of this principle. As noted above, the fact that the utilization of the mutual recognition principle will be limited to same-sex married couples wanting to make use of their immigration rights as provided by Directive 2003/109 will maintain the debate on the functioning of the internal market. By this way, resistance by non-progressive Member States will be kept at a minimum. This can be explained with the perception of the change as small. Once the principle of mutual recognition is put into effect, it will help set the standard of protection against sexual orientation discrimination higherby having the non-progressive Member States to respect the family life of same-sex spouses. This, in turn, will make it easier for other 'small changes' to be introduced in the national laws of such Member States. Such small changes may include the recognition of foreign same-sex marriages for the purposes of Directive 2003/86 on family reunification. Since, due to the utilization of the principle of mutual recognition, there will already be same-sex married couples in the Member State the national legislation of which does not allow people of the same sex to marry, recognizing family reunification demands of same-sex couples will only be a 'small change' to introduce. This approach is in line with the general development of family law as progress in family law has taken place in phases over the centuries in Europe[63].

The expected positive outcomes of using the principle of mutual recognition concerning same-sex marriage are not limited to legislative amendments that will follow. The recognition of same-sex marriages by all Member States by means of the principle of mutual recognition will also have emancipatory effects on all residents. By introducing or respecting LGBTI-friendly legislation, the public authorities give strong signals to the general population that LGBTIs and their relationships are absolutely equal[64].

Returning to the application of the principle of mutual recognition for marriages lawfully entered into in any Member State, it is of utmost importance that the recognizing Member State may not make use of the 'public policy' exception solely on the basis of the fact that the spouses are of the same sex. The public policy exception is a common stipulation regarding the application of mutual recognition[65]. When it

erlands' in Wintemute and Andenæs (eds.) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing 2001) 437-464.

[63] Jens M. Scherpe, 'Families in Europe - European Family Law?', A discussion paper for the conference The Treaty of Rome (A Golden Anniversary - 50 Years On?), British Centre for English Legal Studies, Warsaw University March 9/10 <http://www.cels.law.cam.ac.uk/events/Scherpe.pdf> accessed 24 May 2011.

[64] Paul Borghs and Bart Eeckhout, 'LGB Rights in Belgium, 1999-2007: A Historical Survey of a Velvet Revolution(2010) 24 International Journal of Law, Policy and the Family 1-28.

[65] Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000, [2003] OJL338, art 22(1)(a).

comes to mutual recognition of marriages, it should be ensured that Member States will not be able to present the same-sex character of a marriage as contrary to public policy. In theory, public policy as grounds for non-recognition would be insufficient to uphold an obstacle to free movement as non-recognition still has to respect the proportionality principle[66]. Furthermore, concerning the public policy exception, the 'Brussels II*bis* Regulation […] also provides for a restrictive system, thus protecting the progressive countries'[67]. However, in the case of same-sex marriages the discussions as to the defiance of such marriages of public policy would also be in violation of Article 21(1) of the Charter of Fundamental Rights of the EU as it will constitute discrimination based on sexual orientation. Leaving the same-sex character of such marriages aside, it is also clear that none of the recognized concerns in recognizing foreign marriages are applicable to same-sex marriages such as polygamous unions, absence of genuine consent (in forced and arranged marriages), lack of proper formality or solemnity (in proxy marriages), the danger of one party sexually exploiting the other (in child marriages)[68]. In the face of these arguments, the legislation arranging the use of the principle of mutual recognition of marriages should clearly state that non-recognition cannot be based on sexual orientation of the spouses as this would constitute a violation of the Charter of Fundamental Rights of the EU.

6. Conclusion

The struggle for equal rights for LGBTI has been continuing on many fronts for a long time. At the present moment, we are at a point where the momentum is optimum for a leap forward. The recent judgments of the ECtHR, the wording of the Charter of Fundamental Rights, the setting of the Lisbon Treaty of mutual recognition as the primary tool in judicial cooperation, combined with the level of integration reached within the internal market, indicate that the leap should take the form of mutual recognition of same-sex marriages. The acknowledgment by the ECtHR and by the EU of the fact that it is a matter of time that the definition of marriage will change in a greater extent of European states to the advantage of same-sex couples indicates that we are in a 'transitional period'. It is necessary to introduce the principle of mutual recognition rules concerning marriage to prevent discrimina-

[66] Marc Fallon, 'Contraints of Internal Market Law on Family Law' in Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds.) *International Family Law for the European Union* (Intersentia 2007) 149-181.

[67] Frederik Swennen, 'Atypical Families in EU (Private International) Family Law' in Johan Meeusen, Marta Pertegás, Gert Straetmans and Frederik Swennen (eds.) *International Family Law for the European Union* (Intersentia 2007) 389-423.

[68] John Murphy, 'The Recognition of Same-Sex Families in Britain: the Role of Private International Law'(2002) 16 International Journal of Law, Policy and the Family 181-201.

tory results under the current immigration rules. This approach is in harmony with the general development of family law in Europe which traditionally consists of phases. This first step will eliminate some discrimination directed against LGBTI, namely, in the area of free movement of persons within the EU. The achievement of this first step will be relatively non-controversial as the same-sex marriages that will be recognized will be those conducted or recognized by other Member States and the effects of recognition will be limited to immigration rights of third-country nationals based on secondary legislation and not national laws. This step-by-step approach will pave the way for future legislation while simultaneously preparing the general population for more equality for LGBTIs in Europe. Ultimately, such a step is what the EU owes to LGBTIs when it promised to them, as to everyone living in the EU, an Area of Justice, Security and Freedom.

Free Movement and the European Family – Falling in Love with the Common Market

Justine Quinn

Abstract

Whilst European Union rights such as free movement and family reunification are dependent upon recognition as a family, the question "what is a family?" is generally answered by the Member States according to their own law. Whilst there are European citizens, there is no European family, no single unifying concept for a legal status upon which so many European and national law entitlements are based. This paper proposes that insofar as a definition of family exists in European law, it is strikingly formalist and offers no *panacea* for the recognition or protection of non-traditional families. The paper first addresses the concept of family with reference to two competing theories of family recognition; formalism and functionalism exemplified with reference firstly to the Irish legal system and secondly to the European Court of Human Rights. Thirdly, the concept of family in European Law is then considered with particular reference to free movement. Finally, it is argued that the nascent European family bears far greater resemblance to the formalist interpretation of the family by the Irish courts than the functional family recognised by the European Court of Human Rights. The paper concludes that protection of non-traditional families and in particular same-sex couples is contingent upon a greater convergence between the European Union law and the family as protected by the European Court of Human Rights.

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1. Family life – Functionality or formalism

The European Court of Human Rights has developed a body of case law on *de facto* family ties, recognising and protecting a right to family life based upon the existence of family in fact even where none is recognised in law. The *locus classicus* of the functional family is explained by Jenni Millbank as follows:

> Functional family claims hold that those who function as a committed interdependent relationship require – and implicitly deserve – legal protections, regardless of their sex, or restrictive formal *indicia* of status such as marriage, or ability to marry. In the context of relationships with children, functional family arguments posit that

> those who act as, and are understood by children to be, parents, should be accorded parental status irrespective of any biological connection[1].

The functional family is thus, concerned with the lived experience of its members and not the presence or absence of two members, of the opposite sex and a marriage certificate[2]. It is not unique to any one court or jurisdiction and has been described as offering, "distinct advantages over a more formalistic approach which systematically excludes all but a specific form of relationship"[3]. By contrast formalist interpretations of family, which will be exemplified by reference to the law in Ireland, are said to support "social institutions which are thought to serve desirable ends"[4]. Preferential treatment is given to the family based on marriage vis-à-vis a myriad of legal rights and duties from immigration to taxation and social protection which creates a concomitant disadvantage for other family forms. However, encouraging people to marry, presupposes that they have the capacity to do so, thereby excluding not only same-sex couples (in most countries) but also denying equal protection to children raised by any family other than that based on marriage[5]. Legal systems which adopt a formalist interpretation of family, such as Ireland or the European Union create legal vulnerability for non-traditional families by design justified by reference to the need to protect or promote marriage. Formalism assumes that marriage can be promoted or coerced, an assumption which neglects the social meaning of marriage which may exist independently of any legal benefit. Indeed, one of the arguments advanced in favour of same-sex marriage is it should be permitted so that lesbian and gay relationships will be recognised as normatively valuable[6].

2. The Irish family

There is no constitutional ban on same-sex marriage in Ireland because although Article 41.3.1 of *Bunreacht na hÉireann* 1937 indicates that the family is based on marriage, marriage is not defined. However, the interpretation of marriage by the Courts

[1] Jenni Millbank, 'The Role of 'Functional Family' in Same-Sex Family Recognition Trends' [2008] CFLQ 155, 156.

[2] See Rebecca Bailey-Harris, 'Third Stonewall Lecture – Lesbian and Gay Family Values and the Law' (1999) 29 Family Law 560.

[3] *Attorney Geneeral v. Mossop* [1993] SCR 554, 638.

[4] Carl E. Schneider, 'The Channelling Function in Family Law' (1992) 20 Hofstra Law Review 495, 498.

[5] See Brenda Cossman and Bruce Ryder, 'The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation' Research Paper prepared for the Law Commission of Canada, 1 May 2000 <http://www.samesexmarriage.ca/docs/cossman.pdf> accessed 28 July 2011.

[6] Carlos Ball, 'Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism' (1997) 85 Georgetown Law Journal 1871, 1875.

has been consistently formalist. A statutory ban on same-sex marriage has been in place since 2004[7]. The constitution provides that, "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack". As a result although recently enacted civil partnership legislation[8] provides for the rights and duties of same-sex partners and same-sex and different sex cohabitants neither partnership nor cohabitation create a constitutional family. The civil partnership legislation goes so far as to describe civil partners as having a "shared home" rather than a "family home" a semantic difference indicative of the fact that civil partnerships do not create constitutionally protected family relationships. The absence of jurisprudential protection for non-marital families under the constitution is conceptually linked to the prohibition of same-sex marriage[9]. Both represent an absence of the value pluralism associated with functionalist interpretations of the family which would require "that many alternative forms of family living, though different and perhaps incompatible, must be accorded equal respect"[10]. As a result, the only families which enjoy constitution protection in Ireland are those based on marriage which has been held to derive from the Christian concept of "…a partnership based on *an irrevocable* personal consent given by both spouses which establishes a unique and very special *life-long relationship*"[11]. Tempting though it may be to dismiss the above precedent as dated[12] more recent judicial pronouncements have been similarly under-inclusive. The Constitutional guarantee in Article 41.3.1 has in effect legitimated the unequal treatment of different families and consequently of children depending on their family status. Some members of the judiciary have opined that giving equal constitution protection… to 'families' founded on extra-marital union" would *ipso facto* constitute an attack on the family in breach of the Article 41.3.1 constitutional pledge to "guard with special care the institution of marriage"[13]. If marriage does not convey exclusive access to the bundle of rights and duties offered by the State, then why get married? This is the essence of formalism. One might have thought that with such encouragement, there would be no non-marital families in Ireland however, quite the opposite is true and ever increasing numbers of families are non-marital[14]. Formalism has served not to promote one vision of the family but to penalise others.

[7] Civil Registration Act 2004, s 2(2)(e) provides that there is an impediment to marriage if "both parties are of the same-sex".

[8] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

[9] See Grace Blumberg, 'Legal Recognition of Same-sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective' (2004) 51 UCLA Law Review 1555, 1577.

[10] Andrew Bainham, 'Family Rights in the Next Millennium' (2000) 53 Current Legal Problems 471.

[11] *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, 643.

[12] Judicial separation and divorce were introduced in 1989 and 1969 respectively.

[13] *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, 622.

[14] Approximately 18 per cent of all family units in the State consist of non-marital couples (one third of whom have children) and that Ireland has 190,000 one parent-families CSO, Census 2006, Principal Demographic Results, (Dublin: CSO, 2007), 64.

Given the narrow, formalist approach adopted by the Irish courts, the rejection of a claim by a lesbian couple for recognition of their Canadian marriage for taxation purposes by the High Court is highly unsurprising. The judgment of Justice Dunne in *Zappone & Gilligan v. Revenue Commissioners* amounted to little more than the trite observation that marriage has always been interpreted by the courts as being between a man and a woman[15]. For Irish same-sex parented families, the legal relationship between a child and their non-genetic parent is nothing short of precarious. Ireland has not regulated assisted human reproduction so in theory a donor could apply to be appointed as joint guardian with the child's biological mother, while their social parent would remain a stranger in law[16] and cannot be recognised as the child's guardian while her spouse or partner is still alive[17]. Recently, in a case concerning dispute between a lesbian couple and their gay sperm donor over access to the child conceived by donor insemination, the Supreme Court categorically refused to recognise the couple and their child as a family[18] and ruled that the concept of *de facto* family recognised by the European Court of Human Rights does not form part of Irish law. The dispute was thus, construed as concerning an unmarried couple (the donor and biological mother) and their child. The Supreme Court dismissed arguments based on Article 8 ECHR having concluded that in cases of conflict, Irish law must apply. Justice Susan Denham added that; "Under the Constitution it has been clearly established that the family in Irish law is based on a marriage between a man and a woman". Interestingly, when the case returned to the High Court and order for access to the child was made conditional upon the applicant giving various undertakings to the court, which reflected in near exact terms the original and unenforceable written agreement between the parties by which he "accepts to play the role of 'favourite uncle' until the true nature of his relationship is revealed", "he seeks no parental role" and "he acknowledges and will respect the family integrity of the respondents and H". The language of the ultimate order drafted by the High Court very much tempers the impact of a Supreme Court which appeared unwilling to regard the couple and their child as a family at all. Whilst, the Supreme Court has adhered rigidly to the formal family, both the legislature and lower courts) demonstrated a willingness to protect a more diverse array of family relationships.

3. The ECHR and the de facto family

The jurisprudence of the European Court of Human Rights is not simply characterised by a happy functionalism, but has instead often relied upon a margin of appreciation to uphold formalist interpretations of the family by the Member States and

[15] The case is now on appeal to the Supreme Court and is likely to be heard before the end of the year.
[16] The Guardianship of Infants Act 1964, s. 6A (inserted by the Status of Children Act, 1987.
[17] The Guardianship of Infants Act 1964, s. 7, a guardian may, by will, make any other person a guardian in case of her death. This is known as testamentary guardianship.
[18] *McD v. L & Anor* [2007] IESC 81 (HC), [2009] IESC 81 (SC).

has itself occasionally delivered judgments such as that in *Rees*[19] of which even the strictest formalist would be proud. Nonetheless, the Court does protect *de facto* family ties under Article 8 the right to private and family life, irrespective of legal formalities. Even on a reading of the text of Article 8 itself the conceptual differences are clear, the term "family life" is broader than "the family based on marriage" in the Irish constitution and instead "Everyone has the right to respect for his private and family life, his home and his correspondence". The scope of the Article 8 protection of the family is enhanced by the inclusion of privacy, a right imbued with a liberal or libertarian view, of the relationship between the subject and the State represented as a 'right to be left alone', and strengthened by the prohibition on sexual orientation discrimination[20]. Privacy as protected in the common law world has tended to be similarly amorphous and inclusive. In connexion with family life, the right implies that the State should recognise families as they are, not as the State considers they should be. Accordingly, the European Court of Human Rights has protected a wide variety of family relationships under Article 8 between unmarried parents, non-marital couples and finally same-sex couples and their children on the basis of the existence of a functional family relationship regardless of the presence or absence of formal legal recognition. The Court has repeatedly held that the family protected by Article 8 "is not confined solely to marriage based relationships and may encompass other *de facto* family ties where the parties are living together outside marriage"[21]. In *EB v. France*[22], the Court summarised its case law on the Article 8 as follows;

> …the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings … the right to "personal development" … or the right to self-determination as such. It encompasses elements such as names … gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 … and the right to respect for both the decisions to have and not to have a child[23].

The *Wagner*[24], decision is a good example of recognition of the social reality of the family. The Court found a violation of Article 8 and of the positive obligations imposed on States by the Convention on the Rights of the Child where Luxembourg refused to recognise the Peruvian single parent adoption by the first applicant of the second. The Court concluded that the "Luxembourg courts could not reasonably refuse to recognise the family ties that pre-existed *de facto* between the applicants

[19] *Rees v. United Kingdom* (1985) Series A no 160, (1987) 9 EHRR 56.
[20] See for example, *Karner v. Austria* (2004) 38 EHRR 528.
[21] *Johnston and Others v. Ireland* (1986) Series A no 112, p. 25, para. 55.
[22] *EB. v. France* App no 43546/02 (ECHR, 22 January 2008) [GC].
[23] Ibid., para. 43.
[24] *Wagner and JMWL. v. Luxembourg* App no 76240/01 (ECHR 28 June 2007).

and thus dispense with an actual examination of the situation". The margin of appreciation was small because "adoption by unmarried persons is permitted without restriction in most of the forty-six countries" and accordingly, the law "is at an advanced stage of harmonisation in Europe". The relative dynamism of that decision is far less impressive when one considers the near unanimity amongst the States. The prohibition on sexual orientation discrimination has strengthened the family rights of same-sex couples. *EB v. France* also exemplifies the causal link between the grant of rights to non-marital and single parent families and same-sex couples. The Court considered that the French authorities could not refuse to allow single parent adoption by a lesbian woman because in France it is possible to adopt a child as a single person and that it is impermissible to discriminate against a prospective adopter on the basis of sexual orientation, where the country in question permits single parent adoption. The more interesting question for the protection of same-sex parented family ties is whether there is a right to second-parent adoption – the ECtHR has recently ruled such an application admissible in *Gas and Dubois v. France*[25].

Older authorities on transgender rights such as *Rees*[26], demonstrate a capacity on the part of the Court for formalist thinking. In *Rees*, it was held that "the traditional [marriage] concept provided sufficient grounds for applying biological criteria so as to determine the sex of a person for marriage purposes thereby excluding transgender people from marriage. The Court then considered that the right to marry refers to "the traditional marriage between persons of opposite biological sex" and that "Article 12… is mainly concerned to protect marriage as the basis of the family" and held unanimously that there was no violation of the right to marry in Article 12[27]. This line of authority was subsequently rejected in *Goodwin v. United Kingdom*[28] and *I v United Kingdom*[29] partly on the basis that at the time of *Rees*, "little common ground existed between States" and held that no circumstances justify excluding transgender people from marriage and that the right to marry cannot be confined to purely biological criteria.

In *Parry v The United Kingdom*[30]. the Court considered the requirement that a couple divorce as a pre-requisite to the grant of a full gender recognition certificate to the first applicant. The applicants who had been married for fifty years and had three children together wished to remain married after the first-applicant's gender reassignment. Although, the Court declined to find a violation of the Convention because the applicants could continue their relationship through a UK civil partnership, described by the Court as "in all its current essentials… a legal status akin, if not identical to marriage… which carries with it almost all the same legal rights and

[25] *Gas and Dubois v. France* App. no 25951/07 (ECHR, 31 August 2010).
[26] *Rees v. United Kingdom* (App. 9532/81), 17 October 1986.
[27] A dissenting opinion was given by Judges Bindschedler-Robert, Russo and Gersing.
[28] *Goodwin v United Kingdom* App. no 28957/95 (ECHR, 11 July 2002) [GC], (2002) 35 EHRR 447.
[29] *I v United Kingdom* App no 25680/94 (ECHR, 11 July 2002); (2003) 36 EHRR 967.
[30] *Parry v. United Kingdom* App no 42971/05 (ECHR, 28 November 2006).

obligations"[31]. This suggests that in States which either have no civil partnership legislation or where there is a greater disparity in the rights afforded to married couples and civil partners a violation of the Convention might be found to exist. With *Schalk and Kopf v. Austria*[32]*, same-sex relationships have passed into the daylight, out of privacy and into family life. The ECtHR recognised* that a male same-sex couple in a *de facto* relationship were entitled to be protected as a family under Article 8 in the same manner as a "different-sex couple in the same situation". Whilst the ECtHR did not go so far as to rule in favour of same-sex marriage it did hold that the right to marry in Article 12 was not confined to opposite sex couples despite the fact that marriage had undergone "major social changes", the question of whether to allow same-sex marriage was left to the States, because they are "best placed to assess the respond to the needs of society" and there is "no European consensus".

4. The European Family and Free Movement

Jacques Delors is reputed to have said that, "no one falls in love with a common market"[33] however, given the attention devoted to internal market law arguments for the cross-border recognition of same-sex relationships it appears at that at least some of us have[34]. Although the mobility rights dimension of the problem is clear, the question of competence is not. It is argued that even if the competence problem was solved, the interpretation of family in European law has thus far been strikingly formalist and far closer to Dublin than Strasbourg. McGlynn observes that at the root of the problem is the extent to which Union rights and entitlements are extended to families rather than to individuals. Indeed, had this been done, the question what is a family, would have far less importance for European law. The problem goes deeper than merely having ascribed the rights to families, and left the definition of family to the Member States because the family structure suggested by European law is equally formalist and traditional; that of an economically active spouse and his dependent wife and children. In *Baumbast*, Advocate General Geelhoed noted that Regulation 1612/68 dated back to an era when 'family relationships were relatively stable' and accordingly, the regulation provides for 'the traditional family'. Euro-

[31] Ibid, 10.

