Revista Jurídica vol. 03, n°. 65, Curitiba, 2021. pp. 647 - 689

THE IMPORTANCE OF BEING EARNEST: SAME-SEX COUPLES PROVISIONS IN ITALY AND POLAND UNDER THE EUROPEAN MULTI-LEVEL LEGAL ORDER

A IMPORTÂNCIA DE SER GANHOSO: DISPOSIÇÕES PARA CASAIS DO MESMO SEXO NA ITÁLIA E NA POLÔNIA AO ABRIGO DA ORDEM JURÍDICA EUROPEIA DE NÍVEIS MÚLTIPLOS

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ABSTRACT

Objective: This paper aims to compare the legal systems of Poland and Italy in relation to rights recognized to unmarried same-sex couples.

Methodology: The legal research is mainly conducted through the methodology of comparative law. This is the main criterion to highlight limits and perspectives of the European legal systems through a detailed analysis of their respective legal formats, namely judicial decisions and statutory laws.

Results: The comparative study is not only showing similarities and differences, but it is contextualizing provisions' conflicts and tensions between domestic and international legal environments where the rights to a family life for instance is considered as one of the most important human rights to be recognized to *de facto* couples as well as to unmarried same-sex couples.

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

Contributions: The paper argues that a multi-level dimension of rights can shape national rights as well as being the main changing force to further nurture social changes and political reforms towards a more equal and one could say fairer legal system where European legal principles can coexist with different national rights within a complex and multi-level legal order.

Keywords: Comparative law; Democracy; Human rights; Legislative reforms; Same-sex couples

RESUMO

***Objetivo**: o objetivo deste artigo é comparar os sistemas jurídicos da Polônia e da Itália em relação aos direitos reconhecidos aos casais não casados do mesmo sexo.*

***Metodologia**: A pesquisa jurídica é realizada principalmente por meio da metodologia do Direito comparado. Este é o principal critério para evidenciar os limites e perspetivas dos sistemas jurídicos europeus em uma análise detalhada dos respectivos formatos jurídicos, nomeadamente decisões judiciais e leis.*

***Resultados**: O estudo comparativo não mostra semelhanças e diferenças, mas contextualiza os conflitos e tensões das disposições entre os ambientes jurídicos nacionais e internacionais onde o direito à vida familiar, por exemplo, é considerado um dos direitos humanos mais importantes a serem reconhecidos para casais de facto, bem como para casais não casados do mesmo sexo.*

***Contribuições**: O artigo argumenta que uma dimensão multinível dos direitos pode moldar os direitos nacionais, além de ser a principal força de mudança para promover mudanças sociais e reformas políticas em direção a um sistema jurídico mais igualitário e mais justo, onde os princípios jurídicos europeus podem coexistir com diferentes direitos nacionais dentro de uma ordem jurídica complexa e multinível.*

***Palavras-chave**: Direito comparado; Democracia; Direitos humanos; Reformas legislativas; Casais do mesmo sexo.*

1 INTRODUCTION

Oscar Wilde was put on trial for gross indecency in 1895 after the details of his affair with a British aristocrat (Lord Alfred Douglas). Indeed, Douglas's father, the Marquess of Queensberry, was outraged by the relationship and sought to expose Wilde. Oscar's trial is still alive today. It might seem a memory of the past, but it is not.

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

Still today in Europe unmarried same-sex couples experience potential discriminations due to their intimate and personal choice to build a relationship with someone of the same sex.

For these reasons, our paper is a "*j'accuse*" that spreads from a desire of "ripping off" the seriousness of marriage as in Oscar Wilde's play "The importance of being Earnest". Oscar Wilde wrote when he did not know life, but as he claims once he knows life, he had no more to say. This is why in our paper we would like to express ideas especially in relation to the right of cohabitation and one could say the right to love and being loved for same-sex couples as well as for bisexual or transgender individuals. Our focus is broad but the legal analysis in this paper is mainly related to same-sex couples without taking into consideration the more specific rights of transgender or bisexual individuals. It is useful to anticipate that we believe that no distinction should be made among them, and conversely that the rights that are recognised to one of them should then be automatically extended to benefit all the others. In particular, we vehemently take a negative position against the statements expressed for the purposes of the election campaign to pledge to fight "LGBT ideology" in Poland (SHAUN, 2020). We hope that our legal analysis will change the way of thinking and relate to the situation of same-sex couples.

Furthermore, it is important to underline that even *de facto* couples (namely, couples who are not married through a wedding celebration having legal effects) are being often subject to rights' violations as well as experiencing a minor legal protection of their rights, although it shall be immediately said that the major and more significant discriminations have been mainly in relation to same-sex couples. Indeed, such practice against the *de facto* couples has been quickly recognised as a violation of numerous provisions in the laws of several countries of the Old Continent and furthermore it has been clearly recognised as incompatible with a number of rights and legal provisions set forth in various international declarations. Yet a strong discussion is kept both at national and international level about the existence of an individual right to a family life as established in sections 12 and 16 of the Universal Declaration of Human Rights or sections 8, 12 and 14 of the European Convention for the Protection

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights or ECHRs). In this light, section 23 of the International Covenant on Civil and Political Rights, and, more recently, of sections 7 and 9 of the Treaty of Nice are again a confirmation of an emerging potential conflict between national law provisions and international human rights provisions and principles that aim for universalistic values and openness.

