MARRIED COUPLES, DOMESTIC PARTNERSHIPS AND OTHER TYPES OF COHABITATION: A COMPARATIVE PERSPECTIVE

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The essay examines the most significant regulations of married couples, domestic partnerships and other types of cohabitation in the Member States of the European Union. Some Member States of the European Union, such as Italy, have a special legislation in favor of married couples. Other Countries are taking legal action aimed at aligning the regulations for opposite-sex and same-sex domestic partnerships with those provisions intended for married couples. The author examines the legislation of states that allow homosexual couples to enter an institution defined as marriage and underlines that the introduction of such legislation comes as a result of terminological manipulation. The analysis is also directed to those states that have introduced public recognition for non-married couples based on the conclusion of partnership agreements following the French example of the so called *Pacs*. The essay is critical towards such legislation and underlines the reasons for which non-married couples cannot legitimately be given the same treatment and benefits attributed to families founded on marriage because of its unique role in society. These conclusions are supported by an enquiry into the development of European Community Law and an analysis of the jurisprudence of the Court of Justice of the European Union.

Mediterranean Journal of Human Rights, Vol. 11, No 1, pp. 173-194

1. Introduction

Family law is of fundamental importance for the development of any community.In this regard Costantino Mortati, a famous Italian Professor of Constitutional Law, referred to a "social (although non-public) function of the family."[1]

Indeed, the family is particularly important in two respects - the education and support of the individual, on the one hand[2] and, on the other, the assurance that society as a whole will continue and endure, in particular, by assuming these responsibilities.

As a result, the family represents the "point of intersection at which the public and private spheres or a certain public and intimate life come together, socializing people, while internalizing customs."[3] By teaching and passing on cultural, social, mental and religious values, the family represents the preferred place of an individual's development and well-being into his/her unique identity and, consequently, the growth of the community as a group of people.

However, these basic ideas are not unanimously accepted, either by the Member States of the European Union or at the level of community law. On the contrary, there is, without doubt, broad disagreement between Member States concerning current family law as well as legal provisions regarding domestic partnerships and - in countries where separate laws have been adopted - regarding same-sex domestic partnerships. Therefore, the establishment of a European *ius commune* is impossible with respect to the topic discussed here.

2. Different regulations concerning married couples, opposite-sex and same-sex domestic partnerships in the Member States of the European Union: Italy, France, the Netherlands, Spain and Germany

Some countries involved in the integration process - such as Italy - have a special regulation in favor of married couples compared to

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[1] Mortati, C., (1976), *Istituzioni di Diritto pubblico*, 9th revised edition, Padua: Cedam, p. 1165.

[2] Compare: Baldassarre, A., (1997), *Diritti della persona e valori costituzionali*, Turin: Giappichelli, p. 186.

[3] ibid.

domestic partnerships both at a constitutional level and at the level of ordinary legislation.[4] Domestic partnerships are only sometimes recognized, under certain circumstances and with respect to a certain purpose, and only if they involve different sexes.[5] In Italy, the basis for the preference of married couples is clearly and unmistakably based on Article 29, Subsection 1 of the Constitution, with the following wording: "The Republic recognizes the rights of the family as a natural union founded on marriage."

It has long been emphasized that the Article mentioned above expresses a clear and specific choice adopted jointly by the various positions represented in the Constituent Assembly: the statement of the canonic Roman principle *favor matrimonii*,[6] a principle that ultimately prevailed in the Italian legal system, similar to other principles of identical origin.[7]

However, part of the Italian legal doctrine[8] represents the view that the preferential treatment of married couples pursuant to Article 29 of the Constitution could be overridden based on the inclu-

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[4] With respect to *favor* regarding the legitimately founded family in the Italian legal system, see among others: C. Esposito, C. "Famiglia e figli nella Costituzione italiana", *Studi in onore di A. Cicu*, Milan: Giuffrè 1951 later in *La Costituzione italiana. Saggi*, Padua: Cedam 1954, p. 138; Grossi, P. F., (1996), "La famiglia nella evoluzione della giurisprudenza costituzionale", in dalla Torre, G., (editor), *La famiglia nel diritto publico*, Rome: Studium, p. 7; Baldassarre, A., (1997), *Diritti della persona* cit., p. 186; Loiodice, A., (2000), *Attuare la Costituzione. Sollecitazioni extraordinamentali*, Bari: Cacucci, pp. 37 et seq.

[5] Please see: Rossi, E., (2002), "La tutela costituzionale delle forme di convivenza familiare diverse dalla famiglia", in Panizza, S. - Romboli, R. (editors), *L'attuazione della Costituzione - Recenti riforme e ipotesi di revisione*, Pisa: Edizioni PLUS, pp. 109 et seq. for some examples.

[6] Please refer to: Dalla Torre, G., (2002), "Il 'favor iuris' di cui gode il matrimonio (cann. 1060 and 1101§ 1)", in *Diritto matrimoniale canonico*, I, Vatican City: Libreria Editrice Vaticana, pp. 221 et seq.

[7] Please see in particular: Baccari, R., (1984), *Elementi di Diritto canonico*, Bari: Cacucci, p. 20.