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

[33] As stated by EU Commissioner Péter Balázs <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/04/421&format=HTML&aged=1&language=EN&guiLanguage=en> accessed 28 July 2011.

[34] See for example, Helen Toner, *Partnership Rights, Free Movement, and EU Law* (Oxford 2004); Mark Bell, 'We are Family? Same-Sex Partners and EU Migration Law' (2002) 9 Maastricht Journal of European and Comparative Law 335. Hans Ulrich Jessurun d'Oliveira 'Lesbians and Gays and the Freedom of Movement of Persons' in Kees Waaldijk and Andrew Clapham (eds), *Homosexuality: A European Community Issue – Essays on Lesbian and Gay Rights in European Law and Policy*, (Martinus Nijhoff 1993), 289.

pean Union law thus reproduces the 'dominant ideology of the family' so that 'other forms of family are treated less favourably, and thus rendered more difficult to sustain'[35]. The effect of the dominant ideology of family promulgated in European law on same-sex couples and their children is to render freedom of movement throughout the union largely illusory.

EU secondary legislation is either silent on the rights of same-sex partners or leaves the question of recognition to the member states. The Free Movement Directive only obligates Member States to recognise same-sex partners and their children as family if "the legislation of the host Member State treats registered partnerships as equivalent to marriage"[36]. The Free Movement Directive does not define 'registered partnerships'. If the Member State recognises the same sex partner then the direct descendants under the age of 21 and dependents and dependent direct relatives in the ascending line of the spouse and the partner are also regarded as part of the worker's family. The Family Reunification Directive and Qualification Directive[37] which apply to third country nationals and refugees respectively, similarly leave recognition of family relationships to the Member States. The main consequences of the lack of mutual recognition of the civil status of same-sex parented families is a loss of civil status and secondly a loss of the parental status of the non-biological parent. This can impact on the family in a myriad of different and complex ways, for example a French couple with a *pacte civil de solidarité*[38] would not be recognised as civil partners in Ireland. Irish civil partners are legal strangers in Poland and if a German couple, married in Spain and started a family in the United Kingdom before moving to Greece or to Ireland they not would not only cease to be married, they might also cease to be parents[39]. Further, if the couple travel to a Member State which recognises neither same-sex marriages nor civil partnerships they will lose not only their civil status but every attendant benefit across a spectrum

[35] Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Hart Publishing 1999), 10.
[36] Article 2(2) of Directive 2004/38/EC of the European Parliament and of the Council of April 29, 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation 1612/68, and repealing Directive 64/221, 68/360, 73/148, 75/35, 90/365 and 93/96 [2004] OJ L158/77 (Citizen's Rights Directive).
[37] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304, 12 (Qualification Directive). The Commission has proposed a recast of the Qualification Directive; 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' COM (2009) 551 final.
[38] It is not yet clear whether France will recognise Irish civil partnerships.
[39] See ILGA-Europe's Contribution to the Green Paper, Less Bureaucracy for Citizens, Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Documents, COM(2010) 747 Final, April 2011 < http://www.ilga-europe.org/home/publications/policy_papers/green_paper_april_2011> accessed 28 July 2011.

of rights from tax to pensions, inheritance, family law and immigration once they cross a frontier. That is of course, provided that the family are in a position to move to begin with. A non-economically active partner's residence in a Member State can depend on recognition by the host state of their status a "family member" of the citizen exercising free movement rights[40]. Similarly, the entry of third country national (hereinafter 'TCN') same-sex partners and their children depends on recognition by the Member State of their family relationship with their sponsor. In this respect, recognition of same-sex partners perpetuates the dominant ideology of family. Both the 'new' family and the old are dependent upon intimate relationships and formal legal ties which privileges the nuclear family.

Once the right of free movement is successfully invoked by a citizen, who is a worker in circumstances where there is a cross-border element, European law prohibits not only direct and indirect discrimination on the basis of nationality[41] but also domestic rules which have the effect of hindering the free movement of workers by impeding access to the labour market by making it less attractive[42]. What could be less attractive than ceasing to be a family? However, the concept of family in European law is formalist rather than functional, and entirely lacking the dynamism of the European Court of Human Rights and none too far removed than that of even the more conservative Member States. The mere existence of marital ties, are sufficient to trigger mobility rights, thus privileging marriage over other forms of relationship. The Court of Justice as continually emphasises family form over functionality. For example, in *Diatta v. Land Berlin*[43], the Court of Justice upheld the parasitic rights of the spouse of migrant worker even though they were in the middle of a divorce and no longer lived together because mere existence of a formal tie of marriage was enough. By contrast in *Netherlands v. Reed*, a couple who had cohabited for five years were held not to be entitled to recognition as a family for the purposes of mobility rights. The Court concluded that a more inclusive interpretation 'cannot be based on social or legal developments in only one or a few of the Member States'[44]. Of course, in so deciding the Court has chosen to adopt the interpretation of family in the more conservative Member States.

In *Lisa Jacqueline Grant v. South-West Trains Ltd*[45]. The Court of Justice declined to treat the denial of a travel concession to an unmarried woman with a female part-

[40] Directive 2004/38 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, amending Regulation 1612/68/EC and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 73/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77 (Citizen's Rights Directive).

[41] Article 18 TFEU Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

[42] See for example, Case C-415/93 *Bosman* [1995] ECR I-4821 and Case C-190/98, *Graf* [2000] ECR I-493.

[43] Case 267/83 *Diatta v. Land Berlin* [1985] ECR 567.

[44] Case 59/85 *Netherlands v. Reed*, [1986] ECR 2283, 1300.

[45] Case C-249/96 *Lisa Jacqueline Grant v. South-West Trains Ltd.* [1998] ECR I-621.

ner as sex discrimination (sexual orientation discrimination was not yet prohibited) where such a concession would have been granted to her if her partner was male and concluded that, employers are "not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married or who has a stable relationship outside marriage with a partner of the opposite sex"[46]. The Courts have upheld formalist interpretations of the family even where the law in the Member State of origin did not. For example, in *D and Kingdom of Sweden v. Council of the European Union*[47] the Court of First Instance held that the concept of "marriage" must be understood as a relationship based on civil marriage within the traditional sense and declined to interpret the staff regulations with reference to the law of the Member States, thereby substituting its own more conservative interpretation in place of the plurality of relationships recognised by the Member States. The Court of Justice upheld the decision of the Court of First Instance and found that the refusal to grant the household allowance did not constitute discrimination on grounds of sex or sexual orientation. It was instead a distinction based upon, the "legal nature of the ties between the official and the partner"[48]. The Court indicated that the fact that, "in a limited number of member states, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term married official as used in the Staff Regulations"[49]. It was observed further that, while many states recognise same-sex relationships there is a "great diversity" between the schemes for recognition, and those which have been created are "regarded in the member states concerned as being distinct from marriage".

The Court of Justice made its first finding of sexual orientation discrimination in 2009 in *Maruko*[50] which concerned the effect of the Employment Equality Directive[51] which prohibits discrimination on the basis of sexual orientation in the context of employment or vocational training. However, although the Court found that in applying the Directive Member States "must comply with Community law and in particular, with the provisions relating to the principle of non-discrimination"[52] the effect of the decision is limited and depends on a determination by the national courts that life partners and spouses are comparable:

[46] Ibid., para 17.
[47] Joined Cases C-122/99 & C-125/99 *D and Kingdom of Sweden v. Council of the European Union* ECR I-4319.
[48] Ibid., para. 47.
[49] Ibid., para. 38.
[50] Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-621.
[51] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, 16.
[52] Ibid., para. 59.

> …if 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 on 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[53].

Similarly, the ruling in *Römer*[54] which found "direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension" is applicable only to countries in which partnerships are reserved to persons of the same gender and are comparable to marriage in fact and in law. Recital 22 of the Employment Equality Directive provides that; "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon" to which *Maruko*[55] and *Römer*[56] merely add the caveat, *unless the Member State* regards life partners and spouses as legally comparable. As existing Court of Justice case law suggests, then the free movement argument is not enough on its own without new facts on the ground, namely increased European consensus on the recognition of same-sex family relationships. It could be argued that the free movement question depends upon delimiting the boundaries of European and national law, and in simple terms, on who gets to answer the question what is a family but the problem is deeper. The interpretation of family offered in European law is formalist not functionalist, and in its present state will not magically transform the legal situation of same-sex couples. As European law has chosen to privilege formal family ties, protection of same-sex relationships depends either on a greater consensus amongst Member States or greater convergence between the European family and the ECHR.

The free movement debate is evolving rapidly against a backdrop of important Treaty changes such as the prohibition on discrimination on the basis of sexual orientation and the competence of the Union to legislate against it[57]. The Lisbon Treaty gave the Charter of Fundamental Rights "the same legal status as the Treaties"[58], and provides that the European Union can "accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", although accession will not "affect the Union's competences as defined in the Treaties". The boundaries of Member State competence in private law and that of the European Union are also in transition, particularly as the later has been increasingly drawn into the regulation of private and family law in the context of jurisdiction and enforcement[59]. The Court of

[53] Ibid., para. 72.
[54] Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg*, ECJ 10 May 2011.
[55] Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-621.
[56] Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg*, ECJ 10 May 2011.
[57] Article 19 TFEU.
[58] Article 6(1) TEU.
[59] Council Regulation 1259/2010 on co-operation in divorce and legal separation and the Regula-

Justice has already made it clear in *Akrich*[60] that Member States are bound to consider the right to respect for family life under Article 8 of the European Convention on Human Rights when applying European Union law, if the relationship is genuine even if the applicant does not fulfil the criteria for reliance on EU secondary legislation because that right is "among the fundamental rights which according to the Court's settled case law… are protected in the Community legal order". The European Charter protect "the right to respect for private family life" in terms which are nearly identical to Article 8 of the ECHR[61]. Article 52(3) of the Charter provides that in 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". While both the Convention and the Charter refer to "a right to marry and found a family", only the Charter provision is gender neutral, it "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex"[62]. Article 21 of the Charter prohibits discrimination on the basis of sexual orientation and Article 14 of the European Convention on Human Rights has been interpreted to do the same[63] although the later can only be invoked in conjunction with Convention right, even if ultimately no violation of that right is found to exist. In interpreting any regulation or European law enacted Member States are obliged to follow both the Charter and Treaty based prohibition on sexual orientation discrimination. Article 52(3) explains the relationship between Charter and Convention rights as follows:

> In 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.

The extent to which the *de facto* family of the ECHR will impact the European family is not yet known. However, if the effect is anything like that found in *P v. S and Cornwall County Council*[64] and *K.B. v NHS Pensions Agency*[65] and *Richards v.*

tion on Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (Brussels II-bis) (2003) OJ L 343.

[60] C-109/01 *Secretary of State for the Home Department v. Akrich* [2003] ECR I-9607.

[61] Article 7 of the Charter and Article 8 of the Convention respectively.

[62] CHARTE 4473/00, Convent 49, 11 October 2000; 46 CONV 828/03, Updated Explanations Relating to the Text of the Charter of Fundamental Rights, 9 July 2003, Charter of Fundamental Rights of the European Union [2007] OJ C303/1; Explanations Relating to the Charter of Fundamental Rights [2007] OJ 303/17. The Charter has been reissued with the Lisbon Treaty [2010] OJ C83/2.

[63] See for example, *EB v. France*.

[64] Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143.

[65] Case C-117/01 *KB v NHS Pensions Agency* [2004] ECR I-541.

Secretary of State for Work and Pensions[66] are anything to go by the future may be very bright indeed. In *K.B.* the Court of Justice in *K.B.* described the effect of the ruling by the European Court of Human Rights in *Goodwin v. United Kingdom*[67] and *I v United Kingdom*[68] as follows, although it is for each state "to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages", there is "no justification for barring the transsexual from enjoying the right to marry under any circumstances"[69]. Recent legislative proposals could prove to be decisive. The Commission Green Paper, "Less Bureaucracy for Citizens, Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records"[70] proposes to address administrative documents, notarial acts such as property deeds, contracts, court rulings and birth or marriage certificates. Among the proposals is a European civil status certificate, the example given is a child's birth certificate. While the Green Paper emphasises that while;

> …it is important to stress that the EU has no competence to intervene in the substantive family law of Member States. Therefore, the Commission has neither the power nor the intention to propose the drafting of substantive European rules on, for instance, the attribution of surnames in the case of adoption and marriage or to modify the national definition of marriage. The Treaty on the Functioning of the European Union does not provide any legal base for applying such a solution.

One of the solutions proposed is, "automatic recognition, in a Member State, of civil status situations established in other Member States" on the basis of mutual trust. The Green Paper helpfully points out that such "recognition would not involve the harmonisation of existing rules and would leave Member States' legal systems unchanged". The other suggestion in the Green Paper, namely, harmonisation of conflict of law rules has already been the basis of European regulation of family law, for example the Brussels II-bis (2003)[71]. Two new regulations have been proposed on jurisdiction, applicable law and recognition and enforcement of decisions of matrimonial property regimes and the similar proposal for the recognition and enforce-

[66] Case C-423/04 *Richards v. Secretary of State for Work and Pensions* [2006] ECR I-3585.
[67] *Goodwin v United Kingdom* (2002) 35 EHRR 18.
[68] *I v United Kingdom* (2003) 36 EHRR 53.
[69] Ibid., para. 104.
[70] Green Paper: less bureaucracy for citizens promoting free movement of public documents and recognition of the effect of civil status records, COM (2010) 747 Final, April 2011 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0747:FIN:EN:PDF> accessed 29 July 2011.
[71] Council Regulation 1259/2010 on co-operation in divorce and legal separation and the Regulation on Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (Brussels II-bis) (2003) (2003) OJ L 343.

ment of decisions regarding the property consequences of registered partnerships[72]. Again, each of the above proposals are very promising as Member States will bound by European law, including the prohibition on discrimination on the basis of sexual orientation and fundamental rights protections when applying them.

5. Conclusion

The family in European Union law bears far greater resemblance to the formalist interpretation of the family by the Irish courts than the functional family recognised by the European Court of Human Rights. The protection of non-traditional families and in particular same-sex couples in European Union law is contingent upon a greater convergence between the European Union law and the family as protected by the European Court of Human Rights. Given the reiteration that recognition of the, "marital status of persons falls within the competence of the Member States" by the Court of Justice in the recently released *Römer*[73], decision and the reference by the Court to the "great diversity" between the schemes for recognition in *D and Kingdom of Sweden v. Council*[74] and bearing in mind also the cautious With this in mind the most important new contribution to the free movement of same-sex parented families may well arise not from the Courts but from the legislature. Recent developments such as the Commission Green Paper, Less Bureaucracy for Citizens, Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Status Records[75] are more promising than any recent court decision in this regard.

[72] COM(2011) 126 final Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regime and COM(2011) 127 final - Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.

[73] Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg*, ECJ 10 May 2011.

[74] Joined Cases C-122/99 & C-125/99 *D and Kingdom of Sweden v. Council of the European Union* ECR I-4319.

[75] Green Paper: Less Bureaucracy for Citizens, Promoting Free Movement of Public Documents and Recognition of the Effects of Civil Documents, COM (2010) 747 Final, April 2011.

Legal Recognition of Same-Sex Marriages in Lithuania and the *Ordre Public* Exception

Laima Vaigė

Abstract

Although an increasing number of the European Union (EU) member states allow contracting of same-sex partnerships or marriages, national legal recognition has not been followed by cross-border mutual recognition of civil status. Considering the crucial effects of non-recognition, the EU is faced with the task of providing some kind of a solution. Meanwhile, the Lithuanian national legislation on recognition of marriages contracted abroad has been rather controversial. On the one hand, the Civil Code of Lithuania provides for a general rule on recognition of all marriages legally contracted abroad and the Supreme Court, as well as the commentators of the Civil Code in theory interpret these rules as allowing the recognition of polygamous marriages. On the other hand, various implementing institutions and Lithuanian scholars have recently relied on the *ordre public* exception, claiming that same-sex marriages cannot be recognized. The author analyses the content of the Lithuanian public policy clause and the substantive family law provisions to conclude that the *ordre public* exception cannot justify refusal to recognize same-sex marriages.

* * *

1. Introduction

The question of marriage validity may arise in various cases related to migration, inheritance, matrimonial property, divorce or custody rights. It is said that problems arise due to "limping legal relations", but it is really the legal regime that limps when regulation of certain areas leads to the infringement of the principle of legal certainty. Though spouses may rarely understand the complicated issues of applicable law, should they expect anything of the legislators, at the very least it is the information of whether they are married or not. However, the issue of cross-border recognition is seen as highly complex due to potential policy implications for "marriage" and "family" notions as such. Considering the crucial effects of non-recognition of civil status of marriage, the EU is charged with providing some kind of a solution. Notably, the EU has the competence to adopt regulations in the field of private international law, although the restriction of unanimity applies in the field of family

law[1]. Quite recently, both the European Commission[2] and the European Parliament[3] issued clear statements on mutual recognition of marriages and opened the gate for further legislation on the matters of matrimonial property rights[4], recognition of civil status documents[5] and recognition and enforcement of decisions on parental responsibility[6]. Meanwhile, the Lithuanian national legislation on recognition of marriages contracted abroad has been rather controversial. On the one hand, the Civil Code of Lithuania provides for a general rule on the recognition of marriages legally contracted abroad[7]. In theory, the Supreme Court[8] as well as commentators of the Civil Code[9] have interpreted the national rules as allowing the recognition of *polygamous* marriages legally concluded abroad. On the other hand, the rules on civil registration of foreign marriages establish the requirement of compliance with the substantive conditions of contracting marriage in Lithuania[10] and Lithuanian substantive family law allows only different-sex marriage. Analysis of the relevant provisions raises the issue of arguable applicability of the *ordre public* exception.

2. Legal recognition of same sex marriages and the ordre public *exception*

The relevant section on private international law under the Civil Code of Lithuania provides the general rule that marriages legally concluded abroad must be recognized:

[1] Consolidated Version of the Treaty of the Functioning of the European Union [2008] OJ C115/47 Article 81 (3).

[2] Commission, 'Communication on Action Plan Implementing the Stockholm Programme' COM(2010) 171.

[3] European Parliament resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme 2010/2080(INI).

[4] Commission, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' COM(2011) 126 final.

[5] Commission, 'Green Paper on promoting free movement of public documents and recognition of the effects of civil status records' COM(2010) 747 final.

[6] N 2.

[7] Civil Code of the Republic of Lithuania, 2000, VIII-1864. Article 1.25 (4). Law applicable to the conditions to contract marriage.

[8] Senate of the Supreme Court of Lithuania, Resolution No. 28 'On the overview of case-practice of the Republic of Lithuania on application of private international law norms', Teismų praktika, 2001-01-17, No. 14.

[9] Valentinas Mikelėnas, Alfonsas Vileita, Algirdas Taminskas, *Commentary to Book One of the Civil Code* (Justitia, 2001) Commentary on article 1.25 (4).

[10] Civil registry rules approved by the Minister of justice. Order No. 1R-294 (2008) On amendment Order No 1R-160 (2006) 'On approval of Civil registry rules', Point 81.

> A marriage validly performed abroad shall be recognized in the Republic of Lithuania, except in cases when both spouses domiciled in the Republic of Lithuania performed the marriage abroad with the purpose of evading grounds for nullity of their marriage under Lithuanian law[11].

The sole exception to the general rule is provided in the second part of the sentence: the scenario of evasion of Lithuanian law. The rule (here and further, the author uses the translation to English provided by the Parliament) refers to "grounds for nullity" of marriage but the formulation in Lithuanian repeats verbatim the wording of Article 3.37 (The grounds and procedures for declaring marriage null and void). Perhaps a better translation in this context would be not "evading grounds for nullity" but "evading declaration of marriage null and void". The marriage may be declared null and void by court in case of its non-compliance with the mandatory substantive requirements of contracting marriage in Lithuania (Articles 3.12-3.17 of the Civil Code). The requirement of different sexes of spouses is one of these grounds, thus, same-sex marriages contracted in Lithuania would be voidable.

The Constitution of the Republic of Lithuania provides: 'Marriage shall be contracted upon the free mutual consent of man and woman'[12]. The provision is obviously not gender-neutral and it has encouraged commentators to interpret it as a clear reservation of the institution of marriage to members of the different genders[13] and even to claim that the prohibition of same-sex marriage is of constitutional importance[14]. However, linguistic interpretation also has its weaknesses. For example, the word "between" is not included in the formulation nor is there a clear prohibition or any provision on non-recognition. In 2005, a group of members of the Lithuanian Parliament wanted to amend the Constitution and include a clear prohibition of same-sex marriage but this idea was never implemented. In comparison, the neighbouring Latvia's constitution was amended in 2005 to include the definition of marriage as 'a union *between* a man and a woman'[15] subsequently making sure that if same-sex marriages were to be concluded in Latvia, a constitutional amendment would be needed. Thus it may be claimed that the wording of the Lithuanian Constitution *per se* does not prohibit marriages between man and man or woman and woman but rather, fails to address it. The Constitution, just like the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), is a living instrument. These documents should be interpreted to-

[11] N 7.

