

Same-sex partnerships in Portugal From *de facto* to *de jure*?

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1. Introduction

In 2001 Portuguese legislature conferred, for the first time, legal effects on the relationship of two persons of the same sex who have lived together for more than two years in a *de facto* union (*Act 7/2001 of 11th May*).¹

The legislature's intent in regulating same-sex partnerships was clear and can be seen, firstly, in the title of the Act and, secondly, in Article 1. In contrast with the title of previous Act,² Act 7/2001 is entitled '*Act to adopt measures for the protection of de facto unions*' and not of the '*de facto union*'. The use of the plural indicates that the ambit of Act 7/2001 has been extended beyond different-sex *de facto* unions to same-sex *de facto* unions. Article 1 confirms this purpose of being also applicable to same-sex *de facto* unions stating 'the present law governs the legal status of two persons, regardless of gender, who live together in a *de facto* union for more than two years'.³ Was this the first step on a journey from *de facto* to *de jure*? In my opinion, it was.

As far as cohabitation is concerned, one can detect two opposite, yet simultaneous trends. With regards different-sex cohabitation, there is a growing preference for this model of living together, which seems to support the idea that a 'privatisation' of the couple is underway.⁴ Indeed, statistics show an increasing percentage of different-sex couples choosing to live together

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1 This assertion needs to be clarified. Same-sex partnerships were not entirely ignored by the Portuguese legal system prior to Act 7/2001. As Coelho and Oliveira have already remarked, such partnerships had no legal effects *per se*, but would be taken into account as far as a 'joint household economy' was concerned. In this way, if two persons of the same sex lived in a *de facto* union for more than five years in premises leased by only one of them, on the latter's death the surviving partner enjoyed the right to a new lease that the law granted to whomever had lived with the tenant for more than five years (Arts. 90 (1), (a) and (2) and 76 (1), (a), Urban Leasehold Regime – *Regime do Arrendamento Urbano*). The surviving partner benefited from the right to a new lease, not by living in a *de facto* union with the deceased, but by living with him in a 'joint household economy'. See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol I, 2003, pp. 112-113; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 55-56.

Until 2001, Portuguese law did not directly attribute any positive legal effects to same-sex partnerships, nor did the courts recognise any effect arising from such partnerships *per se*. Take, for example, the judgment of the Lisbon Court of Appeal of 28th June 1990 that denied the right to the survivor's benefit to the surviving member of a same-sex *de facto* union under the same conditions as a surviving spouse. The summary of this judgment may be found at <http://www.dgsi.pt>

Act 7/2001 does not contain any provisions that could apply to situations of same-sex *de facto* unions prior to its entry into force. The Act provides only for the future; in other words, it only applies to same-sex *de facto* unions already existing on that date. See Judgment of the Lisbon Court of Appeal of 11th July 2002 at <http://www.dgsi.pt> and Judgment of the Constitutional Court 513/2003 of 28th October 2003 at <http://www.tribunalconstitucional.pt/tc/acordaos/20030513.html>

2 Act 135/99, of 28th August 1999, Act to adopt measures for the protection of *de facto* union.

3 This was not the purpose of Act 135/99. According to Art. 1, the Act's purpose was to regulate the 'legal position of persons of opposite sex who live in a *de facto* union for more than two years'. Act 135/99 granted legal protection only to different-sex *de facto* union.

4 See S. Aboim, 'A formação do casal: formas de entrada e percursos conjugais', in K. Wall (ed.), *Famílias em Portugal*, 2005, p. 86.

instead of entering the legal institution of marriage.⁵ A movement towards the ‘deinstitutionalisation’⁶ of conjugal life is, therefore, noticeable. This trend also seems to point to an attitude of indifference, or even of rejection of, the need to legitimise cohabitation *vis-à-vis* the outside world.⁷ Couples are now refusing to submit to predetermined values established by the Church or the State, no longer adhering to the ‘institution of marriage’.⁸

Even though a demand for greater freedom to establish the terms of one’s relationship⁹ also appear to exist in Portugal, the Portuguese legislature insists in regulating that relationship. The State does not want this particular area of social life to become so private so as to exclude any sort of intervention. The State’s intervention in different-sex non-marital cohabitation, however, is weaker than that with respect to different-sex marital cohabitation. Accordingly, laws on this subject confer the bare minimum level of protection on the partners. One can witness that the State is searching for a new balance between the autonomy of different-sex couples, who wish to define the rules of their private life and the State’s interference with that definition.¹⁰

As regards same-sex relationships, the opposite trend seems to be becoming dominant.¹¹ A trend towards the public display of same-sex relationships can be observed. Indeed, due to the fact that same-sex relationships have achieved social recognition, the demand for increasing State intervention has risen to the top of the agenda. Same-sex couples are increasingly claiming outside legitimisation of their relationship; they claim for the institutionalisation of same-sex cohabitation by setting legal rules for its establishment, its legal effects and its termination. It amounts to a demand that *de facto* become *de jure*.

In the field of different-sex relationships, the trend appears to be that of deregulation, while in the field of same-sex relationships the opposite trend seems to be discernible.¹² In the words of Mary Ann Glendon: ‘Regulation has thus been withdrawn where it was once taken for granted, and intensified where in the past it had been unknown’.¹³

Act 7/2001 was the first step in the path of granting same sex couples a legal status. What further steps will the Portuguese legislature have to take in the near future?

The legal recognition of same-sex relationships by means of regulation can take on different forms. In fact, this has not happened consistently throughout Western Europe.¹⁴ Despite this divergence one can find three general models of State intervention: enacting a minimal legal

5 See S. Leite, ‘A União de Facto em Portugal’, 2003 *Revista de Estudos Demográficos*, no. 33, pp. 115 and 132; S. Aboim, ‘A formação do casal: formas de entrada e percursos conjugais’, in K. Wall (ed.), *Famílias em Portugal*, 2005, pp. 85 *et seq.*; C. Saraceno & M. Naldini, *Sociologia da Família*, 2003, pp. 79 and 159.

6 J.-L. Renchon, ‘Indisponibilité, ordre public et autonomie de la volonté dans le droit des personnes et de la famille’, in A. Wijffles (ed.), *Le Code Civil entre Ius Commune et Droit Privé Européen*, 2005, pp. 285 *et seq.*

7 See I. Théry, *Couple, Filiation et Parenté Aujourd’hui. Le Droit face aux mutations de la famille et de la vie privée*, 1998, p. 32.

8 See S. Leite, ‘A União de Facto em Portugal’, 2003 *Revista de Estudos Demográficos*, no. 33, pp. 99-100; F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 147-148.

9 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 150.

10 Bearing in mind the purpose of this study, this is not the appropriate place either to further consider this trend and to analyse its causes and effects in Portugal, or reflect on the correct attitude of Portuguese legislature should adopt. For an approach to the issue of cohabitation outside marriage from a historical, socio-demographic and legal-political perspective as well as for a critical analysis of legislative output regarding *de facto* unions in Portugal, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005.

11 Also pointing out these opposite trends Baroness Hale observes: ‘Curiously, it may be that it is among the gay community that the unavailable legal status and commitment [of marriage] is increasing in attraction where everywhere else it is in decline’, Baroness Hale, ‘Unmarried Couples in Family Law’, 2004 *Family Law*, pp. 420-421, *apud* N. Bamforth, ‘Same-Sex Partnerships: Some Comparative Constitutional Lessons’, 2007 *European Human Rights* 1, p. 52.

12 See C. Saraceno & M. Naldini, *Sociologia da Família*, 2003, p. 159.

13 M. Glendon, ‘Introduction: Family Law in Times of Turbulence’, in M. Glendon (ed.), *International Encyclopedia of Comparative Law: Persons and Family*, Vol. IV, 2006, p. 7.

