

Family vs solidarity Recent epiphanies of the Italian reductionist anomaly in the debate on *de facto* couples

Matteo Bonini Baraldi*

1. The constitutional debate on same-sex families

1.1. Background

Taking family matters seriously is a distinct, internationally renowned trait of Italian culture. This often ignites fierce feelings, touching upon a bundle of deep-rooted, yet changing values, such as personal autonomy, masculinity, motherhood, reproduction, etc., which have significant implications on national identity itself.

In recent times, new influences have shown that such a bundle of values might sometimes be founded upon reactionary and discriminatory premises, and/or produce unacceptably hard consequences on those who do not conform to the predominant rule. Due to diffuse and diehard prejudices in many parts of Italy, men and women (whom we today call gays and lesbians) continue to face discrimination based on a personal characteristic such as (homo)sexual orientation. Discrimination which, for its traits, does not belong to the experience of those, heterosexual people, who are not normally marginalised on grounds of (hetero)sexual orientation. The stereotypes which branded the former with characteristics of unreliability or sickness still contribute to ensuring that same-sex couples remain at a distance from ‘conjuality’, the socially recognised place – whether we like it or not – for profound commitment and the most significant existential dynamics of love, care, and moral and material communion.

Despite an ongoing need to do so, in this paper I do not purport to discuss or demonstrate discrimination in family matters, nor to address (at least explicitly) the most openly homophobic discourses. Rather, my concern stems from the intrinsic discriminatory arguments present in the rhetoric of those who claim to favour the promotion of equal treatment and individual rights and liberties. Without any claim to thoroughness, I will briefly survey the debate surrounding constitutional values and principles relevant for the matter at hand, as well as the three main bills on *de facto* partnerships that have attracted public and institutional attention. The survey will serve a twofold aim: it will inform the reader both as to the content of the various proposals, and as to the cultural and political frame of reference within which the proposals found their origin.

* PhD (2004), LLM (2002). EU Research Adviser, Law, Political Sciences & Economics, Università di Bologna (Italy), email: matteo.boninibaraldi@unibo.it. The author wishes to thank Mathias Möschel at the European University Institute in Firenze for his precious comments on an earlier draft of this paper. This paper was submitted for review in March 2008. The reader is advised that, after the general elections of April 2008, all bills discussed in this paper have been dropped by the new Parliament and that, although single opposition MPs have introduced new bills, the new political majority has already made it clear that it will not pursue the matter further.

By juxtaposing and comparing the three proposals, which have succeeded one another in a relatively short time, I hope to be able to show the reader the different, yet homogenous, political objectives and theoretical or cultural references which underpin each of them, in addition to their material content. The three bills can be seen as the unique testimony of the profound implications of the ‘pull-and-let-go’ exercise typical of Italian society and politics. An exercise which, regrettably, mainly descends from the desire to please the wishes of the moderate (mostly) catholic sectors of the population, as well as the official religious predicaments based on clearly antiquated binary notions of right vs wrong, natural vs unnatural, and moral vs immoral.

In my view, whilst the process of law reform and modernization should be welcomed if based on values such as personal autonomy and equality, the censoring temptations which have always contributed to the disappearance of same-sex couples, or to the (self)portrayal as something different and less worthy, must be taken seriously, and even more seriously when they propagate from progressive, left-wing narrations of equality and legal recognition. When the worth of family life of such couples is downgraded to a mere matter of competency for the population registry, or once again ignored through the segregation in hybrid legal schemes, it means that there is a severe gap in the ability to seriously question the reiteration of such concepts of ‘family’ and ‘nature’ which reinforce social and legal exclusion or marginalization. Therefore, every attempt at law reform in this sense should be regarded with utmost suspicion.

My conclusion is that the current Italian anomaly lies precisely in the fact that, masked by the promotion of the much cherished constitutional value of ‘solidarity’, there seems to be only one viable option for progressive political parties and scholars: the reductionist hypothesis. I use this formula to indicate the widespread and predominant incapacity or unwillingness to approach the matter of equality for same-sex couples in any other way that differs from that of diluting the specific problems into broader issues concerning all sorts of cohabiting arrangements based on solidarity or, as they are also called, ‘reciprocal help’.

1.2. *Between nature and culture*

Article 29 of the 1948 Italian Constitution stipulates, among other things, that ‘the Republic recognizes the rights of the family as a natural society based on marriage’, and is still today interpreted as the highest source of the *favor matrimonii* principle, which characterises the Italian legal system.¹ Most scholars interpret this Article as preventing equal treatment of those couples that do not want to or cannot marry (*coppie di fatto*).

In a brilliant essay published in 2000, however, a prominent constitutional scholar remarked that the oxymoron expressed by Article 29 invited answers conceived in an essentially ‘cultural’ manner, as opposed to the echoes of an ideal ‘nature’ it still powerfully generates. Professor Bin warned that the concept of ‘natural society’ refers to ‘that concept of family which derives from the past, of which our culture is imbued and which certainly does not ignore the values of the catholic religion’.² Such a perspective is clearly inspired not by an absolute and

1 C. Grasseti, ‘I principi costituzionali relativi al diritto familiare’, in P. Calamandrei & A. Levi (eds.), *Commentario sistematico alla Costituzione italiana*, 1950, pp. 290 *et seq.*; C.M. Bianca, ‘Famiglia (diritti di)’, in *Novissimo Digesto italiano*, VII, 1961, pp. 68 *et seq.*; C. Grasseti, ‘Famiglia (dir. priv.)’, in *Novissimo digesto italiano*, 1965 (reprint 1981), p. 48 and in App., III, 1982, p. 637; P. Barcellona, ‘Famiglia (dir. civ.)’, in *Enciclopedia del diritto*, XVI, 1967, pp. 779 *et seq.*; M. Bessone, ‘Rapporti etico-sociali, art. 29-31’, in G. Branca (ed.), *Commentario alla Costituzione*, 1976, pp. 14 *et seq.*; A.M. Sandulli, ‘Rapporti etico-sociali, art. 29’, in G. Cian, G. Oppo, A. Trabucchi (eds.), *Commentario al diritto italiano della famiglia*, I, 1992, p. 3; M. Sesta, ‘Privato e pubblico nei progetti di legge in materia familiare’, in *Studi in onore di Pietro Rescigno*, II, 1998, p. 811; M. Bessone, G. Alpa, A. D’Angelo, G. Ferrando, M.R. Spallarossa, *La famiglia nel nuovo diritto*, 2002, p. 16.; M. Fortino, *Diritto di famiglia. I valori, I principi, le regole*, 2004, pp. 25 *et seq.*; L. Califano, ‘La famiglia ed I figli nella Costituzione italiana’, in R. Nania & P. Ridola (eds.), *I diritti costituzionali*, 2006, pp. 925-948; M. Sesta, ‘Article 29’, in M. Sesta (ed.), *Codice della famiglia*, 2007, p. 3.

2 R. Bin, ‘La famiglia: alla radice di un ossimoro’, 2000 *Studium Iuris*, p. 1067.

immutable axiology, but by the principle of the mutability of definitions depending on historical variables.³ A similar viewpoint also characterizes Robby, an 11-year old boy who, on the day his two co-mothers got married in Canada, stated: ‘Nobody can say that their family is a real family and my family is just a bunch of people living in the same house’.⁴

It would certainly be interesting to know what, from the perspective of this young boy, distinguishes a family from just another bunch of people, or perhaps what is natural and what is ‘against nature’. Taking this path would inevitably bring to the surface the problem of definitions, of the *ubi consistam* of the family and, with it, the problem of power relations between those who have always imposed, or posed, such definitions and those who have always borne the consequences of them. In the same way, it would bring to the surface the problem of the distinction of the family from other types of cohabiting arrangements or, even more importantly, that of the value to attribute to the criterion of self-representation, which returns the power to the hands of stakeholders to speak of themselves by themselves.