For this reason, the work is essentially focusing on the development of the (fundamental) right to establish a family in Italy and Poland, taking into consideration a very important role that supranational regulations and jurisprudence have played. We provide remarks about such international level that we define in contrast to national legal systems as a complex multi-level legal order. To this end, in sections 2, 3, 4, and 5 we examine two legal systems: Italy and Poland by describing and illustrating their limits and perspectives through their legal formants based on judicial decisions and statutory laws. The examination of such principles is bringing the discussion to a higher level of understanding that allows for the first time the reader to be aware of the complexity of such legal systems and their main downsides. In section 6, we then put those legal systems' images in comparison to the international level where we examine the ECHRs' provisions and jurisprudence as well as other international agreements where the rights of unmarried same-sex couples seem finally to find for the first time a solid legal basis and recognition. Consolidating remarks are provided in section 7.

2 THE ITALIAN "LEGITIMATE FAMILY" AND THE FIRST RIGHTS RECOGNISED TO THE UNMARRIED SAME-SEX COUPLES IN ITALY

Section 29 of the Italian Constitution defines the legitimate family as a natural society set up on marriage (*società naturale fondata sul matrimonio*). In other words, the constitutional provision is directly linked to specific provisions that are in turn disciplined under the Italian Civil Code (sections 143, 143-bis, 143-ter, 144, 145, 146,

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

147, and 148). Nonetheless, the same Italian Constitution recognises the importance of guaranteeing protection for children born outside of wedlock.

The family is in fact made up of people who, although they are not married, coexist "*more uxorio*", thus acquiring some legal relevance beyond their non-marital status.[1]

Over time, unmarried heterosexual couples have gained, for example, the right to be subrogated in lease and tenancy agreements in the event of the lessee's or tenant's death (section 6 of the Law n. 392 enacted in 1978, and modified by the judgment of the Italian Supreme Constitutional Court n. 404/1988[2]); the protection of ownership rights related to the family house; the right to ask for compensation in case of death of the partner[3]; the possibility of accessing assisted reproductive techniques (section 5 of the Law, enacted on 19 February 2004, n. 40); the right not to testify in a Court against the partner (section 199 (3) of the Italian Criminal Procedural Code); the legitimacy for one partner to be appointed as "*amministratore di sostegno*" (legal guardian or trustee) in favour of the sick partner (section 417 of the Italian Civil Code); the legitimacy to obtain legal protection in case of family abuses (sections 330, 333, 342-*bis* and 342-*ter* of the Italian Civil Code), and also a possibility to enjoy a list of social benefits (such as the allocation of Official Protection Housing), that has once been reserved only for the spouses.[4]

On the other hand, unmarried same-sex couples have never been recognised with the same level of protection. Indeed, they never had access or benefit from the law that has always been meant to protect the primary interests of the legitimate family of the Italian Constitution, namely the one that is seen as a "natural society".

[1] On the topic the Italian Supreme Constitutional Court has upheld many decisions in relation to *de facto* couples such as decision n 6 of 1977; n 45 of 1980; n 237 of 1986; n 404 of 1988; n 423 of 1988; n 310 of 1989; n 559 of 1989; n 8 of 1996; n 2 of 1998; n 166 of 1998; n 352 of 2000; n 461 of 2000; n 491 of 2000; n 204 of 2003; n 86 of 2009; n 140 of 2009; n 7 of 2010; n 138 of 2010; n 170 of 2014.

[2] The Italian Supreme Court ruling no. 5544/94 has extended such right to the same-sex couples living together *more uxorio*.

[3] It should be noted that the Italian Supreme Court with decision n. 33305/02 has granted the right to compensation also to same-sex couples.

[4] Indeed, same-sex couples benefit of further rights as indicated in sections 14 and 18 of the Penitentiary Regulation according to which the couple has the right to visit the detained person; in the law n. 91 dated 1999 on organ donation; in section 681 of the Criminal Procedure Code relating to the petition for pardon (which can be signed by the couple).

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

Furthermore, the lawmaker has never provided them with specific legal provisions such as the regulation of the family business referred to in section 230-*bis* of the Italian Civil Code. This until recent times (see section 4).

3 THE POLISH FAMILY PROTECTION ACCORDING TO THE CONSTITUTION OF THE REPUBLIC OF POLAND

Section 18 of the Constitution of the Republic of Poland defines the concept of family protection (NAZAR, 1997; SMYCZYŃSKI, 1997, p. 188) This section reads that "marriage intended as the relationship of a woman and a man, family, motherhood and parenthood is protected by the Republic of Poland".[5]

The section establishes a special status for marriage and family, significantly differentiating these relationships from the others such as unmarried couples, same-sex couples, trans-gender couples, etc. (MĄCZYŃSKI, 2013, p. 83-101)[6]The intention of the lawmaker in such provision is clear: it wants to delimit the provision of family protection to a specific definition of family, namely the one that involves a relationship based on marriage between a man and a woman (GAJDA, 2014, p.70-75). In the opinion of many scholars, such interpretation of the family seems to effectively constitute a limitation, or even closure to the discussion on other forms of family especially in terms of same-sex marriages.[7]

Furthermore, the law does not regulate the mutual relations of persons in cohabitation or in civil partnership, regardless of their sex (PAUL, 2003, p.16). Indeed, there is not a specific institution in the Polish legal system that provides a legal framework to protect mutual rights and obligations of such individuals as it is in the case of marriage.