[12] Constitution of the Republic of Lithuania, adopted in the Referendum of 25 October 1992, article 38 (3).

[13] Egidijus Jarašiūnas, *Šeimos koncepcijos pagrindai 1992 m. Lietuvos Respublikos Konstitucijoje* (Constitutional Court, 2007) <http://www.lrkt.lt/APublikacijos_20071211a.html> accessed April 20, 2011.

[14] Inga Kudinavičiūtė-Michailovienė, *Santuokos sąlygos ir jų įvykdymas* (Justitia, 2007) 115.

[15] Constitution of the Republic of Latvia, adopted by the Constitutional Assembly on 15 February 1922, last amendment of the relevant section: 15 December 2005. Article 110.

gether and the literal interpretation of either document 'is not acceptable for the nature of the protection of human rights'[16]. Notably, the European Court of Human Rights (ECtHR) has recently found that the right to marry under Art. 12, that refers to 'men and women' as having the right to marry, is not always reserved to different-sex couples[17]. The level of internal protection is still at the discretion of the states, but in the author's opinion, there is no specific constitutional obstacle (i.e. a clear prohibition or reservation) to overcome in Lithuania if the state decided to open the doors to same-sex marriage.

The constitutional amendment in 2005 was in the end considered unnecessary because substantive family law provisions clearly establish prohibition at the level of the Civil Code. Article 3.7 (1) of the Civil Code of Lithuania (Concept of marriage) states explicitly: 'Marriage is a voluntary agreement between a man and a woman to create legal family relations executed in the procedure provided for by law'. It is once again repeated under Article 3.12 (Prohibiting marriage of persons of the same gender): 'Marriage may be contracted only with a person of the opposite gender'. The requirement of different genders is mandatory both for contracting of marriage and for registering a partnership in Lithuania under the Civil Code[18]. When the Civil Code was adopted, family law norms were intended to apply also to different-sex partners who 'after registering their partnership in the procedure laid down by the law, have been cohabiting at least for a year with the aim of creating family relations'[19]. There is no implementing law on partnership to this date, and the relevant provisions on heterosexual partnership are not directly applicable. Nevertheless, courts recognize factual cohabitation relations in practice[20], e.g. property owned in the name of one of different-sex partners *de facto* leading family life is considered as "common"[21]. It is not clear whether the Lithuanian courts would apply the same approach in cases of same-sex *de facto* partners, although a discriminatory approach would not be compatible with the recent case law of the ECtHR[22].

Relying on the mandatory character of the internal substantive requirement and its element of public interests, professor Mikelėnas in 2009 noted that recognition of same-sex marriages could be prevented by the public policy clause contained in

[16] Conclusion of the Constitutional Court of Lithuania on the compliance of the ECHR with the Constitution of the Republic of Lithuania (1995) No. 9-199.

[17] *Schalk and Kopf v. Austria* App no 30141/04 (ECtHR 24 June 2010), para 61. *P.B. and J.S. v Austria* App no 18984/02 (ECtHR 22 July 2010), para 30.

[18] Civil Code (n 7) article 3.229.

[19] *Ibid.*

[20] Vytautas Mizaras, 'Tarptautinės privatinės teisės vienodinimo Europos Sąjungoje rezultatai: reglamentai Roma I ir Roma II' (2008) Justitia 4(70), 14.

[21] *D. Z.* v. *R. A. I.* [2006] 3K-7-332/2006 (Lithuanian Supreme Court).

[22] N 17.

the Civil Code[23]. The Ministry of justice (2009)[24] and the Migration department (2008)[25] in their responses to requests for clarification alleged that same-sex marriages do not have legal effects in Lithuania. In the absence of thorough substantiation of such claims, it is important to discuss whether this is indeed so.

2.1. The notion of ordre public *and its contents*

The public policy (*ordre public*) exception is the saving clause for various occasions where private relations move across the borders and relate to the norms of legal systems that are so dissimilar that application of the norms would cause great distress to authorities of another state. The *ordre public* exception under the Civil Code reads in the following way:

> The provisions of foreign law shall not be applied where the application thereof might be inconsistent with the public order established by the Constitution of the Republic of Lithuania and other laws. In such instances, the civil laws of the Republic of Lithuania shall apply[26].

It might be argued that in principle there is no need to apply the law at the stage of recognition and we can only speak about determination of applicable law to *verify* the existence of a lawful marriage contracted abroad. The *ordre public* exception above is shaped as the basis for refusal to apply foreign law. In comparison, the Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (the Hague Marriage Recognition Convention) provides two separate *ordre public* provisions: one with regards to applicable law at the stage of entering into marriage[27], and one at the stage of determining the validity of marriage[28]. It seems from the formulation under the Civil Code and the explanation of the Supreme Court that applying the *ordre public* exception at the stage of recognition is belated. Nevertheless, the present *ordre public* exception should be interpreted as effective also at the stage of recognition in order to catch such marriages that are truly unacceptable and contradict the fundamental principles of national family law (e.g. forced marriages that are in breach of the fundamental principle of voluntariness of marriage).

The Supreme Court of Lithuania on the basis of comparative analysis has explained the concept of *ordre public* as entailing the main principles that form the

[23] Valentinas Mikelėnas, *Šeimos teisė* (Justitia, 2009), 148.

[24] Ministry of Justice of the Republic of Lithuania, Legal institutions department, Response of 5 October 2009 No. (1.2.3.) 7R-7950.

[25] Migration Department under the Ministry of the Interior of the Republic of Lithuania, Response of 11 January 2008 No. (15/7-7) 10K - 1684.

[26] Civil Code (n 7) article 1.11 (1).

[27] Hague Convention No. 26 of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (entered into force 1 May 1991) article 5.

[28] *Ibid.*, article 14.

foundation for the legal system of the country, the functioning of the state and the society. However, countries base their legal systems on different legal principles. The Court indicated three aspects of the refusal to apply foreign law norms based on *ordre public*:

a) Application of foreign law might mean infringement of fundamental human rights and freedoms (e.g. it would entail discrimination on the basis of sex, or allow trafficking in human beings).
b) Application of foreign law would be contrary to justice, good customs, main moral rules that are consistently upheld in the society (e.g. prohibition to address the court, legitimizing prostitution).
c) Application of foreign law would infringe on state interests and impede good relations with a neighbouring foreign state (e.g. application of foreign law would lead to tax evasion)[29].

In the recognition of same-sex marriage, as in any other case, the content of *ordre public* is not clear in advance – it is not fixed and unchanging, but may develop with changing tendencies in law. Obviously, it must be established separately in each case, and only after an analysis of the factual circumstances, the national law and the applicable law, the possible effects of applying the national law, the possible effects of applying the applicable law, and the effects of applying foreign law from the perspective of international law[30]. The effect of public policy is moderated in consideration with the obligations under international law (*l'effect atténué de l'ordre public international*). The courts should be more cautious when applying the safeguard in cases with a foreign element, in contrast with domestic cases, and consider national public policy from the point of view of international law.

The national courts follow the explanation that public policy applies to infringements of those mandatory substantive norms that entrench the main and universally recognized principles of law[31] and recognize that *ordre public* has an attenuated effect with consideration of Lithuania's international obligations, in particular, the accession to the EU and ratification of the ECHR and its Protocols[32]. Moreover, despite the continuous development of European unification of private international law, the concept of 'public policy' remains an internal matter for each member state of the EU, subject only to the control of the EU in certain circumstances. The Court of Justice of the European Union (CJEU) is very cautious in the concretization of the content of European public policy. In the decisions so far on *ordre public* the Court has limited its role to control the freedom of discretion of the member

[29] Notably, the Resolution No. 28 of the Supreme Court (n 9) is not a binding precedent but provides the guidelines on application of private international law in Lithuania.
[30] Valentinas Mikelėnas, *Tarptautinės privatinės teisės įvadas* (Justitia, 2001) 129.
[31] *K. C. company Schwarz v. individual enterprise A. V.* [2004] 3K-3-612/2004 (Lithuanian Supreme Court).
[32] *Belaja Rus v. Westintorg Corp*. [2008] 3K-3-562/2008 (Lithuanian Supreme Court).

states by interpreting the fundamental principles of law[33]. Notably, the Lithuanian courts take due regard to the jurisprudence on *ordre public* under the EU Law and rely on the decisions of the CJEU[34].

With regard to the application of *ordre public* in the sensitive area of family law, the exception must be used even more cautiously. The material *ordre public* can be used only where a manifest conflict would arise with the regulation in Lithuania, and provided that the effects of the recognition are closely related to Lithuania[35]. Hence the court of recognition must consider very precisely whether the conflict with its law is unacceptable to an absolutely intolerable extent and cannot refuse recognition solely because such decision would not be adopted in the requested state.

More specifically regarding *ordre public* and marriage recognition, the Supreme Court stressed that it is important to distinguish between the *recognition* of subjective rights (acquired under foreign law, however different it is) and the use of public policy clause to refuse the *application* of foreign law. According to the Court, a clear distinction must be drawn in marriages contracted abroad and marriages to be contracted in Lithuania. The Supreme Court illustrates the reasoning by the following example:

> For instance, a polygamous marriage contracted under the requirements of laws of the state that allows it must be recognized but when contracting of marriage in Lithuania, the norms of foreign law of the state that allows polygamous marriage must not be applied[36].

It is remarkable that the legal consciousness of the Supreme Court and the commentators of the Civil Code[37] was as wide as to encompass cross-border recognition of polygamous marriages concluded under really dissimilar legal systems and in countries that cannot be called "neighbouring" (geographically or legally). The Court provided the same example on the recognition of polygamous marriages in Lithuania while explaining the public policy clause (point 3.5. of the Resolution)

[33] Case C-145/86 Martin Hoffmann v Adelheid Krieg [1988] ECR 645, Case C-78/95 *Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH* [1996] ECR I-4943, Case C-38/98 *Régie Nationale des Usines Renault SA v Maxicar SpA i Orazio Formento* [2000] ECR I-2974, Case C-7/98 *Dieter Krombach v. André Bamberski* [2000] ECR I-1935, Case C-394/07 *Marco Gambazzi v. Daimler Chrysler Canada Inc. CIBC Mellon Trust Company* [2009] ECR I-2563, Case C-420/07 *Meletis Apostolides v David Charles Orams i Linda Orams* [2009] ECR I-3571, Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813.

[34] *Belaja Rus* (n 32).

[35] Vytautas Nekrošius, *Europos Sąjungos civilinio proceso teisė. Pirma dalis* (Justitia, 2009) 130-131.

[36] Resolution No. 28 (n 8), point 3.5 'on refusal to apply foreign law'.

[37] Commentary on article 1.25 (4) (n 9). Commentary on article 3.3 of the Civil Code. Valentinas Mikelėnas, Šarūnas Keserauskas, Zita Smirnovienė, Vytautas Mizaras, Algimantas Bakanas, *Commentary to Book Three of the Civil Code* (Justitia, 2002). Mikelėnas, *Tarptautinės privatinės teisės įvadas* (n 30) 130-131.

and the material validity of marriages concluded abroad (point 6.3.1 of the Resolution). The subsequent question is whether a same-sex marriage under the Lithuanian *ordre public* can be seen as "less orderly" than a polygamous marriage.

2.2. The substantive condition on different sex of spouses and ordre public

The analysis of the norms of Book Three of the Civil Code (family law provisions) reveals that some of the substantive conditions under Articles 3.12-3.17 of the Civil Code are also the *principles* of the Lithuanian family law, while others are not. Principles form the foundation of family law, as in any other branch of law[38]. The main principles of Lithuanian family law are: monogamy, voluntary marriage, equality of spouses, priority of protecting and safeguarding the rights and interests of children, the up-bringing of children in the family, and the comprehensive protection of motherhood (Art. 3.3). Adherence to these principles is reflected in other laws[39], in constitutional[40] and the Supreme Court's[41] case law. The article also refers to other 'principles of the legal regulation of civil relationships'. These general civil law principles are additional: the principles of justice, reasonableness, good faith, inviolability of property, freedom of contract, non-interference in private relations, legal certainty, proportionality, legitimate expectations, prohibition to abuse the right, and the principles of full judicial protection of civil rights[42].

Notably, the commentary of Article 3.3 also stresses that the principle of monogamy only prevents the conclusion of such marriages in Lithuania but 'is not an obstacle to recognize polygamous marriages that have been legally concluded by foreigners abroad'[43]. So even monogamy, although clearly entrenched as a principle of national substantive law, was at the time of the adoption of the Code considered not as utterly important from the point of view of private *international* law as to prevent implementation of subjective rights gained with marriage. The author considers that a polygamous marriage could only face more difficulties in recognition because it might also raise the questions of equality of spouses and possible discrimination on the basis of sex (both fundamental principles of law in Lithuania). Meanwhile, marriages of same-sex couples exhibit the same features as "Lithuanian classic" marriages: they are based on the principles of voluntariness, monogamy, and the equality of spouses. Consequently, the substantive prohibition of same-sex marriage is one of the conditions of contracting marriage in the country (a negative re-

[38] Mikelėnas, *Šeimos teisė* (n 23) 119.

[39] Law on Sickness and Maternity Social Insurance, 2000, No IX-110. Labour Code, 2002, No IX-926.

[40] Ruling of Constitutional Court on support of children of 7 June 2007.

[41] E.g., decision on equality of spouses, No. 3K-3-207/2009; on interests of the child, No 3K-3-203/2009.

[42] Commentary on article 3.3 (n 37). Civil Code, article 1.2 on 'principles of legal regulation of civil relationships'.

[43] Commentary on article 3.3 (n 37) of the Civil Code.

quirement) but it is not a fundamental principle of family law that may justify non-recognition. It is up to the national courts to establish which principle is of such significance under specific factual circumstances but a failure to mirror the requirement that is not clearly enlisted as principle in laws or jurisprudence should not be seen as falling under the *ordre public* exception.

Moreover, if we presume that as an act of civil protest, a same-sex marriage is contracted in Lithuania despite the prohibition, it would be valid until the court annuls it based on the breach of a substantive condition. Marriages that are in breach of substantive conditions fall under the category of "rebuttable transactions"[44] and cannot be automatically void before a legal declaration on nullity by the court[45]. The presumed validity of marriage[46] is one of the strongest presumptions in law, thus it should apply also in the context of the marriages concluded abroad.

Recognition of marriage is an acceptance of the legal reality formed in another country due to application of its valid and functioning legal norms. As the Supreme Court pointed out, one of the aspects of *ordre public* clause is not impeding 'good relations with the neighbouring foreign state'[47]. It may be claimed that due to the very nature of the EU, member states can be considered as such "neighbouring foreign states" and a refusal to recognize marriages coming from another EU member state may impede mutual relations.

Although the different-sex requirement in itself is not and has never been equated to a principle, it should be analysed whether other principles may be applicable. The Ministry of Justice in 2008 has relied on the principle of the protection of child interests to argue for the non-recognition of same-sex marriage[48]. It claimed in particular that 'if the state allowed legal effects of same-sex marriages, it would infringe its obligation to take care of children and ensure their normal development'. This reasoning is based on a naive assumption that (same-sex) couples do not have children before getting married and an outdated prejudice that same-sex parenting would result in other than "normal" development of a child. It should be enough to note that even before the increased possibilities for the formalization of same-sex relations, there have been millions of same-sex parents in Europe[49] including un-

[44] Article 178 (2) of the Civil Code: 'Any transaction for the declaration of voidability of which a court judgement is necessary, shall be a voidable one'.

[45] Mikelėnas, *Šeimos teisė*, n 23, 180.

[46] Civil Code, article 3.286.

[47] Resolution No. 28 (n 7).

[48] Conclusion of the Legal affairs Committee of the Lithuanian Parliament on the Proposal for a Council, Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters. No. 13445/07 JUSTCIV 250 (16 January 2008).

[49] Leslie Ann Minnot, Scott Long (eds.), *Conceiving parenthood. Parenting and the rights of Lesbian, Gay, Bisexual, and transgender people and their children* (International Gay and Lesbian Human Rights Commission, 2000) 5-7.

counted numbers in Lithuania[50]. It is also more important to stress that both different and same-sex couples from the point of law can be childless and nevertheless lead a family life[51].

This issue should, in fact, be discussed from the point of view of children's rights. Children parented by same-sex couples should be treated in the same way as the children parented by different-sex couples or single parents. Studies on Lithuania show a high level of homophobia and prevalent bullying at schools, which can be a deadly combination for homosexual or bisexual teenagers and children of same-sex parents. The automatic recognition of documents (birth certificate and surname that indicates both same-sex parents) and unified conflict of law provisions on child's origin are crucial for subsequent exercise of rights. Whether a child is brought to life by artificial insemination or adopted, he or she should have adequate rights and interests protected in relation to maintenance and succession. Children should not be displaced from their parents during a (medical) crisis, or lose connection with a parent, or control over the family or vacation home solely because they are born or parented in a same-sex family.

Lithuania should consider the risk of becoming a haven for the evasion of matrimonial and parental responsibilities. If same-sex marriage is not recognized in Lithuania, it would be possible to conclude another different-sex marriage in Lithuania or avoid the duty to support children that were brought to life together with a former same-sex partner[52]. Thus, nonrecognition of same-sex marriages could actually infringe the fundamental principles of the substantive family law in Lithuania: the protection of child's interests and the principle of monogamy.

As for the fear that same-sex couples might want to adopt children in Lithuania and this would impede the children's interests, it must be rebutted by identifying it as a hidden phobia that homosexual parents somehow "train" their children to be homosexual or are otherwise incapable of parenting. There are now studies that negate such suggestions and it has also been recognized in the field of law by the ECtHR[53]. In addition, there is no reason to presume that the Lithuanian child protection authorities are not capable of choosing proper parents for a particular child or hearing out the opinion of a particular child. On the contrary, strongly disapproving views on homosexuality of the holders of parental responsibility might be more

[50] E.g., reported by Audra Telksnienė, 'Moteris pasirenka moterį: lesbiečių šeimos istorija' *Lietuvos rytas* (Vilnius, 16 December 1995) 295.

[51] *Schalk* (n 17).

[52] Although *forum necessitatis* clause is provided under the relevant Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Article 7), the outcome is still far from clear and it should not be the rule under the EU law to aid the 'limping regime' or an evading party.

[53] *Salgueiro da Silva Mouta v. Portugal* ECHR 1999-IX 309, *E.B. v. France* App no 43546/02 (ECtHR 22 January 2008).

threatening to child interests, because homosexual and bisexual teenagers are often rejected by their conservative families and are much more likely to become homeless or suicidal than their heterosexual peers. Notably, the precedence of equality regulation and child interests over religious beliefs are increasingly recognized in European countries.

In addition, the common European family principles that the Commission of European family law (CEFL) has been attempting to draft since 2001 could be taken in consideration. The CEFL represents the European states, including Lithuania, and is an independent scientific initiative. The principles are being prepared either on the basis of "common-core" principles of the European family or, where no such common-core is found, on the basis of the "better law" method[54]. The CEFL has already drafted principles related to divorce and maintenance of former spouses, parental responsibilities, and is working in the field of property relations between spouses. Regarding the right to marry for same-sex partners or cross-border recognition of marriage, no such common-core or better-law principle has been found yet. However, the analysis of European family law series reveals great development in other closely related areas. For instance, a principle drafted on the better-law approach (with the participation of a Lithuanian representative in the working group) establishes that all children must be treated equally, regardless of sexual orientation of persons holding parental responsibilities[55].

Depending on the specific case circumstances, there may be other principles involved. For example, denial of the recognition of the status of a spouse could result in the breach of the fundamental right to court in cases where marital status is needed to claim damages. Nonrecognition in cases of succession, divorce, entry to country might result in breaches of various principles under the Lithuanian law and raise issues under the EU law related to freedom of movement and EU citizenship. These questions are also closely related with the issues of jurisdiction and applicable law. However, under circumstances such as succession of immovable property or claim for damages after accident resulting in a spouse's death, the connecting factors would point to Lithuania and decisions would need to be enforced in Lithuania.

2.3. The principle of non-discrimination and l'effect atténué

The next focus point of this paper is whether the legal protection of same-sex marriage may be prevented because of any fundamental dissimilarity in regulation of sexual orientation in Lithuania. During the last few years, Lithuania received warnings from the European Parliament and international organizations on various attempts to restrict human rights on the basis of sexual orientation. However, despite

[54] Masha Antakolskaia, 'The "better law" approach and the harmonization of family law' In Katharina Boele Woelki (ed.), *Perspectives for the unification and harmonization of family law in Europe* (Intersentia 2003) 180-181.

[55] Principles of European Family Law Regarding Parental Responsibilities, drafted by Commission on European Family Law, 2007. Principle 3.5 on 'Non-discrimination of the child'.

any possible political debates and legislative proposals, discrimination on the grounds of sexual orientation is prohibited in Lithuania.

Although sexual orientation is not mentioned under constitutional provisions on non-discrimination, the list is not exhaustive[56]. The constitutional provisions on basic human rights should be considered together with the provisions of the ECHR, which also does not include an explicit mention of sexual orientation. However, according to the case law of the ECtHR, the margin of appreciation of states in this area is narrow and any difference in treatment based on sexual orientation requires particularly serious reasons of justification[57]. In a similar way, the International Covenant on Civil and Political Rights has been interpreted as covering the basis of sex orientation under the prohibition of discrimination as to "sex"[58].