Although it is clear that the arguments proposed today for supporting the value of cultural (as opposed to natural) traditions – unity of the family, perpetuation of the species, children well-being, the community’s benefit, and similar others – often mask the normative translation of certain moral beliefs, there appears to be a preoccupying lack of a sufficiently informed and broad vision able to remedy the ongoing situation of social exclusion and of limitation of individual prerogatives. Regrettably, extreme radicalization of right-wing and religious discourses have produced the perverse effect of imposing the inability to look beyond the lowest common denominator on the more progressive, yet fragmented, sectors of society.

Whilst marriage equality is an issue that, in contemporary Italy, is giving headaches to many, very few support the contention that because the construction of the ‘legitimate family’ (a term still widely used) finds its source in cultural traditions shaped by history, and not in an immutable idea of nature and ‘naturalness’, then the *status quo* would need to be argued for at the level of principles. Very few are willing to recognise that traditional Italian values have often contributed to constraining the individual within clothes that were not really custom-made for those who were required to wear them, especially when one considers women, children, the disabled or homosexuals. Whereas most scholars and intellectuals recognise that the legal culture of our times conceives marriage principally as an individual prerogative, a free choice which reflects a life-plan imagined, built up, conquered for celebrating one’s own affections and projects, for overcoming the many difficulties that a life together always presents, inside and outside the couple,⁵ few would concede that society has little interest in keeping some of its members away from it.

This circumstance raises the question of justifiability of the *status quo*. The most refined thinkers have warned that every exclusion ‘must give explanations, arguments: it must produce an argument that justifies it’;⁶ and it must do so if it wishes to avoid to be perceived as that ‘French cook who, when asked to justify the cruelty with which she peeled off eels while still

3 See V. Zagrebelski, ‘Famiglia e vita familiare nella Convenzione europea dei diritti umani’, in M.C. Andriani (ed.), *Un nuovo diritto di famiglia europeo*, 2007, p. 118; G. Ferrando, ‘Matrimonio e crisi della famiglia – Note introduttive’, in G. Ferrando (dir.), *Il nuovo diritto di famiglia*, 2007, p. 50.

4 E. Wolfson, *Why Marriage Matters. America, Equality, and Gay People’s Right to Marry*, 2004, p. 85.

5 The Belgian Cour d’arbitrage, with its decision of 20 October 2004, no. 159 (on line at www.arbitrage.be) held that ‘Au regard d’une telle conception du mariage (la création d’une communauté de vie durable), la différence entre, d’une part, les personnes qui souhaitent former une communauté de vie avec une personne de l’autre sexe et, d’autre part, les personnes qui souhaitent former une telle communauté avec une personne de même sexe n’est pas telle qu’il faille exclure pour ces dernières la possibilité de se marier’.

6 See the B. Constant’s quotation in G. Zanetti, ‘Le coppie di fatto tra diritto e morale’, in G. Zanetti (ed.), *Elementi di etica pratica. Argomenti normativi e spazi del diritto*, 2003, p. 159.

alive, answered “they are used to it”: she had been doing it for thirty years”.⁷ However, few have embraced such perspective thus far.⁸ Meanwhile, recent medical research drew attention to the implications of the so called ‘minority stress’ suffered by lesbian and gay families by way of lack of legal recognition.⁹

1.3. Individual ‘desires’ vs objective discourses

Freedom and equality are fundamental principles of law. The theme of same-sex and unmarried unions, and the problems posed by it, concerns precisely these two fundamental principles and values: equality and autonomy, equal treatment and respect for fundamental rights of the individual, the ban on discrimination and the promotion of personal development and identity.

Whilst these concepts have framed the debate elsewhere, both in Europe and overseas, in the boot of Europe they have not yet been able to limit the token of hypocrisy and deference which the legislature and intellectuals continue to pay to external and non-democratically appointed agents. Legal scholars or philosophers, in turn, have initially been very critical of any attempt to inject these elements into the legal debate. Even when they grant the individual a certain degree of autonomy within the private sphere, such critiques forcefully maintain that same-sex couples should not aspire to any kind of recognition in the public sphere. Concerning sexual orientation in general, even when they show tolerance towards certain dimensions linked to conduct, these scholars tend to limit it to a conduct of a merely erotic-sexual nature.

The conclusion normally drawn from such premises is that sexual orientation is a characteristic that should be relevant only within the limits of the private sphere of the individual; therefore, any further expression of sexual orientation cannot rise to the level of a legally relevant phenomenon, deserving of protection. This line of reasoning, while accepting that today homosexuality is no longer a disease and the homosexual is no longer a deviant, emphatically reiterates that the homosexual is a person with an identity which should be respected, but only in the bedroom.

Following some elaborations – which embody the closest attitude – same-sex relationships are not, and should not be, relevant for the law because, by being indicators of ‘subjective and individual desires’, they belong to a pre-judicial experience which clashes with an ‘objective discourse on the human person’.¹⁰ This viewpoint seems to consider ‘homosexual cohabitation’ a ‘thing’ where sexual activity takes place which, albeit protected in the private sphere, does not deserve any public recognition. Those who admit a certain degree of ‘respect for human dignity and private autonomy’ see legal recognition of same-sex couples as a merely ideological statement, where ‘homosexuals are not considered for what they are, but for what they would like and cannot be’.¹¹

On the occasion of the approval of some regional laws granting same-sex couples access to public housing facilities, some have even argued that same-sex couples could not be denied such facilities, but should be considered ‘following a proper order’, that is to say ‘in an inferior and subordinate position’ when compared with married and unmarried different-sex couples.¹² Others have claimed that the family has ‘intrinsic characteristics which cannot be defined or

7 *Ibid.*

8 See, however, as one attempt to raise the profile of alternative discourses on the family, various contributions published online at www.famiglienellacostituzione.it/spunti/1index.html.

9 V. Lingiardi, *Citizen gay: famiglie, diritti negati e salute mentale*, 2007.

10 F. D’Agostino, *Una filosofia della famiglia*, 2003, p. 140.

11 F. D’Agostino, ‘Le coppie omosessuali, problema per i giuristi’, 1994 *Iustitia*, p. 83.

12 F. D’Angeli, *Il fenomeno delle convivenze omosessuali: quale tutela giuridica?*, 2003, p. 32.

modified by the legal system'. These characteristics are monogamy, exogamy, and heterosexuality, and the argument produced is that if one is upset, such as difference of sexes, 'nothing can guarantee that in the future the others will not be modified', as demonstrated by a German case where brother and sister were subjected to criminal sanctions for living together as a couple.¹³ Even more radically, some have argued that 'if homosexuality is not a sin, nothing is a sin. If homosexuality is not morally reprehensible, neither is paedophilia. The latter is nothing but a *species* of the former'.¹⁴

Apart from apocalyptic parallels between homosexuality and incest or paedophilia, the specifically problematic element is not really that of conceding tolerance towards certain social and even legal phenomena, when individual rights are at stake, but that of imposing on the 'objective discourse' concerning the human person a discourse aimed at the legitimation of a phenomenon in the family sphere, which is inherently sterile and, thus, fundamentally different. It is this difference which impedes that such subjective desires acquire dignity before the law, just as it happens for friendship, a situation existentially important, but legally irrelevant. Practically speaking, as it will be illustrated in the last section, a marriage contracted in The Netherlands by two Italian men has been considered radically non-existent and, thus, has not been registered in the national registry or births, marriages, and deaths.

1.4. Social formations and the role of solidarity

Midway between the integralist views mentioned above and claims for full marriage equality lie some cautious theses which favour a limited recognition of *de facto* couples, irrespective of the partners' gender and, to be sure, of the intimate nature of the relationship. The focus of this paper is precisely on these views; more precisely, my aim is principally to provide some indications as to why they only favour *limited* recognition.