[5] Section 8 of the Constitution of the Republic of Poland: "*Małżeństwo jako związek kobiety i mężczyzny, rodzina, macierzyństwo i rodzicielstwo znajdują się pod ochroną i opieką Rzeczypospolitej Polskiej*".
[6] MĄCZYŃSKI, 2013, p. 83-101; GARLICKI, 2003; WINCZOREK, 2008, p. 54; BORYSIAK, 2016, p. 478–480.
[7] T. SMYCZYŃSKI, 1997, p. 23; BANASZKIEWICZ, 2004, p. 383; GOŁOWKIN, 2001, p. 94; MIK, 1999, p. 136; BANASZKIEWICZ, 2013, p. 591–656; B. BANASZKIEWICZ, 2016, p. 41 diffrent E. ŁĘTOWSKA, J. WOLEŃSKI, 2013, p. 38.

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

However, as argued by scholars, this does not mean that mutual personal and property relationships cannot be arranged by those individuals under other civil law provisions of the Polish Civil Code (1964 and further modifications) (ŁĄCZKOWSKA, 2013, p.171-208). It is possible for example to write a will (section 941 of the Polish Civil Code); entering into an annuity contract, namely a contract under which the issuer agrees to make payments for a period of time determined in whole or in part by reference to the life expectancy of one or more individuals (section 903 of the Polish Civil Code); entering into the articles of association of a civil law partnership (section 860 of the Polish Civil Code) (HARTWICH, 2011) or even acquiring the ownership of assets by establishing fractional joint ownership (section 195 of the Polish Civil Code).

Additionally, the lawmaker provides for the protection of people in cohabitation (section 691 of the Polish Civil Code) defined as "close persons"[8] (section 149 (2) of the Family and Guardianship Code (1964 and further modifications); section 446 (2) in relation to personal injuries, and section 923 (1) and (2) of the Polish Civil Code in relation to inheritance rights; section 3 of the Act on Patient Rights and Patients' Ombudsman (2008 and further modifications); section 4, point 13 of the Real Estate Management Act (1997 and further modifications); section 15, subsection 1 and 2, of the Act on Housing Cooperatives (2000 and further modifications); the closest persons (section 1008 of the Polish Civil Code) or the closest family members (section 446 (2) paragraphs 2, 3 and 4 of the Polish Civil Code). The protection of close relatives or people in cohabitation is also established under substantive criminal law provisions (sections 41 (a), 46, 72, 75, 115 (11), 190, 190 (a), 239, 278 (4), 279 (2), 284 (4), 285 (2), 286 (4), 287 (3), 289 (5) of the Polish Criminal Code or provisions set forth in the

[8] There is no definition of a close person or the closest person or the closest family member under Polish law. The common perception of closeness presupposes the existence of a certain emotional bond characterized by kindness, friendship or love between the persons concerned. Sometimes, however, it is also the case that certain rights are granted to a person whom the legislator treats as a close relative and what is more, as the closest family member, regardless of the actual emotional relations between specific persons. Sometimes real emotions are irrelevant to civil law and do not involve the granting of special rights, and these rights result only from fulfilment of certain conditions. The choice of a loved one is often to the authorized person and it depends on him who to perceive as a close person.

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

procedural law (section 40 (1) paragraphs 2, sections 182, 183, 184, 185, 560 (1) of the Polish Criminal Procedural Code).[9]

However, in some circumstances, the fact of being a heterosexual couple and cohabitants is providing them with some sort of rights that can be comparable to married couples whereas in other instances such principle of equality can be even applied between partners regardless of their sex (NAZAR, 2014, p.982-994). Specifically, when family decisions can have effects on health conditions such as in the case of procreation, and family matters. For instance, heterosexual cohabitants may apply for access to medically assisted procreation techniques (section 2 point 8 of the Infertility Treatment Act (2015) (HABERKO, 2016): same-sex partners may be donors of cells, tissues or organs according to the clause of "special personal reasons" (section 12 of the Act on the Collection, Transplantation and Storage of Cells, Tissues and Organs (2005 and further modifications).[10]

On the other hand, judicial decisions[11] and scholars' opinions[12] argue different positions regarding the protection of "close persons", the closest persons and persons in cohabitation. In particular, some scholars are in favour of granting a protection similar to the one that is granted to married couples; on the other hand, others believe that the scope of this protection should be limited to the situations expressly and distinctly indicated in the regulations.[13] Nevertheless, the opinion that such family

[9] See also PLICH, 2011.

[10] Zespół dp. Opinii prawnych i regulacji międzynarodowych Krajowej Rady Transplantacyjnej, Wytyczne Zespołu Prawnego Krajowej Rady Transplantacyjnej dla Komisji Etycznej w zakresie interpretacji klauzuli „szczególnych względów osobistych" przy pobraniu narządów od żywych dawców niespokrewnionych, Poltransplant Biuletyn Informacyjny 2013, no. 1.

[11] Judgement of the Polish Constitutional Tribunal of 1.07.2003, P 31/02, OTK-A 2003, n. 6, item 58; Judgement of the Constitutional Tribunal of 9.09.2003, SK 28/03; resolution of the Supreme Court of 21.05.2002, III CZP 26/02, OSNC 2003, no. 2, item 20; resolution of the Supreme Court of 20.11.2009, III CZP 99/09, OSNC 2010, no. 5, item 74; sentence of the Supreme Court of 27.05.2003, IV KK 63/03, LEX no. 80281, sentence of the Supreme Court of 7.07.2014, II KK 176/04, LEX no. 121668 differently: resolution of the Supreme Court of 28.11.2012, III CZP 65/12.

[12] B. CZECH, 2011, p. 380-381 differently J. HABERKO, 2011, p. 72-73 mainly M. NAZAR, 2008, p. 220; PAWLICZAK, 2014.