Non-discrimination on the basis of sexual orientation is also clearly established in the national laws. Article 169 of the Criminal Code provides responsibility for any person who carries out the actions aimed at hindering, on grounds of *inter alia* sexual orientation, a group of persons or a person from participating in political, economic, social, cultural, labour or other activities or at restricting their rights and freedoms. Hatred related to sexual orientation is an aggravated circumstance of crimes under Article 60 (12) of the Criminal Code[59]. Discrimination as to sexual orientation is also prohibited under Article 1(2) of the Law on equal opportunities[60] and under the Law on the protection of minors against the detrimental effect of public information[61]. Thus homosexuality as a sexual orientation *per se* is not against the public policy of the Lithuanian Republic. On the contrary, the sexual orientation of a person is protected under the principle of non-discrimination. The margin of protection increases, even though it does not currently extend to the substantive marriage conditions of national family law. This protection is nevertheless in clear contrast to polygamous relations, which are not awarded a comparable internal legal protection.

In consideration of the attenuated effect of the *ordre public* clause, it is important to mention that the right for same-sex partners to marry under Article 12 (the right to marry) of the ECHR was recently analysed in the case of *Schalk and Kopf v. Austria*. The ECtHR ruled that the Convention did not impose the obligation to grant same-sex couples access to marriage and due to the lack of sufficient consensus, states

[56] N 16.

[57] *L. and V. v. Austria* App Nos 39392/98 and 39829/98 (ECtHR, 9 January 2003) para 45; *S.L. v. Austria* App No 45330/99 (ECtHR 9 January 2003) para 37; *Karner v. Austria* App No 40016/98 (ECtHR 24 July 2003) para 37; *Kozak v. Poland* App No 13102/02 (ECtHR 2 March 2010) para 92.

[58] *Toonen v Australia* UNHRC Communication No. 488/1992.

[59] Criminal Code of the Republic of Lithuania. VIII-1968, 2000.

[60] Law on Equal Opportunities. IX-1826, 2003.

[61] Law on the Protection of Minors against the Detrimental Effect of Public Information. 10 September 2002. IX-1067, article 4 (12).

still have a wide margin of appreciation with regard to Article 12[62]. However, a significant thing to stress about this case is that the Court recognized Article 12 as applicable to the case of applicants[63]. Thus the Court has deviated from its former explanation of marriage as only reserved to different-sex partners[64] (including transgender persons after gender reassignment). Deriving from the Court's recognition that the right to marry is not restricted 'in all circumstances' to different-sex couples (i.e. it may come under Convention if the states allow such marriage), it is very reasonable to expect that the outcome in case of recognition of already-concluded marriage would be utterly different. The author is convinced that in case of nonrecognition, the Court could find a violation under Article 12 of the Convention, considering that the right to marry is provided 'according to the national laws governing the exercise of this right' and the Lithuanian law refers this question to *lex loci celebrationis*.

The EU Charter on Fundamental Rights also refers to the 'national laws' governing the exercise of the right to marry and find a family but Article 9 is notably gender neutral[65]. Moreover, the cases of *Maruko*[66] and *Römer*[67] prohibit discrimination on the ground of sexual orientation where same-sex partnerships are available and place partners in 'comparable' situation with different-sex spouses. Although the cases may not be directly applicable to the legal situation in Lithuania where no such partnerships are allowed, it may be argued that the CJEU should in the future consider this situation as a case of indirect discrimination. Meanwhile, non-recognition of marriages solely on the basis of sexual orientation of spouses may be seen as a case of direct discrimination. In the author's opinion, the cases of *Maruko* and *Römer* also give a clear understanding on the direction of the further development and interpretation of fundamental principles of law.

The argumentation from the point of the EU law may be built on various dimensions: it may rely on the EU citizenship, on the development of principle of mutual recognition, the freedom of movement, family reunification and asylum, and the free circulation of civil status documents. In any case, the concept of public policy that justifies derogation from a fundamental freedom must be interpreted strictly and cannot be determined unilaterally by each member state. Thus, it should only be reserved to exceptional circumstances.

Although same-sex couples do not have the right to marry under the substantive law, the recognition of such marriages in the territory of Lithuania cannot be reasonably claimed as capable of causing significant distress to Lithuanian authorities. Discrimination on the basis of sexual orientation is prohibited in Lithuania. In con-

[62] *Schalk* (n 17) para 58.
[63] *Ibid.*, para 61.
[64] *Rees v United Kingdom* (1986) 9 EHRR 56, para 49; *Cossey v United Kingdom* (1990) 13 EHRR 622, paras 43 and 46; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, para 66.
[65] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, article 9.
[66] Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-1757.
[67] Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* (GC 10 May 2011).

sideration of international law developments, the attenuated effect of the public policy exception is such that cannot possibly justify nonrecognition. Quite the different, full-scale recognition of same-sex marriages (i.e. 'marriage as marriage') is completely compatible with the family law principles enshrined under substantive provisions and with the explanations of the Supreme Court.

2.4. Is nonrecognition of same sex marriages of Lithuanian nationals possible?

Article 1.25 (1) of the Civil Code establishes the general rule that matrimonial capacity and marriage conditions are established by the Lithuanian law and Article 1.25 (3) states that matrimonial capacity and other conditions to contract marriage in respect of foreign citizens and stateless persons without Lithuanian domicile may be determined by the law of the state of domicile of both persons intending to marry if such marriage is recognized in the state of domicile of either of them[68]. Moreover, point 81 of the Civil registry rules (the Rules) precludes registration not only of the same-sex marriages, but also of any marriages that fail to mirror the Lithuanian marriage conditions:

> Civil registry offices shall include into records only these marriages which have been registered without infringing of the conditions on concluding marriage set out under articles 3.12-3.17 of the Civil Code of the Republic of Lithuania[69].

The previous version of the Rules also contained a similar and even narrower provision which read that only those marriages are recorded, which have been registered in foreign countries 'without infringements of the laws of the Lithuanian Republic'. The amendment only specifies the substantive conditions on contracting marriages and not the procedural norms. Noting that only foreign marriages of nationals are included into registry data, these provisions reveal possibly different treatments of nationals and non-nationals and raise the issue of discrimination of own citizens[70]. Such interpretation of the norms may be compared with the French approach of "distributive application": French nationals who performed a same-sex marriage abroad would not have their marriage recognized since their national law did not allow it, although same-sex marriages of foreign nationals are recognized[71]. Under the legal provisions applicable in Lithuania before the entry into force of the Civil Code, the Marriage and Family Code explicitly provided that without prejudice to *lex loci celebrationis*, the national marriage conditions had to apply "additionally" in determination of validity of marriages of Lithuanian nationals[72].

[68] Civil Code, article 1.25 (3).
[69] N 10.
[70] Having in mind that registration does not equate to recognition.
[71] Reply of the French Minister of Justice to a parliamentary question No 41533 (2005), 7437.
[72] Marriage and Family Code (1969) No. 21-186, repealed in 2000. Article 210 (2).

The interpretation of "distributive recognition" under the currently valid Civil Code in the author's opinion is wrong. Article 1.25 (3) on applicable law with regard to foreign nationals is explained as applicable to contracting of marriages *in Lithuania* and reaffirming the *lex loci celebrationis* rule[73]. It is illustrated with the example of a Lithuanian national who wants to marry his 20 year old girlfriend in Lithuania, while according to the laws of their domicile, she is too young and lacks matrimonial capacity. It is explained that because of his nationality, the registry office would have the right to register this marriage and because such marriage would be valid in Lithuania, the marriage would be registered[74]. Consequently, it would not be reasonable to demand for the Lithuanian conditions on marriage conclusion to apply to Lithuanian nationals wherever they may reside. Rather, the deletion of the provision that stated Lithuanian laws apply 'additionally' should be interpreted as now relying only to *lex loci celebrationis*. Article 1.25 (3) could thus be relevant only when foreign nationals (or national and foreigner national couples) want to contract marriages in Lithuania. Only in this case, as the Supreme Court explained, can the *ordre public* exception apply to prevent application of foreign law that allows polygamous marriages. It is not clear whether the *ordre public* exception would be sufficient to prevent conclusion (in Lithuania) of same-sex marriage however, considering that the different-sex requirement is arguably not as significant as the principle of monogamy.

In addition, in principle and from the perspective of EU law so far, it has not been forbidden to discriminate own citizens in purely internal situations. However, marriages concluded abroad arguably are beyond such purely internal situations and in its recent *Zambrano* case the CJEU can be seen as 'reversing' the reverse discrimination[75]. The argument that member states will have to recognise a same-sex marriage concluded elsewhere, 'perhaps even in the hypothetical case that it concerns two of its own citizens'[76] can also be reinforced under *Grunkin*[77] and *Sayn-Wittgenstein*[78] cases, where the CJEU admitted that the nonrecognition of surname results in an obstacle to freedom of movement. Such an obstacle may be justified only if it is based on objective considerations and is proportionate to the legitimate purpose of the national provisions. The author is convinced by the simple conclusion that there are other means to protect different-sex families and marriages than measures to the detriment of same-sex partners and their families.

[73] Commentary to Article 1.25 (3) of the Civil Code. Mikelėnas, *Tarptautinės privatinės teisės įvadas*, 216.

[74] Commentary to Article 1.25 (3) of the Civil Code.

[75] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] OJ 130/2, para 42.

[76] Veerle Van Den Eeckhout, 'Promoting Human Rights within the Union: The Role of European Private International Law' *European Law Journal*, 14 (1) 2008, 118.

[77] Case C-94/04 *Standesamt Niebüll (Grunkin Paul I)* [2008] ECR I-7639.

[78] Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] OJ C 193.

3. Conclusions

The author considers that non-recognition of same-sex marriages would cause unacceptable effects and would actually be against the *ordre public* of Lithuania, as explained by the Supreme Court: 1. It would mean infringement of fundamental human rights and freedoms (e.g. it would entail discrimination, create an obstacle to freedom of movement and family life, and could infringe the rights of the child), 2. It would be contrary to justice, good customs, main moral rules that are consistently upheld in the society (e.g. it would entail failure to provide legal remedy, legitimize evasion of duties, and allow infringement of the monogamy principle), 3. It would infringe the interests of Lithuania and impede good relations with foreign states (especially the EU member states that may be seen as "neighbouring" states due to the nature of the EU).

The author insists that in the absence of a clear possibility to 'adapt' the legal relationship, full-scale recognition of a same-sex marriage is much more reasonable. The Supreme Court's guidelines allow to argue for consideration of 'marriage as marriage' rather than downgrading to an unclear level of internal protection. Under the current Civil Code, distributive recognition that denies the recognition of marriages of nationals is also not plausible and should not apply with regards to marriages from the EU member states.

Although providing some unified standards of protection under substantive law of member states would be the best solution, the delay in the adoption of partnership laws shows how difficult it is to introduce changes in this area. Meanwhile, recognition is merely an acceptance of the legal reality formed in another country due to application of its valid and functioning legal norms. The steps taken at the level of private international law would not really involve any dramatic judicial or legislative activism: tools for advancement of same-sex partners' and their children's rights are already available in Lithuania.

VI.
THE ROLE OF THE JUDICIARY AND OF THE EQUALITY BODIES

Le rôle du juge en Italie

Alessio Liberati

Résumé

Faute l'adoption des mesures législatives spécifiques en matière de droits LGTB, les entités juridictionnels italiennes doivent résoudre les controverses liées à l'exercice de tels droits sans le support normatif et avec un rôle substitutif du législateur.
La responsabilité qui accompagne la délégation de l'activité régleuse de la matière, de la part du législateur et à l'avantage des juges, comporte des risques aussi, concernant le contraste dans les solutions, selon le différentes sensibilités, et cela n'aide ni à la certitude du droit ni, conséquemment, une harmonisation rapide des ordres des Pays UE.
Dans cette perspective un instrument utile de référence est le droit de la CEDH, dans les limites dans lesquelles il a résolu des solutions spécifiques.

Abstract

Not having adopted specific legislative measures concerning LGTB rights, Italian jurisdictional entities have to solve lawsuits related to the enforcement of those rights without the support of such norms.
The lawmakers' delegation of regulating LGBT rights to judges is accompanied by responsibilities and risks, concerning disputes in solutions, according to different sensibilities. This framework does not support certainty of law or the harmonization of EU countries' legal systems.
In this perspective, the ECHR (European Court of Human Rights) operates as a useful instrument within the framework of specific LGBT resolutions promulgated by the same organization.

* * *

1. L'absence du pouvoir législatif

La fonction du juge dans le cadre de matières particulièrement sensibles à la morale publique a de plus en plus assumé un rôle important au cours des dernières années.

En effet, dans un Pays vivement connoté par des valeurs catholiques, comme la République italienne, il y a une timidité du législateur à intervenir dans les matières étroitement liées à ces valeurs, même si d'autres pays de l'Union Européenne ont adopté des solutions normatives en contraste avec la morale catholique.

Dans cette perspective il est en effet hors de doute que l'électorat catholique a

certainement le pouvoir de conditionner l'équilibre des majorités en Italie, étant la politique actuelle caractérisée par une dualité sensible à leurs votes.

En l'absence d'une législation propre à cette typologie de problèmes le juge a assumé donc ce rôle substitutif. En effet, le législateur a lui délégué la solution de nouveaux problèmes juridiques sans fournir le moindre instrument législatif nécessaire pour leur solution.

On a ainsi une vraie et propre *vacatio* du législateur dont le rôle est délégué au pouvoir juridictionnel qui doit se faire charge, dans les controverses, de trouver une solution juridique appropriée.

1.1. La responsabilité des juges et les risques

Dans cette dynamique le juge devient le responsable de la solution de nouveaux problèmes concernant les droits de la personne.

Ceci constitue, à mon avis, un échange dangereux de rôles par rapport à la politique qui, en s'éloignant des problèmes, laisse toute responsabilité à l'autorité judiciaire qui est appelée périodiquement à rendre compte de ses propres décisions aux hommes politiques.

Dans le cadre des débats publics et dans les sièges institutionnels, où, loin de s'assumer la responsabilité du vide normatif, l'on assiste de plus en plus aux critiques féroces vis-à-vis de l'interprète (le juge) qui a cherché à trouver une solution.

L'on a donc un juge-législateur, malgré lui, autrement dit un juge responsable devant la collectivité de la solution de problèmes normatifs qui devraient trouver une solution dans le siège législatif.

Ce mécanisme finit pour être préjudiciable de l'image du pouvoir juridictionnel, qui apparaît comme le responsable de ce choix, certainement délicat et difficile, dont le juge ne devrait pas être chargé sans le support d'une indication normative.

De telles considérations sont aggravées en raison de la distance entre la perception sociale de la Justice et la justice réelle. La difficulté des procédures et de l'application des droits essentiels a comporté, en effet, une grande distance entre ce qui est perçu comme niveau social juste et ce que le juge est appelé à appliquer.

2. La jurisprudence de la CEDH en Italie

A ce sujet la Convention Européenne pour la Sauvegarde des Droits de l'Homme et les arrêts de la Cour de Strasbourg revêtent une importance particulière.

Si la Cour Européenne des Droits de l'Homme a en effet laissé libre cours aux États de vérifier l'admissibilité des mariages entre gens du même sexe[1], la même Cour de Strasbourg à certainement fourni d'importants éléments herméneutiques concernant la reconnaissance des droits LGTB.

[1] Schalk et Kopf c. Autriche (CEDH - 30141/04).

2.1. Les arrêts de la Cour Européenne : emploi, adoption, parentalité

En effet, la Cour a prononcé des arrêts soit en matière d'emploi, soit en matière de parentalité, soit en matière d'adoption.

Par exemple, dans l'arrêt Schalk et Kopf c. Autriche[2], la CEDH a affirmé que la relation homosexuelle stable relève de la « vie familiale », au même titre qu'un couple hétérosexuel dans la même situation. Cependant, la Cour a affirmé que la Convention européenne des droits de l'homme n'oblige pas un Etat à ouvrir le droit au mariage à un couple homosexuel.

Dans l'arrêt Fretté c. France[3], la Cour a jugé légitime le rejet d'une demande d'agrément préalable à l'adoption d'un enfant par un homosexuel. Selon la Cour, les autorités nationales ont légitimement et raisonnablement pu considérer que le droit de pouvoir adopter dont le requérant se prévalait trouvait sa limite dans l'intérêt des enfants susceptibles d'être adoptés, nonobstant les aspirations légitimes du requérant et sans que soit remis en cause ses choix personnels.

Très important est l'arrêt Salgueiro Da Silva Mouta c. Portugal[4], concernant le droit de garde partagée retirée à un père en raison de son homosexualité. La décision des juridictions portugaises reposait essentiellement sur le fait que le requérant était homosexuel et que « l'enfant doit vivre au sein d'une famille traditionnelle portugaise ». La Cour a jugé que cette distinction, dictée par des considérations tenant à l'orientation sexuelle, ne pouvait être tolérée d'après la Convention, étant en violation de l'article 14 (interdiction de la discrimination) combiné avec l'article 8 (droit au respect de la vie privée et familiale).

De même façon, la Cour a jugé[5] que la législation du Royaume Uni sur les pensions alimentaires applicable avant l'entrée en vigueur de la loi sur le partenariat civil était discriminatoire à l'égard des partenaires de même sexe, en violation de l'article 14 (interdiction de discrimination) combiné avec l'article 1 du Protocole n° 1 (protection de la propriété). Dans le cas d'espèce, après son divorce, la requérante n'obtint pas la garde de ses enfants et dut verser une pension alimentaire. En 1998, elle s'installa avec une autre femme. La loi applicable à l'époque – avant l'entrée en vigueur de la loi sur le partenariat civil – prévoyait que le parent non gardien qui avait noué une nouvelle relation (qu'il se soit remarié ou non) pouvait obtenir une réduction du montant de la pension dont il était débiteur, mais pas dans le cas où il vivait avec une personne de même sexe.

Par l'arrêt Perkins et R. c. Royaume Uni[6] et Beck, Copp et Bazeley c. Royaume-Uni[7] la Cour a jugé en violation des de l'article 8 (droit au respect de la vie privée) le cas des requérants exclus de l'armée uniquement en raison de leur homosexualité,

[2] Schalk et Kopf c. Autriche, CEDH 30141/04.
[3] Fretté c. France, CEDH 36515/97, 26.02.2002.
[4] Salgueiro Da Silva Mouta c. Portugal, CEDH 33290/96, 21.12.1999.
[5] J.M. c. Royaume-Uni, CEDH 37060/06, 28.09.2010.
[6] Perkins et R. c. Royaume Uni, CEDH 43208/98 et 44875/98, 22.10.2002.
[7] Beck, Copp et Bazeley c. Royaume-Uni, CEDH 48535/99, 48536/99 et 48537/99, 22.10.2002.

suite aux enquêtes sur leur orientation sexuelle. Selon la Cour, les mesures prises contre les requérants constituent des ingérences particulièrement graves dans leur droit au respect de leur vie privée, et cela sans « raisons convaincantes et solides ».

2.2. La liberté de réunion et d'association

La Cour a reconnu la violation des articles 11 (liberté de réunion et d'association), 13 (droit à un recours effectif) et 14 (interdiction de la discrimination) dans l'affaire Baczkowski et autres c. Pologne[8] et dans l'affaire Alekseyev c. Russie[9].

Dans le premier cas, les autorités locales refusèrent de laisser organiser un défilé dans les rues de Varsovie afin de sensibiliser l'opinion à la discrimination envers les minorités, les femmes et les handicapés. La manifestation s'est finalement tenue quand même, mais la Cour a souligné que les requérants ont pris un risque puisqu'elle n'était alors pas officiellement autorisée. Ils ne disposaient que de recours a posteriori contre les décisions de refus et il était de plus raisonnable de supposer que les motivations réelles du refus étaient une opposition des autorités locales à l'homosexualité.

Dans l'affaire Alekseyev c. Russie, il s'agissait d'interdictions répétées (2006, 2007, 2008) d'organiser des défilés de la Gay Pride opposés par les autorités moscovites à un militant russe pour les droits des homosexuels. La Cour a jugé que les interdictions d'organiser les manifestations litigieuses n'étaient pas nécessaires dans une société démocratique. De plus, le requérant n'avait pas disposé d'un recours effectif pour contester ces interdictions, et avait été victime d'une discrimination fondée sur l'orientation sexuelle.

La Cour n'a pas encore décidé l'affaire Genderdoc-M c. Moldova[10], concernant le refus d'autoriser une manifestation à Chişinău, et l'affaire Zhdanov et Rainbow House c. Russie[11], concernant le refus d'enregistrer une association lesbienne, gay, bisexuelle and transsexuelle.

2.3. Les droits sociaux

La Cour a affirmé que la législation espagnole en matière de droit aux prestations de survivants avait un but légitime (la protection de la famille fondée sur les liens du mariage) et la différence de traitement constatée pouvait être considérée comme relevant de la marge d'appréciation de l'Etat, en déclarant irrecevable la requête Antonio Mata Estevez c. Espagne[12].