14 See I. Schwenzer, ‘Convergence and Divergence in the Law on Same-Sex Partnerships’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 146.

regulation of the relationship of two persons of the same sex;¹⁵ attributing ‘quasi-matrimonial’ status¹⁶ to these relationships, or allowing same-sex marriages outright.¹⁷

This article aims, firstly, to give a brief description of Act 7/2001 as the first Portuguese Act that offered legal protection to same-sex relationships. Secondly, to reflect on the current legal situation in Portugal, and thirdly, to try to assess what the further steps the Portuguese legislature should take along the path of granting same-sex couples a legal status.

2. Act 7/2001 of 11th May 2001: ‘Act adopting measures for the protection of *de facto* unions’

2.1. Background to Act 7/2001

Act 7/2001 expressly repealed Act 135/99. One might suppose that the new legislation would contain new provisions regarding the regulation of *de facto* unions, however this did not occur. In fact, Act 7/2001 essentially reproduces the legislation it replaces. That is to say that the new law did not amend the definition of *de facto* unions,¹⁸ their establishment, the conditions under which they can take effect, their effect on persons and property, their termination and its consequences.

Although we can say that *de facto* unions in Portugal, ‘were somewhat institutionalised by Act 135/99 of 28th August’,¹⁹ the Portuguese legislature did not institute a systematic, unitary and substantially innovative regulatory structure for *de facto* unions.²⁰ Both Act 135/99 and Act 7/2001 appear to be little more than ‘a mere summary of protective measures’,²¹ which had already been laid down in previous legislation. Indeed, Article 3, Act 135/99 referred in four of its eight paragraphs to ‘measures to protect the *de facto* unions’ to be found dispersed throughout existing legislation, largely in the fields of Social Security, Employment, Tax and Administrative Law.²² Moreover, Act 135/99 refers itself, in Article 1(2), to standards laid down in other laws,²³ which confer to some extent legal consequences on *de facto* unions.

15 For example, in France and Portugal. It should, however, be pointed out that although the two legal systems set a minimum legal status for same-sex partnerships, the same status is regulated in more detail in France (*Loi relative au Pacte Civil de Solidarité, Loi No. 99-944*, of 15 November 1999 and Arts. 515-1 to 515-7 French Civil Code) than in Portugal (Act 7/2001 of 11th May 2001). To better understand the distinction, see, on the PACS, J. Carbonnier, *Droit Civil. Introduction. Les Personnes. La famille, l'enfant, le couple*, Vol I, 2004, pp.1481-1490 and G. Cornu, *Droit Civil. La famille*, 2006, pp. 105-114, and on Act 7/2001 of 11th May, F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 111-137; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 111-127.

16 As is the case in Denmark (Registered Partnership Act, Act No. 372 of 7th June 1989, in force as of 1st October 1989), Sweden (*Lag om registerat partnerskap*, Act 1994: 1117 of 23rd June 1994, in force as of 1st January 1995), Norway (*Lov om registreret partnerskap*, No. 40/1993, of 20th April 1993, in force as of 1st August 1993) of Finland (Registered Partnership Act, Act 950/2001, in force as of 1st March 2002), Germany (*Lebenspartnerschaftsgesetz* of 16th February 2001 modified by the Law of 6th February 2005), the United Kingdom (Civil Partnership Act 2004, in force as of 5th December 2005) and, most recently, Switzerland (*Partnerschaftsgesetz* of 18th June 2004, in force as of 1st January 2006).

17 As is the case in The Netherlands (Act Opening Marriage to Same-Sex Couples (*Wet openstelling huwelijk*) of December 2000 and Art. 1:30 Dutch Civil Code), Belgium (*Loi du 13 février 2003* and Art. 143-1 Belgian Civil Code) and Spain (*Ley 13/2005*, of 1 July and Art. 44 Spanish Civil Code).

18 Act 7/2001 gives us no idea as to what should be understood by *de facto* union; nor, indeed, did Act 135/99.

19 F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 109.

20 On the need for and suitability of such regulations, see N. S. Cid, ‘União de Facto e Direito: Indecisão ou Desorientação do Legislador?’, 1994 *Economia e Sociologia*, no. 57, pp. 66-72; H.E. Hörster, ‘Does Portugal Need to Legislate on the Facto Unions?’, 1999 *International Journal of Law Policy and the Family*, no. 3, p. 279; R. Xavier, ‘Novas sobre a união “more uxorio” em Portugal’, in J. Gomes (ed.), *Estudos dedicados ao Prof. Doutor Mário Júlio Almeida Costa*, 2002, pp. 1398 *et seq.*, N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 759-789.

21 F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 109.

22 See R. Xavier, ‘Novas sobre a união “more uxorio” em Portugal’, in J. Gomes (ed.), *Estudos dedicados ao Prof. Doutor Mário Júlio Almeida Costa*, 2002, pp. 1398-1399.

23 Such as, for example, the Civil Code which, as regards maintenance, gives the surviving partner of a (different-sex) *de facto* union the right to require provision from the deceased’s estate in cases where the union had lasted for more than two years and he or she could not obtain the same from a spouse, ex-spouse, descendants, ascendants or siblings (Art. 2020, Civil Code).

This being so, a few new departures from the previous legislation are discernible. However, none of these new departures include the legal protection of same sex relationships (Article 1 Act 135/99). Same-sex *de facto* unions remained almost irrelevant until 2001.

2.1.1. Constitutional Court's jurisprudence

Although there are a number of novelties in the act(s) referred to above, only a few of them can be considered really innovative. Indeed, some of these solutions have been anticipated by the Constitutional Court's jurisprudence.

Portuguese higher courts did not recognise *de facto* unions within the ambit of family law²⁴ and therefore did not analogously apply legal precepts relating to marriage. Thus, the Portuguese higher courts refused to attribute *de facto* unions with similar effects to those conferred on marriage by operation law.

Brief mention should, however, be made to several decisions of the Constitutional Court on this matter, where the solutions adopted have been accepted, in some cases, and even developed by the law.

Take, for example, the judgment of the Constitutional Court No. 359/91, of 9th July 1991,²⁵ where the Constitutional Court was asked to rule on the question of whether or not the transfer of the right to lease the family home was applicable upon the breakdown of a *de facto* union when there were minor children from that union. This right could be granted, by agreement of the spouses or ex-spouses, or, failing that, by court order, to the spouse or former spouse who was not the tenant in case of divorce or separation of persons with division of property. The issue here was to know whether the protection offered by the law could be analogously extended to the termination of a *de facto* union. The Constitutional Court declared the interpretation unconstitutional, which denied the analogous application to situations involving termination of a *de facto* union with minor children. However, the Constitutional Court did not directly address the controversial issue of equivalence of the *de facto* union to marriage for certain purposes. Instead, it developed a line of reasoning based on the constitutional principle of non-discrimination against children born outside marriage (Article 36(4) Constitution of the Portuguese Republic).²⁶

A similar result was reached in the judgment of the Constitutional Court No. 1221/96 of 4th December 1996.²⁷ Here the Constitutional Court also ruled that an interpretation that reserved the application of Article 1793(1) Civil Code to cases of dissolution of the marriage, thus excluding the situations of breakdown of a *de facto* union with minor children, was unconstitutional. The provision referred to above provides that, at the request of one of the spouses, the

24 According to Article 1576, Civil Code only marriage, kinship, affinity and adoption are considered to be sources of family relationships. Since *de facto* unions were not on the exhaustive list of family relationships higher courts did not recognise *de facto* unions within the ambit of family law.