[8] Puleo, S., (1989), Art. "Famiglia, (II) disciplina privatistica: in generale", *Enc. giur.*, XIV, Rome: Treccani, p. 2.
With this in mind, see among others: Barile, P., (1977) "La famiglia di fatto: osservazioni di un costituzionalista", *La famiglia di fatto, Atti del Convegno nazionale* (Pontremoli May 27-30, 1976), Montereggio: Tarantola editore, p. 45; Busnelli, F. D., (1977), "Sui criteri di determinazione della disciplina normativa della famiglia di fatto", *La famiglia di fatto* cit., pp. 133 et seq.; Rescigno, P., (2000), "*Società naturale, esperienze contrattate*", *Memoria o futuro della famiglia*, Milan: Giuffrè, p. 170.

sion of Article 2 of the Constitution, which establishes the following: "The Republic recognises and guarantees the inviolable rights of the person, as an individual, and in social groups where an individual's personality develops."

Some authors think same-sex domestic partnerships should be given the same level of protection of rights as opposite-sex domestic partnerships, based on the view that they are characterized by the same attributes as opposite-sex domestic partnerships.[9]

The Italian Constitutional Court continues to counter the increasingly prevalent view of the legal doctrine by stating that Article 2 of the Constitution cannot be used to question the application of Article 29 of the Constitution: domestic partnerships cannot be equated with married couples.

The Constitutional Court has always insisted on the impossibility "of extending the regulation intended for married couples to domestic partnerships based on the simple equalization of both situations."[10]

By contrast, legal action is currently being taken in other European Member States aimed at equalizing the regulations for opposite-sex and same-sex domestic partnerships with those provisions intended for married couples.

In this respect, the regulations adopted by France, Germany and the Netherlands are particularly noteworthy. Moreover, there are harsh disputes about the recently introduced changes in the Spanish legal system.

As is generally known, detailed provisions about the family are non-existent at a constitutional level in France.[11] In fact the Constitution, dated September 27, 1946 merely includes a note regarding families in the preamble, which has been referred to in the Constitution of the Fifth Republic:

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[9] Rossi, E., (2000), "L'Europa e i gay", *Quad. cost.*, p. 405.

[10] See for example among a number of decisions: Corte cost., Judgment n. 313 of 2000, in *Giur. Cost.*, 2000, pp. 2367 et seq. This train of thought constantly reappears in jurisprudence of the Italian Constitutional Court.

[11] Please see: Tettinger, P. J., (2003), "La protección del matrimonio y de la familia fundada en el derecho constitucional. Una inversión estatal de cara al futuro que merece la pena", in F. Fernández Segado (editor), *The Spanish Constitution in the European Constitutional Context*, Madrid: Dykinson, p. 1799.

> *"la Nation assure à l'individu et à la famille les conditions nécessaires à leur développement" (the nation assures the individual and the family the conditions necessary for evolution).*

Law no. 99-944, dated November 15, 1999, introduced the following provision in the first volume of the French Civil Code, under heading XIII:

> *"Du pacte civil de solidarité et du concubinage" ("The civil union arrangement and cohabitation".)*

In Article 515-8 of the Civil Code, the *concubinage* (cohabitation) is determined as

> *"une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple" ("a de facto union, characterized by a communal life having the characteristics of stability and continuity, between two persons of different sex or the same sex, who live together as a couple")*

The term *Pacs* (*pacte civil de solidarité*) (*civil union arrangement*) is defined in Article 1 of the Law no. 99-944. On this basis Article 515-1 of the Civil Code was amended to read

> *"un contrat conclu entre deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune" ("a contract made between two individuals of legal age, of different sexes or the same sex, that establishes their living together").*

Based on this regulation, the agreement can refer to heterosexual or same-sex couples.

The *Conseil Constitutionnel (Constitutional Council)*[12] - called upon to provide a prior statement about the constitutionality of the

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[12] *Conseil Constitutionnel* 99/419 Dc, dated November 9, 1999.

law - emphasized that the "*vie commune*" is the condition for the applicability of the institution with a common domicile and living together as a true couple.

Although the *Pacs* can not be put in the same category as marriage, it grants same-sex and heterosexual couples entering into a *Pacs* agreement, some of the same effects as those related to marriage. Although the so-called *pacsés* enjoy a high degree of independence with respect to the regulation of the effect of the legal transaction entered into,[13] they have the right of support pursuant to Article 515-4 of the *Civil Code*.[14]

In the Netherlands, opposite-sex and same-sex domestic partnerships are entitled to be registered in a special registry. In addition, the law[15] allows homosexual couples to enter an institution defined as marriage,[16] based on a terminological manipulation discussed below. Although homosexual couples are not entitled to international adoptions, they are allowed to adopt minors residing in the Netherlands.

In addition to the regulation that became effective in Belgium in 2003, this model was adopted by a recently introduced amendment to the Civil Code in Spain. Sixteen articles of the Spanish Civil Code were amended as a result of the new regulation. Terms such as "marido" (husband) and "mujer" (wife) were replaced by "cónyuges" (spouses) and "padre" (father) and "madre" (mother) by the term "progenitores" (parents).

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[13] Vitucci, P., (2001), "'Dal dì che nozze ...' Contratto e diritto di famiglia nel pacte civil de solidarité", *Familia*, p. 717.