The dominant argument claims that Article 29 of the Constitution – by tracing a clear divide between marriage and *de facto* families – requires the legal scholar to 'raise the issue of the control of the border between family and non-family'.¹⁵ Unmarried cohabitation is considered by many as a way for the individual to realise his or her personality, which nevertheless cannot lead to full equality with marriage.¹⁶

There is, thus, a deeply felt and shared need to reiterate the exclusivity of the family model supposedly foreseen by the Constitution. The argument normally concludes that it should be possible to embrace same-sex couples within the concept of 'para-family relations', which would seem to include every kind of cohabitation under the same roof and could be 'lightly' regulated under the auspices of Article 2 of the Constitution.¹⁷ Article 2 guarantees inviolable human rights by connecting them both to the individual and to the 'social formations' where he or she develops

13 L. Violini, 'Il riconoscimento delle coppie di fatto: praeter o contra constitutionem?', 2007 *Forum dei Quaderni costituzionali*, online at <http://www.forumcostituzionale.it/site/temi-di-attualita/temi-di-attualita/diritti-e-liberta.html>.

14 A. Donati, *La famiglia tra diritto pubblico e diritto privato*, 2004, p. 326.

15 F.D. Busnelli, 'La famiglia e l'arcipelago familiare', 2002 *Rivista di diritto civile*, p. 509. See also G. Bonilini, 'Il matrimonio', in G. Bonilini and G. Cattaneo (dir.), *Il diritto di famiglia*, I, *Famiglia e matrimonio*, 2007, p. 63; F. Santosuoso, *Il matrimonio*, 2007, p. 25.

16 See in general on unmarried cohabitation M. Dogliotti, 'Famiglia di fatto', in *Digesto delle discipline privatistiche, sezione civile*, 1992, p. 192; F.D. Busnelli & M. Santilli, 'La famiglia di fatto', in G. Oppo, G. Cian & A. Trabucchi (eds.), *Commentario al diritto italiano della famiglia*, VI, 1, 1993, p. 757; L. Califano, 'La famiglia ed i figli nella Costituzione italiana', cit., p. 937; L. Balestra, 'La famiglia di fatto', in M. Sesta & V. Cuffaro (eds.), *Persona, famiglia e successioni nella giurisprudenza costituzionale*, 2006, pp. 483-503.

17 Busnelli 2002, *supra* note 15, p. 509.

his or her own personality; furthermore, it demands the execution of the non-renounceable duties of political, economic and social solidarity.¹⁸

These conceptions echo arguments that other experiences around the globe have had to face. They have informed both the French and the Spanish approach, to name but some neighbouring countries, where at some point the debate was dominated by those wishing to dilute the incumbent recognition by mixing it with broader issues dealing with personal relationships of ‘reciprocal help’. In Italy, however, the distinct trait is that such attempts characterize the *maximum*, not the minimum, of protection that has been put on the table by the academic and political establishment and the lesbian, gay, bisexual and transgender (LGBT) movement alike. Why?

I believe that if constitutional scholars continue to claim (even recently) that it is ‘imprecise’, especially with regards to same-sex couples, to call them ‘*de facto* families’ or ‘non-traditional families’, because they are in truth ‘social formations within which solidaristic manifestations are realised’,¹⁹ this is because the family is assumed to be an immutable part of the debate. Starting from this often implicit assumption, all new phenomena must automatically fall under the other, the open, the variable element of the debate, the one referring to ‘social formations’ in general. My contention here is that few authors have been willing or able to emancipate from the binary logic which – in the Italian constitutional system – opposes the ‘family’ and ‘social formations’, a logic which descends from a limited reading of the constitutional text approved by the Constitutional Court.²⁰ This Court, in particular, has always held very clearly that ‘cohabitation *more uxorio* is different from the matrimonial tie, and with the latter not automatically comparable in order to deduct the constitutional requirement to equal treatment: the former, in fact, lacks those characters of stability and certainty typical of the matrimonial tie, based as it is on day-to-day affection which can be freely and instantly withdrawn (...) Therefore it cannot be held unreasonable and arbitrary that (...) the legislature adopts diversified solutions for the family based on marriage, foreseen by Article 29 of the Constitution, and for cohabitation *more uxorio*: and this because the former epitomises, as opposed to the latter, not only the need to protect individual affective relations, but also the need to protect the “family institution” based on stability of relations’.²¹

In this context, the permeability of the concept of solidarity and of social formations mentioned by Article 2 of the Constitution appears to many the maximum stretch allowed under the current system. As I mentioned, this is perhaps true only if the other side of the bar remains constant. Everything changes, of course, if the meaning of family and of marriage, and the content of their constitutional protection, is approached from a perspective capable of taking into account the theoretical references mentioned in the Paragraph 1.2 above and superbly illustrated by some of the most often cited judicial decisions around the globe.²²

18 A. Barbera, ‘Principi fondamentali, art. 1-12’, in G. Branca (ed.), *Commentario alla Costituzione, sub art. 2*, 1975, pp. 66 et seq.; D. Messinetti, ‘Personalità (diritti della)’, in *Enciclopedia del diritto*, XXXIII, 1983, p. 366; A. Baldassarre, ‘Diritti inviolabili’, in *Enciclopedia giuridica*, XI, 1989; A. Barbera, ‘“Nuovi diritti”: attenzione ai confini’, in L. Califano (ed.), *Corte costituzionale e diritti fondamentali*, 2004, p. 19; A. Barbera & C. Fusaro, *Corso di diritto pubblico*, 2006, p. 126; P. Lillo, *Diritti fondamentali e libertà della persona*, 2006, p. 79.

19 R. Alesse, ‘Quando i “dico” non trovano “Pacs”’, 2007 *Forum dei Quaderni costituzionali*, online at <http://www.forumcostituzionale.it/site/temi-di-attualita/temi-di-attualita/diritti-e-liberta.html>, p. 2.

20 See, for instance, Corte cost. 13-18 November 1986, no. 237, 1986 *Consiglio di Stato*, II, p. 1447; Corte cost. 26 May 1989, no. 310, 1991 *Foro italiano*, I, p. 446; Corte cost., 18 January 1996, no. 8, 1996 *Famiglia e diritto*, p. 107; Corte cost. 29 January 1998, no. 2, 1998 *Consiglio di Stato*, II, p. 3; Corte cost. 13 May 1998, no. 166, 1998 *Giurisprudenza italiana*, p. 1783.

21 Corte cost. 25 July 2000, no. 352, 2001 *Cassazione penale*, p. 28.

22 Ontario Court of Appeal, *Halpern et al v. Attorney General of Canada et al.*, 10 June 2003, 2003 *Dominion Law Reports*, (4th), 225, p. 529, online at <http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm>; Vermont Supreme Court, *Baker v. State of Vermont*, 20 December 1999, no. 98-032, 744 A.2d, 864 (Vt. 1999); Massachusetts Supreme Court, *Goodridge v. Department of Public Health*,

It is also interesting to note how the mainstream constitutional argument appears to be at odds with the more open teachings of the best *dottrina* of civil law, which stress that ‘man does not simply have sexual instincts, but also and foremost, the essential need to realise himself in the family, as the first form of human living-together arrangement [so that] freedom of the family must be understood as freedom of the individual to set up the family in accordance with his own choices, and as freedom to develop in it one’s own personality’.²³ Rather interestingly, very few constitutional scholars have considered that: (1) freedom to marry is a fundamental (human) right; (2) as a fundamental human right, it is protected by Article 2 of the Constitution; (3) freedom to marry entails the freedom of each individual to choose the person to be married; (4) gay and lesbian people cannot marry a person of their choice; and (5) gay and lesbian people suffer an interference with the sphere of personal freedom guaranteed by the Constitution.