[13] For the protection of personal rights and discrimination in employment see A. BODNAR, *Przeciwdziałanie dyskryminacji ze względu na orientację seksualną w sferze prawa cywilnego, in: Przeciwdziałanie dyskryminacji z powodu orientacji seksualnej w świetle prawa polskiego oraz standardów europejskich*, ed. K. ŚMISZEK, 2006, p. 15–40.

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

protection should be granted only to heterosexual relationships seems now to be the minority view.(LITWIN, 2014, p. 185)[14]

4 THE LEGAL EVOLUTION OF THE PROTECTION OF UNMARRIED SAME-SEX COUPLES IN ITALY: THE STATUTORY LEGAL FORMANT

In Italy, the argument according to which certain rights shall be exclusively reserved to the benefit of the legitimate family has always been construed as a "fair point of view" in scholars' opinions especially due to the fact that the family based on wedding is the only legitimate family under section 29 of the Italian Constitution. This preference for the legitimate family of course has never affected the legal status of "natural children" (namely, children born outside of marriage), whose rights have always been equalled to those of the children born within the legitimate family at least since the last Italian Family Law Reform since 1975.

In this legal context, there was not a general favour for same-sex couples living *more uxorio* (hence, outside of marriage) and only few decades ago the lawmaker granted them with a form of guardianship or protection.[15]

[14] Extensive presentation with grounds LITWIN, 2014, p. 185.

[15] For the general view of the problem concerning the situation of the same-sex couples in the Italian law, see: MAZZOTTA, 2004, p. 163; BOCCHINI, 2006; ROSSI; PIGNATELLI, 2006, p. 208 ss.; G. BRUNELLI, *Matrimonio same-sex e unioni civili: alla ricerca di una tutela costituzionale e sovranazionale*, in *www.forumcostituzionale.it*; A. RUGGERI, 2007, p. 753 ss.; ID., *Il diritto al matrimonio e l'idea costituzionale di "famiglia*", in *Nuove aut.,* 2012, p. 37 ss.; ID., *Le unioni tra soggetti dello stesso sesso e la loro (innaturale…) pretesa a connotarsi come "famiglie"*, in *www.forumcostituzionale.it*; L. VIOLINI, *Il riconoscimento delle coppie di fatto*: praeter o contra constitutionem?, in *Quad. cost*., 2007, p. 394 ss.; B. PEZZINI (a cura di), *Tra famiglie, matrimoni e unioni di fatto. Un itinerario di ricerca plurale*, Napoli, 2008; V. TONDI DELLA MURA, *La dimensione istituzionale dei diritti dei coniugi e la pretesa dei diritti individuali dei conviventi*, in *Quad. cost*., 2008, p. 125 ss.; F. BILOTTA, 2010, p. 412 ss.; N. PIGNATELLI, *Dubbi di legittimità costituzionale sul matrimonio "eterosessuale": profili processuali e sostanziali,* in *www.forumcostituzionale.it*; B. NASCIMBENE, 2010, p. 107 ss.; M. SEGNI, 2010, p. 252 ss.; E. ROSSI, 2010, p. 388 ss.; M. MELI, 2012, II, p. 451 ss.; T. AULETTA, *Ammissibilità nell'ordinamento vigente del matrimonio fra persone del medesimo sesso*, in *Nuova giur. civ. comm.*, 2015, p. 654 ss.; G. COSCO, *Le unioni omosessuali e l'orientamento della Corte costituzionale*, in *Giust. Civ.,* 2011, p. 485; G. FERRANDO, *Matrimonio* same-sex: *Corte di Cassazione e giudici di merito a confronto*, in *Corr. giur.*, 2015, 909 ss.

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

In 2004, during the XIV Italian legislature the member of parliament Mr. Franco Grillini proposes the introduction in the Italian legal system of *Pacs* (acronym for "*Patto Civile di Solidarietà*" [Civil Union Agreements of Solidarity]) that is a form of civil unions derived from the French model, which entered into force in France on 5 November 1999. This initial proposal was devoted to recognise the existence of specific rights and duties to cohabitants, although in a measure that was still below the threshold of rights recognised to married couples (indeed, among those rights it was not contemplated the possibility to adopt and to have access to assisted procreation).

Subsequently, this proposal has been re-formulated into a legislative draft or bill in 2007, and it has been brought to discussion in the Italian Parliament by Ms. Rosy Bindi and Ms. Barbara Pollastrini with the new name of *DiCo* (acronym for "*Diritti e doveri delle persone stabilmente conviventi*" [Rights and Duties of People living together permanently as co-habitants"). The legislative bill was focused on providing a protection for the status of unmarried couples or better to individuals who are permanently living together in the same house.[16]

The main objective of the legislative draft is to recognise a legal status, and consequently rights and duties to same-sex and heterosexual co-habitants whose cohabitation is evidenced by virtue of annotation within municipal registers (*i.e. registro comunale*). The declaration of being a cohabitant can be made simultaneously by both partners. However, if only one partner made the necessary declaration, then this member of the couple has the burden of proof of notifying the other partner by virtue of certified letter with acknowledgment of receipt (*raccomandata con lettera di ritorno*).

Specifically, the legislative draft regulates, *inter alia*, the issues related to the allocation of social housing (entitling the regional administrative entities to take into account the registered partners for the purposes of classification); the subrogation in the lease contracts (consented by the couple "as long as the cohabitation lasts at least three years or the couple have children"); and, the alimentary obligations due in the hypotheses in which the couple is in a state of necessity. Furthermore, the bill

[16] The document is available at *www.senato.it/service/PDF/PDFServer/BGT/00253559.pdf.*

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

considers specific set of rules on "inheritance", "sickness and hospitalization assistance" and "social security and pension treatment".