[14] "*Es partenaires liés par un pacte civil de solidarité s'apportent une aide mutuelle et matérielle. Les modalités de cette aide sont fixées par le pacte. Les partenaires sont tenus solidairement à l'égard des tiers des dettes contractées par l'un d'eux pour les besoins de la vie courante et pour les dépenses relatives au logement commun*". ("*The partners bound by a civil union agreement contribute mutual and material assistance. The methods whereby such assistance is contributed is established in the agreement.*

The partners are obligated jointly and severally vis-à-vis third parties for any debts contracted by either of them for the needs of daily life and for expenses relative to joint lodging ")

Regarding *Pacs* please also refer to: Probert, R., (2001), "From Lack of Status to Contract: Assessing the French Pacte Civil de Solidarité", *The Journal of Social Welfare & Family Law*, p. 257 et seq.

[15] Law dated December 21, 2000, number 26672, entered into force on April 1, 2001.

Based on these amendments, same-sex couples are entitled to get married and to adopt minors.

These intentions were clarified with the introduction of the following provision into the Spanish legal system:

> *"El matrimonio tendrá los mismos requisitos y efectos cuando ambos contrayentes sean del mismo o de diferente sexo"* (*"Marriage will have the same requisites and effects when both contracting parties are of the same or different sex"*).

When taking into consideration Article 32 of the Spanish Constitution, this regulation is grounds for obvious concern with respect to its constitutionality:

> *"El hombre y la mujer tienen derecho a contraer matrimonio con plena igualdad jurídica" ("A man and a women are entitled to contract marriage with full legal equality ").*

In Germany, the *Bundesverfassungsgericht* (*Federal Constitutional Court*) has consistently insisted that the key element of a marriage is the union between a man and a woman. This excludes the applicability of the same institution to individuals of the same sex and prevents this exclusion from being considered discriminating against homosexual couples.[17]

In addition, the Federal Constitutional Court represents the view that there is no discrepancy between Article 6 *GG*[18] and the law, dated February 16, 2001, which came into effect on August 1 of the

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[16] Please see: Ceccherini, E., (2001), "Il principio di non discriminazione in base all'orientamento sessuale: alcune considerazioni alla luce delle esperienze straniere", *Dir. pubbl. comp. eur.*, pp. 39 et seq.

[17] With this in mind, please see: BverfGE (verdicts of the Federal Constitutional Court), vol. 105, pp. 313 et seq. (verdict dated July 17, 2002), in *NJW*, 2002, pp. 2543 et seq.

[18] With respect to Article 6 GG please see: Maunz, T. - Zippelius, R., (1985), *Deutsches Staatsrecht*, 26th edition, Munich: C.H. Beck , pp. 217 et seq.; Tettinger, P. J., *La protección del matrimonio y de la familia* cit., pp. 1800 et seq.; Badura, P., (2003), *Staatsrecht*, 3rd edition, Munich: C.H. Beck, pp. 155 et seq.

same year and concerns elimination of discrimination against same-sex domestic partnerships (*eingetragene Lebenspartnerschaften*).[19]

Because it is impossible to discuss the German regulation any further as regards its constitutionality within this scope,[20] I would only like to explain that *eingetragene Lebenspartnerschaften* can be founded by two people of the same sex who declare before the competent authorities that they intend to enter into a mutual lifelong *partnership*.

A number of consequences result from such agreements, which represent a clear alternative to marriage because this declaration is not valid if one of the two individuals is married.

These agreements include the right of support and the corresponding obligation to support, entitlement to the compulsory portion of the estate of the deceased partner, the right of succession to the rental agreement signed by the deceased, the right to refuse to testify against the partner, the right to adopt a common family name and the effects of separation corresponding to those of married couples.

Pursuant to the amendment of law that became effective on January 1, 2005, partners are entitled to transfer the family name of the other partner to their own offspring, provided he/she has parental custody and the child lives in the joint household.

3. The position of the European Parliament

The different regulations for married couples, opposite-sex and same-sex domestic partnerships have caused a number of disputes in the European Parliament which implicitly and sometimes even explicitly has asked all Member States of the European Union, on numerous occasions, to equalize all forms of cohabitation.

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[19] Please refer to: Tettinger, P. J., (2002), "Kein Ruhmesblatt für 'Hüter der Verfassung'", *Juristen Zeitung*, pp. 1146 et seq. for a convincing review of this verdict.

With respect to the impossibility to equalize other cohabitations with the family pursuant to Article 6, GG please see: Pechstein, M., (1994), *Familiengerechtigkeit als Gestaltungsgebot für die Staatliche Ordnung*, Baden-Baden: Nomos-Verlagsgesellschaft, p. 388.

[20] Please compare the Authors mentioned in the remark above.

In particular, notwithstanding the fact that the European Union does not have corresponding jurisdiction, the European Parliament adopted a resolution on equal rights for homosexuals and lesbians on February 8, 1994. The resolution moves that the Commission should submit recommendations concerning the elimination of "obstacles preventing the marriage of homosexual couples or the establishment of an equal legal basis by guaranteeing them the rights and advantages of marriage, including the possibility to register their union;" as well as the elimination of "any limitations on the entitlement of homosexuals to parenthood, adoption and guardianship of children."[21]

These directives were also included in a Resolution regarding respect of human rights in the European Union for the period 1998-1999. This resolution was introduced on March 16, 2000: the European Parliament requested "those States which have not yet granted legal recognition to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender" by referring to Article 13 of the Treaty establishing the European Community.[22]

This emphasized the necessity to bring about rapid progress towards the "mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same sex in the EU."