Even today case law and the predominating private law doctrine do not understand the *de facto* unions as a family relationship. See J. Castro Mendes, *Direito da Família*, 1990/1991, pp. 13 and 15; J.J. Almeida Lopes, 'A União de Facto no Direito Português', 1993 *Revista Española de Derecho Canónico*, no. 134, p. 246; P. de Lima & A. Varela, *Código Civil Anotado*, Vol. IV, 1992, pp. 14-15; D. Leite de Campos, *Lições de Direito da Família*, 1997, p. 21; A. Varela, *Direito da Família*, Vol. I, 1999, p. 31; N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, p. 505 (note 12), with extensive references to legal literature and case law.

However, as Coelho and Oliveira warn, although *de facto* unions are not seen as a family relationship for most legal purposes, 'we need to know if we are or not dealing with one of those exceptional areas where such a designation is merited', see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 108.

Considering a *de facto* union as a family relationship see T. Carvalho, 'A União de Facto: A sua Eficácia Jurídica', in *Comemorações dos 35 Anos do Código Civil e dos 25 Anos da Reforma de 1977: Direito da Família e das Sucessões*, Vol. I, 2004, p. 226.

25 At <http://www.tribunalconstitucional.pt/tc/acordaos/19910359.html>

26 On the principle of non-discrimination against children born out of wedlock as one of the constitutional principles of Portuguese Family Law, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 172 *et seq.*; J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Tomo I, 2005, pp. 419 *et seq.*; J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 565.

27 At <http://www.tribunalconstitucional.pt/tc/acordaos/19961221.html>

court awards the lease of the family home to one of them, irrespective of whether it is joint property or owned by one of them. The court should particularly consider the needs of both spouses and the children's interests.

Once again, the Constitutional Court avoided the problem of the legal consequences of *de facto* unions, basing its decision in the aforementioned principle of non-discrimination against children born out of wedlock.

Another 'irradiation'²⁸ of the same principle can be found in the judgement of the Constitutional Court No. 286/99, of 11th May 1999.²⁹ The question was whether or not to apply, by analogy, the rules of Articles 42(1) and 46 of *Decree-Law No. 18/88, of 21st January*. These rules established a 'conjugal preference' as a criterion to be used in the process for placement of teachers in public education in those situations where a teacher lived in a *de facto* union with another public official and with whom he or she had children. Faced with this question, the Constitutional Court again relied on the principle of non-discrimination against children born outside marriage. It held that the provisions under consideration were unconstitutional, since they excluded teachers who, though not married, lived in conditions similar to those of spouses and had children living with them. The Court held that such an exclusion prejudiced children who would thus be deprived of the chance of living together with their father and this constituted unjustified discrimination against children born outside marriage.

These solutions were incorporated into and even expanded upon by the law as will be seen below.

From the abovementioned cases, it can be concluded that both Act 135/99 and Act 7/2001 did not represent a substantial extension of the protection of *de facto* unions, but were above all of symbolic value. The public debate in Portugal was focused neither on the legal problems posed by the reality of *de facto* unions nor on developing a consistent family policy as would have been desirable.³⁰

2.2. Brief analysis of Act 7/2001

This analysis purports neither to list nor analyse all the respects in which *de facto* unions can have legal consequences in the context of the Portuguese legal system.³¹ Reference will instead only be made to the general legal regime covering *de facto* unions as established by Act 7/2001.

2.2.1. Scope of the law

Act 7/2001 seeks to regulate the situation of two persons, regardless of gender, who have lived together in a *de facto* union for more than two years (Article 1(1)). However, it does not explain what a *de facto* union is.³²

The absence of a legal definition can be justified by the difficulty, also experienced by scholars,³³ in accurately determining the legal contours of this 'multi-faceted phenomenon'.³⁴

28 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p 565.

29 At <http://www.tribunalconstitucional.pt/tc/acordaos/19990286.html>

30 See R. Xavier, 'Novas sobre a união "more uxorio" em Portugal', in J. Gomes (ed.), *Estudos dedicados ao Prof. Doutor Mário Júlio Almeida Costa*, 2002, pp. 1401-1402. On the various draft laws that preceded the two laws and the parliamentary debate they gave rise to, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 636-667; S. O. Pais, 'De Facto Relationships and Same-Sex relationships in Portugal'; A. Bainham (ed.), *International Survey of Family Law*, 2002, pp. 342-343.

31 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 111 *et seq.*; A. Pitão, *União de Facto e Economia Comum*, 2006, pp. 71-328; T. Carvalho, 'A União de Facto: A sua Eficácia Jurídica', in *Comemorações dos 35 Anos do Código Civil e dos 25 Anos da Reforma de 1977: Direito da Família e das Sucessões*, Vol. I, 2004, pp. 239 *et seq.*

32 Neither did Act 135/99.

33 See N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, p. 39.

34 See G. Cornu, *Droit Civil. La famille*, 2006, p. 85.

Despite such difficulties, one can say that the concept of *de facto* union embraces exclusive and enduring relationships between two persons, regardless of gender, who have ‘made a life together under the same roof’.³⁵

One must stress that a *de facto* union can only be invoked either by the partners (or by one against the other) or by third parties against them, if it has lasted for more than two years³⁶ (Article 3, Act 7/2001). Therefore, the determination of the beginning of the relationship is very important. However, the identification of that moment and the proof that the relationship exists are not easy tasks, considering that the law does not provide any ‘formalities’ concerning the beginning of the relationship.³⁷ A *de facto* union comes into being ‘when the partners in the relationship come together’.³⁸

Although it is possible to prove the beginning and the existence of the relationship through documentary evidence, this means of evidence also presents difficulties. Indeed, neither a certificate from the council of the parish where the partners in a *de facto* union are resident, proving the existence of such a relationship between them, nor a statement made by them before the civil registrar at the time of registration of the birth of their child, affirming that they are living together ‘as husband and wife’ and that they wish to jointly exercise parental responsibilities (Article 1911(3), Civil Code), nor a contract made before the notary laying down their propertorial relationship constitute full proof of the existence of the relationship or of when it came into being.³⁹

It must be said that the possibility of seeking a declaration by the court to prove the existence of cohabitation between the members of a *de facto* union has also proved ineffective.⁴⁰ Thus, the protection offered by the law to *de facto* unions can end up being undermined since it ultimately depends upon witness evidence.

2.2.2. Circumstances that prevent de facto unions having legal effects

It is also necessary to add that not every instance of cohabitation between two persons that lasts for more than two years enjoys the protection of Act 7/2001. Cohabitation only produces the effects prescribed by this Act if none of the circumstances described in Article 2 pertain.

35 On this point, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 84, 118; J. Pitão, *União de Facto e Economia Comum*, 2006, p. 76.

On the difficulties in choosing the appropriate terminology and of conceptual definition, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 36 et seq.

36 A *de facto* union produces not only consequences favourable to the partners but also adverse effects. Although Act 7/2001 only provides measures for the protection of *de facto* unions and, accordingly, specifies only favourable consequences, the reality is that a *de facto* union produces more effects than those provided for in the statute and some of these are unfavourable to the two partners.

An example of the unfavourable effects is the joint and several liability of partners in a *de facto* union regarding debts incurred by one or the other as part of the normal outgoings of their life together. Scholars have maintained the view, in relation to *de facto* different-sex unions, that as the partners ‘live together under the same roof’, and thus create the appearance of marriage on which third parties rely, it appears reasonable to argue for the applicability of the regime concerning the debts of spouses provided for in Arts. 1691(1b) and 1695(1) Civil Code, by which the spouses are jointly responsible for debts incurred by either that represent the outgoings of normal joint life. On this point, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 106. For an argument that this regime should apply equally to homosexual *de facto* unions because of the expectations of third parties, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, p. 571.

37 *De facto* unions are not subject to civil or even administrative registration.