Notwithstanding, the advanced legislative proposal, such new legislative reform has never came into existence due to the hard opposition from influent political groups mainly associated with Catholic movements in Italy.

Subsequently, in 2008 there have been formal modifications to the *DiCo* through a new proposal called *Cus* (*Contratti di Unione Solidale* [Union Agreement of Solidarity]). Those formal modifications included, *inter alia*, the possibility of entering into a civil union agreement between same-sex couple by formal recognition of a public notary or by a honorary judge. However, on 8 May 2008, the Prodi Government ended, and a new fourth government lead by Berlusconi was set up. This new political change has prevented *Cus* from being passed into law.

Finally, in 2008, the new Berlusconi government failed to enact a law that recognises rights and duties of same-sex couples. However, it is important to highlight how the Berlusconi government has tried to reformulate the *DiCo* and *Cus* into a new deal defined as *DiDoRe* (*Diritti e Doveri di Reciprocità dei Conviventi* [Rights and Duties of Cohabitants]).

This first Italian legislative excursus can provide the reader with a clear and direct example that shows how many difficulties have occurred during the proposition of the first Italian legislative reform on same-sex couples. Hence, we can confidently state that from a comparative point of view the legal formant of statute law has clearly failed multiple times in Italy.

4.1 THE ITALIAN JUDICIAL ACTIVISM ON SAME-SEX COUPLES

As we argued previously the *Pacs*, *DiCo*, *Cus*, and *DiDoRe* are instances of legislative failure in terms of formants representing statutory law.

In this light, Italian judges have become particularly sensitive to the situation of same-sex couples, and indeed a judicial activism has started to emerge in Italy since April 2009 when the Court of first instance in Venice raised a constitutional

[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]

incompatibility with Constitutional provisions in relation to sections 93, 96, 98, 107, 108, 143, 143-*bis* and 156-*bis* of the Italian Civil Code *"*in the part in which, interpreted systematically, [they] do not allow same-sex couples to marry their same sex partner*"* (Venice Court of first instance, dated 3 April 2009).

Furthermore, the same doubt on the constitutionality of the Italian law provisions set forth in the Italian civil code has been raised by the Court of Appeal of Trento in August 2009 (through public ordinance dated 29 July 2009). Specifically, the Court of Appeal of Trento claims that those provisions are in direct breach with the Universal Declaration of Human Rights, the European Convention on Human Rights, and the Treaty of Nice.

Finally, on 15 April 2010, the Italian Supreme Constitutional Court issued the decision n. 138[17], which has dismissed the appeals of the Court of Venice as well as the Court of Appeal of Trento by qualifying such possible unconstitutional matters as inadmissible with respect to sections 2 and 117 of the Italian Constitution, since the matter does not fall under the responsibility of the Court, and it declared as "unsubstantial" the decisions in relation to sections 3 and 29 of the Italian Constitution, as long as the relationship between same-sex couples cannot be assimilated to married couples (as stated in the Italian Supreme Constitutional Court's decision, dated 15 April 2010).

Subsequently, the same reasoning has been used by the Italian Supreme Constitutional Court through acts n. 276 (22 July 2010)[18] and n. 4 (5 January 2011)[19]in respect of the challenges raised by the Court of Appeal of Florence and the Court of first instance of Ferrara.

[17] To see the comments concerning the judgment, see N. COLAIANNI, *Matrimonio omosessuale e Costituzione*, in *Corr. giur.*, 2010, p. 845 ss.; M. GATTUSO, *La Corte costituzionale sul matrimonio tra persone dello stesso sesso*, in *Fam. dir.*, 2010, p. 653 ss.; L. MORLOTTI, *Il no della Consulta al matrimonio gay*, in *Resp. civ. prev.*, 2010, p. 1505 ss.; P. PALERMO, *Uguaglianza e tradizione nel matrimonio: dall'adulterio alle unioni omosessuali*, in *Nuova giur. civ. comm.*, 2010, II, p. 537 ss.; R. PINARDI, *La Corte, il matrimonio omosessuale ed il fascino (eterno?) della tradizione*, *Ibidem*, p. 527 ss.; A. PUGIOTTO, *Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio*, in *www.forumcostituzionale.it.*

[18] Published in *Fam. dir.*, 2011, 1, 18 ss., with a note of A. RIVIEZZO, *Sulle unioni omosessuali la Corte ribadisce: "questo" matrimonio non s'ha da fare (se non lo vuole il Parlamento).*

[19] It can be seen at *Giust. civ.*, 2011, 4, 18 ss., con nota de G. COSCO, *Le unioni omosessuali e l'orientamento…,* cit.

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Specifically, the Italian Supreme Constitutional Court points out a declaration of principles in its decision n. 138/2010. Indeed, it declares that the rights of same-sex couples are protected under section 2 of the Italian Constitution by stating that:

> (…) any form of social community, simple or complex, should be considered adequate to allow and facilitate the free development of the person in social life, in a context of revaluation of the plurality. This concept also includes the same-sex unions that are construed as the stable coexistence between two people of the same sex to whom the fundamental right to live freely in a relationship corresponds to the legal recognition of rights and duties[20]

Furthermore, the Italian Supreme Constitutional Court clarifies that it is up to the Parliament, in the exercise of its full discretion, to establish the ways to guarantee and recognize the rights of those couples.