This line of reasoning is still alien to many, who only see Article 2 as a (weak) way of counterbalancing the protection that Article 29 allegedly affords to the traditional family based on marriage. Instead of embracing the argument just outlined, a majority of the moderately progressive scholars support what I call the reductionist argument. The reductionist argument claims that: (1) *de facto* (same-sex or different-sex) couples are not a family based on marriage (a stronger version claims that this is because the family is ‘natural’ and therefore immutable as allegedly prescribed by Article 29 of the Constitution); (2) however, they *can* be seen as a manifestation of functions of solidarity; (3) these functions are approved by the Constitution in its Article 2; and (4) regulating such social formations would not be unconstitutional *provided that the supremacy of the traditional family is left untouched* (this part is often left implicit).

There are no reasons to hide the fact that a similar approach has inspired, two decades ago, the first Danish law establishing a ‘separate’ scheme for same-sex couples. However, the Danish scheme, as well as many of the subsequent ones, also produced a substantive equalisation in rights and duties; it was separate, true, but (more-or-less) equal.²⁴ What is striking about the Italian situation is that mainstream, liberal discourses all focus on a separate *and* unequal scheme, while presenting it as a fair innovation.

In my view, an argument such as this one can be subject to a number of critiques, the main one being that it isolates from the debate precisely what needs to be debated: the immutability and the naturalness of the traditional family. However, what I wish to emphasise here is the principle from which this position originates. In my view, as it will be clear, solidarity is *the* key word in contemporary Italian debate on *de facto* couples. It appears in the title of the bill drafted and supported by the Italian LGBT movement. It appears in a regional law of Apulie, which has addressed these matters. It appears in the Governmental Bill on ‘Rights and Duties of Cohabitants’ (DiCo), as well as in the title of the latest parliamentary bill, creating the ‘contract of solidarity union’. It is, I conclude, the only (hypothetical) *laissez-passer* under the current circumstances.

The theoretical premises of the diverse Italian political establishment, notwithstanding apparent ideological distance, all converge into the concept of solidarity and have all had an immediately visible influence on the various legislative proposals that have been presented to the public opinion and to the decision makers. This conclusion is not contradicted by the fact that the real debate is much richer than this – especially at the fringes – and that there have even been

18 November 2003, SJC-08860, online at <http://news.findlaw.com/hdocs/docs/conlaw/goodridge111803opn.pdf>

23 C.M. Bianca, *Diritto civile. La famiglia, le successioni*, 2, 2005, p. 15.

24 See, also for further developments, K. Waaldijk, ‘Others May Follow: the Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries’, 2004 *New England Law Review*, no. 3, p. 569.

parliamentary proposals for opening up marriage to same-sex couples. These are issues of, and for, the radicals, which bother mainstream élites to a negligible extent.

Clearly, solidarity is a very noble concept, but also very distant from what needs to be debated. Solidarity is a broad concept that can be found in a multiplicity of situations in life and that can acquire several meanings. In legal terms, it is very difficult to grasp its precise relevance.

It is my firm belief that solidarity is a concept that has been put forward because it allows one to gather political consensus around a central concept of both Christianity and socialist/communist views. The same concept also serves a more subtle purpose, because it allows one to pretend that the real problem of full marriage equality for same-sex couples will disappear. Regrettably, the emphasis on solidarity also has the effect of reinforcing the shift of the debate from some of the central problems of Italian society: male chauvinism and machismo, homophobia and transphobia, lack of adequate public policies and programmes in support of minorities and for the promotion of diversities, lack of adequate welfare nets for the economically weak, lack of opportunities for the young and innovative sectors of society.

Overall, the widespread obsession on the constitutionality of an eventual parliamentary act on *de facto* couples obliges many to direct their efforts at demonstrating that the solidarity ties within these couples do make them constitutionally relevant and, thus, do ensure the legitimacy of an eventual act. This move, however, produces a progressive distancing from the problematisation of concepts of family and marriage in the 21st century, considerably reduces the room for discussion by strengthening the insulation and the immutability of such concepts and, thus, procrastinates the supremacy of the classical understanding that marriage is the only legitimate place for the exercise of sexuality, which should be orientated to procreation.

The proposals for new legislation, which will be discussed in the following sections, illustrate both how the shift from the crucial problems was implemented, and the impact this has had on the position of individuals and couples alike.

2. The Proposal on the *Patto civile di solidarietà*: phenomenology of a self-inflicted compromise

Even if the story begins at least a decade earlier, the theme of same-sex couples became a hot electoral issue only in the months prior to the 2006 parliamentary elections, following an intense campaign by political parties of the major Italian gay association (Arcigay). Prior to the 2006 elections the Chamber of Deputies had already addressed the issue with an analysis of the various proposals on the table. The main proposal to be discussed had rapidly become the one named '*Patto civile di solidarietà*' (Pacs), proposed by Franco Grillini MP on behalf of Arcigay. The Justice Committee of the lower Chamber held hearings on the matter, which made it possible to collect and put on parliamentary records various experts' views on same-sex couples.²⁵

The 'Pacs' proposal has always been defended by its drafters as 'the lowest possible compromise', meaning that the proposal had already taken into account the peculiarities of the Italian situation by refraining from claiming full legal recognition, on an equal footing with marriage. This claim also meant that, notwithstanding the self-restraint exercise, the proposal was the best possible compromise under the circumstances of that time, for it actually sought to improve the situation to some degree.

25 See them on the website of the campaign www.unpacsavanti.it

The Pacs proposal, re-presented after the elections as Bill C-33, is accompanied by an introduction that goes out of its way to clarify what it is *not*. The need to downplay and ‘disguise’ the meaning of the bill vividly depicts the climate of misinformation and suspicion that characterised the political audience towards which it was directed. It also epitomizes the difficulties that the proposers had to face in order to defend an even incomplete recognition. The main character which illustrates this difficulty is symbolised by the choice of combining, from the very beginning, the position of different-sex cohabitants with that of same-sex couples. This monistic approach was then believed to avoid further singling out of sexual differences, and to be able to attract support from a larger population than just the gay and lesbian population. To this end, the lesbian and gay movement started or reinvigorated relations with some of those social sectors working on secularism, pluralism, diversity, and organised for a few years a national ‘Pacs day’ in Rome as an occasion to collectively press Parliament for change.

The choice of addressing the situation of all unmarried couples in a single bill, without focusing on the specificity of same-sex couples, had a clear negative impact on the intensity and the scope of the legal scheme proposed. Put simply, it is rather clear that if same-sex couples wish to obtain a legal scheme that closely resembles marriage in terms of legal effects, this does not necessarily hold true for different-sex couples aiming at an alternative scheme. Moreover, even if the scheme was conceived and proposed as an instrument to ensure better protection of the inviolable right to personal development, and it does indeed propose some interesting solutions, the majority of the choices made at the private law level were not entirely consistent with these lofty premises.

The first and main aspect which testifies to the self-inflicted exclusion from family law is exemplified by the fact that the new scheme is a contract, governed by contract law. By way of illustration, the explanatory notes written by the proposers state that ‘today in Italy contracts must rigorously have a patrimonial content. Without this legislative reform two individuals cannot, under the current state of things, conclude agreements concerning the non-patrimonial issues of their cohabitation’.²⁶

Clearly, a contract for regulating both the patrimonial and non-patrimonial issues of a life together already exists, and it is normally called marriage. Since it was chosen not to address marriage and marriage rights directly, though, the proposal sought to achieve as many practical results as it could whilst at the same time distancing the Pacs from the family as much as possible.

This dubious juggling exercise can also be deducted from Article 2 of the proposal, which defines the Pacs as ‘the agreement between two people, also of the same sex, concluded in order to regulate the personal and patrimonial relations concerning their life together’. Moreover Article 6 stipulates that ‘the *patto civile di solidarietà* is governed by the rules of the Civil Code on contracts, if applicable’.

Articles 3 to 5 are dedicated to the manner in which a Pacs can and should be established. The system tends to resemble the establishment of a marriage, as much as possible. In fact, it includes the impossibility to sign a Pacs between close relatives, or between individuals who are already bound by a marriage or a Pacs. Article 4, in particular, makes it clear that a Pacs can come to life only after a formalised procedure in front of the registrar (with the signature of the pact by both parties).