Similar motions were also included in the Decision regarding fundamental rights in the European Union, which was adopted by the European Parliament on September 4, 2003 with a slim majority.

It is obvious that the cases mentioned above are purely political documents that lack any legal effect with respect to the organs of the European Union as well as its Member States. Their sparse content also becomes evident from the comparison with the orientation of the Court of Justice which is discussed below.

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[21] Please refer to: Schlesinger, P., (1994), "Una risoluzione del Parlamento europeo sugli omosessuali", *Vita e pensiero*, pp. 250 et seq. for a review of this decision.

[22] The following is specified herein: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting 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".

4. Some objections to public recognition of opposite-sex and same-sex domestic partnerships

With respect to the tendency of publicly recognizing opposite-sex and same-sex domestic partnerships, it must first be noted that major discrepancies exist in this respect.

On the one hand, the family order is undergoing gradual "privatization,"[23] in which the social significance and dimension of the family is not recognized; on the other hand, the tendency is to ascribe a social dimension to structures that are not true families.[24]

In the case of opposite-sex domestic partnerships, the condition for being deemed equal to a married couple lies in the invalidation of marriage as the founding act based on the perception of marriage,[25] dating back to the Enlightenment, as a simple agreement[26] and in the allegation that "the family is no longer an institution that refers to a clear content and predetermined relationship,"[27] "because in the end, it is not a natural, but an *artificial* reality."[28]

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[23] Regarding the topic of gradual privatization of the family law based on the prevalence of individualistic opinions, please see in particular: Mengoni, L. (1987), "La famiglia tra pubblico e privato negli ordinamenti giuridici europei", *La famiglia e i suoi diritti nella comunità civile e religiosa*, Atti del VI Colloquio giuridico (Rome, April 24-26, 1986), Rome: Libreria Editrice Vaticana - Libreria Editrice Lateranense, p. 239. Busnelli, F. D., (1996),"'Persona' e sistemi giuridici contemporanei", *Roma e America. Diritto romano commune*, p. 137, mentions „the saddened remarks of a Swedish lawyer who talked about a ‚journey without a destination' a few years ago, when he noticed the legal confusion involving the personal status and the family law as a result of the so-called *deregulation*" (this refers to: Agell, A., (1981), "The Swedish Legislation on Marriage and Cohabitation: a Journey without a Destination", *American Journal of Comparative Law*, pp. 212 et seq.).

[24] Please compare: D'Agostino, F. - Dalla Torre, G. , (1994), "Per una storia del diritto di famiglia in Italia: modelli ideali e disciplina giuridica, G. Campanini (editor), *Le stagioni della famiglia*, Cinisello Balsamo: San Paolo, pp. 246 et seq.

[25] For an overview, please see: Vassalli, F., (1932), *Lezioni di diritto matrimoniale*, I, Padua: Cedam, p 72, nt. 1.

[26] Please compare: Zoppini, A., (2002), "Tentativo d'inventario per il 'nuovo' diritto di famiglia: il contratto di convivenza", in Moscati, E. - Zoppini, A. (editors), *I contratti di convivenza*, Turin: Giappichelli, pp. 1 et seq. regarding the topic of individualistic tendencies based on the contract doctrine which are widespread in family law.

[27] Zoppini, A., (2000), "Tentativo d'inventario per il 'nuovo' diritto di famiglia: il contratto di convivenza" cit., p. 6.

[28] D'Agostino, F., (2000), "Diritti della famiglia e diritti dei minori", *I figli: famiglia e*

Based on these conditions, one can conclude that "it is indeed possible to *invent* new, noteworthy, legal and family-like models governed by regulatory policies, namely based on individual needs, interests and tastes, which are not objectionable in principle and which deserve particular attention on the part of the legal system."[29] Accordingly, it is necessary to provide not one single family model, but several different ones.[30]

The tendency to put the family on par with same-sex domestic partnerships is on the horizon. The current dissemination of the so-called myth of "sexual indifference"[31] is thus quoted as an argument. What becomes evident is a boundless trust in the power of legislators who are able to overcome the barrier before which even the omnipotent British Parliament came to a halt: the possibility to transform a man into a woman and vice versa - as De Lolme so poignantly formulated it.

In fact, the possibility for same-sex couples to get married - as is possible in the Netherlands, Belgium and now also in Spain - is based on downright terminological manipulation.

The term marriage consists of a legal notion requiring certain characteristics.

If one examines the legal characteristics of this institution based on the "common facts provided by the law,"[32] one must admit that the term marriage - interpreted with methodical and terminological stringency, indispensable in an age which is plagued by terminological manipulations[33] - basically requires the union of a man and a

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società nel nuovo millennio (Atti del Congresso Internazionale Teologico-Pastorale, Città del Vaticano 11-13 ottobre 2000), Vatican City: Libreria Editrice Vaticana, p. 109. D'Agostino is very critical of this view.

[29] F. D'Agostino, *ibid.* again criticizing this view.

[30] Compare: Scalisi, V., (1986), "La 'famiglia' e le 'famiglie'", *La riforma del diritto di famiglia dieci anni dopo. Bilanci e prospettive*, Padua:Cedam, pp. 270 et seq.; Rescigno, P., "Società naturale, esperienze contrattate", loc. cit., 163 et seq.