Par contre, la CEDH a jugé qu'avant un amendement législatif intervenu en juillet 2007, il y a eu en Autriche violation de l'article 14 (interdiction de la discrimination)

[8] Baczkowski et autres c. Pologne, CEDH 1543/06, 3.05.2007.
[9] Alekseyev c. Russie, CEDH 4916/07, 25924/08 et 14599/09, 21.10.2010.
[10] Genderdoc-M c. Moldova, 9106/06.
[11] Zhdanov et Rainbow House c. Russie, CEDH 12200/08.
[12] Antonio Mata Estevez c. Espagne, CEDH 56501/00, 10.05.2001.

combiné avec l'article 8 (droit au respect de la vie privée et familiale) P.B. et J.S. c. Autriche[13], étant donné le refus d'étendre la couverture d'une assurance maladie au compagnon homosexuel d'un assuré, puisque la loi autrichienne disposait que seuls un proche parent du titulaire de l'assurance maladie ou une personne du sexe opposé cohabitant avec celui-ci pouvaient être considérés comme personnes à charge.

Enfin, la Cour a souligné la violation de l'article 14 (interdiction de la discrimination) combiné avec l'article 8 (droit au respect de son domicile) dans les affaires Kozak c. Pologne[14] et Karner c. Autriche[15] concernant le refus de reconnaître à un homosexuel le droit à la transmission d'un bail après le décès de son compagnon : la Cour n'a pas pu admettre qu'il soit nécessaire, aux fins de la protection de la famille, de refuser de manière générale la transmission d'un bail aux personnes vivant une relation homosexuelle.

2.4. L'homophobie et mauvais traitements en prison et le risque lié au renvoi d'homosexuels dans leur pays d'origine

Ils sont encore pendants les affaires Vincent Stasi c. France[16], concernant les mauvais traitements allégués en prison en raison de l'homosexualité et l'affaire X. c. Turquie[17], dont le requérant se plaint notamment d'une discrimination en raison de son homosexualité, ayant été incarcéré seul dans une cellule de cinq mètres carrés, privé de tout contact avec d'autres détenus et d'accès à la promenade en plein air.

Pareillement pour l'affaire D.B.N. c. Royaume-Uni[18], dont le requérant a allégué le risque de décès, de mauvais traitements et d'atteinte au droit au respect de la vie privée en cas de renvoi d'une femme lesbienne au Zimbabwe, et l'affaire K.N. c. France[19], concernant le risque allégué de décès et de mauvais traitements en cas de renvoi d'un homme homosexuel en Iran.

2.5. Le droit italien et l'application de la jurisprudence CEDH

Il se pose à ce point le problème de l'application des arrêts de la Cour et de la Convention Européenne pour la Sauvegarde des Droits de l'Homme dans l'ordre juridique italien.

La Cour Constitutionnelle s'est exprimée récemment[20] au sujet de l'admissibilité de l'entrée des précepte de la Convention EDH dans l'ordre juridique intérieur, en précisant qu'il appartient à la Cour Constitutionnelle même le rôle de vérification de la compatibilité avec les valeurs fondamentales de la Constitution.

[13] P.B. et J.S. c. Autriche, CEDH 18984/02, 22.07.2010.
[14] Kozak c. Pologne, CEDH 13102/02, 2.03.2010.
[15] Karner c. Autriche, CEDH 40016/98, 24.07.2003.
[16] Vincent Stasi c. France, CEDH 25001/07.
[17] X. c. Turquie, CEDH 24626/09.
[18] D.B.N. c. Royaume-Uni, CEDH 26550/10.
[19] K.N. c. France, CEDH 47129/09.
[20] Corte Costituzionale, n. 80/2011.

Les juges, surtout les juges administratifs, ont affirmé un mécanisme plus direct.

Ils ont affirmé, en particulier, que la capacité opérationnelle de la Convention Européenne pour la Sauvegarde des Droits de l'Homme, comme interprétée par la cour de Strasbourg, est dirigée directement aux citoyens.

En substance, le Conseil d'État et les tribunaux administratifs régionaux ont précisé que la Convention européenne trouve application directe des jugements intérieurs[21].

Sous un autre profil, les décisions de la Cour européenne des droits de l'homme constituent un modèle fondamental pour une interprétation correcte des règles intérieures.

L'on assiste donc à une réception en voie jurisprudentielle particulièrement incisive.

Mais une solution semblable comporte des avantages et des inconvénients, évidemment.

Il est certainement positif que le juge, même en absence d'intervention législative, puisse trouver dans la Convention européenne pour la sauvegarde des droits la solution pour défendre les droits LGTB en voie directe. L'on doit cependant avoir pleine conscience et perception de cette délégation de pouvoirs de la part de la loi et des effets que cela comporte.

En particulier, l'on ne peut pas cacher le risque d'orientations contrastantes, déterminées par la différente sensibilité des juges qui pourraient être conditionnés par leur propre formation dans la réception des décisions de la Cour de Strasbourg.

3. Le pouvoir discrétionnaire du juge

Il reste à vérifier les limites que l'ordre italien attribue au pouvoir discrétionnaire du juge.

Le syndicat de légitimité constitutionnelle n'a pas un caractère diffus dans l'ordre italien, mais il se concentre dans la Cour constitutionnelle.

Les jugements de légitimité constitutionnelle peuvent être soulevés par le juge quand il croie le problème de constitutionnalité en tant que décisif et pas manifestement injustifié, afin de prononcer sa propre décision.

[21] TAR du Latium 11984/2010, selon le quel la Convention Européenne des Droit de l'Homme a une application directe par le biais de l'article 117, première alinéa, de la Constitution, étant donné que les lois doivent respecter « les obligations de l'ordre judiciaire communautaire », et puisque l'article 6 (F) du Traitée de Maastricht (modifié par le Traitée d'Amsterdam), « l'Union ne respecte les droits fondamentaux comme assurés par la Convention Européenne des Droit de l'Homme, comme principes généraux du droit communautaire » et la jurisprudence de la CEDH a établi un conflit direct entre la Convention et l'expropriation indirecte (CEDU; Sez. l - 17 may 2005; Sez. l - 15 novembre 2005, ric. 56578/00; Sez, l - 20 avril 2006). Conseil d'état italien, qui a affirmé qu'en raison d'un principe déjà applicable avant l'entrée en vigueur du Traité de Lisbonne, le juge National doit éviter la violation de la Convention du 1950 (CEDU, 29-2-2006, Cherginets c. Ucraina, § 25) en adoptant la solution qui on en assure le respect (CEDU, 20-12-2005, Trykhlib c. Ucraina, §§ 38 e 50).

Mais le pouvoir du juge est plus immédiat aussi.

En effet, dans les cas où une règle nationale soit évaluée en conflit avec la normative communautaire, le juge est tenu à la désapplication de la règle, en faveur de la règle transnationale.

Les arrêts les plus récents, comme déjà vu, ont affirmé que la Convention Européenne pour la Sauvegarde des Droit de l'Homme doit assumer un rôle direct dans l'ordre judiciaire italien, consentant ainsi au juge d'en utiliser les préceptes soit comme modèle herméneutique, soit comme règle en cas de conflits avec le droit national.

Il est donc évident que le rôle du juge, singulièrement considéré, est déterminant dans les problèmes que nous sommes en train d'affronter.

3.1. Justice juridique et justice essentielle

L'accueil de la jurisprudence CEDH peut devenir pour le juge italien une occasion pour un rapprochement possible de la justice « juridique » à l'essentiel, à travers une activité herméneutique sensible aux instances transnationales et à l'évolution de l'éthique.

Sur le juge cependant continue à s'accabler un risque disciplinaire et juridique qui, d'une façon ou de l'autre, peut limiter la liberté des choix herméneutiques.

En effet, malgré la liberté reconnue, le juge subit de cette manière des liens "environnementaux" qui peuvent le porter vers une limitation de l'ouverture herméneutique.

Dans cette perspective le juge risque aussi de nuire considérablement à sa propre image et à sa carrière.

Mais le risque le plus grand est d'assister à une tentative constante de décharger les responsabilités sur d'autres organes (Cour Constitutionnelle, Cour de Justice), en évitant ainsi de prendre la responsabilité des décisions qui ne sont pas soutenues par la normative spécifique.

4. Considérations finales

Le problème n'a pas une solution facile.

En effet le sujet est lié à la sensibilité éthique et culturelle, soit du juge soit du législateur.

Dans l'application pratique il est réel certainement le risque d'une dichotomie d'application entre juges de générations différentes. Sur le point, il y a une étude intéressante dell'ANM sur les effets liés au "renouvellement" de la Cour de Cassation, même si avec référence aux décisions de caractère général.

À mon avis il est donc opportun d'avoir une intervention législative en matière ou une indication politique claire, qui permettent aux juges d'appliquer une règle et de vérifier dans les sièges institutionnels internes et transnationaux le contraste entre les débuts concernant l'appartenance à l'Union Européenne et la Convention pour la Sauvegarde des Droits de l'Homme.

Il est certainement nécessaire d'offrir une formation adéquate aux magistrats. Le problème est très délicat parce que la formation peut involontairement conditionner la liberté du juge, et, donc, il est certainement préférable de charger les juges de l'organisation de leur propre formation.

Réflexions sur l'office du juge

Julien Henninger

Abstract

This article discusses the role of the judicial branch regarding LGBT rights, drawing on the broader question of equality. It seems that there should be a necessary self-restraint from the judiciary on politically or socially charged questions. Societal choices ought to be made by a public debate and not by a secret judicial conference in which votes are tallied. The French "Conseil constitutionnel" leaves a margin of discretion to the legislative power, as the ECHR sometimes does to the States. Judges, whose decisions are subject to appeal, have to be even more careful. If courts and tribunals must strike down any provision that is discriminatory, judges should keep in mind that there is a thin difference between political and judicial judgments.

* * *

L'égalité peut recevoir plusieurs définitions, et puisqu'il faut choisir un point de départ, voilà le considérant type du Conseil constitutionnel français sur la question : « le principe d'égalité ne s'oppose ni à ce que le législateur règle de façon différente des situations différentes ni à ce qu'il déroge à l'égalité pour des raisons d'intérêt général pourvu que, dans l'un et l'autre cas, la différence de traitement qui en résulte soit en rapport avec l'objet de la loi qui l'établit »[1]. Le principe d'égalité ne signifie donc nullement une stricte et universelle égalité juridique ; toutefois, les différences de traitement doivent être justifiées, sous peine de devenir des discriminations et d'être sanctionnées par le juge.

L'office du juge peut sembler aisé à définir : il lui appartient de sanctionner une pratique discriminatoire, et de faire respecter le principe d'égalité. C'est donc lui qui, *in fine*, va tracer la frontière entre ce qui est une différence de situation – légale[2] –, et ce qui constitue une discrimination – illégale –. Il n'est pas ici question de se demander où doit se situer cette frontière, mais de s'interroger sur la place du juge dans ce contrôle. L'office du juge est de trancher le litige, de donner une solution au différend présenté par les parties. Mais son office « reste lié aux fonctions

[1] Rédaction constante, voir notamment Conseil constitutionnel, 7 janvier 1988, n° 87-232 DC.

[2] Dans un sens large de la légalité, soit la conformité aux normes supérieures.

que lui reconnaît le système juridique et aux missions qui lui sont dévolues. Certes, cela implique une certaine marge de liberté et d'initiative. Mais cela suppose surtout que le juge soit encadré par des normes qu'il doit mettre en œuvre, interpréter et appliquer, ainsi que par les limites du litige, essentiellement sinon uniquement tracées par les prétentions des parties »[3]. La question de sa marge de liberté et d'initiative reste posée en doctrine, et les points de vue sont très opposés entre le point de vue selon lequel la puissance « de juger est en quelque façon nulle »[4] et celui qui fait du juge le véritable créateur de la norme[5]. Ces quelques pages n'ont certainement pas pour objectif de trancher ce débat, mais de proposer un rapide état des lieux (très franco-français) du traitement judiciaire des questions LGBT et de soumettre quelques réflexions sur l'office du juge.

1. Le Conseil constitutionnel français

Le Conseil constitutionnel reste prudent dans son contrôle de constitutionnalité des lois, cherchant à ne pas substituer son appréciation à celle du législateur. Il refuse parfois de procéder à un réel contrôle de proportionnalité et lui préfère un contrôle dit de l'erreur manifeste d'appréciation.

Deux décisions récentes liées aux questions LGBT illustrent cela. Tout d'abord, sur la question de l'adoption réservée aux seuls couples mariés, il a jugé qu'« en maintenant le principe selon lequel la faculté d'une adoption au sein du couple est réservée aux conjoints, le législateur a, dans l'exercice de la compétence que lui attribue l'article 34 de la Constitution, estimé que la différence de situation entre les couples mariés et ceux qui ne le sont pas pouvait justifier, dans l'intérêt de l'enfant, une différence de traitement quant à l'établissement de la filiation adoptive à l'égard des enfants mineurs ; qu'il n'appartient pas au Conseil constitutionnel de substituer son appréciation à celle du législateur sur les conséquences qu'il convient de tirer, en l'espèce, de la situation particulière des enfants élevés par deux personnes de même sexe »[6]. Puis, à propos de l'interdiction du mariage entre personnes de même sexe, qu'« en maintenant le principe selon lequel le mariage est l'union d'un homme et d'une femme, le législateur a, dans l'exercice de la compétence que lui attribue l'article 34 de la Constitution, estimé que la différence de situation entre les couples de même sexe et les couples composés d'un homme et d'une femme peut justifier

[3] Jean-Louis Bergel, « Introduction générale », colloque sur *L'office du juge*, organisé au Sénat les 29 et 30 septembre 2006, <http://www.senat.fr/colloques/office_du_juge/office_du_juge1.html>.

[4] Montesquieu, *L'Esprit des lois*, Livre XI, chapitre VI, p. 50, <http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_2/esprit_des_lois_Livre_2.pdf>.

[5] Voir par exemple la théorie réaliste de l'interprétation de Michel Troper, voir notamment « Le positivisme juridique », *Pour une théorie juridique de l'État* (PUF, 1994), p. 35.

[6] Conseil constitutionnel, 6 octobre 2010, n° 2010-39 QPC.

une différence de traitement quant aux règles du droit de la famille ; qu'il n'appartient pas au Conseil constitutionnel de substituer son appréciation à celle du législateur sur la prise en compte, en cette matière, de cette différence de situation »[7].

Le législateur et le Conseil constitutionnel n'ont donc pas le même rôle, puisque, selon la formulation constante, il « n'appartient pas au Conseil constitutionnel de substituer son appréciation à celle du législateur ».

Le contrôle doit toutefois se diviser en deux temps : il faut tout d'abord vérifier la présence d'une différence de situation, puis que le traitement de cette différence est légal. Dans les deux décisions précitées, le Conseil ne conteste pas qu'il existe une différence de situation (ici entre couples mariés et non-mariés, et entre couples de même sexe et couples composés d'un homme et d'une femme), et l'on doit en déduire qu'il estime qu'elle existe bien. Il est pourtant de son office de vérifier que la différence de situation est réelle et il a déjà pu censurer un texte fiscal qui « aboutit à traiter différemment […] des contribuables qui peuvent être placés dans des conditions quasiment identiques »[8]. Cette appréciation de l'existence de situations différentes a été effectuée dans plusieurs décisions, sur des questions diverses, et sans qu'il apparaisse que le Conseil constitutionnel procède à autre chose qu'un contrôle de proportionnalité[9].

Une fois cette différence de situation constatée, il reste à apprécier les conséquences à tirer de celle-ci, puisque rien « n'oblige à traiter différemment des personnes se trouvant dans des situations différentes »[10]. C'est ici que l'office du juge est particulier, et le conduit à accepter que le législateur conserve une marge de manœuvre sur les conséquences juridiques à tirer de cette différence. Ce raisonnement est constant, et est notamment repris, depuis une décision de 1974 sur l'interruption volontaire de grossesse, par la formule « l'article 61 de la Constitution ne confère pas au Conseil constitutionnel un pouvoir général d'appréciation et de décision identique à celui du Parlement, mais lui donne seulement compétence pour se prononcer sur la conformité à la Constitution des lois déférées à son examen »[11]. Celle-ci fut complétée par la formulation « il n'appartient pas au Conseil constitutionnel de substituer sa propre appréciation à celle du législateur » dans une décision de 1981[12]. Cette retenue apparait dans des domaines variés, tels que la définition des peines et délits[13] ou en matière électorale[14], et la démarche suivie par le

[7] Conseil constitutionnel, 28 janvier 2011, n° 2010-92 QPC.

[8] Conseil constitutionnel, 3 juillet 1986, n° 86-209 DC.

[9] Sur la différence de situations entre cadres selon la taille des entreprises, Conseil constitutionnel, 20 juillet 1983, n° 83-162 DC ; ou sur la nature juridiques des banques, Conseil constitutionnel, 16 janvier 1982, n° 81-132 DC.

[10] Conseil constitutionnel, 29 décembre 2003, n° 2003-489 DC.

[11] Conseil constitutionnel, 15 janvier 1975, n° 74-54 DC.

[12] Conseil constitutionnel, 20 janvier 1981, n° 80-127 DC.

[13] *Ibid*.

[14] Voir par exemple, Conseil constitutionnel, 18 novembre 1986, n° 86-218 DC.

Conseil constitutionnel dans les décisions récentes liées aux questions LGBT s'inscrit dans une jurisprudence classique.

Notons enfin que si le Conseil constitutionnel laisse toute liberté au législateur pour estimer que le mariage est l'union d'un homme et d'une femme, il ressort d'une lecture *a contrario* de sa décision du 28 janvier 2011, puis « qu'il n'appartient pas au Conseil constitutionnel de substituer son appréciation à celle du législateur sur la prise en compte, en cette matière, de cette différence de situation »[15], que si le législateur français décidait d'autoriser le mariage entre personnes de même sexe, la loi qui procéderait à cette modification du Code civil serait conforme à la Constitution. Rien dans la Constitution ne semble ni interdire ni autoriser le mariage homosexuel et c'est au législateur (et non au juge) de procéder à ce choix. L'office du juge n'est donc pas infini, et il faut admettre qu'il existe des domaines précis où il ne peut apporter aucune réponse juridique. Cette marge de manœuvre laissée au législateur peut sûrement se rapprocher de la doctrine des *political questions* développée aux États-Unis par la Cour suprême[16]. Il est des questions qui « par leur nature politique, ou qui, par la Constitution ou par les lois, sont soumises à la branche exécutive, ne peuvent être soumises »[17] aux tribunaux. Un des critères développés par la Cour suprême lui permet de refuser de trancher au fond une question si elle ne peut être décidée sans un choix initial de politique qui ne peut dépendre de l'appréciation du juge[18].

2. Le juge ordinaire

Cette retenue existe également pour le juge ordinaire, qui doit lui aussi apprécier ce qui est de son office. La retenue semble nécessairement devoir être plus importante pour les juges du fond. En effet, une décision de justice qui déclarerait pour la première fois illégale une différence de situation doit de manière préférentielle venir des juridictions placées au sommet de la hiérarchie judiciaire. En tout cas, il semble opportun qu'un revirement de jurisprudence ou qu'une création jurisprudentielle importante provienne de la juridiction qui a la compétence de cassation[19]. Cela nous semble d'autant plus vrai quand la question est sensible, politiquement ou socialement. Le juge de première instance doit être particulièrement prudent et se demander s'il est bien de son office de juger dans un sens qui ne sera peut-être pas celui retenu par un

[15] Voir Conseil constitutionnel, 27 janvier 2011, *op. cit.*

[16] Baker v. Carr, 369 U.S. 186, 210-219 (1962).

[17] « Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court »? Marbury v. Madison, 5 U.S. 137, 170 (1803);

[18] « The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion », Baker v. Carr, 369 U.S. 186, 217 (1962).

[19] Prudence de langage liée au fait que le Conseil d'État, juge de cassation de l'ordre administratif, a également des compétences de première instance et d'appel. Peu importante qu'il procède à une nouveauté jurisprudentielle en cassation ou en première instance.

autre juge, les divergences de jurisprudence entre tribunaux entrainant de sérieuses questions de sécurité juridique, de prévisibilité et d'uniformité de la règle.

La question de l'adoption illustre ces difficultés. Pour pouvoir adopter un enfant en France, une personne ou un couple doit se voir délivrer un agrément par l'administration. Le parcours contentieux de Mlle B. est topique. Celle-ci souhaite adopter, mais l'agrément nécessaire lui a été refusé en 1998 et 1999 à raison de son homosexualité (explicitement ici, la décision se fondait sur « l'absence d'image ou de référent paternels susceptibles de favoriser le développement harmonieux d'un enfant adopté, et, d'autre part, sur la place qu'occuperait [son] amie dans la vie de l'enfant »[20]). Ce motif fut considéré comme illégal, et le refus d'agrément annulé par le tribunal administratif de Besançon, juridiction de première instance, en 2000[21]. La cour administrative de Nancy, sur appel de l'autorité administrative, a tranché cette question dans un sens contraire, dans une formulation prudente. Le refus pouvait légalement être opposé à la requérante, « eu égard à ses conditions de vie et malgré des qualités humaines et éducatives certaines, ne présentait pas des garanties suffisantes sur les plans familial, éducatif et psychologique pour accueillir un enfant adopté »[22]. Il convient d'ailleurs de noter que cet arrêt a été rendu non seulement dans un délai particulièrement court, mais également par la formation plénière de la cour, qui est la plus solennelle prévue par les textes. Cet arrêt fut confirmé en cassation par le Conseil d'État[23], et les conclusions du commissaire du gouvernement rappelaient à cette occasion que « c'est au législateur qu'il revient en premier lieu de se prononcer »[24]. Les décisions de la cour administrative d'appel et du Conseil d'État étaient conformes à ce qui était alors la jurisprudence de la Cour européenne des droits de l'homme[25].