26 Explanatory Memorandum to Bill C-33, p. 4.

In terms of legal consequences, Article 7 stipulates a duty to contribute to the charges of the common life and Article 8 gives the parties the possibility to opt for the *comunione legale*, the matrimonial regime of common property between spouses foreseen by Articles 177 *et seq.*, Civil Code. Furthermore, Article 11 makes it clear that, in case of intestate succession, the party to a *patto civile di solidarietà* will have exactly the same inheritance rights as a spouse. There are other important rights attached to the *patto*, albeit the proposal is by no means complete. The rest of the bill is devoted to regulating the termination of the pact, as well as issues of private international law; the final part modifies various laws and codes in order to make room for the new scheme.

The informed reader might be able to identify in this proposal some opportunities and suggestions for the new, light, minimal family law of the future, but will also conclude that the sanctity of the legitimate family cannot be challenged as easily as the ‘homosexual lobbies’ would like. For the reasons set out in the previous paragraphs, a bill such as this one might have started as the best possible compromise, but it ended up as something very close to a ghetto.

3. ‘Out of the frying pan into the fire’: the Governmental proposal on rights and duties of cohabitants

As mentioned, the theme of *de facto* couples became a hot electoral issue, and thus of public domain, only in 2006, with severe delay if compared to other European and non-European jurisdictions. The diverse and rather fragmented centre-left coalition headed by Mr. Prodi had managed to agree that, once in power, it would propose new legislation to improve the protection and the rights afforded to *individuals* living in a *de facto* cohabitation. When, at the beginning of 2007, the Government chose to draft and publish its own proposal on the issue,²⁷ the public debate erupted uncontrollably. The Governmental proposal fuelled rampant opposition by the Catholic Church and conservative sectors of Italian society, which found a common reason to call for a large public demonstration in Rome in defence of the traditional family, called the Family Day, organised just weeks before an unprecedentedly huge gay pride parade took place in the same city. In between, the President of the Republic had called upon all political parties to refrain from exacerbating the deep fracture between *laici* and *cattolici*, between secular and Catholic views. The contrast, however, exploded in the streets and, thus, could not have been more evident.

The Government had attempted to craft a compromise proposal, refraining from any recognition of *de facto* couples but granting protection to the *individual* cohabiting with another person. The ruling coalition, composed of moderate Catholics, liberals, social-democrats, greens, communists and post-communists could only agree on this minimal standard which, as a matter of fact, largely corresponds to the views of mainstream, moderately liberal legal doctrine. I have sketched above the theoretical and legal reasons of this choice, such as the rigid dichotomy between family and other ‘social formations’ always upheld by the Constitutional Court.

An initial benchmark for assessing the nature and content of the Governmental Bill could consist in clarifying from which debate the DiCo Bill emanates. Did it originate from a political, cultural, and scientific debate on the problematisation of the dominant representation of the family? Did it originate from the problematisation of the prevalent narrations of the body, sexuality, pleasure, desire and reproduction? Did it originate from the renewed role of family

27 Senate Bill no. 1339, *Diritti e doveri delle persone stabilmente conviventi*, by Ministers Pollastrini and Bindi.

functions and parental responsibilities in the 21st Century? I strongly believe that, if the DiCo Bill was indeed a product of such a broad reflection, it would already be a positive development in itself, even with its intrinsic (technical) limitations in terms of rights and benefits it entails.

Unfortunately, all indicators point in different directions. The obsessive and recurring governmental emphasis on the rights of the individual as a single person, the repeated assurances by the LGBT movement that its proposals would do nothing to change the family and its structures, the alarmed and recurrent comments made by the highest religious authorities, including the Pope, *vis-à-vis* the Catholic sectors of political forces, they all point to the conclusion that the core inspiration of the DiCo Bill, clearly reflected in most technical solutions adopted, is that of tracing a very visible and rigid line between the legitimate family and other living-together arrangements. As I tried to illustrate, this fundamental choice is consistent with the majoritarian views on the matter of both the political, the religious, and the scientific community in Italy.

From my point of view, however, the bill stands out, because it embodies the reductionist hypothesis taken to its highest level, as if a decade of European and global experiences had nothing to teach; or rather, as if the only teaching of such experiences was that full equality was indeed possible and, thus, a concrete and immediate danger urging solutions of a radically different nature. What happened with the DiCo Bill was inspired not only by plain reductionism, but by a reductionism so complexly inter-related with international developments to take the form of a race to the bottom growing faster, rather than slower, as full equality for same-sex couples became a more and more concrete reality elsewhere and, especially, in neighbouring countries, more comparable, and more interrelated with Italy (*e.g.* France and Spain). A reductionism so pronounced that it induced the Government to entirely reject any scheme based on a formal manifestation of party choice, because the danger of equating, from the formal point of view, marriage and cohabitation was too great.²⁸

If compared with the Pacs proposal, the Governmental choice has produced a very significant downgrade of the scheme, and by consequence of the personal relationship which underpins it, from the (mildly) formal to the purely informal level. The way this ‘cultural’ and political premise was technically implemented was the involvement of a mechanism foreseen by the population registry, called to prove the existence of cohabitation by means of the data recorded. In other words, the population registry is used as a tool to prove cohabitation between two individuals, through a presumptive mechanism which allows contrary evidence as to the existence of the prerequisites, the initial or final date of cohabitation, etc. Nothing farther from a new legal scheme.

Notwithstanding the premises I recalled, the title of the Governmental proposal, ‘Rights and duties of people stably cohabiting’ (DiCo its short name) could seriously run the risk of pleasing some post-modern commentators. Here it is, finally, the light, minimal law, the law that speaks of and to persons with multiple and interchangeable identities, not of legal constructs or institutions. But is it really the family law of the future, the one that abandons the rigidity of the traditional status and allows for the broadest blossoming of personal autonomy, the law set by this proposal? Or, rather, such law is so ‘minimal’ that no one could reasonably dare to speak of family law at all, as, in fact, several reactionary critiques wished?

The way the nature of the union and the subjective requisites are conceived sends out a clear message. According to Article 1 (coldly called ‘Scope and modalities of application’), ‘Two

28 M. Dogliotti & A. Figone, ‘Famiglia di fatto e DICO: un’analisi del progetto governativo’, 2007 *Famiglia e diritto*, p. 417.

people of age and not incapacitated, also of the same sex, united by reciprocal affective ties, who cohabit stably and exchange assistance and moral and material solidarity, not tied by marriage, blood ties in the direct line within the first degree, in-law ties in the direct line within the second degree, adoption, affiliation, guardianship or protection, are entitled to the rights, duties and claims established by the present act' (unofficial translation).

First of all, a stylistic remark: if the Government has always defended the proposal arguing that it only protects the rights of individuals and not of couples, it is then ironic that the first word of the bill is 'two', 'two persons'. As is immediately clear by the cumbersome and inelegant definition cited above, the very essence of the type of relationship is precisely based on exchange of assistance and solidarity. Not the family, not conjugality, not cohabitation *more uxorio*, nor sexuality, but solidarity, an evergreen champion of good sentiments directed at the disenfranchised, the excluded, the 'minor'. Thus, the bill attaches rights and duties not only to individuals living in a marriage-like relationship (characterised by the *affectio maritalis*), but also to those who cohabit for affective reasons, with assistance and solidarity: old people, brothers and sisters, relatives or in-laws who remained in the same house after the once large family became thinner, students, etc.

According to the bill, cohabitants must not be already married. Furthermore, the bill does not exclude relations between close relatives, such as for instance brothers and sisters. Only first degree relatives in the direct line, that is parents and children, and second degree in-laws in the direct line are excluded from the definition of (potential) cohabitants. Apart from these cases, all other relatives living together could potentially fall under the scope of the law. There is, really, little need to comment why this is done the way it is. Past European, but also overseas experiences have shown that this option is a way of symbolically diluting the material object and, thus, of downplaying any potential comparison between such living-together arrangements and marriage.