[31] Compare: D'Agostino, F. - Dalla Torre, G., (1994), "Per una storia del diritto di famiglia in Italia" cit., p. 223 for a critical review.

[32] Grossi, P.F., (1991), *I diritti di libertà ad uso di lezioni*, I, 1, II edition, Turin:Giappichelli, pp. 286 et seq., annotation 8.

[33] The law that introduced abortion into the Italian legal system entitled „*Norme per la tutela sociale della maternità* e *sull'interruzione volontaria della gravidanza*" ("*Standards for the protection of motherhood and the voluntary interruption of pregnancy*") is deemed an example of such manipulation. In International Law we need

woman. This incontestable and uncontested fact of history of law[34] was defined early on by the Romans with the fitting definition of the term marriage by Ulpian. This definition was later readopted in modern law.[35] According to Ulpian, who defines marriage as an institution of the *ius naturale*, by which it is regulated, the term marriage mainly consists of the *maris atque feminae coniunctio*: i.e. the union Roman Jurists refer to as marriage (*quam nos matrimonium appellamus*, D. 1.1.1).[36] The *corpus familiae* (D. 50.16.195.2)[37] is the result of the *consortium omnis vitae, divini atque humani iuris communicatio* (D. 23.2.1), *individuam consuetudinem vitae continens* (Inst. 1.9.1).

The explanation becomes more complex regarding the various legal systems that introduced public recognition for non married couples based on a simple de facto union.

With respect to domestic partnerships, it should be noted that they

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to bear in mind that a number of ambiguous terms such as humanitarian interference or international police operation are used to describe markedly warlike actions. With respect to the latter topic, please see the recent publication by Walzer, M. *Arguing about War*, New Heaven: Yale University Press, 2004.
Regarding the significance of semantic values in jurisprudence, please see: Biondi, B., (1953), "La terminologia romana come prima dommatica giuridica", *Studi in onore di V. Arangio-Ruiz*, Naples:Jovene, II, pp. 73 et seq. [and later published in: *Scritti giuridici*, Milan:Giuffrè, 1965, 181 et seq.]; Orestano, R., (1981), *'Diritto' Incontri e scontri*, Bologna:Il Mulino, pp. 265 et seq.; 549; 737; Koselleck, R., (1979), *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten*, Frankfurt a. M.: Suhrkamp.

[34] Please see among others: Schlesinger, P., (1994), *Una risoluzione del Parlamento europeo sugli omosessuali* cit., pp. 252 et seq.

[35] For an overview, please see: Stein, P., (1984), *Legal Institutions. The Development of Dispute Settlement*, London: Butterworths.

[36] With respect to Ulpian's definition, please see: Di Marzo, S., (1919), *Lezioni sul matrimonio romano*, I, Palermo, pp. 3 et seq.; Talamanca, M., (1993), "Recensione a M. Kaser," in *Iura*, pp. 272 et seq., pp. 290 et seq. See also: Baccari, M.P., (2000), *Concetti ulpianei per il "diritto di famiglia"*, Turin:Giappichelli, pp. 13 et seq. including an extensive bibliography.

[37] Within this context, I would also like to refer to the pre-Christian Roman teachings which the term "family" in the Italian Constitution is derived of: please see La Pira, G., (1974), "La famiglia, una casa costruita sulla roccia", *Il focolare*, No. 8, p. 5 regarding this opinion. In it, a "teleological" and a "biblical" reason are added to the "ontological and legal basis for the specification of marriage...: *Duo ... unum!* (*Genesis*, I, 26-27; II, 23-24; *Matt.* XIX, 3-6)" (see also: Catalano, P., (1995), "La famiglia sorgente della storia' secondo Giorgio La Pira", *Index*, No. XXVIII, p. 27).

are associated with a certain degree of freedom granted in all Member States of the European Union. Granting such partnerships the same treatment as married couples would be equivalent to "a violation of the principles of free decision of the parties,"[38] such as "the freedom to choose between marriage and other forms of cohabitation"[39] as was also declared by the Italian Constitutional Court.

Conversely, the argument that in some cases partners are unable to enter into marriage even if they wish to do so is therefore irrelevant.

In cases of the so-called forced cohabitation, i.e. a partnership that is characterized by the impossibility of getting married as a result of a ban imposed by legislators - a extremely rare scenario if one considers, in particular, the divorce regulations that apply in the European Union Member States[40] - equal treatment of non married couples and married couples would undermine the *ratio* of the provision that prevents marriage between the partners: "the legal recognition of such free structures would equal the recognition of a situation that is not only *extra legem*, but virtually *contra legem*."[41]

The question appears even more complex within legal systems that have introduced agreements based on the example of the *Pacs* granting same-sex and/or heterosexual partners family-like legal benefits.

In this respect, I would like to point out that regulations for the legitimate family are associated with advantages that significantly burden federal budgets and can sometimes have a direct influence on the rights of private persons - although only third parties with respect to the marital relationship.

Take for example tax breaks or tax exemptions in favor of families and various provisions such as the transferability of pensions to the husband or wife. Regarding the effects on rights of third parties with respect to the marital relationship, it suffices to single out one of

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[38] Corte cost., Judgment n. 166 of 1998, in *Giur. Cost.*, 1998, pp. 1419 et seq.

[39] Corte cost, Judgment n. 166 of 1998 cit.