On 11 June 2014, the Italian Supreme Constitutional Court issued a decision n. 170[21] through which it has indirectly addressed the issue by declaring the unconstitutionality of sections 2 and 4 of the Law n. 164, dated 14 April 1982 (a law regarding sex change), and section 31, subsection 6, of Legislative Decree, dated 1 September 2011, n. 150, in the part in which they do not foresee that the change of sex of one of the spouses, which causes the dissolution of marriage or the elimination of the civil effects of the wedding, still allows both spouses to maintain a legal relationship through a registered union.

The decision reads that:

[20]According to the Constitutional Court, "it should be deemed false, however, that the aspiration for such recognition - which necessarily requires a general discipline, aimed at regulating the rights and duties of the members of the couple - can only be achieved through an equalization of homosexual unions to marriage. The examination, although not exhaustive, of the legislation of the countries that have so far recognized these unions to ensure the diversity of the options, is sufficient.

[21] See A. RUGGERI, 2014); BARBA, 2014, p. 866; PALMERI; VENUTI, 2014, p. 553; R. ROMBOLI, *La legittimità costituzionale del "divorzio imposto": quando la Corte dialoga con il legislatore, ma dimentica il giudice*, *Ibidem*; C. SALAZAR *Amore non è amore se muta quando scopre un mutamento*, in www.confronticostituzionali.it;
R. CATALDO, 2014; F. BIONDI, 2014; F. SAITTO, *Rettificazione di sesso e «paradigma eterosessuale» del matrimonio: commento a prima lettura della sent. n. 170 del 2014 in materia di «divorzio imposto»*, in *www.diritticomparati.it*; P. VERONESI, *Un'anomala additiva di principio in materia di "divorzio imposto": il "caso Bernaroli" nella sentenza n. 170/2014*, in *www.forumcostituzionale.it*; P. BIANCHI, *Divorzio imposto: incostituzionale ma non troppo*, *Ibidem*; A. RAPPOSELLI, *Illegittimità costituzionale dichiarata ma non rimossa: un "nuovo" tipo di sentenze additive?,* in *AIC – Associazione Italiana dei Costituzionalisti*.

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> (…) however, *reductio ad legitimitatem* is not possible (…) due to the fact that an automatic form of divorce [namely, the one caused by the change of sex] is replaced by a divorce available at the request of one spouse, since this would allow to keep the bond between people of the same sex, which in turn would be in breach of section 29 of the Italian Constitution.

Therefore, the Italian Supreme Constitutional Court called upon the lawmaker to address the provisional unconstitutionality of those legal provisions to allow the spouses to avoid the transition from a state of maximum legal protection (the legitimise family in the form of marriage) to a state of an absolute indeterminacy.[22]

It is interesting to highlight how the Italian Supreme Constitutional Court is trying to expand the rights of the *de facto* couples (also in the case of same-sex unions) in order to conceptualise the affective-relational nucleus as having a direct protection under section 2 of the Italian Constitution.[23]

However, such openness of the Italian Supreme Court is not followed by the Italian Supreme Administrative Court (*Consiglio di Stato*) that with a famous decision dated 27 October 2015, it establishes that the annotation of foreign marriage certificates of same-sex couples in the archives of Italian Municipalities are void due to the fact that a same-sex marriage lacks of "the unfailing condition of the diversity of sex between future spouses.[24] However, it is interesting to note that at municipal level, municipal authorities have started to accept the request for annotation of certificates of same-sex marriages from abroad. This factual phenomenon has brought to the creation of a registry of civil unions that although they could not be legally recognised,

[22] Just as Cass. civ. Nº. 8097 de 21 de abril de 2015 commented M. GATTUSO, *Nasce il matrimonio sottoposto a condizione risolutiva, ovvero sul caso Bernaroli*, in *www.personaedanno.it,* y por A. RUGGERI, *Il matrimonio "a tempo" del transessuale: una soluzione obbligata e … impossibile?*, in *Consulta online*, 2015.

[23] See the Italian Supreme Constitutional Court decisions: the decision 22 October 2009, n. 40727; decision 22 January 2014, n. 1277; decision 9 February 2015, n. 2400.

[24] The decision relates to the possibility of registering same-sex marriages celebrated abroad in the Civil Registry (under the "principle of reciprocity"). Indeed, at that time the minister of domestic affairs sent a specific document (so called circular) to the *prefetti* (officers who are acting as delegates or subdelegates of the Government). The minister underlines the disagreement of such registrations with the Italian laws. This case then was appealed in the Administrative Court of First Instance (*TAR*) that upheld that only the ordinary judicial bodies can consent the cancellation of such registration. Hence, the matter is not for the minister of domestic affairs or *prefetti*. However, such decision was subsequently squashed by the Supreme Administrative Court, which recognized the *prefetti* the power to act in "*autotela* on acts adopted *contra legem* by a subordinate body" and highlighted the absence of a "fundamental right to same-sex marriage" in European treaties and international conventions.

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they still have represented a strong symbol of rebellion against the authority of the State and judges.

For instance, the first municipality to adopt such register was Empoli with an administrative decision dated 21 October 1993. The decision was, however, almost immediately suspended by the Regional Control Committee, but was later approved instead by the Italian Administrative Court of first instance (*Tribunale Amministrativo Regionale*) of Tuscany in 2001.

As it can be seen the road for the recognition of same-sex couples in Italy has never been a smooth route and even the legal formant of judicial decisions that have been qualified for the purpose of our analysis as “judicial activism” has found a very hostile environment to the recognition of basic civil rights to unmarried same-sex couples.