There have been both political and scientific claims, in the global debate around the world, that this expansion beyond sexuality and conjugality might not be a negative development in itself. In this case, however, it becomes a very negative counter-revolution if seen as the product of the limited debate sketched above. In truth, in Italian politics there seems to be an omnipresent subtext, never expressly mentioned. An idea of the couple, of the cohabiting couple, of the conjugal but unmarried couple, which cannot be the object not only of recognition, but even of explicit representation. This is also evidenced by the fact that the Governmental Bill does not address one of the crucial problems of *de facto* families that of the fate of purchases made during the relationship and of the division of property upon its break-up.

At the centre of this bill are not people, single or coupled, but rights and duties, mere legal constructs which become, in the absence of a subject, nomad and empty ghosts 'in search of an author', to say it with Pirandello. There are laws that mould, shape, organise, foresee, guarantee; and, within the scope of these purposes, entrust certain subjective position to the individuals concerned. But this draft has the only declared purpose of 'attributing' rights and duties.

According to the bill, cohabitation does not begin with a formal act; simply, it is proven by the records of the population register. The second paragraph of Article 1 speaks only of an aseptic 'inscription' and of 'cancellation'. The population registry, according to the explanatory notes, allows the interested parties to 'demonstrate the existence and the duration of the cohabitation in order to exercise the rights foreseen by the Bill'.²⁹ The 'inscription' seems to follow a

29 Relazione di accompagnamento, p. 14.

declaration given by the parties according to existing rules governing the population registry which, as maintained by the explanatory notes, already has the institutional mandate of ‘ascertaining and certifying’.³⁰ To be sure, it was already a legal duty for everyone to declare to the population registry his or her eventual cohabitants. The bill even stipulates that when the declaration is made by only one party, he or she *must* inform the other of this circumstance by registered mail (Article 1(3)). There is, thus, nothing resembling a formal celebration.

In terms of legal consequences, Article 4 of the bill delegates to hospitals and other care facilities the regulation of the ways in which the cohabitant can exercise his or her visitation and assistance rights. This is another rather curious provision, without much attached to it; whilst delegation to the periphery is sometimes a good thing, in a diverse and contradictory country like Italy the law should at least set the general criteria and establish clear guidelines and principles for hospitals to follow. Otherwise, it is almost certain that a situation similar to that of abortion or contraception would arise, where doctors with conscience objections refuse to implement the law and to provide services or care to women in need.

The bill also addresses important issues such as residence permits for the partner of third country nationality, work carried out by the *de facto* partner in the partner’s company, tenancy contracts, change of workplace, succession, maintenance in case of need. The common theme in all of these cases is that of underscoring the difference between cohabitants and spouses, either by making the exercise of rights for the former more cumbersome, or by crafting such rights in a more limited fashion both *ratione personae* and *ratione materiae*. As just one instance which testifies to this approach, it will be sufficient to mention that succession rights can only be acquired after nine years of cohabitation (Article 11).

In general, cohabitation must be ‘actual, ongoing’ in order for the parties to be able to exercise the rights and duties attributed by the bill. Ironically, thus, cohabitants must always stay together, at all times, as opposed to spouses who can each go their own way, since living apart is not a problem in marriage and certainly not a condition for its existence. On closer examination, however, if one analyses other areas of human behaviour, it is not ‘living under the same roof’ in itself which justifies the attribution of rights and benefits (except for cases specifically and strictly linked to this circumstance, such as the right to housing or domicile). If this was true, I could issue a declaration of cohabitation with my cat: after all, we have mutual affective and solidarity links and we live together. It is, rather, the common life project, the interconnection of experiences and desires, of fears, of attempts, of property, it is the *comunione di vita*. Cohabitation is nothing, but one of the many possible epiphanies of this *comunione*, which is a central aspect in the lives of many and what should really matter: it is condescending to pretend that it is cohabitation alone what triggers the necessity of law reform.

Clearly, it is no secret that this view leads one to admit that there is no real difference between *de facto* and married couples. In fact, the Italian Constitutional Court has held on various occasions that the reason for upholding differential treatment lies precisely in a legal, non-factual difference (marriage is a relationship encapsulated in a legal scheme which guarantees certainty and stability, cohabitation is uncertain and unstable). Hence, this bill magically ensures that cohabitation between unmarried partners remains a *de facto* phenomenon, unable and unfit to pierce the juridical realm, the sanctuary of marriage and the traditional family. This is why it only ‘attributes’ rights and benefits, and why it attributes them only to disentangled individuals. The underlying fact is not a juridical fact, but a *brute* fact which penetrates the legal order as a mere

30 The system is regulated by Decreto del Presidente della Repubblica 30 maggio 1989, no. 223.

fact, without any social meaning and worth. In a way, this bill treats the cohabitation experience as the legal system treats a car accident: a brute fact which triggers some legal protections and a need to distribute rights and duties between the various parties involved.

As it has been written by a highly respected scholar, ‘juridification means (...) guarantee: setting up of protection and, thus, possibilities of defending one’s own subjectivity or whichever aspect of it before a court, either civil, administrative, or criminal. It means, in other words, to bring back in society – in the form of court structures – the conflict which used to be resolved in a power game among single individuals, or between individuals and the group (or the state), where the weakest individual, either because mere individual or because socially marginalised, had to succumb’.³¹ Unfortunately, it is difficult to conclude that the DiCo Bill could have such an empowering effect.

Finally, Article 13(2) stipulates that – when pension entitlements will be re-organised as envisaged by Article 10 – it still will not be possible to calculate pension rights based on the years of cohabitation which preceded the ‘declaration’; for pension purposes, cohabitation only begins when the declaration is made. The bill is silent as far as termination of the relationship is concerned (or, rather more accurately, as far as termination of the possibility to exercise the rights and benefits is concerned). Only Article 13(6) concludes that patrimonial and succession rights, as well as other benefits foreseen by the bill, terminate upon marriage of one of the cohabitants. There is absolutely no mention of the implications of a relationship breakup: it is only said that ‘rights terminate’.

4. The Parliamentary compromise: towards a ‘contract of solidarity union’?

At the outset of this paper I claimed that the current situation allows the curious scholar to reconstruct, through the analysis of the three bills, the rapid and sharp variations which have accompanied the debate on rights and duties of cohabitants. I also claimed that, notwithstanding the apparently different cultural and political frame, some common traits – based on the concept of solidarity – constitute the backbone of all proposals. A demonstration can be found in the way Parliament chose to approach the matter.

In the spring of 2007, almost submerged by implacable opposition and brought to the edge of a crisis, the Government chose to bring to an end its involvement in the matter of *de facto* families. It claimed that Parliament was sovereign, and left the matter to the perils of parliamentary vicissitudes, so as to detach the uncertain fate of the coalition from the even more uncertain fate of the DiCo Bill. At that point the Senate Rapporteur, who was said to favour a rather more pronounced legal protection of *de facto* couples, decided to recast all proposals in a new, single proposal. What came out of this exercise was the bill on the Contract of Solidarity Union (*Contratto di unione solidale, CUS*). With this move, the rapporteur practically killed the Government Bill, by tabling the discussion of the Senate committee only on the new CUS Bill.

Whilst the DiCo Bill only ‘attributes’ rights and duties to a *de facto* situation (the declaration foreseen by the law is only intended as evidence of an existing cohabitation) which is and should remain informal, because the bill is only concerned with the protection of the *individuals*, the CUS Bill seeks to anchor the new scheme to a rather more formal, yet not really institutional, frame of reference.