[40] Especially with respect to Italy, see among others: Giacobbe, G., (1999), "La famiglia dal codice civile alla legge di riforma", *Iustitia*, p. 269. It is emphasized here that the Divorce Act "basically introduced a kind of *free divorce* into the Italian legal system".

[41] Trabucchi, A., (1988), "Morte della famiglia o famiglie senza famiglia ?", *Una legislazione per la famiglia di fatto?*, Naples:Jovene, p. 17.

many examples that concern the restrictions regarding disposal of property for inheritance.

Attempts to gain public recognition of cohabitation are basically aimed at obtaining similar significant economic advantages, rather than protecting the rights of freedom or fundamental rights of individuals. Indeed, with respect to cohabitation of any kind, the latter are now guaranteed in the legal systems of European Union Member States.

Accordingly, this issue is either associated with the demand to guarantee social rights, i.e. "rights for positive services," which, when fulfilled, "ultimately burden the community that is obligated to comply by imposing taxes or via public accumulation of debt or in any other way,"[42] or with the recognition of legal positions which can affect third parties with respect to cohabitation.

In this context, it is noted that the publicly perceived significance of the family and the corresponding recognition of its rights - ultimately affecting the whole community that assumes significant burdens for taking them on - is justified on the basis that the marital tie alone secures the 'duties' and obligations on which the family as an institution is based. These obligations and the associated inherent necessities justify special treatment granted to spouses.[43]

As mentioned at the beginning, the family fulfils an irreplaceable social responsibility. Although not always duly valued nowadays, in reality, it has always been recognized due to views deeply rooted in western society, according to which the family represents the basis of social and civil life.

Here, I would merely like to point out that it was Cicero who described the family as *principium urbis et quasi seminarium rei publicae.*[44] It is highly significant that the same term was reintroduced by Vico more than sixteen centuries later with the definition of the term family as *primulum rerum publicarum rudimentum.*[45]

The irreplaceable social value of the family becomes evident based

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[42] Sorrentino, F. (2004), "La tutela multilivello dei diritti", *Rivista amministrativa della Repubblica italiana*, Vol. I, p. 867.

[43] The Italian Constitutional Court rightly spoke out about the two institutions family and marriage within the meaning of an „inseparable hendiadys". Accordingly, please see: Corte cost, sent. n. 237 of 1986, in *Giur. Cost*, 1986, I, pp. 2056 et seq.

[44] Cicero, *De officiis*, I, 17, 54.

[45] G. B. Vico, *De uno universi iuris*, CIII.

on the fact that it was recognized in a number of basic laws that became effective after the last post-war era, both explicitly[46] and implicitly through statements granting it special protection within the constitutional system.[47]

If we accept the irreconcilability of potential agreements like the *Pacs* along with the transfer of the responsibilities and "duties" that are associated with the protection of family rights, then public recognition of cohabitation is ultimately founded on the appreciation of the *affectio* between the *partners*, i.e. the bond of affection that exists between them.

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[46] See in particular with respect to Europe: Article 41 of the Irish Constitution, based on which "1st The state recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law; 2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State;" Article 67 of the Portuguese Constitution: "The family, as a fundamental element of society has the right to protection by society and the state and to the creation of all conditions permitting the personal self-fulfillment of its members;" on a global scale, I would like to mention the following among others: Article 1 of the Chilean Constitution: "The family is the basic core of society ... It is the duty of the state ... to provide protection for the people and the family;" Article 4 of the Peruvian Constitution, stipulates that "the community and the government ... also protect the family and promote marriage; they recognize them as natural fundamental institutions of society.".
Finally, it needs to be mentioned that Article 16 of the Universal Declaration of Human Rights defines the family as "the natural fundamental group unit of society;" in the preamble of the Convention on the Rights of the Child - signed in New York on November 20, 1989 - family is recognized "as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children," where it is further emphasized that the family "should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community".

[47] With respect to Europe, please see among others: the previously mentioned Article 6 GG; Article 39 of the Spanish Constitution with the following wording: "The public authorities shall assure the social, economic, and legal protection of the family;" Article 18 of the Polish Constitution, that stipulates the following: "Marriage, being a union of a man and a woman, the family, as well as motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."
In other parts of the world, the family is granted protection based on the following Articles among others: Article 14 of the Argentinean Constitution, which stipulates the following: "... The law ... shall grant full family protection"; Article 4 of the Mexican Constitution, where it says that "the law ... shall protect the organization and development of the family."

It is impossible to have recourse to the principle of equality, which is often invoked illegitimately, to overcome the bottleneck mentioned above.

At a prominent location and with respect to the principle of equality formulated in Article 3 of the Italian Constitution, Carlo Esposito declares that accordingly "citizens and people should be treated differently according to the different situations they are in" and that "they should be granted different benefits depending on whether or not they meet certain conditions."[48]

Only a society blinded by relativism and a nihilism reflected in its legal system is not able to recognize that opposite-sex domestic partnerships based on the free choice of the partner, and even more so, same-sex domestic partnerships - which for obvious and objective reasons clearly differ from opposite-sex partnerships - are unable to assume the responsibilities inherent to a legitimate family, irrespective of whether such partnerships are registered.

It is obvious that these considerations do not apply to the protection of the children, who are entitled always to receive the same treatment, regardless of whether their parents are married or not.