4.2 REMARKS ON THE NEW ITALIAN STATUTORY LAW: THE "CIRINNÀ" LAW (2016)

As a result of the strong supranational pressure, it was clear that Italy could not delay an introduction of laws protecting homosexual couples any longer.

On 11 May 2016, the law n. 3634 – also known as "*Cirinnà*" law – has been passed concerning the “Regulation of civil unions between people of the same sex and a regulation of coexistence”.[25] The law is intended to regulate, on the one hand, (following the German model of the *Lebenspartnerschaftgesetz* in 2001) registered civil unions as an alternative institution to marriage reserved only to same -sex couples[26],

[25] See M. SEGNI, *Unioni civili: non tiriamo in ballo la Costituzione*, in *Nuova giur. civ. comm.*, 2015, II p. 707 ss.; V. F. BOCCHINI – E. QUADRI, *Diritto privato*, 2016, Torino, p. 363 ss.; G. FERRANDO, 2/2016; G. AUTORINO, 2016; F. DELL’ANNA MISURALE, 2016; R. PACIA, 2016.

[26] This is because opposite-sex couples can resort to the typical instrument of formal consecration of their bond, that is, marriage. Granting them also the possibility of accessing civil unions would infringe a serious *vulnus* on the traditional notion of the family, founded on marriage.

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and, on the other hand, *de facto* couples for both heterosexuals and homosexuals (to which the second part of the legislative text is dedicated).[27]

Since the enactment of this law, it seems that civil unions have started to benefit from the recognition of the same rights and duties that usually derive from marriage. This grant has seen similarities both in the constitutive phase of the "social formation" in question[28], and in the pathological crisis of the union (namely, when and if a “breaking-up” occurs), except for the fact that civil unions have the right to obtain immediately a decision similar to divorce, without waiting for a formal period of separation first. Indeed, it is sufficient to communicate the intention of separating before the person in charge of the Civil Registry, and after 3 months, the separation becomes effective.[29]

The acts of the civil union that contain the personal data, the patrimonial regime and the residence are recorded in the Civil Registry; and the parties may establish, during the duration of the union, a common surname, being able to choose between their surnames or by putting or postponing their own surname (if different).

With the constitution of the civil union, the parties acquire the same rights and the same duties: they have the reciprocal obligation of moral and material assistance and coexistence; and they must, each in proportion to their sources and their ability to perform professional or domestic work, contribute to common needs. The obligation of fidelity is not included, while it has been established that the parties will establish by common agreement the family home where they will live.

The law also establishes a specific regulation in matters of impediments and nullity of civil unions (as well as in matters of inheritance) and extends the rules of the Civil Code relating to the patrimonial regime of the family and the community of property to the members of the civil union.

[27] Section 1, paragraph 36 of the normative document in question establishes that “the term de facto couple is understood as two persons of legal age stably united by emotional ties and reciprocal, moral and material assistance, not linked by blood relations, affinity or adoption, marriage or civil union.
[28] Note that, in comparison to the original bill, the "controversial" references to articles 29-30-31 of the Constitution were removed and it was decided that only articles 2 and 3 of the Charter of Rights be remembered.
[29] This regulation has considerable analogies with articles 81 and 86 of the Spanish Civil Code amended by the Law 15/2005.

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To ensure full rights effectiveness and full compliance with the obligations arising from the civil union, the normative text provides that "the provisions containing the words "spouse", "spouses" or equivalent terms, in any law, in the acts with force of law, in the regulations as well as in administrative acts and in collective agreements, also apply to each of the parties of the civil union between persons of the same sex"(section 1 and section 20 Law n. 3634). However, it has been clarified (to reassure the most conservative) that such provision is not applicable "to legal provisions of the Italian Civil Code not expressly mentioned in this law" and especially to "the provisions of the Law of 4 May 1983, n. 184" (in fact, the possibility of admitting the so-called stepchild adoption to civil unions has been excluded); although, it has been established "without disapplying the provisions in terms of adoption by current regulations" (with an obvious allusion to the opening of less important jurisprudence on the issue of adoption by same-sex couples).[30]

In relation to *de facto* couples, the law, after a series of indications from the constitutional jurisprudence with reference to the Italian Supreme Court and minor jurisprudence (as well as supranational), establishes the effects that derive from stable relations between two persons of legal age (also of the same sex) united "by emotional ties and mutual moral and material assistance, not linked by relations of consanguinity, affinity or adoption, marriage or civil union" (section 1 and section 36 of the Law n. 3634).

The subjects in question are entitled to the same rights that correspond to the spouses in case of illness or hospitalization (that is: the right of visit, of assistance, in addition to access to personal information according to the rules of organization of the Hospitals or Health Services, public, private or concerted), in case of death (as for the donation of organs, the way of treatment of the body, the celebration of the funeral, the right to compensation for the damage in case of death if it has occurred as a result of an unlawful act of a third party), and also with respect to the insertion in the classification for the allocation of Official Protection Housing or in relation to what is foreseen in the penitentiary system.

[30] See F. BOCCHINI – E. QUADRI, *op. cit.*, p. 367.

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In fact, couples can regulate the patrimonial relations related to their common life through the conclusion of a "coexistence agreement" (which cannot be submitted to term or condition), submitted in written form to avoid its voidance and nullity, in a public or private document with a signature authenticated by a public notary or lawyer.[31]The law also defines irremediable cases of nullity (section 1, paragraph 57, of the Law n. 3634), of suspension (section 1, paragraph 58, of the Law n. 3634) and resolution (section 1, paragraphs 59 – 64, of the Law n. 3634) of the affair in question.[32]

The new regulations also regulate the so-called economic rights related to coexistence (such as staying at home or subrogation in the lease, in the event of death of the coexisting person, and participation in the benefits of the family business[33]) or to their termination (obligation to provide food when the couple is in a "state of need and not able to support themselves).