31 G. Alpa, *Status e capacità: la costruzione giuridica delle differenze individuali*, 1993, pp. 44-45.

Clearly, the bill could not have been too daring, given the premises set by the Pacs and the DiCo Bills. In fact, as the name already anticipates, the CUS is conceived as a contract; a contract for the ‘organisation of life in common’ (proposed new Article 455-*bis*, Civil Code). We know from the French experience that framing the issue in contractual terms mainly responds to the wish of maintaining intact the supremacy of the family and marriage, whilst being at the same time an attempt of ensuring some ‘juridification’ to a situation that is felt as socially and politically pressing. We also know that this ‘light’, separate, and unequal solution is a product of ambiguity (though some would call it realism) rather than vision, of prejudice rather than equality.

The novelty of the CUS Bill is that it would insert the new rules in the Civil Code, an option that has a profound symbolic meaning in civil law countries. The bill proposes to insert a new Title XV at the end of Book 1 of the Civil Code, the one dedicated to persons and family, as opposed to the Pacs which borrowed heavily from contractual theory. Most importantly, the scheme is certainly given a more pronounced family-like structure than the DiCo, since the contract cannot be concluded between relatives in the direct or *collateral* line until the *second* degree (Article 455-*bis*). Whilst this testifies to the slightly more open and progressive approach of the drafters, it remains rather evident that the contract of solidarity union resulted in a sinister hybrid regulated both by the specific rules of the bill inserted in Book 1 of the Civil Code, and by the general and specific rules on contracts of Book 4, as made it explicit by Article 455-*bis*(2) of the bill.

My negative stance towards the bill derives not only from the general theoretical principles from which it stems, but also from the very concrete and practical options chosen to substantiate the scheme. Firstly, the contract can only come to life through a ‘joint declaration’ made to the justice of the peace or a notary (Article 455-*ter*). Again, certainly not a normal conclusion of a normal contract (I can purchase or sell a diamond worth millions without a justice or a notary), more significant than a declaration made to the population registry as in the DiCo Bill, but not really a public ceremony as for marriage.

Once the contract has been ‘declared’, the two parties have a duty to provide reciprocal help, and to contribute to the needs of the communal life in proportion to their income, assets and work capacity, either professional or domestic (Article 455-*septies*). The contract may regulate the time frame and the modalities of the contribution. Up to this point, one might wonder whether the same objectives could not be realised by the couple by way of a simple cohabitation contract which, under Italian law, is considered valid according to Article 1322 Civil Code; this allows individuals to conclude so-called atypical contracts within certain bounds. The question, thus, becomes that of assessing whether the bill does indeed add anything to what private parties can already do under the general legal framework.

As far as reciprocal relations are concerned, it must be concluded that the added value is very little. For instance, the bill claims that both parties must state in the contract whether they wish to consider purchases made after the contract as subject to the ordinary rules on joint property even if the purchase is made by one party alone. Here, the law makes it possible for one partner to become co-owner even when he or she did not actually participate to the purchase; such co-ownership is, however, governed by the general rules on joint property and not by the rules on matrimonial joint property. In addition, the bill stipulates that both parties can be held responsible *vis-à-vis* third parties for the debts made by only one of them (Article 455-*septies*(2) Civil Code). The joint responsibility only exists when debts were made for the needs of the communal life including the joint home.

Regarding the rights and benefits attributed by a contract of solidarity union, the bill attempts to ensure some protection in some areas. According to Article 455-*nonies* a party to such a contract has the same rights and duties as first degree relatives in relation to hospital and prison assistance and information. After at least three years of cohabitation, the parties can have some benefits when it comes to change of workplace. Furthermore, in the lack of explicit choice, all decisions on health conditions, including organ donation and funeral services, are made by the other party to the exclusion of all relatives. Finally, some succession rights accrue to the party of a CUS, but only after nine years of formal cohabitation.

In conclusion, it is rather evident that, whilst the bill does attempt to ensure some legal protection, at least in the most sensitive areas, it operated as an arbitrary selection of rights and benefits, and even within the areas selected it requires unacceptable conditions based on length of cohabitation (three years for some rights, nine years for some others). Lastly, in order to avoid any possibility for more favourable foreign schemes to enter the Italian legal system, Article 455-*quinquies* sets the principle that the Italian citizen who concludes a ‘contract of solidarity union’ abroad *according to the formalities of the law of that country*, is still subject to the rules of the new title of the Civil Code. Thus, the Italian citizen registered abroad, even in countries that foresee schemes very similar to marriage, cannot acquire more rights and duties than those acquired by the Italian citizen who concluded a CUS in Italy.

5. Global issues and Italian policies towards foreign regimes

Italian policies towards foreign schemes alternative to marriage have been, until recently, non-existent. Generally speaking the regulation of cases entailing a foreign element is left to the private international law rules contained in Law 31st May 1995, No. 218 which, nonetheless, is silent on the issue of registered partnership and other schemes. This has opened up an academic debate on the potential of the current rules, and on the limitations of the connecting factors foreseen by the relevant articles of that law.³²

Briefly, matrimonial capacity and other conditions to marry are regulated by the national law of each party at the time of marriage (Article 27 of Law 218/1995). This means that, for instance, while a Spanish marriage between two Spanish citizens should hypothetically be considered valid because Spanish law applies, a Spanish marriage between a Spanish and an Austrian citizen would not be considered valid, due to the lack of matrimonial capacity for one of the two spouses (the Austrian). Of course, in the first case the public policy exception of Article 16 of Law 215/1995 would prevent the application of foreign law contrary to domestic fundamental values.

As to the formalities, Article 28 tends to be rather liberal, since it poses three alternative criteria: a marriage is valid in Italy if it is considered valid (a) by law of the place where it was contracted (*lex loci celebrationis*), (b) by the national law of at least one of the spouses at the time of marriage, or (c) by the law of the place of common residence at that time. Furthermore, personal relations between spouses are governed by the common national law or, in its absence, by the law of the place where matrimonial life is principally located (Article 29). Patrimonial relations are regulated by the same law applicable to personal relations, unless the parties have

32 M. Bonini Baraldi, *Le nuove convivenze tra discipline straniere e diritto interno*, 2005; G. Rossolillo, ‘Registered partnerships e matrimoni tra persone dello stesso sesso: problemi di qualificazione ed effetti nell’ordinamento italiano’, 2003 *Rivista di diritto internazionale privato e processuale*, p. 363 et seq. See also S. Tonolo, *Le unioni civili nel diritto internazionale privato*, 2007; E. Calò, *La pianificazione delle vicende personali e patrimoniali. Dall’amministrazione di sostegno al testamento biologico. Rapporti patrimoniali tra coniugi e successioni nel diritto internazionale privato*, 2004.

agreed in writing on the applicability of a different law, namely the law of the country of which at least one of them is a citizen or has his or her residence (Article 30(1) and (2)).

Whilst there have been isolated attempts³³ to argue that these rules should at least apply to foreign same-sex marriages and registered partnerships, because the private international law qualification of ‘what is marriage’ should be autonomous from the substantive law qualification, the majority of the legal doctrine considers that difference of sexes is a fundamental prerequisite which, if lacking, prevents the application of such rules *tout court*, let alone subsequent, eventual recognition according to the applicable law.³⁴

An illustration of this point of view can be found in a recent court case. In 2005 an Italian court had to decide whether two male Italian citizens could register the marriage they had contracted in The Hague in Italy. After moving back to Italy, the two men had chosen to request the registrar of the city where they lived to record them as ‘married’ in the national registry of births, marriages, and deaths. Upon refusal of the registrar, who was also supported by an opinion of the Ministry of the Interior that he had requested, the couple sued the State. The local court rejected the claim,³⁵ and so did the Rome Court of Appeal. The marriage was considered non-existent under Italian law and contrary to Italian public policy.³⁶ The Court based its reasoning on the notion of ‘family’ which can be found in the 1948 Italian Constitution, thereby putting the debate on the highly contentious grounds seen at the outset of this paper. It concluded that the Italian Constitution refers only to the traditional marital relationship between people of different sex, and that this concept finds its justification ‘in the sentiment, the culture, and the history of our national community’ which precede the law books.