5. The Community Law and Article 9 of the Charter of Fundamental Rights of the European Union

When examining the Community Law, I would first like to emphasize that the Court of Justice of the European Communities[49] adhered to the view that "according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex."

The Court of Justice further declared that even in Member States where the registration of (hetero- and homosexual) partnerships is provided for, thus granting benefits similar to those associated to marriage - with the exception of the Netherlands (and now Belgium, Spain and England) - the difference between both concepts is clear.

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[48] C. Esposito, (1954), "Eguaglianza e giustizia nell'art. 3 della Costituzione", *La Costituzione italiana* cit., pp. 25 et seq..

[49] See Judgment of the Court of Justice dated May 31, 2001 (C-122/99 P and C-125/99 P), *D, Kingdom of Sweden v Council of the European Union*.

Based on this difference, the Court of Justice stated that the different regulations for married couples and registered domestic partnerships do not violate the principle of equality - in particular because different situations exist in this respect - and they do not constitute discrimination against sexual orientation.[50]

The recent jurisprudence of the Court of Justice takes the point of view, which implies that "the decision to restrict certain benefits to married couples, while excluding all persons who live together without being married, is either a matter for the legislatore to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on the grounds of sex, prohibited by Community law."[51]

Moreover, the Court of Justice believes that even a different regulation for married couples and opposite-sex domestic partnerships, on the one hand, and same-sex domestic partnerships, on the other, does not constitute discrimination which is prohibited by community law.[52]

A solution deviating from the above cannot be achieved by claiming the application of Article 9 of the Charter of Fundamental Rights of the European Union.

Article 9 stipulates that the "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights." This basically corresponds to the provision of Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[53] based on which "men and women of marriageable age have the right to marry

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[50] ibid.

[51] Judgment of the Court of Justice dated January 7, 2004 (C-117/01), *K.B. v National Health Service Pensions Agency and Secretary of State for Health.*

[52] Judgment of the Court of Justice dated February 17, 1998 (C-249/96), *Grant v. Soc. South West Trains Ltd.*

[53] Please see: Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza", D'Atena, A. - Grossi, P.F. (editors), *Diritto, diritti e autonomie tra Unione europea e riforme costituzionali. In ricordo di Andrea Paoletti*, Milan:Giuffrè, 121 et seq.; Ferrari Bravo, L. - di Majo, F.M. - Rizzo, A., (2001), *Carta dei diritti fondamentali dell'Unione europea*, Milan:Giuffrè, p. 22 for the jurisprudence of the European Court of Human Rights.
However, compare the remarks with respect of an *overruling* dated July 2002 in the paragraph below. With respect to the jurisprudence based on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms - which protects the *Right to respect for private and family life* and stipulates the

and to found a family, according to the national laws governing the exercise of this right."[54]

According to the commentators, Article 9 of the Charter of Fundamental Rights allows two different interpretations: "i.e. that «the right to marry and the right to found a family» shall be interpreted as a unit, as if the latter right forms a whole with the first right and cannot be viewed as separate from the first; or, alternatively, that these rights can be viewed as functionally independent from one another."[55] If so, "the right to «found a family» is recognized, but a more exact definition is lacking and with respect to further details, reference is made to the respective national and «local» laws. In reality, this means that Europe as a political and economic unit considers the family to be an empty container."[56]

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following: "1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" - see: Van Dijk, P. - van Hoof, G.J.H., (1998), *Theory and Practice of the European Convention on Human Rights*, The Hague, London, Boston: Kluwer Law International, p. 504; Russo, C. - Quaini, P.M. (2000), *La Convenzione europea dei diritti dell'uomo e la giurisprudenza della Corte di Strasburgo*, Milan:Giuffrè, p. 103.

[54] Earlier precedents include Article 16, subsection 1, of the Universal Declaration of Human Rights that stipulates the following: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." Article 23, subsection 2, of the International Covenant on Civil and Political Rights says: "The right of men and women of marriageable age to marry and to found a family shall be recognized. "

[55] Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., 117 including an extensive bibliography.

[56] E. g.: Donati, P., (2001), "La famiglia italiana 'si pluralizza': realtà, significati, criteri di distinzione", P. Donati (editor) *Identità e varietà dell'essere famiglia. Il fenomeno della pluralizzazione*, Cinisello Balsamo:San Paolo, p. 17. This author points out that the second interpretation "(would interrupt) a long tradition of civilization based on the family as it was previously provided for in the Universal Declaration of Human Rights of the United Nations (1948), as well as the Convention for the Protection of Human Rights of the European Council and in a number of other international supranational documents, which adjudicated an express and general preference for the legitimately founded family between a man and women in its continuity of their relationship with the children".

Rather, if the Charter of Fundamental Rights succeeds in achieving formal recognition in the future, a privilege which it is currently deprived of,[57] it would at least regulate the institutions of marriage and family as legally defined terms and refer to the common facts elaborated by the jurisprudence for the determination of the respective characteristics.

As mentioned previously,[58] we certainly cannot "derive the virtually precluded possibility of comprehensive and complete equality, the full and absolute, practical and terminological equity of appearances from the facts outlined above", such as domestic partnerships, on the one hand, and same-sex or transsexual domestic partnerships, on the other, "which are significantly unequal, and, better said, are essentially categorically different."[59]

For this reason, and contrary to the explanatory remarks by the Presidium of the Convention that approved the Charter, part of the Italian legal doctrine[60] insists that Article 9 of the Charter does not provide for the recognition of marriage between individuals of the same sex.