38 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 110. On this point see also T. Carvalho, ‘A União de Facto: A sua Eficácia Jurídica’, in *Comemorações dos 35 Anos do Código Civil e dos 25 Anos da Reforma de 1977: Direito da Família e das Sucessões*, Vol. I, 2004, pp. 237-239, and J. Pitão, *Unões de Facto e Economia Comum*, 2006, pp. 79-80.

39 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 110.

40 See the Judgment of the Lisbon Court of Appeal of 26th November 2006 which states in its summary: ‘These legal proceedings are not intended to enable the parties to obtain evidence, but are intended to assert rights that are uncertain, threatened or violated (Arts. 2(2) CPCivil and 20(1) CRP)’ at www.dgsi.pt

Situations that prevent *de facto* unions having legal effects include the following: if either of the parties is under the age of 16 (Article 2 (a), Act 7/2001);⁴¹ visible dementia, even including lucid intervals, and incapacity or civil disability by reason of mental disorder (Article 2(b), Act 7/2001);⁴² a subsisting previous marriage, except where the parties have been judicially separated and division of property has already been decreed (Article 2(c), Act 7/2001);⁴³ kinship in the direct line or in the second degree of the collateral line or affinity in the direct line' (Article 2(d), Act 7/2001); a previous conviction of one partner for murder or attempted murder of the other partner's spouse (Article 2 (e), Act 7/2001).

It is interesting to note that this list copies the list of impediments to marry (Articles 1601 and 1602 Civil Code).

Taking into account the fundamental public interests that are the basis of impediments to marry, it is reasonable to assume that, by so doing, the legislature wished to avoid conferring favourable legal effects similar to those applying to marriage⁴⁴ on *de facto* unions of persons barred from marrying. Nevertheless, the legislature was not consistent with these aims.⁴⁵ Indeed, in dealing with *de facto* same-sex unions, this Act confers effects similar to those of marriage on the relationship of two people who cannot marry under Portuguese matrimonial law. A marriage celebrated between two people of the same-sex is non-existent pursuant to Article 1628(e) Civil Code.

2.2.3. Legal effects of *de facto* unions

In comparison with Act 135/99, Act 7/2001 did nothing more than extend the legal protection of *de facto* unions to include same-sex *de facto* unions. The legal regime of *de facto* unions has remained the same. All the rights that Act 7/2001 attribute to the partners of a different-sex *de facto* union are now equally attributed to the partners of a same-sex *de facto* union.⁴⁶

Article 3 Act 7/2001 lists a series of measures for the protection of *de facto* unions. However, this list is not exhaustive. Under the Portuguese legal system, the legal consequences of *de facto* unions are not limited to the protective measures provided therein.⁴⁷ Indeed, this is acknowledged in Act 7/2001 itself where, in Article 1(2) it is provided that 'no rule of this statute shall affect the application of other laws or regulations in force seeking the legal protection of *de facto* unions (...)'. By this provision, the legislature seems to have wished to prevent a possible restrictive interpretation of Act 7/2001 that would exclude the application of other legislative provisions not specifically mentioned in the statute.⁴⁸

It should be emphasised that this provision does not imply any analogous application of the rules that apply to legal marriage; a *de facto* union has only the effects recognised by the law.⁴⁹

41 For a critique of conferring legal consequences on *de facto* unions where the partners are minors, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 644-645; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 84-86.

42 For further observations on this impediment, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, p. 645; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 86-94.

43 For a critique of conferring legal consequences on adulterous *de facto* unions, see R. Xavier, 'Novas sobre a união "more uxorio" em Portugal', in J. Gomes (ed.), *Estudos dedicados ao Prof. Doutor Mário Júlio Almeida Costa*, 2002, p. 1399; N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, p. 645.

44 For the argument that Art. 2 Act 7/2001 should be interpreted narrowly so that the occurrence of some of these impediments does not hinder the creation of adverse effects, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 117.

45 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 116-118.

46 Except the right to full and jointly adopt a child.

47 See *supra*, 2.1.

48 See J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 82-83. For an interpretation of Art. 1(2) Act 7/2001 which considers the requirements set by the same law as minimum requirements for conferring favourable effects on *de facto* unions, see N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, p. 644.

49 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 112.

2.2.3.1. Effects on persons

Act 7/2001 expressly recognises only one effect on persons who live in a *de facto* union: the right to adopt a child under the same conditions that law provides for married couples (Article 7 Act 7/2001 and Article 1979(1) Civil Code).⁵⁰ Act 7/2001, despite recognising direct legal consequences of same-sex *de facto* unions, retained the provisions of Act 135/99 in continuing to reserve the right to joint strong adoption to different-sex *de facto* unions. This being so only the partners of a different-sex *de facto* union enjoy that right. Moreover, two partners of a different-sex *de facto* union who want to qualify for joint strong adoption of the child must be over 25 years old and their relationship must have subsisted for over four years (Article 1979(1) Civil Code).

Even if two partners of a same-sex *de facto* union cannot jointly adopt a child, each one of them can qualify for strong adoption in the same conditions as unmarried people. That is to say, he or she must be over 30 years old (Article 1979 (2) Civil Code).

Other than the right to adopt, Act 7/2001 did not add anything to the effects on persons of *de facto* unions. There was no attempt to regulate personal relationships between the partners, such as establishing a catalogue of rights and duties similar to that applying to married couples (Articles 1672 *et seq* Civil Code),⁵¹ nor did it allow the partners in a *de facto* union the possibility of adding a partner's surname to one's own.

Act 7/2001 is also silent on the issue of nationality. However, the amendment of the Nationality Act (*Act 37/81 of 3rd October by Act 2/2006 of 17th April*) should be noted.⁵² The Act provides that 'a foreigner who at the date of the declaration has been living in a *de facto* union for more than three years with a Portuguese national may acquire Portuguese nationality, following an action in the civil court for the recognition of this situation' (Article 3(3)). Although this is one of those effects on persons provided for by outside legislation its novelty and significance justify it being referred to here.

Reference should also be made to the right to benefit from the legal regime on holidays, absences, leave and preferential placement enjoyed by officials of the Public Administration under the same terms as spouses (Article 3(b), Act 7/2001)⁵³ and the right to benefit from the legal regime on leave, public holidays and absences, as applied to individual employment contracts, on terms equivalent to those applying to married couples. Such rights cannot properly be characterised as effects on persons; they are rather measures of social protection that were intended by Act 7/2001 to extend to partners in *de facto* unions. They appear to evidence the law's recognition and protection of that special closeness which exists within a *de facto* union.

2.2.3.2. Effects on property

Since the Portuguese Civil Code does not recognize *de facto* unions as family relationships (Article 1576 Civil Code) cohabiting partners do not belong to each other's family: they are treated as strangers. The *de facto* union has no legal impact on the ownership of their property, that is to say that each partner remains the owner of the property that he/she has acquired prior to the *de facto* union, as well as the property that he/she has acquired during the *de facto* union.

50 On other effects on persons of *de facto* unions, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 118-119; N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 674-696.

51 The behaviour by a partner in the union that amounts to a breach of conjugal duties (respect, fidelity, cohabitation, cooperation and assistance) will have no legal consequences.

52 Published in *Diário da República*, I – Série-A, no. 75, 17th April 2006.

53 As far as preferential placement of public administration officials is concerned, this measure was anticipated, by the Constitutional Court's jurisprudence for different-sex *de facto* unions with minor children, see above at 2.1. Act 7/2001 generalised this to cover different-sex *de facto* unions with or without children and same-sex *de facto* unions.