In this unsympathetic context it is not surprising that, on the specific problem of registration of foreign marriages, the central director of the Ministry of the Interior has felt the need to warn Italian registrars that they should always carefully check, when receiving foreign marriage certificates and multilingual forms, that the spouses be of different sex.³⁷

If registration of foreign marriages appears to be a dead end, there has been an unreported case, which leaves fewer reasons for pessimism. The case was based on EC Regulation No. 44/2001³⁸ (Article 19(2)(a)) and on the Employment Equality Directive.³⁹ A public sector employee had been seconded indefinitely to the Brussels liaisons office of his employer. After he got married with a Belgian citizen in Belgium, he requested his employer to grant him honeymoon leave. After a long and not always smooth confrontation, the employer agreed with his submission that his Belgian marriage should have been recognised for the purposes of employment benefits. In this case, which made national headlines, the Italian citizen was able to obtain from his Italian employer the benefit normally awarded to newly-wed personnel. From a political point of view, it is interesting to note how the debate on ‘what is family’ was influenced more by a European dimension than by a closed circuit of purely local values. Legally speaking, the worker was able to make ‘portable’ his personal status of being married.⁴⁰

33 Bonini Baraldi 2005, *supra* note 32, pp. 199 *et seq.*

34 See the authors cited in the two following notes and their bibliographies.

35 Tribunale di Latina, decree 10 June 2005, 2005 *Famiglia e diritto*, p. 411, with concurring comment of P. Schlesinger and with dissenting comment of M. Bonini Baraldi, and in 2006 *Nuova giurisprudenza civile commentata*, p. 86, with dissenting comment of F. Bilotta.

36 Rome Court of Appeal, decree 13 July 2006, 2007 *Famiglia e diritto*, p. 166, with concurring comment of M. Sesta.

37 Ministry of the Interior, Circolare no. 55 of 18 October 2007.

38 *OJL* 12, 16.1.2001, p. 1.

39 Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, *OJL* 303, 2.12.2000, p. 16.

40 On the concept of ‘portability’ see M. Bonini Baraldi, *Freedom and Justice in the EU: Implications of the Hague Programme on Lesbian, Gay, Bisexual, Transgender Families and their Children*, 2007, p. 21.

Alongside the very evident recognition problem and some fragmented openings in the employment field, Italian judges had previously addressed sexual orientation cases – in immigration or family law matters – with suspicion. As far as immigration cases are concerned, the *Corte di Cassazione* held in two instances that a deportation order of a third country citizen, illegally residing in Italy, could only be suspended in case of demonstrated persecution in the country of origin. Moreover, persecution can only be alleged if the criminal law of the country penalises homosexuality *per se*, not ‘the manifestation of homosexual practices not conform to the public sentiment of that country’.⁴¹ In other words, it held that criminalisation of homosexual acts which are felt to be against the public sentiment cannot amount to persecution if the person has the choice of being ‘discreet’. The immediate (negative) consequence is that persecution can only be proved when ‘being’ homosexual is penalised, but not when sexual orientation is acted upon.

As mentioned, there is an accumulation of other preoccupying decisions dealing with sexual orientation and family matters. First, the *Cassazione* has confirmed the decision of a Sicilian court which had found the wife responsible for the marriage breakup because she had had a lesbian affair (the practical consequence being that, if entitled to maintenance, the spouse who is found responsible for breakup loses his or her entitlement to ex-spousal maintenance, Article 156 Civil Code).⁴² Furthermore, a lower court in Brescia not only found the husband responsible for the marriage breakup on grounds of his homosexual affair, but also awarded € 40,000 to the wife in damages for a peculiar item of pain and sufferings (*danno esistenziale*). The amount awarded took into account the fact that the homosexual relationship was a circumstance which ‘has created a situation of severe shock – due to the realistic suspicion of having been infected with some serious disease following sexual intercourse with her husband – which has certainly negatively altered the quality of life of Ms C. for a significant period of time’.⁴³

Other courts have adopted more open approaches. Recently, a specialised court for child protection (*Tribunale dei minorenni*) was asked by the former lesbian partner of the mother of two children to grant her contact, since before breakup she had been taking part in their upbringing. The court could only conclude that, according to current Italian law, only (biological or adoptive) parents have standing in court for such requests. Therefore, it had to turn down the application for contact on grounds of lack of standing.⁴⁴ However, the court also considered that, notwithstanding the lack of any inquiry into the merits, the best interests of the children could in the abstract require further action in order to ensure the continuation of their relationship with the applicant. The Court, thus, instructed the public prosecutor to assess whether there were grounds for activating further child protection proceedings.

Finally, in the context of separation proceedings, a court in Naples chose to attach no significance whatsoever to the husband’s claim that his wife should be denied parental authority of their child on ground that she was lesbian.⁴⁵ The Court held very clearly that the husband’s argument was only the product of ‘pseudo-cultural stereotypes, expression of moralism and not of shared ethical principles’. Moreover, it stated that such prejudices have no legal foundation in light of the equality clause of the Constitution (Article 3).

41 Cass. 16 April 2007, I civil section, no. 16417, unreported; see also Cass. 18 January 2008, I criminal section, no. 2907, unreported.

42 Cass. 1 March 2005, no. 4290, 2005 *Foro italiano*, I, p. 2994.

43 Tribunale di Brescia, 14 October 2006, 2007 *Famiglia e diritto*, p. 57, with comment of G. Facci, and in 2007 *Responsabilità civile e previdenza*, p. 81, with dissenting comment of F. Bilotta and P. Cendon. Confirmed on appeal by the Brescia Court of Appeal, 5 June 2007, forthcoming publication in 2008 *Responsabilità civile e previdenza*, with comment of Caterbi.

44 Trib. Min. Milano, 2 November 2007, with comment of F. Bilotta, forthcoming publication in 2008 *Famiglia e minori*.

45 Tribunale di Napoli, 28 June 2006, 2007 *Famiglia e diritto*, p. 621, with comment of M. Iannaccone.

6. Conclusion

Notwithstanding the development of advanced solutions in foreign countries, repeated recommendations of the European Parliament, and ongoing internal pressure, in Italy the inclusion of same-sex couples within the family is destined to find an insurmountable limitation in the constitutional concept of the ‘natural family’. Now, if one concludes with this answer, which accurately summarises the *status quo*, it seems to me that the wrong question was asked. When this is the answer, it means that the theme of legal recognition of same-sex couples was addressed from the following perspective: can same-sex couples be understood as falling within the scope of the constitutional concept of the ‘family’? This perspective, which is dominant among liberal scholars and politicians, places on same-sex couples the burden of demonstrating their family character as a condition for obtaining the right to be treated equally. Of course, difference of sexes is considered a natural and immutable trait of the family, so that the burden is (believed to be) insurmountable. Failing evidence, either no action should follow, or public action and new legislation could be legitimised only on grounds of the solidarity element present in a wide range of cohabiting arrangements. This second option epitomises what I called the reductionist solution which is predominant among liberal élites.

I believe that the reductionist solution is inadequate and that the correct question to be answered is a different one. This belief is motivated by the circumstance that Article 2 of the Italian Constitution (let alone Article 3, the equality clause) celebrates the centrality of the protection afforded to fundamental freedoms and human rights. Without forgetting that sexual orientation is a personal characteristic protected both by the Constitution and by the European Convention on Human Rights, it becomes crucial to motivate whether a prevailing State interest exists, which could justify the *prima facie* violation of a fundamental freedom. Briefly, the question to be addressed should be: is it possible to demonstrate a rational or even necessary link between the objective served by the *status quo*, and current exclusion of same-sex couples from marriage?

This question should lead to the precise identification of the objectives, and interests, which underpin the *status quo*. Since freedom to marry is a fundamental freedom of the individual, one must assess whether, apart from mere ideological declamations about the supremacy of a certain family model, the marriage ban can be justified on grounds of rational principles, as several court decisions around the globe have already recognised. When this discussion will finally become of public domain in Italy, perhaps the answers will follow, more easily than expected.