Mlle B. décida toutefois de poursuivre son action en justice devant la Cour de Strasbourg, qui décida en sa faveur, en retenant que « si les raisons avancées pour une telle distinction se rapportaient uniquement à des considérations sur l'orientation sexuelle de la requérante, la différence de traitement constituerait une discrimination au regard de la Convention »[26]. Mlle B. demanda alors une nouvelle fois que lui soit délivré un agrément, demande rejetée en 2009, mais non pour des motifs liées à son orientation sexuelle, mais pour des « divergences conséquentes »[27] sur le projet d'adoption entre elle et sa compagne. Ce refus fut annulé par le tribunal administratif de Besançon, qui a enjoint que soit délivré à Mlle B. l'agrément demandé[28].

[20] Voir la décision TA Besançon, 24 février 2000, Mlle B., n° 990541.
[21] *Ibid*.
[22] CAA Nancy, 21 décembre 2000, Mlle B., n° 00NC00375.
[23] CE, 5 juin 2002, Mlle B., n° 250333.
[24] Pascale Fombeur, conclusions sous CE, 5 juin 2002, *op. cit.*
[25] CEDH, 26 février 2002, Fretté c/ France, n° 36515/97.
[26] CEDH, 22 janvier 2008, E.B. c/ France, n° 43546/02.
[27] TA Besançon, 10 novembre 2009, Mme B, n° 0900299.
[28] *Ibid*.

Ce long récit n'a pas pour unique but de détailler la vie contentieuse d'un dossier qui a conduit la Cour européenne à une importante décision et à un revirement de sa propre jurisprudence. Il vise surtout à rappeler que si l'on parle d'office du juge, il nous semble que les juges ne peuvent avoir le même comportement en fonction du degré de juridiction. L'on peut saluer l'audace du tribunal administratif de Besançon, qui dès 2000 a anticipé la solution définitive qui sera la sienne neuf ans plus tard. Mais était-il de son office de juge de première instance de décider que l'homosexualité de Mlle B. ne pouvait fonder un refus d'agrément, et ce en contradiction avec la jurisprudence contemporaine ? Il était plus prudent, d'un strict point de vue de cohérence juridique, (et de sécurité juridique !) d'attendre que le Conseil d'État, et après la décision Fretté de 2002 la Cour européenne des droits de l'homme, se prononcent sur la question.

Pour atténuer cette règle de prudence, il faut dire que les juges de première instance peuvent (doivent ?) parfois servir d'aiguillon aux infléchissements de jurisprudence. Toutefois, les conséquences d'une création jurisprudentielle en premier ressort ne doivent pas être sous-estimées. Tout d'abord, elle fait entrer les requérants dans un jeu de roulette géographique : ceux qui habitent dans le ressort du tribunal audacieux obtiendront gain de cause, leurs voisins auront une fortune différente. Ensuite, elle soulève au dessus du requérant qui obtient gain de cause l'épée de Damoclès de l'appel ou de la cassation. Mlle B. n'a obtenu qu'une victoire très temporaire en 2000, et l'agrément obtenu devant le juge de première instance[29] a disparu quelques mois plus tard quand cette décision a été annulée en appel. S'il est parfois nécessaire et salutaire que les juges du fond fassent preuve d'audace, il ne faut pas sous-estimer le risque d'incertitude juridique qui pèse sur le requérant qui en bénéficie.

3. La Cour européenne des droits de l'homme

La Cour se trouve dans une situation comparable[30] avec la marge d'appréciation laissée aux États membres. Cette marge est même souvent au cœur de son contrôle, et les exemples contentieux déjà cités sur l'adoption par une personne célibataire homosexuelle le rappellent. Dans sa décision Fretté c/ France de 2002, la Cour « avait accepté que les autorités nationales disposent d'une large marge d'appréciation lorsqu'elles sont appelées à se prononcer dans un tel domaine »[31]. Les opinions dissidentes dans la décision E.B. c/ France de 2008, qui infirme cette position, rappellent à plusieurs occasions que cette question devait, au sens de certains juges,

[29] Le tribunal administratif de Besançon avait déjà enjoint à l'autorité administrative de délivrer sous quinze jours l'agrément demandé.

[30] Voir notamment Mireille Delmas-Marty et Marie-Laure Izorche, « Marge nationale d'appréciation et internationalisation du droit » (2000) *Revue internationale de droit comparé*, p. 754.

[31] CEDH, 22 janvier 2008, E.B. c/ France, n° 43546/02, point 70.

continuer à relever de la marge d'appréciation des États[32]. La question de la marge d'appréciation est classique et a pu par exemple jouer récemment dans les deux décisions Lautsi sur la présence de crucifix dans les écoles italiennes[33] : elle n'est donc pas propre aux questions LGBT.

4. En conclusion

La frontière entre le droit et la politique est certainement poreuse et fluctuante dans le temps, mais il faut rappeler que le juge n'a pas la même marge de manœuvre que le législateur[34]. Il est d'ailleurs préférable que cela ne soit pas le cas : les choix de société doivent être faits non dans le secret d'un délibéré, mais par un débat et un choix publics. Si certaines questions relèvent en priorité de la décision politique, cela ne signifie en rien qu'elles échappent au contrôle du juge[35], mais simplement que les normes supérieures qui s'imposent à celui qui édicte la règle ne lui commandent pas la solution. Dans certaines limites toujours présentes, il est donc légal d'interdire comme il est légal d'autoriser. L'office du juge s'arrête donc là où commence le choix politique. Cette frontière, certes fixée de manière définitive par le juge, ne lui appartient pas entièrement, et il ne peut ici faire abstraction de la teneur, au moment où il statue, du débat politique.

[32] Idem, voir les opinions dissidentes, explicitement des Juges Loucaides et Mularoni.

[33] « Le choix de la présence de crucifix dans les salles de classe des écoles publiques relève en principe de la marge d'appréciation de l'Etat défendeur », CEDH, Grande chambre, 18 mars 2011, Lautsi c/ Italie, n° 30814/06 ; voir également dans la même affaire la décision de la deuxième section du 3 novembre 2009.

[34] Dans un sens strict, ou dans le sens plus large de celui qui fait les règles générales et impersonnelles.

[35] Cela est rappelé explicitement tant par la Cour suprême des États-Unis que par la CEDH.

Médiation et conciliation dans les litiges en matière de discrimination

Chrysoula Malisianou

Résumé

Les modes alternatifs de règlement des conflits connaissent un véritable essor en France. Outre la médiation décidée par certains juges ou autorités du secteur public, il existe parmi les modes alternatifs de résolution des différends, ceux qui ont été mis en œuvre par la haute autorité de lutte contre les discriminations et pour l'égalité (ci-après la HALDE), pendant ses six années et demi d'existence. Il s'agit de la médiation, du règlement amiable et de la mission de bons offices. Ces procédures, qui n'appellent aucune participation financière des parties, ont permis la résolution amiable des conflits, en instaurant ou en restaurant un dialogue entre les parties, tout en dégageant une solution tenant compte des intérêts de chacun.

Depuis le 1er mai 2011, le Défenseur des droits, qui a notamment succédé à la HALDE, poursuit la mise en œuvre de ces procédures. Le règlement des différends par ses délégués est désormais inscrit dans la loi (article 37 de la loi organique n° 2011-333 du 29 mars 2011 relative au Défenseur des droits) et il peut proposer une médiation (article 26 de cette loi). Il reste toutefois à déterminer les modalités d'intervention de ce nouveau médiateur défenseur.

Abstract

Alternative dispute resolutions are booming in France. In addition to mediation decided by some judges or public sector authorities, there are other alternative dispute resolutions that were implemented by the High Authority against Discrimination and for Equality (hereinafter HALDE) during its six and a half years of existence. One is mediation, the amicable settlement and the mission of good offices. These procedures, which require no financial contribution of the parties, allow the amicable resolution of conflicts by establishing or restoring a dialogue between the parties, while generating a solution taking into account the interests of everyone.

Since May 1st 2011, the Defender of rights, which notably succeeded HALDE, continues the implementation of these procedures. The settlement of disputes by its delegates is now enshrined in the law (article 37 of organic law No. 2011-333 of 29 March 2011 on the Defender of rights) and the Defender may propose mediation (article 26 of that act). However the modalities of intervention of the new mediator defender remain to be determine.

* * *

L'essor en France des modes alternatifs de règlement des conflits[1], depuis les années 1980-1990, est lié au constat des limites du système judiciaire lui-même. Il s'agit, par leur biais, de répondre à certains des dysfonctionnements de la justice (encombrement, lenteur, coût, complexité et distance).

Parmi ces modes alternatifs de résolution des différends, il existe en France la procédure de médiation qui peut être décidée par certains juges (pénal, civil) ou par d'autres autorités du secteur public (par exemple : le médiateur de l'éducation nationale, le médiateur de la Poste, le médiateur des ministères de l'économie et du budget…). Ainsi, on constate une multiplication des acteurs principalement publics, à qui sont confiées, à titre bénévole ou non, des missions de médiation, conciliation ou de règlement amiable.

Concernant plus particulièrement, les litiges dans lesquels la violation du principe de non-discrimination est soulevée, c'est la HALDE, qui pendant ses six années et demi d'existence a été l'initiatrice et, donc au cœur, des modes alternatifs de règlement des conflits en cette matière.

L'intégration de la médiation notamment dans les missions de la HALDE vient de l'observation de ce qu'une structure comparable existant au Canada (la Commission des droits de la personne et des droits de la jeunesse du Québec) traite 85 % des dossiers de discrimination par voie de médiation[2].

Jusqu'au 1er mai 2011, date de sa fusion au sein du Défenseur des droits (ci-après le Défenseur), la HALDE a mis en œuvre la médiation, le règlement amiable et les bons offices.

Ainsi, au niveau de la HALDE, il convient de distinguer les missions de bons offices, conduites par ses 130 correspondants locaux ou ses 6 délégués régionaux[3], qui interviennent localement sur toute l'étendue du territoire français[4], en amont de toute instruction, des règlements amiables confiés à ses chargés d'enquête ou juristes au siège de l'institution à Paris. Il faut également distinguer ces deux procédures, des médiations confiées à des tiers par le Collège de la HALDE après une instruction ayant mis en évidence au moins une forte présomption de discrimination.

L'esprit de ces procédures, qui n'appellent aucune participation financière des parties, est le même et l'objectif poursuivi commun : trouver une solution de manière amiable en instaurant ou en restaurant un dialogue entre les parties, susceptible de dégager une solution tenant compte des intérêts de chacun. Dans les trois

[1] Il s'agit d'alternatives à une procédure contentieuse dans un différend portant sur des droits dont les parties ont la libre disposition.

[2] En outre, la Grande-Bretagne, les Etats-Unis, la Suède, l'Irlande et la Belgique ont également une expérience importante en matière de médiation menée soit par des organismes indépendants de lutte contre les discriminations, soit par des organismes spécialisés dans la médiation.

[3] Au 31 décembre 2010.

[4] Au 31 décembre 2010, il existait 203 lieux de permanences des correspondants locaux dans 78 départements.

cas, il s'agit de l'action d'un agent de la HALDE ou d'un professionnel extérieur à celle-ci ayant pour finalité de contribuer à résoudre à l'amiable un différend.

La majorité de ces procédures visent à permettre aux victimes de rester dans leur emploi tout en assurant la réparation du préjudice subi. Elles ne sont proposées que s'il s'agit de la solution la plus efficace pour faire cesser le différend dans l'intérêt des parties.

Il existe ainsi un proverbe selon lequel « *un mauvais arrangement vaux mieux qu'un bon procès* », dans la mesure où d'aucuns estiment que la conciliation entre les parties est toujours plus profitable que le conflit. Ainsi, considérés par certains comme le vrai remède à tous les différends, ils suscitent également méfiance et hostilité. Au-delà de ce débat, c'est au travers de l'examen de leur efficacité qu'il convient d'apprécier les modes alternatifs de règlement des conflits.

Il est vrai que les procès ou les recommandations générales émises par le Collège de la HALDE sont très importants en termes de pédagogie et d'exemplarité, nécessaires au changement des mentalités en matière de discrimination, car leur retentissement est souvent considérable. Toutefois, outre que les procédures de médiation, de règlement amiable ou de bons offices pratiquées par la HALDE revêtent parfois également ce caractère pédagogique (cf. *infra*), il s'agit de procédures très efficaces qui permettent aux victimes, tant de recouvrer leur dignité, que d'obtenir des réparations morales et matérielles importantes.

Ainsi, sur les 12 467 réclamations enregistrées en 2010 par la HALDE, plus de 450 dossiers ont trouvé une solution grâce aux bons offices et règlements amiables mis en œuvre par ses correspondants locaux ou ses chargés d'enquête et juristes. De telles procédures sont réellement montées en puissance ces dernières années.

En outre, depuis sa création, 63,5 % des médiations décidées par le Collège de la HALDE ont abouti à un accord satisfaisant pour les parties. En 2010, sur 279 dossiers présentés au Collège, 19 médiations ont été décidées par ce dernier.

Par suite, c'est de l'expérience de la HALDE dont il sera principalement fait état dans la présente contribution. Nous verrons que, s'agissant de procédures juridiquement encadrées répondant à des conditions précises (1), dont la mise en œuvre requiert des modalités particulières (2), elles ont permis la résolution efficace de nombreux conflits dont la HALDE a été saisie (3).

1. Des procédures juridiquement encadrées répondant à des conditions précises

La médiation, le règlement amiable ou les bons offices pratiqués par la HALDE, pendant ses six années et demi d'existence, tant dans le secteur public, que le secteur privé, sont des procédures encadrées par le droit (1.1), qui ne sont ni un marchandage, ni une négociation entre les parties pour régler un différend. Ces procédures se poursuivent au sein du Défenseur (1.2).

1.1. Au sein de la HALDE

a. Missions et pouvoirs

Il convient de faire un point sur les missions et pouvoirs qui étaient dévolus à la HALDE et qui se retrouvent aujourd'hui au sein du Défenseur.

La HALDE, autorité administrative indépendante, a été crée par la loi n° 2004-1486 du 30 décembre 2004. Elle était « compétente pour connaître de toutes les discriminations, directes ou indirectes, prohibées par la loi ou par un engagement international auquel la France est partie » (article 1er de la loi n° 2004-1486 du 30 décembre 2004 portant création de la HALDE). Ainsi, chargée de lutter contre toutes les formes de discriminations en France, il lui incombait de traiter les réclamations individuelles dont elle était saisie et de celles dont elle se saisissait d'office.

Elle avait ainsi pour tâche d'accompagner les victimes de discrimination dans la constitution de leur dossier, ainsi que d'identifier les procédures adaptées à leur cas et de promouvoir les bonnes pratiques afin de passer d'une égalité formelle à une égalité réelle.

Pour ce faire, des pouvoirs d'investigation importants lui ont été attribués, qu'elle a mis en œuvre pour instruire les réclamations dont elle a été saisie. La HALDE avait ainsi autorité sur les personnes publiques et privées pour obtenir toute information et tout document qu'elle jugeait nécessaire (pouvoir de vérification sur place ; d'entendre toute personne dont elle juge l'audition nécessaire ; de demander à toute personne physique ou morale et aux personnes publique des explications et la communication d'informations ou de documents utiles au dossier ; de mettre en demeure le mis en cause de lui répondre dans le délai qu'elle fixe et de saisir le juge des référés afin qu'il ordonne toute mesure d'instruction qu'il juge utile).

Si, à l'issue de cette enquête, la personne mise en cause n'arrivait pas à faire échec à la présomption de discrimination résultant du dossier, le Collège de la HALDE pouvait décider entre plusieurs solutions envisageables : émettre des recommandations générales ou particulières qui pouvaient être rendues publiques par le bais de rapports spéciaux ; présenter des observations devant les juridictions civiles, pénales ou administratives en qualité d'expert du droit de la discrimination, de sa propre initiative (dans ce cas son audition était de droit), ou à la demande des parties ; s'agissant des faits constitutifs d'une discrimination au sens pénal : le dossier pouvait être transmis au Procureur de la République, une transaction pénale pouvait être proposée ou, encore, le mis en cause pouvait directement être cité devant le tribunal. Enfin, une médiation pouvait être proposée afin de permettre la résolution amiable des différends.

Ses correspondants locaux, délégués régionaux, ou les agents de sa cellule du règlement amiable à Paris pouvaient quant à eux mettre en œuvre des règlements amiables ou des missions de bons offices.

b. Le pouvoir de proposer des médiations, des bons offices ou des règlements amiables

L'article 7 de la loi n° 2004-1486 du 30 décembre 2004 précitée disposait que « la haute autorité peut procéder ou faire procéder à la résolution amiable des différends portés à sa connaissance, par voie de médiation ». Toutefois, les actions de média-

tion de la HALDE devaient être portées à la connaissance du Procureur de la République lorsque les faits discriminatoires pouvaient constituer un crime ou un délit (article 12 de la loi du 30 décembre 2004).

Concernant les modalités de cette médiation et les exigences requises du médiateur, elles sont fixées par l'article 28 du décret n° 2005-215 du 4 mars 2005 relatif à la HALDE[5].

S'agissant des bons offices et des règlements amiables, ils trouvaient leur source dans une délibération du Collège de la HALDE du 23 avril 2007, qui précisait qu'une des missions du correspondant local notamment était de « contribuer à trouver toute solution permettant de traiter une réclamation, fondée sur une discrimination alléguée lorsque celle-ci ne paraît pas, selon la Direction des affaires juridiques de la HALDE, justifier une instruction préalable ».

Des conditions précisent encadrent toutes ces procédures.

c. Les conditions de la médiation

Posées par l'article 28 du décret n° 2005-215 du 4 mars 2005 susmentionné, elles résultent également de la pratique de cette procédure au sein de la HALDE :

– la mise en œuvre d'une médiation nécessite l'accord écrit du réclamant et du mis en cause ;
– la médiation n'intervient, qu'après une instruction plus ou moins approfondie selon les situations à l'égard du réclamant et/ou du mis en cause, menée par le Direction des affaires juridiques (DAJ) de la HALDE (par ses chargés d'enquête ou ses juristes). Cette instruction permet au minimum de mettre en évidence une présomption de discrimination (des éléments laissant supposer l'existence d'une discrimination) ;
– l'existence d'une procédure contentieuse pendante ne fait pas nécessairement obstacle à la médiation ;
– la médiation ne peut être décidée que par le Collège de la HALDE, qui invite son Président à désigner un médiateur : un tiers spécialiste extérieur à la HALDE. Il s'agit d'avocats-médiateurs formés par la HALDE, qui rencontrent les parties. Les médiateurs peuvent ainsi entendre, convoquer et confronter les points de vue des parties en vue de parvenir à une résolution amiable ;
– la procédure ne peut en principe excéder 6 mois ;
– enfin, elle se termine par la rédaction d'un protocole d'accord (qui comporte les prétentions des deux parties, le cadre juridique et les points d'accord conformes à ce cadre juridique) ou d'un procès-verbal de désaccord, dont le médiateur est partie et donc signataire. Une copie est laissée aux parties, une autre est gardée par la HALDE.

[5] En vigueur à la date de la présente contribution.

d. Les conditions des bons offices et des règlements amiables

Leur mise en oeuvre nécessite :

– l'accord écrit préalable du réclamant ;
– en principe, l'absence de procédure contentieuse pendante ;
– l'absence d'instruction conduite par la DAJ, sauf dans le cas où celle-ci réoriente un dossier vers le correspondant local ou le délégué régional (ainsi, l'instruction préalable du dossier n'est pas une condition préalable à leur mise en œuvre) ;
– les missions de bons offices sont dévolues aux agents de la HALDE localement : ses 130 correspondants locaux ou ses 6 délégués régionaux, qui interviennent sur toute l'étendue du territoire français. Dans le cadre de leurs missions de bons offices, les correspondants locaux et les délégués régionaux peuvent directement rencontrer les parties à un différend ;
– le règlement amiable est également exercé par les agents de la HALDE, mais seulement au siège de cette institution à Paris. Au sein de sa DAJ, il existe la cellule du règlement amiable qui procède à de tels règlements. Cette cellule est placée sous la responsabilité d'un juriste spécialiste en la matière, qui dispose d'une assistante. Elle comprend également des chargés d'enquête. Toutefois, dans ce cadre, les agents de la HALDE ne peuvent rencontrer les parties. Les échanges se passent uniquement par courrier ou téléphone ;
– enfin, qu'il s'agisse du règlement amiable ou des bons offices, si les agents de la HALDE peuvent inciter les parties à rédiger un accord afin de consacrer leurs engagements, ils ne peuvent être partie à cet accord ou en être les signataires.