In addition, neither one of the partners acquires any right of ownership of the other's property, nor any right or duty to administer it. This being so, the property of each one is subject to the general regime of law of obligations and property law:⁵⁴ each partner is allowed, for instance, to sell or rent his/her movable or immovable property without the other's consent being required.⁵⁵ Moreover, partners are permitted to make between them sale, labour or loan contracts, among others.⁵⁶

Act 7/2001 did not regulate these aspects, namely providing a property regime similar to the matrimonial property regime. Indeed, the statute neither provides a choice of property regimes, nor establishes rules covering the administration of assets and debts of the partners similar to those for married couples (Articles 1678-1697 Civil Code). Effects on property of *de facto* unions regulated by Act 7/2001 are thus also limited.

Even though the partners are treated as strangers, the fact is that living in a *de facto* union presupposes the sharing of resources in daily life and therefore some kind of mingling of ownership of movable assets of the two partners may occur.

Act 7/2001 does not permit the partners of *de facto* unions to freely set out the terms of their relationship, however it is also not prohibited. This being so, and taking into account the possible mingling of ownership of the partners' property, some authors have argued that so-called cohabitation contracts should be regarded as valid, although restricted to the field of property, and thus within the limits of the principle of private autonomy.⁵⁷

The sole effect on property that Act 7/2001 effectively establishes is the application to the partners of the taxation regime of personal income established for cohabiting married couples (Article 3(e), Act 7/2001).⁵⁸

2.3. Termination of the relationship

According to the statute a *de facto* union can be terminated: on the death of one of the partners (Article 8(1a), Act 7/2001); by the decision of one of them (Article 8(1b), Act 7/2001),⁵⁹ and by the marriage of one of the partners to a third person (Article 8(1c), Act 7/2001).

Most of the protective measures of *de facto* unions contained in Act 7/2001 are directed towards moments of crisis. However, the regulation of these moments is not detailed; provision is only made for some of the consequences of the termination.⁶⁰

One of the main problems in case of termination of a *de facto* union is the future of the joint home. In fact, the first of the protective measures listed in Article 3 specifically focuses on the attribution of the joint home (Article 3(a), Act 7/2001).

The statute provides different solutions to this problem and they depend on whether the *de facto* union is being terminated by breakdown or the death of one partner, as well as whether the house is owned (by one or both of them), leased or rented.

54 Note the exception in Art. 953, Civil Code.

55 In contrast, one spouse may have to ask for the other spouse's consent to sell his/her own property depending on the property regime, which applies to their marriage (Art. 1682 –A (1a), and (2), Civil Code).

56 There is no legal rule prohibiting them from making such contracts between them as there is for spouses (Art. 1714 (2), Civil Code).

57 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 119-120; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 174-175.

58 On other effects on property of *de facto* unions, see Pereira Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 119-120; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 315-321.

59 Or by agreement of both partners.

60 For instance, there are no rules covering the settlement and division of property acquired during a *de facto* union. On the difficulties that arise in this regard, with pointers towards a possible resolution, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 120; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 173-183.

For those situations involving breakdown of the *de facto* union where the joint home is leased or rented, Act 7/2001 provides the former partners the possibility to agree to the assignment of the lease from one partner to the other or from both to one of them (Article 4(3), Act 7/2001 which refers to Article 1105 Civil Code).⁶¹

If the partners are not able to agree, the court must decide the issue taking into account ‘the needs of each [of the former partners], the interests of children and other relevant factors’ and the landlord must be officially notified of that decision (Article 1105(2) and (3) Civil Code).

If the joint home is owned jointly by the partners or by just one of them, the act refers to Article 1793, Civil Code that governs the outcome for the joint home in cases of divorce where it belongs jointly to the spouses or to just one of them.

This provision allows either spouse to petition the court for the grant of a lease in the joint home. The court’s decision must take into account the needs of each of the spouses and the interests of the children of the family (Article 1793(1) Civil Code).⁶²

As referred to above, these provisions were anticipated by the Constitutional Court’s jurisprudence⁶³ in cases of separation of the partners in a *de facto* union with minor children. Nevertheless, the protection that the statute now offers is broader in that it extends both to the possibility of agreement on which of the former partners will become the tenant, and to the ability of the court to grant one of them a lease of the joint home in cases where there are no minor children or no children at all.⁶⁴

In case of the death of the owner of the joint home, the surviving partner has a right *in rem* to remain there⁶⁵ for a period of five years, as well as a preferential right in the sale of the property for an equal period (Article 4(1) Act 7/2001), provided that the deceased partner is not survived by a descendant aged less than one year old, nor by other descendants who lived with him or her for over a year and intend to continue living there, and in the absence of any testamentary disposition to the contrary (Article 4(2) Act 7/2001).

If the joint home was rented or leased and the deceased partner was the tenant, the tenancy is transferred to the surviving partner (Article 5 Act 7/2001 and Article 1006(1a) Civil Code).

In case of death of one partner, legal protection is not confined to the establishment of rules concerning the joint home. The death of one of the partners has other consequences that are reflected in the granting of a certain social protection to the surviving partner, namely: the right to the death grant and survivor’s allowance (Articles 3 and 6, Act 7/2001),⁶⁶ the right to benefits for death resulting from an work related accident or occupational illness (Article 3(f), Act 7/2001) and the right to pensions for survivors of military personnel and for exceptionally meritorious services rendered to the country (Article 3(g), Act 7/2001).⁶⁷

Departing from the principle that partners of a *de facto* union are treated as strangers, Act 7/2001 does not attribute one partner any kind of inheritance rights in case of death of the other.

61 Introduced by the Act 6/2006, of 27th February 2006, published in *Diário da República* I-Série-A, no. 41, 27th February 2006.

62 Once the court has granted to one of the spouses such application for a lease, the lease is then subject to the residential rent laws. Despite this, the court can set the terms of the contract, after hearing the spouses, as well as terminate the lease on the application of the landlord, when supervening circumstances so justify (Art. 1793(2), Civil Code).

63 See *supra*, 2.1.1.

64 Note that where a *de facto* union is terminated at the instigation of the partners, the termination must be declared judicially when any claim is made regarding rights that derive from the termination. A judicial declaration of termination of a *de facto* union should be made in an action where the alleged rights are exercised or in an action according to the procedural rules for status actions (Art. 8(2) Law 7/2001). See J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 327-328.

65 This does not give the partner the right to require that the contents be left for him or her use.

66 On the interpretation of Art. 6, see J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 290-292; N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 672-673.

67 For a more detailed description of these rights and the legal regime governing them, see F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 127; J. Pitão, *União de Facto e Economia Comum*, 2006, pp. 293-302.

The surviving partner will continue to be treated as a stranger. He or she does not belong to the other partner's family and is therefore not considered to be one of his or hers legal heirs (Articles 2157 and 2133 Civil Code). So, unless one of the partners make a provision in his or her will in favour of the other, the latter will not acquire any assets or values from the first's estate.

3. Same-sex *de facto* unions and Act 7/2001

Act 7/2001 has given some legal visibility to same-sex *de facto* unions; it conferred important effects on them, but has not equalised their position as compared with different-sex *de facto* unions. The one does not coincide with the other in effective scope. This interpretation of the Act 7/2001 can give rise to increasing ambiguities,⁶⁸ which risk generating difficulties in the implementation of the statute due to the imprecision of language by the legislature and inadequacies of legislative technique. However, it does not seem possible to interpret the law other than as meaning that same-sex *de facto* unions do not produce the same legal effects as different-sex *de facto* unions.