Even if one does not consider the fact that the Charter - pursuant to subsection 2 of Article 51 - does not introduce any new competences or responsibilities for the European Community and the Union and does not amend the competences and responsibilities stipulated in the Treaties, Article 9 of the Charter expressly entrusts the competence of regulating and exercising the right to marry and the right to found a family to the national legislators, on the basis of the undeniable presence of significant differences in the legal systems of the Member States.

The method of referring to national legislators, which is also used for other provisions of the Charter[61] - e. g. in subsection 2 of Article

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[57] Please see: Sorrentino, F., (2003), "La nascita della Costituzione europea: un'istantanea", *The Spanish Constitution in the European Constitutional Context* cit., p. 231 regarding the evaluation of the Charter in its validity. See also Judgment of the Court of Justice dated June 27, 2006, (C-540/03), *European Parliament v. Council of the European Union.*

[58] See top of paragraph 4.

[59] Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., p. 121.

[60] Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., p. 122.

[61] Please compare: García Manrique, R., (2003), "La Carta de los derechos fundamentales

10[62] or subsection 3 of Article 14[63] - ultimately provides domestic legislators with extensive discretionary powers to regulate the matter mentioned above within the stipulated limits.

It goes without saying that the individual Member States must adhere to the provisions of their respective national laws when exercising their discretionary powers.

6. Final remarks

I would like to refer to the approach taken by the European Court of Human Rights,[64] according to which the impossibility of a transsexual to get married to an individual of the same biological sex (but different from the sex whose external characteristics he has adopted) constitutes a violation of the provision of the previously mentioned Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms even though the same Court expressly refers to the impossibility to found a family based on this situation.[65]

In view of the remarks above, this decision is cause for concern. It is difficult to agree with the Court on the alleged limitation of the

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de la Unión europea. Análisis crítico de su contenido", L. Leuzzi - C. Mirabelli (editors), *Verso una Costituzione europea*, Atti del Convegno europeo di Studio, Rome 20-23 June 2002, Lungro di Cosenza:Marco editore, pp. 409 et seq.

[62] Accordingly, the following applies: "The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right."

[63] Accordingly, the following applies: "The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right."

[64] See Judgment dated July 11, 2002, *I. v. The United Kingdom*; Judgment dated July 11, 2002, *Christine Goodwin v. The United Kingdom*.

[65] Please see: Grossi, P.F., (2003), "Alcuni interrogativi sulle libertà civili nella formulazione della Carta di Nizza" cit., pp. 121 et seq. The author refers to the passage where both verdicts state the following: "*the Court observes that Section 12 secures the fundamental right of a man and a woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision*" (verdict dated July 11, 2002, *Case of I v. The United Kingdom*, § 78; verdict dated July 11, 2002, *Case of Christine Goodwin v. The United Kingdom*, §. 98).

quintessence of the right to marry based on the objected 'gap'. Limiting the examination to positive law: the provision of the Convention for the Protection of Human Rights, that the Court deems violated, expressly refers to the fact that the spouses are a man and a woman; furthermore, the decision does not take into account the fact that the provision itself leaves this matter to the jurisdiction of national legislators.

The same must apply to a Judgment of the Court of Justice which adopted the view of the European Court of Human Rights,[66] according to which a transsexual's impossibility to get married to an individual of the same biological sex to which the transsexual still belongs despite surgical procedures, is deemed irreconcilable with the provision of Article 141 of the Treaty establishing the European Community.[67]

This interference in the regulation of conditions concerning the right to get married, which contravenes reference to the jurisdiction of national legislators pursuant to Article 9 of the Charter of Fundamental Rights, can be interpreted as a sign that the founding process of a European *ius commune* does not take into account the principles outlined above and is based on centralization typical of the 19th century, or, according to Weiler's definition, on "reversed regionalism."[68]

It is a pattern that not only discounts the fundamental differences that exist within this highly important and delicate area in the

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[66] Judgment of the Court of Justice dated January 7, 2004, loc. cit.
Please see: Sorrentino, F., (2004), "La tutela multilivello dei diritti" cit., p. 876 regarding this decision. The author examines the judgment within the scope of verdicts used as evidence for "the expansion of the Community Law from its natural arenas, justified by the Court of Justice based on the need to secure the respect of all cases in which its application is influenced by normative evaluations which are subject to the competence of the Member States."

[67] It stipulates the following:
"1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
N/a."

[68] See: Weiler, J. H.H., (2003), *Un'Europa cristiana. Un saggio esplorativo*, Milan:BUR, pp. 168 et seq. regarding the corresponding risks.

European States, but also weakens the legitimacy and solidarity of the European Union.[69] An ancient saying reads: "*unius linguae uniusque moris regnum imbecille et fragile est*".

[69] Please see: Weiler, J. H.H., (2003), *Un'Europa cristiana* cit., pp. 168 et seq. for an overview. The author emphasizes in particular that the "reversed regionalism" tends to "weaken the legality of the Union," particularly if "the Community or Union interferes in areas that represent or are deemed to be traditionally 'national' responsibilities and which are associated with a symbolic value" and include everything from the "ridiculous (the traditional beer dose in Great Britain) to the sublime (the right to life in the dispute about abortion in Ireland)."