1.2. Au sein du Défenseur des droits

Le 1er mai 2011, le Défenseur a succédé à la HALDE, ainsi qu'à trois autres autorités administratives indépendantes (le Médiateur de la République, le Défenseur des Enfants et la Commission Nationale de Déontologie de la Sécurité).

Considéré comme « l'Ombudsman le plus puissant d'Europe »[6], ou encore comme un « super médiateur »[7], il s'agit d'une autorité constitutionnelle indépendante qui reçoit les missions susmentionnées, précédemment dévolues à la HALDE, en ce qu'il est chargé « de lutter contre les discriminations, directes ou indirectes, prohibées par la loi ou par un engagement international, régulièrement ratifié ou approuvé par la France ainsi que de promouvoir l'égalité » (article 4 de la loi organique n° 2011-333 du 29 mars 2011 relative au Défenseur).

[6] Selon le Garde des Sceaux, Ministre de la justice, M. Michel Mercier.

[7] H. Portelli, « Le futur Défenseur des droits concentrera des missions dont il ne pourra s'acquitter », entretien publié sur Public Sénat, 12 février 2001, www.publicsenat.fr

a. Des pouvoirs renforcés et la mission de médiation poursuivie

Les pouvoirs d'enquêtes précités, attribués à la HALDE, sont renforcés au sein du Défenseur qui assiste la personne qui s'estime victime dans la constitution de son dossier et « l'aide à identifier les procédures adaptées à son cas ».

Ainsi, à titre d'illustration, outre que le caractère secret ou confidentiel notamment des informations ne peut lui être opposé sauf en matière de défense nationale, de sûreté de l'Etat ou de politique extérieure, pas plus que le secret de l'enquête ou de l'instruction, le fait de ne pas déférer aux convocations du Défenseur, de ne pas lui communiquer les informations et pièces utiles à l'exercice de sa mission ou de l'empêcher d'accéder à des locaux administratifs ou privés est puni d'un an de prison et de 15 000 € d'amende. Un délit d'entrave à l'exercice de ses missions a ainsi été créé. Par ailleurs, un droit de visite étendu au sein des locaux privés notamment est prévu. En effet, lorsque l'urgence, la gravité des faits, ou le risque de destruction de documents le justifient, la visite du Défenseur pourra se faire sans que le responsable des locaux en ait été informé, sur simple autorisation préalable du juge des libertés et de la détention.

Des modalités de règlement des litiges étendues sont également inscrites dans la loi. Ainsi, le Défenseur peut notamment recommander de régler en équité le différend dont il est saisi (article 25 de la loi organique n° 2011-333 du 29 mars 2011) et il poursuit la mission de médiation. Il « peut procéder à la résolution amiable des différends portés à sa connaissance, par voie de médiation » (article 26 de cette loi). Comme au sein de la HALDE, les actions de médiation du Défenseur doivent être portées à la connaissance du Procureur de la République, lorsque les faits discriminatoires peuvent constituer un crime ou un délit (article 33 de la loi organique n° 2011-333 du 29 mars 2011).

Il reste toutefois à déterminer, les modalités d'intervention de ce nouveau médiateur défenseur, qui pourra se faire soit, par la voie de la nomination d'un professionnel extérieur à ses services (comme au sein de la HALDE) soit, par ses services eux-mêmes (à l'instar de la procédure appliquée par l'ancien Médiateur de la République), ou encore par le maintien de ces deux options.

b. Les missions de bons offices et de règlements amiables inscrits dans la loi

Le Défenseur peut désigner, sur l'ensemble du territoire ainsi que pour les Français de l'étranger, des délégués, placés sous son autorité, qui peuvent, dans leur ressort géographique, instruire des réclamations et participer au règlement des difficultés signalées ainsi qu'aux actions mentionnées au premier alinéa de l'article 34. Afin de permettre aux personnes détenues de bénéficier des dispositions de la présente loi organique, il désigne un ou plusieurs délégués pour chaque établissement pénitentiaire[8].

Ainsi, ces procédures, désormais inscrites dans la loi, se poursuivent au sein du Défenseur. En outre, à la différence de la HALDE, la loi organique relative au Dé-

[8] Article 37 de la loi organique relative au Défenseur des droits.

fenseur, prévoit que ses délégués, compétents pour intervenir sur tout le territoire, pourront exercer des pouvoirs d'enquête, ce qui n'était pas le cas des correspondants locaux de la HALDE, mais seulement de ses délégués régionaux et de certains de ses agents du siège, à Paris.

Toutefois, au sein du Défenseur, les missions de bons offices et de règlement amiable devront se coordonner, principalement, avec l'action des délégués de l'ancien Médiateur de la République et des correspondants territoriaux de l'ex Défenseur des enfants, également présents sur le territoire français, en vue d'une intervention tout aussi efficace.

Les modalités de ces interventions dépendront des décrets ou des circulaires d'application de la loi organique n° 2011-333 du 29 mars 2011[9]. Nous pouvons, toutefois, légitimement supposer que les bonnes pratiques, issues des procédures mises en œuvre par la HALDE seront reprises au sein du Défenseur.

2. Les modalités de leur mise en œuvre

Il s'agit de préciser les garanties requises des professionnels chargés de la mise en œuvre des médiations, bons offices et règlement amiable (2.1), leurs formations (2.2), ainsi que les principales étapes de déroulement de ces procédures au sein de la HALDE (2.3).

2.1. Les garanties requises des médiateurs extérieurs et agents de la HALDE

Trois principales garanties peuvent être identifiées :

– la neutralité, l'impartialité et l'indépendance par rapport aux parties[10]. Les agents en charge de ces procédures ne sont pas les avocats ou les conseils juridiques des réclamants, ou des arbitres. S'agissant plus particulièrement du médiateur, celui-ci n'est toutefois pas neutre par rapport au principe de non-discrimination et doit veiller à ce que l'accord qui est adopté soit conforme à ce principe ;
– la confidentialité de la procédure et le respect du secret professionnel. Ainsi, une clause de confidentialité accompagne celle du consentement et permet ainsi de favoriser un véritable dialogue ;
– enfin, la formation ou l'expérience adaptée à la pratique de la médiation ou du règlement amiable et des bons offices dans les litiges en matière de discrimination.

[9] Ils n'ont pas été adoptés à la date de la présente contribution.

[10] Pour la médiation, cf. article 29 décret n° 2005-215 du 4 mars 2005 relatif à la HALDE, qui précise les conditions auxquelles doit satisfaire le professionnel qui assure l'exécution de cette procédure.

2.2. La formation des médiateurs et agents en charge des bons offices et des règlements amiables

Concernant, en premier lieu, la procédure de médiation, des médiateurs compétents et formés au droit des discriminations offrant des garanties nécessaires aux usagers étaient désignés[11].

La HALDE a ainsi formalisé la médiation en matière de discrimination, en vue d'assurer l'homogénéité du service offert aux réclamants. Ella a ainsi mis en place un réseau de médiateurs sur l'ensemble du territoire français (réseau divisé en sept zones géographiques)[12].

Elle a également élaboré avec le concours du centre de formation IFOMENE (Institut de Formation à la Médiation et à la Négociation), un module de formation spécifique à la médiation en matière de discrimination pour les médiateurs qui agissent en son nom sur l'ensemble du territoire (plus d'une cinquantaine d'avocats ont été formés dans ce cadre de 2007 à 2009). C'est principalement parmi ces médiateurs formés, que le Collège de la HALDE invitait son Président à désigner un médiateur.

S'agissant, en second lieu, des missions de bons offices ou des règlements amiables, ils étaient mis en œuvre par des agents de la HALDE ayant également bénéficié d'une formation professionnelle assurée par des médiateurs extérieurs, ainsi que par le juriste senior de sa DAJ en charge des correspondants locaux.

2.3. Les étapes du déroulement de la médiation, des bons offices et du règlement amiable

a. La médiation

- Avant la délibération du Collège

Lorsqu'au terme de l'enquête menée, les faits qui permettent de présumer l'existence d'une discrimination n'ont pas pu être justifiés par le mis en cause par des éléments objectifs étrangers à toute discrimination, une médiation pouvait être proposée aux parties par la DAJ de la HALDE ou par ses délégués régionaux.

L'accord de la partie mise en cause était sollicité par le biais d'un courrier qui lui était adressé exposant la situation, ainsi que le fait que la médiation proposée permettrait d'établir un dialogue susceptible de dégager un accord tenant compte des intérêts de chacun.

Si les parties étaient d'accord pour procéder par voie de médiation, un projet de délibération-médiation était préparé par le juriste en charge du dossier. Ce projet était présenté au Collège qui, s'il l'adoptait, invitait son Président à nommer un médiateur.

[11] Cf. article 29 décret n° 2005-215 du 4 mars 2005 relatif à la HALDE.

[12] cf. notamment, convention conclue, dès 2005, entre la HALDE et le Conseil National des Barreaux en vue de former les avocats médiateurs au droit des discriminations.

- Après la délibération du Collège

La HALDE a élaboré une procédure spécifique à la médiation en matière de discrimination, qui permet notamment de réunir les parties. Même si, à tout moment, l'une ou l'autre des parties peut se retirer de la médiation, le déroulement de la médiation HALDE comporte des étapes biens définies :

– tout d'abord, un ou plusieurs entretiens individuels avec chacune d'elles (le médiateur rencontre d'abord séparément le réclamant et la personne privée ou publique mise en cause). Ces entretiens individuels sont déterminants (explication du déroulement de la médiation, détermination des prétentions des parties, faire prendre conscience au mis en cause du problème, enjeux et préparation des parties à aller de l'avant vers un accord, rappel des termes de la délibération du Collège et du droit applicable. Par exemple : il expliquera au mis en cause que la sélection de candidats en fonction de leur âge constitue une discrimination prohibée par la loi) ;
– ensuite, une ou plusieurs réunions plénières avec les parties interviennent, afin de dégager l'accord préparé durant le travail préalable. Le rôle du médiateur est alors d'aider les parties à trouver un accord équitable sur les bases du droit de la non-discrimination ;
– enfin, en cas de succès, il y a signature d'un protocole d'accord de médiation ou, à défaut, signature d'un procès-verbal de désaccord.

b. Les bons offices et le règlement amiable

En dehors même de tout cadre formel de règlement amiable ou de bons offices, il arrivait souvent que les affaires se règlent à l'amiable du seul fait que les services de la HALDE aient fait savoir au mis en cause qu'ils étaient saisis. En effet, la saisine de la HALDE, eu égard à son autorité morale, et les premières mesures d'instruction, voire la simple invocation d'une de ses délibérations pouvait contribuer à inciter les parties à réexaminer leurs positions et aider à une prise de conscience, certes tardive, mais efficace[13].

Il convient ainsi de se référer à la situation d'un réclamant sourd à 80%, reconnu travailleur handicapé, employé par une entreprise de téléphonie en qualité de technicien qui a saisi la HALDE de son affectation, à la suite de la restructuration de l'entreprise, au sein du service hotline de « relation clientèle ». Dès réception de cette réclamation, la HALDE a adressé un courrier de demande d'explications à l'entreprise, tout en lui rappelant ses obligations en matière d'aménagement du poste de travail d'un travailleur reconnu handicapé. En réponse, l'entreprise a indiqué à la HALDE, que conformément aux obligations lui incombant, elle allait très prochainement proposer un poste adapté au handicap du réclamant. C'est ainsi, que grâce à un simple courrier adressé par la HALDE au mis en cause, la situation du réclamant s'est rapidement réglée. Ce dernier ne souhaitant pas aller plus avant dans

[13] Cf. rapport annuel de la HALDE de 2006 sur ce point.

le différend a fait savoir à la HALDE, qu'ayant obtenu un poste correspondant à ses attributions et adapté à son handicap, il s'estimait rempli de ses droits.

Dans le cadre de la mise en œuvre formelle des bons offices ou des règlements amiables, le correspondant local ou le délégué régional devait tenter d'aller au-delà des simples allégations du réclamant. Ainsi, il pouvait l'aider à rassembler des éléments de preuve à sa portée (tels que : contrat de travail, bulletins de paie, dossier administratif, attestations…) et prendre contact avec les personnes intervenues en faveur du réclamant (telles que les délégués du personnel, les délégués syndicaux). Le correspondant ou le délégué devait également : - se rapprocher du mis en cause sans être accusateur ; - veiller à demeurer impartial afin de faciliter la restauration du dialogue ; - et, inviter les intéressés à rédiger un accord pour consacrer leurs engagements.

Enfin, de telles procédures pouvaient aussi donner lieu à une délibération du Collège de la HALDE, par laquelle, il prenait acte de l'accord intervenu entre les parties, afin notamment d'en appuyer le caractère pédagogique (cf. *infra*).

3. L'efficacité de ces procédures

Elle se mesure au travers des avantages liés à ces procédures (3.1), des situations spécifiques dans lesquelles elles sont privilégiées (3.2), du suivi assuré en cas d'échec (3.3), ainsi que par des illustrations de différends qui ont été résolus par leurs biais (3.4 et 3.5).

3.1. Leurs avantages

Il s'agit principalement :

– d'éviter un contentieux lourd ;
– de procédures économiques, dont la mise en œuvre ne requière aucun frais de la part des parties ;
– de procédures rapides : surtout s'agissant de la mission de bons offices, dont l'intérêt réside notamment dans les délais plus rapides dans lesquelles elle peut être entreprise ;
– de permettre aux parties d'être auteurs de la solution ;
– de tenir compte des intérêts de chacun ;
– de ne pas envenimer ou cristalliser un conflit (prévention des tensions, apaisement des parties et responsabilisation des acteurs) ;
– et d'aboutir à une meilleure résolution des conflits, par le biais de solutions concrètes et efficaces au profit de la victime afin qu'elle retrouve sa dignité (réparations importantes du préjudice tant matériel que moral ; reconnaissance de la faute commise et du préjudice subi ; proposition d'un poste adapté à sa situation ; faire reconnaître ses droits ; présentation d'excuses…).

3.2. Situations dans lesquelles elles sont privilégiées

Outre qu'elles peuvent correspondre à une attente du réclamant, de telles procédures sont privilégiées dans des situations où celui-ci est toujours en poste et concernant lesquelles il paraît plus opportun de ne pas attiser un conflit, tout en essayant de concilier les parties.

Il peut également s'agir de situations de discriminations non intentionnelles, lorsque le mis en cause ne semble pas de mauvaise foi et que le différend paraît résulter : - d'une difficulté de communication entre les parties ; - ou d'une méconnaissance des textes législatifs ou réglementaires (ex : dispositif en faveur des personnes handicapées relatif à l'aménagement raisonnable des postes de travail, à l'accessibilité de la voirie et des lieux ouverts au public, à la priorité d'attribution des logements sociaux…).

3.3. Le suivi en cas d'échec de ces procédures

Si ces procédures échouaient et n'aboutissaient pas à un accord satisfaisant pour les victimes, la HALDE épaulait ces dernières afin d'aboutir à la résolution la plus efficace du conflit encore en suspend.

En effet, en cas d'échec de la médiation, des bons offices, ou du règlement amiable une instruction approfondie pouvait être initiée ou poursuivie. Des observations pouvaient également être présentées devant la juridiction qui avait pu être saisie par le réclamant. Les services de la HALDE examinaient alors si cette éventualité était opportune et présentaient, le cas-échéant, un nouveau projet de délibération-observations au Collège.

Toutefois, il était prévu que lorsqu'il était procédé à une médiation, « les constatations et les déclarations recueillies au cours de celle-ci ne peuvent être ni produites ni invoquées ultérieurement dans les instances civiles ou administratives, sans l'accord des personnes intéressées » (article 7 de la loi n° 2004-1486 du 30 décembre 2004, susmentionnée).

La loi organique du 29 mars 2011 relative au Défenseur, va plus loin sur ce point. Elle dispose que « les constatations effectuées et les déclarations recueillies au cours de la médiation ne peuvent être ni produites, ni invoquées ultérieurement dans les instances civiles ou administratives sans le consentement des personnes intéressées, sauf si la divulgation de l'accord est nécessaire à sa mise en œuvre ou si des raisons d'ordre public l'imposent » (par exemple : afin d'assurer l'intégrité physique d'une personne, s'agissant du dernier élément de cet article). Les deux derniers points de ces dispositions sont repris de la Directive communautaire 2008/52/CE du Parlement Européen et du Conseil du 21 mai 2008 relative à certains aspects de la médiation en matière civile et commerciale.

Il convient de se reporter à certains exemples d'échecs de médiations proposées par la HALDE, ayant notamment conduit à la présentation d'observations devant le juge saisi par le réclamant.

En premier lieu, nous pouvons mentionner la délibération n° 2008-31 du 18 fé-

vrier 2008 relative à une discrimination salariale, dans le secteur de privé, fondée sur le sexe. La réclamante avait saisi la HALDE d'une réclamation relative au litige qui l'opposait à son employeur, en considérant que sa rémunération était inférieure à celle de son collègue placé dans une situation comparable. L'enquête de la HALDE a révélé l'existence d'une discrimination salariale fondée sur le sexe et une procédure de médiation a été décidée. Toutefois, après l'échec de cette médiation, la HALDE a décidé de présenter ses observations devant le Conseil des Prud'hommes saisi, ainsi que devant toute autre juridiction compétente.

Cette affaire est allée jusqu'en cassation et la Cour de cassation a considéré que la HALDE était légitime à présenter ses observations dans ce cadre (les observations de la HALDE ne méconnaissent pas en elles-mêmes les exigences du procès équitable consacré par l'article 6§1 de la Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales, ni le principe de l'égalité des armes ou celui du contradictoire notamment). En outre, sur le fond de l'affaire, conformément aux observations de la HALDE, la discrimination a été retenue par la Cour[14]. Celle-ci a confirmé son analyse selon laquelle « le principe de l'égalité de rémunération entre hommes et femmes pour un même travail ou un travail de valeur égale » devait être assuré entre salariés de sexe différent, occupant des fonctions de valeur égale[15], sans qu'il soit nécessaire que le travail accompli par les salariés soit identique.

On peut également se référer à une autre affaire, dans le secteur public, concernant le rejet discriminatoire d'une candidature à raison de l'âge du candidat, qui était en poste lors de la mise en œuvre de la médiation (délibération n° 2010-25 du 1er février 2010). Le réclamant, infirmier psychiatrique au sein d'un centre hospitalier se plaignait des refus successifs d'inscription à la formation de « cadre», qui auraient porté préjudice au déroulement de sa carrière. Il estimait que ces refus étaient discriminatoires, car fondés sur son origine et son âge (58 ans à la date du dernier refus). Les éléments de l'enquête n'ont pas permis de retenir la discrimination à raison de l'origine de l'intéressé, une candidate d'origine étrangère ayant obtenu, l'année précédente, la promotion professionnelle pour le diplôme de cadre de santé. Toutefois, l'âge du réclamant a été retenu pour refuser l'inscription à cette formation, en méconnaissance du principe de non-discrimination, alors que cette condition ne répondait pas à une exigence professionnelle essentielle et déterminante et que l'objectif poursuivi n'était pas légitime et l'exigence proportionnée. Dans le cadre de la médiation, l'hôpital a reconnu la faute commise à l'égard du réclamant et lui a proposé la formation « cadre » souhaitée, ainsi qu'une indemnisation financière (près de 5000 €). Le réclamant n'a toutefois pas accepté ces propositions estimant que ses préjudices étaient plus importants. Dans l'éventualité d'un recours contentieux initié par le réclamant, le Défenseur pourrait être amené à produire ses observations.

[14] Arrêt du 16 novembre 2010, n° C 09-42.956.
[15] Arrêt du 6 juillet 2010, n° 09-40.021.

Il convient enfin de mentionner, une affaire dans laquelle la première procédure de médiation ayant échoué, la nomination d'un nouveau médiateur a été sollicitée par les parties, qui a conduit à une indemnisation très importante des préjudices subis par le réclamant.

La HALDE avait été saisie par un réclamant, cadre supérieur au sein d'une entreprise privée, qui s'estimait victime de discrimination en raison de son orientation sexuelle, dans le déroulement de sa carrière. Or, il est apparu, qu'à partir de la révélation de son homosexualité, l'évolution de la carrière du réclamant a été entravée par des mesures pouvant s'apparenter à du harcèlement discriminatoire (éviction de la direction, périodes sans affectations précises, attribution de fonctions aux responsabilités moindres…). Afin de favoriser la résolution amiable de ce litige, un médiateur avait été désigné, dont le mandat avait été renouvelé (délibération n° 2007-151 du 04 juin 2007). Toutefois, la première médiation décidée s'était soldée par un échec.

La HALDE avait alors poursuivi l'instruction du dossier. Parallèlement à cette instruction, les parties avaient poursuivi la recherche d'un accord amiable. C'est ainsi, qu'elles ont indiqué à la HALDE qu'elles étaient parvenues à un rapprochement de leurs positions et ont manifesté leur attachement à la présence de la HALDE pour concrétiser la conclusion de l'accord transactionnel. Par sa délibération n° 2009-309 du 7 septembre 2009, le Collège de la HALDE a décidé de nommer un médiateur. L'accord conclu entre les parties dans ce cadre a conduit à une indemnisation très importante des préjudices subis par le réclamant de 100 000 €.