Firstly, such equivalence seems not to have been the legislature's purpose: if that had been the legislature's intention, the legislature should have explicitly mentioned it – as they did, for example, in the case of the right to transfer residential leases (Article 5 Act 7/2001)⁶⁹ – and not simply omitted it. Secondly, Act 7/2001 itself makes the different sex of the parties an express condition for the only effect on persons that it recognises for *de facto* unions: the right to joint strong adoption of a child (Article 7, Act 7/2001),⁷⁰ Thirdly, the statute invokes by reference the provisions of other laws (Article 1(2), Act 7/2001) in which the difference of sexes is presupposed, either by the very nature of things – for example, in the functioning of the legal presumption of paternity in actions to establish the defendant's paternity when he and the child's mother have lived as husband and wife during the legal period for conception (Article 1871(1c), Civil Code) – or because the rules in question establish the difference in the sex of the parties as a requirement by specifying cohabitation 'in conditions similar to those of husband and wife' – such as Article 2020, Civil Code that accords to a person, who, had lived with the deceased (not married or legally separated in person with division of property) for more than two years under conditions similar to those of husband and wife, the right to ask for maintenance from the estate of the deceased, if he or she cannot obtain it from a spouse, ex-spouse, descendants, ascendants or siblings.

The effects of a same-sex *de facto* union can be summed up as those that Act 7/2001 explicitly confers on it (Articles 3 and 5, Act 7/2001) plus those that other laws, without requiring the difference of sexes, confer on *de facto* unions. There is therefore no legal basis for extending the scope of the effects of same-sex *de facto* unions in order to make it coincide with that of different-sex *de facto* unions.⁷¹

4. The future of same-sex unions in Portugal

From this brief description of Act 7/2001, one must conclude that the legal importance of same-sex *de facto* unions in the Portuguese legal system is limited. Though one may ask whether the

68 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 113.

69 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 114.

70 See *supra*, 2.2.3.1.

71 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 114.

partners in same-sex *de facto* unions after Act 7/2001 are left without legal protection to an extent that results in situations of profound injustice and consequently flagrant disrespect for the dignity of the human being demanding further legislative intervention.

Given the description above, it seems that, although the legal consequences of same-sex *de facto* unions are few, the statute covers a range of subjects (from the protection of the joint home to survivors' benefit) establishing a minimum of social protection of partners. This minimum of social protection ensures the fulfilment of the imperative of respect for the dignity of the human being in a democratic State based on the rule of law (Articles 1 and 2 Constitution of the Portuguese Republic).

It is true that Act 7/2001 makes no mention of the issues concerning the ownership of assets and to the regime covering the consequences of possible mingling of ownership of movable assets during the lifetime of the relationship, nor of the recognition of inheritance rights.

These two aspects must be distinguished. With regard to the first aspect, it does not appear to be forbidden for partners, by means of a cohabitation contract, to determine the rules according to which their property will be governed.⁷² With regard to the second aspect, as already mentioned, the rules of succession are mandatory and the surviving partner does not acquire any inheritance rights (Articles 2156, 2157, and 2133, Civil Code). Nevertheless, it should not be forgotten that the testator always has a margin of freedom, albeit within the *quota* available, of disposition of his or her assets by making provision in a will in favour of the other partner.

Is there a case for adding further (favourable) effects to a same-sex relationship, which has sufficient exclusivity and durability to amount to a 'life together under the same roof', in particular by recognising it as a familial relationship?

This question is not new in the debate on the legal status of same-sex relationships and therefore no major new line of argument is to be expected for or against more extensive protection of such relationships. It is, above all, a difficult and sensitive issue of social and family policy.⁷³

This is not the place to attempt to propose a definitive solution. Therefore, only the most common arguments encountered in the debate will be dealt with here.

The benefit of such recognition is usually invoked by the following arguments, namely the greater visibility of same-sex relationships and the change of mentalities and attitudes towards homosexuality, which has increasingly gained social acceptance and is no longer prosecuted as a crime,⁷⁴ the progressive loss of the traditional functions of the family,⁷⁵ the absence of a single model of the family, the transformation of the concept of marriage into a relationship of emo-

72 See *supra*, 2.2.3.2.

73 See J.-L. Renchon, 'La Régulation par la Loi des Relations Juridiques du Couple non Marié', in J.-L. Renchon et al. (eds.), *Le Couple Non Marié à la Lumière de la Cohabitation Légale*, 2000, p. 13.

74 See S. Pais & A. Sousa, 'A União de Facto e as Uniões Registadas de Pessoas do mesmo Sexo – Uma Análise de Direito Material e Conflitual', 1999 *Revista da Ordem dos Advogados*, p. 707; A. Agell, 'The Legal Status of Same-Sex Couples in Europe – A Critical Analysis', in K. Boele-Woelki et al. (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 130.

75 On the causes of the progressive loss of the traditional functions of the family, see M. Glendon, *The New Family and The New Property*, 1981, pp. 1-2, 7; F. Coelho, G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 146-147; F. Swennen, 'O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage', in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 123.

tional coexistence detached from the purposes of procreation and upbringing of children,⁷⁶ and finally, the argument of non-discrimination on grounds of sexual orientation.⁷⁷

Against such recognition the following arguments are often deployed, namely the tradition that confines marriage to people of different sex,⁷⁸ the connection between marriage and procreation – though not necessarily a requirement, it is greater than a mere eventuality⁷⁹ –, the main functions of the different-sex family in the procreation, protection and socialization of children,⁸⁰ the ‘intergenerational interest’ of different-sex families and their importance for the reproduction of human society itself,⁸¹ and, finally, a restrictive interpretation of the principle of equality.⁸²

One may assume that, in the future, further legislative intervention will occur to extend the legal effects conferred on same-sex relationships due to the increasing social acceptance of those relationships, the discernable European trend towards a wider legal recognition of such relationships⁸³ and the legislature’s intent to promote the integration of homosexuals into society. It is thus the task of the legal scholar to determine which legal instrument better suits that purpose. It is incumbent on the legal scholar in the treatment of this problem, to develop a rational, logical and strictly legal and scientific discourse.⁸⁴

There are two main models from which the legislature can choose:⁸⁵ the opening up of civil marriage to partners of the same sex, or the organization of a specific legal status for same-sex unions with more or less similar features as that relating to marriage, as registered partnerships.

76 See W. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, 1996, pp. 96 *et seq.*; D. Coester-Waltjen & M. Coester, ‘Formation of Marriage’, in M. Glendon (ed.), *International Encyclopedia of Comparative Law: Persons and Family*, Vol. IV, 1997, pp. 50-51; S. Oliveira Pais & A. Frada de Sousa, ‘A União de Facto e as Uniões Registadas de Pessoas do mesmo Sexo – Uma Análise de Direito Material e Conflitual’, 1999, *Revista da Ordem dos Advogados*, pp. 707-708; F. Swennen, ‘O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, pp. 138, 139.

77 See W. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*, 1996, pp. 153 *et seq.*, especially pp. 172 *et seq.*

78 See F. Swennen, ‘O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 137.

79 See R. Posner, ‘Should there be homosexual marriage? And if so, Who should decide?’, 1997 *Michigan Law Review* 95, p. 1583.

80 See F. Swennen, ‘O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, pp. 140-141.

81 See A. Agell, ‘The Legal Status of Same-Sex Couples in Europe – A Critical Analysis’, in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 131.

82 See A. Agell, ‘The Legal Status of Same-Sex Couples in Europe – A Critical Analysis’, in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 123-124; N. Cid, *A Comunhão de Vida à Margem do Casamento: entre o Facto e o Direito*, 2005, pp. 563-565. On the demand for non-discrimination on the grounds of sexual orientation, see J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, pp. 333 *et seq.*, especially pp. 340-341 and pp. 349-350.

83 This trend is not equally established throughout Europe. This being so, some authors say that although the harmonisation or unification of family law in this area is desirable, it is not, however, feasible, see I. Curry-Sumner, *All’s Well that Ends Registered?*, 2005, p. 518. Noting the lack of convergence in Europe in this regard, see M. Antokolskaia, ‘Harmonisation of Family Law in Europe: A Historical Perspective’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 17; detecting, however, a ‘temporary divergence’, see F. Swennen, ‘O Tempora, O Mores! The Evolving Marriage Concept and the Impediments to Marriage’, in M. Antokolskaia (ed.), *Convergence and Divergence of Family Law in Europe*, 2007, p. 137 *et seq.*

84 See A. Agell, ‘The Legal Status of Same-Sex Couples in Europe – A Critical Analysis’, in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 122-123.