Ainsi, nous allons voir que la procédure de médiation notamment est particulièrement efficiente dans le domaine de l'emploi, lorsque l'agent est toujours en fonction.

3.4. Quelques illustrations de médiations réussies

a. L'efficacité de la médiation dans le domaine de l'emploi public lorsque l'agent est en poste

C'est au travers des exemples qui suivent, que cette efficacité peut être appréciée.

- **Délibération relative aux refus d'accorder la priorité légale prévue pour les mutations au profit d'un agent public handicapé (n° 2010-146 du 14 juin 2010) :**

La réclamante, conseillère principale d'éducation, se plaint de refus opposés à ses demandes de mutation intra-académique et d'affectation définitive au sein d'un établissement scolaire situé dans une ville où se trouvent ses médecins traitant, ainsi que d'un défaut d'aménagement de son poste de travail. Elle estime que cette situation est discriminatoire car elle ne tient pas compte de son handicap.

L'ensemble des éléments du dossier recueillis au cours de l'enquête ne sont pas paru suffisants pour écarter la présomption de discrimination à raison de son handicap. Dans le cadre de la médiation décidée par le Collège, les parties sont ainsi parvenues à un accord très satisfaisant sur les principaux points débattus. Ainsi, un accord a été retenu sur les points suivants : - affectation définitive de la réclamante au Lycée qu'elle souhaitait ; - indemnisation des préjudices subis (4800 €) ; - un accord a également été trouvé s'agissant de son logement de fonction.

- Délibération relative au rejet d'une candidature à un recrutement sans concours d'agents des services hospitaliers qualifiés que la réclamante, déjà en poste au sein de l'hôpital, estime fondé sur son âge (n° 2009-296 du 07 septembre 2009) :
La HALDE a été saisie d'une réclamation relative au rejet d'une candidature à un recrutement sans concours d'agents des services hospitaliers qualifiés, par le Directeur du centre hospitalier mis en cause. Il s'agissait d'un poste qui lui permettait de devenir agent titulaire de la fonction publique hospitalière et de bénéficier de tous les avantages induits (par exemple : accéder à des échelons supérieurs, profiter d'une évolution de son traitement, bénéficier notamment de la prime annuelle de service…). La réclamante soutenait que le rejet de sa candidature était fondé sur son âge (49 ans à la date de sa candidature).

L'instruction menée par la HALDE a permis de retenir que l'âge a été un critère de sélection des candidats. Ainsi, l'avis de recrutement à la suite duquel la réclamante a présenté sa candidature, comportait une limite d'âge alors que le texte applicable n'en prévoyait plus.

Dans le cadre de la médiation décidée par le Collège, les parties sont parvenues à un accord satisfaisant, sur la réparation du préjudice subi (2000 €). Mais, surtout, la réclamante a pu intégrer l'hôpital en qualité d'agent des services hospitaliers qualifiés titulaire, ce qui lui avait été refusé et qui était la cause de la saisine de la HALDE.

- **Délibération relative à des faits de harcèlement moral discriminatoire à raison des convictions d'un fonctionnaire territorial (n° 2009-124 du 2 mars 2009) :**
Le réclamant, agent de maîtrise territorial, se plaint d'avoir fait l'objet, de la part de l'ancien et du nouveau maire d'une commune, de faits de harcèlement moral en lien avec ses convictions. Ces faits tenaient principalement à des brimades, des suppressions de primes, d'indemnités et à des successions de sanctions injustifiées, à une procédure de licenciement illégale, ainsi qu'à une réintégration dans des fonctions subalternes qui ne correspondaient pas à son grade et ses qualifications. Le réclamant soutenait que les faits critiqués étaient liés à ses convictions, qui ont pu le faire regarder comme un opposant à l'équipe municipale en place (notamment refus d'aider l'ancien maire lors d'une de ses campagnes électorales).

Les éléments du dossier ont permis de retenir que la dégradation de la situation professionnelle du réclamant pouvait être regardée comme la conséquence de la situation de harcèlement discriminatoire critiquée.

Dans le cadre de la médiation décidée par le Collège, les parties sont parvenues à un accord sur les principaux points débattus au cours de la médiation, alors que tout dialogue était rompu entre elles depuis de nombreuses années : - la mairie a accepté l'indemnisation du réclamant au titre des primes et indemnités qui avaient été indûment supprimées, ainsi qu'au titre de certains rappels de salaires (17 700 €, ce qui correspondait à peu près un an de salaire pour le réclamant) ; - un accord a également été trouvé s'agissant de la position administrative du réclamant au sein de la mairie (proposition d'un poste correspondant à son grade et ses compétences).

- **Délibération relative à des refus successifs de transformation d'un emploi à temps non complet en un emploi à temps plein en raison de l'origine et de l'état de santé (n° 2008-156 du 7 juillet 2008) :**
La réclamante, agent d'entretien territorial, se plaint de faire l'objet d'une inégalité de traitement dans l'attribution du temps de travail, à raison de son origine et de son état de santé, qui tiendrait principalement aux refus répétés de son employeur, le Maire, de faire droit à ses demandes de transformation de son emploi à temps non complet au sein de la commune en un emploi à temps plein. Elle estimait avoir fait l'objet d'un traitement moins favorable que ses collègues en raison de ses origines et de son état de santé. Elle alléguait l'absence de prise en compte de la pathologie dont elle souffre, l'insuffisance du montant de sa rémunération et se plaignait de son régime de sécurité sociale.

Les raisons avancées par la commune n'ont pas pu être considérées comme suffisantes pour justifier la différence de traitement subie par la réclamante.

Dans le cadre de la médiation décidée par le Collège, les parties sont ainsi parvenues à un accord très satisfaisant : - concernant sa situation passée, la commune a proposé de réparer le préjudice subi par la réclamante en lui allouant une indemnité de 10 900 €. - un dossier de maladie professionnelle a également été constitué. La réclamante a ainsi donné acte au Maire de ce qu'elle se considérait remplie de ses droits, son préjudice ayant étant réparé.

- **Délibération relative à des faits de harcèlement moral discriminatoire à raison des activités syndicales d'un fonctionnaire territorial (n° 2010-168 du 5 juillet 2010) :**
Le réclamant fonctionnaire territorial a saisi la HALDE d'une réclamation relative à l'absence d'évolution de sa carrière, qu'il estime discriminatoire en raison de ses activités syndicales (délégué syndical pendant de très nombreuses années). Il n'a bénéficié d'aucune promotion depuis plusieurs années. Après enquête, le Collège a considéré que l'absence de promotion du réclamant pouvait être regardée comme susceptible de constituer une différence de traitement à raison de ses activités syndicales et qu'une médiation permettrait d'établir un dialogue entre les parties, qui étaient dans une situation conflictuelle depuis des années.

Si les parties ne sont pas parvenues à la signature d'un protocole d'accord formel de médiation, le Maire mis en cause a procédé, au cours de la médiation décidée par le Collège, à la régularisation de la situation administrative du réclamant, par son avancement d'échelon et de grade, qui constituaient les points contestés dans ce dossier.

Des exemples topiques permettent également d'appréhender la portée de l'efficacité de la médiation dans le domaine du fonctionnement des services publics.

b. L'efficacité de la médiation dans le domaine du fonctionnement des services publics
- **Délibération relative au refus d'un Maire d'accorder à une association l'accès à une salle municipale (n° 2009-398 du 14 décembre 2009) :**

La HALDE a été saisie par une association d'une réclamation relative à différentes décisions adoptées par une mairie (principalement suppression d'accès à une salle municipale pendant plus de deux ans), intervenues pendant et postérieurement à une campagne électorale opposant notamment le Maire sortant et certains représentants de l'association. Cette dernière considérait que les décisions critiquées, et le comportement du Maire et de son équipe, constituaient une atteinte au principe de non-discrimination à raison des convictions religieuses, des origines et des opinions politiques de certains de ses membres.

Suite à l'enquête menée par la HALDE, une médiation a été décidée par son Collège, qui a permis d'aboutir à un accord satisfaisant sur les principaux points débattus, alors que les parties étaient dans une situation de conflit depuis des années : - le Maire a accepté le principe du rétablissement du droit, de l'association à bénéficier d'un local communal ; - ce local communal a été mis à disposition, à titre gratuit, afin que l'association puisse y exercer ses activités culturelles ; - afin de permettre à l'association de faire connaître ses activités, elle a bénéficié d'un article dans un bulletin périodique d'information de la ville ; - et l'association a renoncé à l'indemnisation des préjudices subis.

- **Délibération relative au refus d'un rectorat d'agréer une association de défense et de protection des personnes homosexuelles pour intervenir en milieu scolaire en matière de lutte contre l'homophobie (n° 2008-151 du 7 juillet 2008) :**
A quatre reprises, un rectorat a refusé à une association de défense et de protection des personnes homosexuelles l'agrément lui permettant d'intervenir en milieu scolaire en matière de lutte contre l'homophobie en appui aux activités d'enseignement dans les établissements scolaires conformément au décret n°92-1200 du 6 novembre 1992. En réponse à l'enquête de la HALDE, le recteur a expliqué son dernier refus en relevant que « cette question relève de l'espace privé alors que la réglementation applicable à l'éducation à la sexualité suppose une éthique dont la règle essentielle porte sur la délimitation entre l'espace privé et l'espace public afin que soit garanti le respect des consciences, du droit à l'intimité et de la vie privée de chacun ».

Or, dans une affaire similaire, dans le cadre de laquelle la HALDE a présenté ses observations devant le juge saisi, la Cour administrative d'appel (CAA) de Nancy a jugé que la lutte contre les discriminations fondées sur l'orientation sexuelle et l'homophobie poursuivait un objectif d'intérêt général et que c'était à la suite d'une erreur manifeste d'appréciation que le recteur concerné avait estimé, le projet d'une autre association fondé sur la mallette pédagogique « Vivre ses différences, comment parler de l'homophobie », comme ne satisfaisant pas au critère de qualité exigé par les textes applicables (CAA Nancy, 14 février 2008, *Association C.G.* ; délibération de la HALDE, n° 2008-14 du 14 janvier 2008).

En l'espèce, l'association et le rectorat ont néanmoins continué à rechercher un accord amiable et une médiation a été décidée par le Collège de la HALDE. Cette procédure a conduit à un accord très satisfaisant entre l'association et le rectorat, ayant pour objet de créer un projet pilote sur toutes formes de discrimination por-

tant notamment sur la sexualité et le physique dans certains établissements scolaires qui, d'après l'association, « dépasse largement celle de l'agrément ».

3.5. Des illustrations de bons offices et de règlements amiables réussis

a. Des procédures entérinées par délibération du Collège pour l'exemplarité

- **Délibération relative au refus opposé par un Préfet de convier officiellement à une cérémonie de commémoration de la déportation une association représentant les déportés homosexuels (délibération n° 2007-126 14 mai 2007) :**

Une association ayant pour objet d'honorer le souvenir des personnes homosexuelles qui ont été déportées au titre de leur orientation sexuelle pendant la deuxième guerre mondiale a saisi la HALDE du refus opposé par un Préfet, de les convier officiellement à la cérémonie de commémoration de la déportation organisée le dernier dimanche d'avril, au même titre que les autres associations de déportés.

La HALDE a estimé que non seulement ce refus est illégal (contraire notamment à une loi d'avril 1954 qui dispose que « La Nation honore la mémoire de tous les déportés sans distinction »), mais qu'il est de surcroît discriminatoire car il ne vise qu'à exclure les associations en raison de l'orientation sexuelle de ses membres et des déportés qu'ils représentent.

En l'espèce, les premiers actes d'instruction diligentés par la HALDE ont permis aux parties de se rapprocher, et le Préfet lui a indiqué que des invitations officielles avaient été adressées aux membres de l'association réclamante permettant ainsi à ceux-ci de prendre place, pendant la cérémonie, dans le carré des officiels.

L'association ayant informé la HALDE de ce que la cérémonie s'était déroulée en tous points sans discrimination, le Collège a pris acte dans sa délibération de l'issue favorable de ce dossier.

- **Délibération relative à des faits de harcèlement moral discriminatoire à raison de l'origine d'un fonctionnaire territorial (n° 2006-198 du 2 octobre 2006) :**

Le réclamant agent de salubrité titulaire au sein d'une commune a indiqué avoir été l'objet de comportements discriminatoires depuis son arrivée au sein de cette commune, qui se seraient traduits par des faits de harcèlement discriminatoire de la part de ses collègues qui l'auraient quotidiennement insulté. Il est le dernier agent d'origine étrangère de son secteur d'activité, plusieurs de ses collègues ayant successivement démissionné du fait de l'attitude discriminatoire des personnels à leur égard.

Peu après la saisine de la HALDE, une médiation a été proposée au Maire. Toutefois, avant que la médiation ne soit mise en œuvre, le Maire a, d'une part, nommé le réclamant sur un nouveau poste conforme à ses souhaits et, d'autre part, fait procéder à la publication, dans le journal interne de la ville, d'un article portant sur les droits et devoirs des agents publics, notamment sur le thème de la discrimination raciale.

Dans sa délibération, le Collège de la HALDE a pris acte de l'issue positive de ce dossier, mais a tenu a rappelé au Maire ses obligations, tenant au fait qu'il incombe à l'employeur d'assurer un environnement de travail exempt de toute discri-

mination et, qu'à ce titre, il devra veiller, ainsi qu'il s'y est engagé, à sanctionner les auteurs de comportements racistes et de rendre compte à la HALDE des mesures prises à l'encontre des agents impliqués dans le harcèlement dont le réclamant a été victime.

- **Délibération relative à un déroulement de carrière entravé à raison des activités syndicales d'un fonctionnaire territoriale (n° 2006-188 du 18 septembre 2006)**
La HALDE a été saisie par un fonctionnaire territorial de catégorie C employé par une commune, au sein de laquelle il est également représentant syndical. En 2003, ayant réussi un concours de catégorie B, il a été inscrit sur la liste d'aptitude de rédacteur. Il indique qu'il n'a pas été nommé à ce grade en raison de ses activités syndicales et que les droits attachés à son concours risquaient d'être perdus si une nomination n'intervenait pas avant juin 2006.

Bien qu'aucun texte légal ou règlementaire n'impose à une collectivité territoriale de nommer un fonctionnaire ayant réussi un concours interne, les éléments du dossier laissaient présumer que le réclamant avait été victime d'une discrimination à raison de ses activités syndicales.

Alors que la HALDE envisageait de faire procéder à une médiation, le réclamant s'est vu proposé un poste de rédacteur. C'est pourquoi, par sa délibération, le Collège a pris acte de l'issue positive de ce dossier, tout en rappelant au Maire ses obligations.

Dans d'autres situations, les règlements amiables ou bons offices ne sont pas entérinés par une délibération du Collège.

b. Des procédures mises en œuvre sans délibération du Collège dans d'autres situations
Les exemples qui suivent permettent d'appréhender l'efficacité des missions de bons offices, tant dans le domaine de l'emploi, que celui de l'accès à des biens et services ou du fonctionnement des services publics[16].

- **Entrave au déroulement de carrière d'une salariée en raison de son origine :**
Une réclamante s'estimait discriminée dans le déroulement de sa carrière en raison de son origine. Elle soutenait qu'elle n'avait bénéficié d'aucun avancement depuis 9 ans alors qu'elle justifiait régulièrement de bonnes évaluations et qu'une de ses collègues, d'origine européenne, moins experte et moins diplômée qu'elle, venait d'être promue.

L'intervention du correspondant local a permis qu'un entretien soit consenti à la réclamante par son responsable de service, et qu'une proposition de changement de poste satisfaisante lui soit présentée.

[16] Ces exemples sont tirés d'une note élaborée par Mme Sophie PISK, juriste sénior, en charge des correspondants locaux de la HALDE, devenus les délégués du Défenseur des droits.

- **Inégalité de traitement dans les conditions de travail d'un salarié en lien avec son origine et son état de santé :**
Le réclamant estimait subir une inégalité de traitement en raison de son origine et de son état de santé, notamment dans l'aménagement de ses horaires de travail et des tâches qui lui étaient confiées.

Le correspondant local a sollicité un entretien avec le directeur général des services. Ce dernier l'a reçu avec le directeur des moyens généraux pour évoquer le statut du réclamant, les plannings, les fonctions exercées, ainsi que l'accès aux formations. Au terme de cet entretien, le directeur général a accepté de recevoir le réclamant en vue de la recherche d'un règlement amiable. Un compte-rendu écrit de la réunion a été adressé au correspondant local prenant acte de l'élaboration d'un nouveau planning et du bénéfice de 30 heures de formation en français en faveur du réclamant afin de lui permettre de progresser par la suite.

- **Inégalité de traitement dans les conditions de travail d'un salarié en lien avec son état de santé :**
A la suite d'un accident, en septembre 2009, le médecin du travail a reconnu le réclamant inapte aux fonctions occupées (agent technique dans une grande entreprise) et a préconisé son repositionnement sur des tâches administratives. Or, en mars 2010, aucune proposition ne lui avait été faite, sa hiérarchie lui suggérant de rechercher un poste dans une des filiales du groupe.

Le réclamant, placé en arrêt maladie, à demi-traitement, toujours dans l'attente d'un poste de reclassement, a sollicité l'intervention de la HALDE.

Le correspondant local a rencontré le directeur des ressources humaines pour lui rappeler qu'il incombe à l'employeur, et non au salarié, de rechercher les possibilités de reclassement et que l'absence de recherches sérieuses s'interprète en une discrimination en raison du handicap. Par la suite, le réclamant a reçu une proposition de reclassement.

- **Inaccessibilité d'une personne handicapée à l'immeuble où elle réside :**
Un des correspondants de la HALDE a été alerté par une personne handicapée en difficultés dans sa vie quotidienne en raison de l'inaccessibilité de l'immeuble où elle réside. La réclamante souffrant d'un handicap moteur a dénoncé l'état de la voirie l'empêchant d'accéder sans aide à son immeuble. Elle a souligné les multiples démarches effectuées, en vain, auprès de la mairie afin que soit pris en compte son handicap.

L'intervention du correspondant de la HALDE auprès des services municipaux a permis de les sensibiliser aux obligations leur incombant en matière d'accessibilité de la voirie en faveur des personnes handicapées, notamment à l'occasion de la réalisation de travaux. Une rampe d'accès a donc été réalisée par la commune conférant ainsi à la réclamante une plus grande autonomie dans ses déplacements.

- Absence d'aménagement raisonnable d'examens au profit d'un candidat handicapé :
Un étudiant sourd et muet, ne pouvant passer son oral d'allemand de BTS, est venu rencontrer avec son éducateur le correspondant local pour lui faire part des difficultés qu'il rencontre pour obtenir l'aménagement de ses examens.

L'intervention du correspondant a contribué à ce que le réclamant bénéficie d'une dispense d'épreuve.

- **Scolarisation d'un enfant handicapé :**
La réclamante est mère d'un enfant handicapé, qu'elle souhaite inscrire dans l'école la plus proche de son domicile. Elle a obtenu l'aide d'une auxiliaire de vie scolaire. Mais le maire a tardé à inscrire l'enfant. L'adjoint au maire chargé de l'enfance et de l'éducation s'était borné à promettre l'étude du dossier, sans prendre le moindre engagement.

L'intervention du correspondant local a permis l'inscription sans délai de l'enfant.

- **Inaccessibilité à un spectacle public d'une personne handicapée :**
A l'occasion d'un spectacle public, la réclamante s'est présentée avec un enfant en fauteuil roulant. Aucune place ne leur a été attribuée, les organisateurs du spectacle invoquant qu'ils auraient du être informés avant la soirée. La correspondante locale a pris contact avec ces derniers, lesquels ont admis qu'ils n'avaient pas su gérer cette situation.

Ayant reconnu leur erreur, ils ont consenti à présenter leurs excuses à la réclamante et lui ont offert des places pour de nouveaux spectacles. La réclamante s'est estimée satisfaite de cette issue.

En conclusion de tout ce qui précède, nous pouvons souhaiter que dans le cadre du Défenseur, la mise en œuvre de telles procédures, qui s'y retrouvent renforcées, permettra la résolution tout aussi rapide et efficace des différends qui lui seront soumis, au service des victimes de discrimination notamment.

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This book represents the effort by jurists from all walks of life – legal practitioners, scholars, judges, legal advisers to NGOs, and equality bodies – to reflect on the challenges that sexual orientation and gender identity pose to contemporary law. It originates from the international conference *Equality and Justice - LGBTI (Lesbian, Gay, Bisexual, Trans and Intersex) Rights in the XXI Century* organized within the framework of the Equal-Jus.eu Project in Florence on May 12 and 13, 2011.

It discusses the state of legal studies in the field of sexual orientation and gender identity and deals more specifically with the notions and usage of sex and gender in the Western legal tradition, with constitutional and comparative law approaches, EU and migration law, and issues common to LGBTI couples such as freedom of movement, mutual recognition, parenthood, and inheritance. Significant attention is devoted to gender identity issues and to the role of the judiciary and of equality bodies in dealing with LGBTI cases. Essays are written in English, Italian and French.

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