85 See A. Agell, ‘The Legal Status of Same-Sex Couples in Europe – A Critical Analysis’, in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 130. The author stresses the need to decouple the issue of organisational forms of cohabitation between people of the same sex from the forms of organization of cohabitation between people of different sex. The author asserts that, on the one hand, the social needs that the regulation of such relations must satisfy is not the same in the one case as in the other, and, on the other, that neither are the different roles that such relationships play in society.

4.1. Marriage of two people of the same sex

As stated in the introduction, there are calls for same-sex relationships to benefit from external legitimisation of the relationship. These calls often take the form of claiming the right to marry⁸⁶ with the symbolic value of marriage.⁸⁷ Furthermore, marriage is also seen as a means of access to a more ‘advantageous’ regime than that available to *de facto* unions, namely in the fields tax and inheritance.⁸⁸ Is this the correct legislative solution to adopt?

To answering this question one must, firstly, look at the terms in which the Portuguese legal system protects the right to marry and, secondly, assess whether that right embraces the possibility of marriage between two people of the same sex.

4.1.1. The right to marry in the Constitution

The right to marry has constitutional support. Article 36(1), Constitution of the Portuguese Republic provides that ‘everyone has the right to found a family and to marry on terms of full equality’. It is the unanimous view of scholars that this provision enshrines not one, but two fundamental rights: the right to found a family *and* the right to marry. Not unanimous, however, are the interpretations of the result of combining them.

The provision can be interpreted as meaning that the constitutional concept of family is not confined to the matrimonial family, but also covers the ‘natural family’ and the ‘family created by adoption’. However, according to this interpretation, the right to found a family should be interpreted, firstly, as a right to procreate and, secondly, as a right to establish the corresponding parentage ties.⁸⁹

According to a different interpretation, the consideration of the right to marry and the right to found a family as two different rights purports an implicit recognition of cohabitation outside marriage as a familial relationship. This being so, the right to found a family has to be interpreted as a constitutional expansion involving appreciation of how *de facto* unions can legally be recognised as familial relationships⁹⁰ and thus benefit from direct legal protection.⁹¹

In spite of those differences of interpretation, one can say that the Portuguese Constitution is open ‘to the plurality and diversity of family relationships in our time’⁹² and that constitutionally the worlds of *family* and *marriage* do not necessarily coincide.

The fact that these concepts do not coincide, however, does not appear to lead to the conclusion that of the acceptance of another model of the family within marriage or even the abandonment of the traditional concept of marriage as based on the difference of the sexes. Firstly, because Article 36(1) 2nd part, Constitution of the Portuguese Republic enshrines not only a right to marry, but also includes an *institutional guarantee* of marriage. From this *institutional guarantee* follows a protection that amounts to a ban on the legislature modifying the concept and the legal regime governing marriage in a manner leading to its abolition or even to detracting

86 See Judgment of the Lisbon Court of Appeal of 15th February 2007, which rejected the appeal and upheld the refusal of the Civil Registrar of a request for a marriage ceremony between T. and M. because they were two persons of the same sex. This was the first time a higher Portuguese court had pronounced on the issue of marriage between two persons of the same sex. See Judgment of the Lisbon Court of Appeal of 15th February 2007 at www.dgsi.pt. T. and M. were dissatisfied with that decision and have appealed to the Constitutional Court where a decision is pending.

87 See N. Cid, ‘Direitos Humanos e Família: Quando os Homossexuais querem casar’, 1998 *Economia e Sociologia*, no. 66, pp. 230-231; R. Posner, ‘Should there be homosexual marriage? And if so, Who should decide?’, 1997 *Michigan Law Review* 95, p. 1587.

88 See M. Glendon, ‘Marriage and the State: the Withering Away of Marriage’, 1976 *Virginia Law Review*, no. 62, p. 710.

89 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 162-166; J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, pp. 399-401.

90 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 561.

91 See J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, p. 402.

92 See J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, p. 398. Similarly, see J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 567.

from its main features.⁹³ The traditional concept of marriage itself delimits the right to marry, as can be seen in the prohibitions on polygamy and on the marriage of two people of the same sex.⁹⁴ Indeed, the constitutional concept of marriage is derived from the historical concept of marriage as a union of two people of different sex rooted in a communion of life. Therefore, we cannot, infer from Article 36(1) 2nd part, Constitution of the Portuguese Republic ‘a direct and compulsory recognition of same-sex marriages’.⁹⁵ The constitutional opening recognition of the different models of the family does not encompass same-sex marriage.

Secondly, the fundamental right to marry is not an absolute right⁹⁶ because it is limited by the impediments to marriage: marriageable age, insanity, prior marriage, certain degrees of kinships and affinity and the condemnation for murder of a prior spouse (Articles 1601, 1602, 1604, Civil Code). These impediments to marriage are considered to be in accordance with the right to marry provided they are based on fundamental public interests that express important societal interests.⁹⁷ The legislature may thus establish such impediments and set out a legal concept of marriage as the ‘contract between two people of different sex who wish to found a family with a full communion of life’ (Article 1577 Civil Code).

4.1.2. *The right to marry and the principle of equality*

Would such a solution violate the principle of equality which prohibits that anyone is ‘privileged, benefited, harmed, deprived of any right because (...) of their sexual orientation’?⁹⁸

The principle of equality, as the structuring principle of the social and democratic State based on the rule of law, has three strands: the liberal, the social and the democratic.⁹⁹ The dialectical combination of these strands has resulted in a broadening of the scope of protection of the principle of equality in the Portuguese constitutional system, resulting in the prohibition of arbitrariness and discrimination and in the obligation to differentiate.¹⁰⁰

For a complete answer to the question formulated above, one should clarify what the prohibition of arbitrariness and by the prohibition of discrimination mean. As to the former, the ban on arbitrariness is characterised in this way: neither shall what is essentially equal be arbitrarily treated as unequal, nor shall what is essentially unequal be treated as equal. The Constitution leaves to the legislature the task of defining, from an appropriate material base, the facts or relationships, which are to serve as points of reference for an equal or unequal treatment.¹⁰¹

When trying to discover if same-sex relationships are equal or different from different-sex relationships, one must focus not on the individuals themselves but on the relationship between them. Individuals involved in different-sex and same-sex relationships are persons and therefore citizens with equal right to the respect of their human dignity independent from their sexual orientation.

93 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 159,160; J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, pp. 396, 397.

94 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 158; J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, pp. 396-398; J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 562.

95 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 568.

96 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, p. 158; J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Tomo I, 2005, p. 396; J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 562.

97 See F. Coelho & G. Oliveira, *Curso de Direito da Família*, Vol. I, 2003, pp. 158-159; J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, p. 396.

98 See Art. 13, Constitution of the Portuguese Republic.

99 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, pp. 337-338.

100 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 339.

101 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 339.

In spite of these relationships being equal with regards the ‘intimate mutual love and affection and long-term commitment’¹⁰² and the display of ‘intimacy, stability and social and financial interdependence’,¹⁰³ some differences remain. Besides the traditional argument of procreation, one must not forget another distinguishing factor: there are men and women involved. Even though men and women are considered to be citizens with equal rights and duties, the fact is that their real position before society and the labour market is quite unequal. It is often said that, in Portugal, a woman earns a half of what a man earns for the same work during the same time, a woman’s career perspectives are quite inferior compared to those of a man. This difference between sexes has a great influence in the relationship of two persons of opposite sex. In fact, the Portuguese legislature when defining the legal regime of marriage took this into account establishing, for example, the principle of equality of rights and duties between spouses and the principle of joint orientation of the family life (Article 1671 Civil Code), the duty of contributing to the family expenses according to the each one’s financial possibilities, which can also be fulfilled with the work done at home including the daily care and the education of the children of the family (Article 1676 Civil Code)¹⁰⁴ and establishing as criteria for the payment of maintenance between former spouses, namely, the professional qualifications of the spouses, each one’s employment possibilities, the time each one of them will spend with the care and education of their children.¹⁰⁵

In same-sex relationships that difference does not exist and thus the above mentioned legislature’s preoccupation does not seem to be justified under the same terms.

It follows that, given the substantive and objective difference in these situations, there being no right of marriage contemplated by the Constitution for same-sex couples does not seem to cause any incongruity in the constitutional system because it respects the prohibition on arbitrariness.

A similar conclusion is likely to be drawn in relation to the constitutional prohibition of discrimination. Regarding this prohibition, it should immediately be made clear that it does not impose absolute equal treatment whatever the concrete circumstances, nor prevent any differential treatment. From a constitutional point of view, different treatment is illegitimate where differences in treatment are not founded on the objective diversity of situations arising from consideration of one of the unlawful discrimination factors (Article 13(2), Constitution of the Portuguese Republic), did not pursue a constitutionally legitimate purpose and, finally, did not satisfy the requirements of necessity, appropriateness and proportionality.¹⁰⁶

The lack of constitutional recognition of a right to marry for same-sex couples, in contrast to the position different-sex couples does not represent a violation of the prohibition on discrimination. Indeed, the denial of such a constitutional right is based in the first place on an objective distinction between situations; secondly, it is not based solely on sexual orientation as a reason for justifying the difference in treatment – the heart of the issue is not concerned with the sexual orientation of those seeking marriage, but in the institution of marriage itself, historically and sociologically oriented towards the legal regulation of different-sex relationships, and therefore an inappropriate instrument for legal regulation of the emotional relationship of two persons of

102 *Ghaidan v. Godin-Mendoza* [2004], UKHL 30, Lord Rodger of Earlsferry (126) at <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm>

103 *Ghaidan v. Godin-Mendoza* [2004], UKHL 30, Baroness Hale of Richmond (139) at <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm>

104 This specific way of accomplish the duty of contributing to the family expenses was thought for those situations of women staying at home caring and educating the children of the family while their spouses (men) were making progresses in their careers in the outside world.

105 Once more one can find here a special worry with the situation of women.

106 See J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 340.

same sex.¹⁰⁷ Thirdly, it is pursuing a constitutionally legitimate purpose in the shape of the *institutional guarantee* of marriage.¹⁰⁸ Finally, it is necessary, appropriate and proportionate to the pursuit of that objective, in that denying the right to marriage to persons of the same sex does not prevent the legislature from providing the legal effects of marriage to same-sex relationships and affording them the appropriate legal protection. Portuguese constitutional doctrine has understood that the Constitution should remain open to the recognition of new realities and to the increasing diversity of models of family. Therefore constitutional protection of the family can be extended to stable relationships between two people of the same sex.¹⁰⁹

4.2. Registered partnerships

The legislature seems to be left with registered partnership as a possible legal instrument for regulating the legal status of same-sex relationships. Is this model consistent with the Portuguese constitutional system? A solution to this problem must be sought.

The model of registered partnership was introduced for the first time in Denmark in 1989 as a means of providing legal protection to same-sex relationships and thus promoting social acceptance of these relationships.¹¹⁰ Registered partnership was considered to be a new legal familial relationship. Although different from marriage, in name and the persons to whom it applied, it was very similar to it with regard to its effects, which are progressively being extended.¹¹¹ Other legal systems were quick to follow suit, firstly, those of other Nordic countries¹¹² and then in other countries such as The Netherlands,¹¹³ Germany¹¹⁴ and most recently the United Kingdom and Switzerland.

All the countries mentioned adopted this model of regulation of same-sex relationships basing it, to a greater or lesser extent, on the regime governing marriage. In fact, the laws on registered partnerships lay down detailed rules the establishment of the relationship, its effects on persons and property and its dissolution.

In most cases, registered partnerships appear to be little more than a substitute for marriage, although differences remain between the respective regimes.¹¹⁵

The creation of a new institution with a different name, but in all other respects similar to marriage should not be the path followed by the Portuguese legislature to achieve the objective of giving more effective legal protection to same-sex relationships. Firstly, because marriage in the Portuguese legal system enjoys a specific protection stemming from the *institutional guarantee* that it enjoys under the Constitution, contrary to any proposal to grant to same-sex

107 See M. Glendon, 'Marriage and the State: the Withering Away of Marriage', 1976 *Virginia Law Review*, no. 62, p. 677; S. Pais & A. Sousa, 'A União de Facto e as Uniões Registadas de Pessoas do mesmo Sexo – Uma Análise de Direito Material e Conflitual', 1999 *Revista da Ordem dos Advogados*, p. 721.

108 See J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, p. 405.

109 See J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, p. 406; J. Canotilho & V. Moreira, *Constituição da República Portuguesa Anotada*, Vol. I, 2007, p. 568.

110 See I. Lund-Andersen, 'The Danish Registered Partnership Act', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 13.

111 See I. Lund-Andersen, 'The Danish Registered Partnership Act', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 13, 17 *et seq.*

112 On registered partnerships in Sweden and Finland, see M. Savolainen, 'The Finish and the Swedish Partnership Acts – Similarities and Divergences', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 24 *et seq.*

113 In The Netherlands, registered partnerships are not intended only for same-sex, but also for different-sex couples. On registered partnerships in the context of the Dutch legal system, see K. Boele-Woelki, 'Registered Partnership and Same-Sex Marriage in The Netherlands', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 45, especially, pp. 45-48.

114 On the 2001 reform that introduced the *Lebenspartnerschaft*, see K. Thorn, 'The German Law on Same-Sex Partnerships', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 84 *et seq.*

115 Which, however, are still disputed. See H. Ytterberg, 'All Human Beings are Equal, but Some are More Equal than Others – Equality in Dignity without Equality in Rights?', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 1 *et seq.*

partners an absolutely equal status to that of married couples.¹¹⁶ Secondly, to accord an equal status in (almost all) material respects to that of married couples only with a different name could lead to some confusion¹¹⁷ and to interpretative difficulties that should always to be avoided. Thirdly, the legislature must strive to regulate the specific characteristics of same-sex relationships in what that are unique and therefore deserve to be treated accordingly, eschewing the inappropriate solutions that could result from ignoring the differences from different-sex relationships, in particular those regarding the difference of gender within the family, the society¹¹⁸ and the labour market.

The Portuguese legislature, in trying to ensure effective protection of those involved in same-sex relationships should seek to solve the legal problems raised by this model of cohabitation and therefore seek to create a specific legal regime for these situations which could take the form of registered partnerships, provided that they would not be considered a substitute for marriage or a 'second-class' marriage. By paying special attention to the specific features these relationships, the legislature would respect their difference reflecting the increasing social acceptance of these relationships.

On the path from *de facto* to *de jure* another step must be taken, the Portuguese legislature should chose the best direction to take in the light of the features and structuring principles of the Portuguese legal system.

116 See J. Miranda & R. Medeiros, *Constituição Portuguesa Anotada*, Vol. I, 2005, p. 406.

117 See K. Thorn, 'The German Law on Same-Sex Partnerships', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, pp. 85, 87.

118 See K. Thorn, 'The German Law on Same-Sex Partnerships', in K. Boele-Woelki *et al.* (eds.), *The Legal Recognition of Same-Sex Couples in Europe*, 2003, p. 93.