5 THE LEGAL EVOLUTION OF THE PROTECTION OF SAME-SEX COUPLES IN POLAND: THE STATUTORY LEGAL FORMANT

In Poland the first proposals to legislate on civil unions appeared almost twenty years ago. Public acceptance of same-sex partnerships is relevant for legislative activities and court decisions. Indeed, it is interesting to highlight that the acceptance of such unions among polish society has always been questioned, and the levels of approval have always been low if compared to those of other European countries.

[31] The act may contain an indication of residence, the way of contribution to the couple's shared needs (in proportion to each other's sources and their ability to perform professional or domestic work); the property regime of the community of goods (which can be changed at any time).

[32] Section 61, dealing with the termination of the effects of the coexistence contract for unilateral termination, states that "in the event that the family home is exclusively available to the resigning person, the declaration of termination, under penalty of nullity, must contain the term, not less than ninety days, granted to the partner to leave the house".

[33]The law provides for the inclusion in the Italian Civil Code of section 230b, whereby "the *de facto* couple who permanently lend their own work within their partner's company are entitled to a portion of the benefits of the family business and the assets acquired with them, as well as to the increases in the company value, even in the start-up, in relation to the achieved results. The right of participation does not apply if there is a partnership or work relationship between the couple".

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According to the research conducted over the last two decades by CBOS (Public Opinion Research Centre) from 69% (2001) to 66% (2019) of Poles surveyed did not accept same-sex marriages. Similarly, the number of Poles strongly rejecting the possibility of adopting children by same-sex couples has been at a constant high level (84%-90%).[34] Poles' stand on formal same-sex relationships other than marriage in 2019 was similar to that of 2013. Between 2013 and 2019, there was an increase in the acceptance of entering into relationships by same-sex couples, although this trend has stopped nowadays. At the same time, the approval for the legalization of informal cohabitation relationships has been growing. [35]

In Poland there is no legislative act that is comprehensively regulating the matter of partnerships, regardless of sex orientation. In fact, Polish law does not regulate the institution of cohabitation, nor does it regulate the same-sex partnership. Nevertheless, legislative drafts have been proposed in the same fashion of Italy (see section 4) since the beginning of the 2000s.

The first draft dated 2003 has been submitted by Senator Szyszkowska. This bill has been preceded with some amendments in the form of a Senate draft law.[36] Subsequently, in 2011, a further legislative draft has been submitted by members of the Democratic Left Alliance.[37]The next two bills in 2012 have been also signed by Democratic Left Alliance and the Palikot Movement party.[38]Finally, a bill proposed by

[34]The attitude of Poles towards homosexual relationshipp. Research by Public Opinion Research Center, https://www.cbop.pl/SPISKOM.POL/2019/K_090_19.PDF.

[35] The attitude of Poles towards homosexual relationship. Research by Public Opinion Research Centre, https://www.cbop.pl/SPISKOM.POL/2019/K_090_19.PDF. Other conclusions based on the same research has been drawn by J. PAWLICZAK, *Legal opinion on the need and possibility of institutionalization of same-sex partnerships (in accordance with the provisions of civil and constitutional law)*, available at http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_Potrzeba%20instytucjonalizacji%20zwiazkow%20partnerskich%20osob%20tej%20samej%20plci.pdf.

[36] Senate draft law on civic unions converted into a draft law on registered partnerships between people of the same sex, Documents 548 (Senate of the 5th term of office); text available at http://ww2.senat.pl/K5/DOK/dr/500/548.htm.

[37] Sejm draft law on the partnership agreement, Sejm document 4418 (Sejm of the 6th term of office); text available at http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/4418.

[38] MPs' draft law on civil partnerships, Sejm document 552 (Sejm of the 7th term of office); text available at http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?no.=552; MPs' draft law on civil partnerships, Sejm document 554 (Sejm of the 7th term of office); text available at http://www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?no.=554; Opinion of the members of the Legal Committee Studies of the Polish Academy of Sciences of April 23, 2012 to the Sejm Documents of the

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Civic Platform has also appeared in the Sejm of the Republic of Poland (namely, the lower house of the Parliament) on the 7th term of office.[39]

All those legislative solutions are now of a mere historical value. Indeed, all of them have been rejected by the Sejm of the Republic of Poland.[40] This fact, however, has not stopped the activities of bringing forward new legislative drafts such as the bills that appeared in the social and parliamentary reality.[41]

Specifically, in 2018 the Nowoczesna political party has submitted a new draft.[42]The bill tries to establish that two adult individuals could enter into partnership or civil union by expressing an informed and free decision and by submitting a declaration of their intention to the Registrar. Furthermore, in exceptional cases, upon the Court's consent, a partnership could be concluded by individuals under at least the age of sixteen. Partners can express their intention in relation to their common surname. In case of no declaration, each partner would have his own surname. The legislative draft finally establishes the possibility of dissolution of a partnership in the event of death of one of the partners by submitting mutual declarations of the intention to dissolve the partnership before the registrar or at the moment when the Court decision dissolving the partnership becomes final. By agreement between partners it could even be set up a joint property regime. It is also worthy it to note that the bill reads the possibility of adopting a partner's children according to the principles set out in the Family and Guardianship Code (1964).

Finally, the introductory provisions to the act provides for mutual inheritance by partners in the first inheritance group of persons, identically to inheritance by spouses. At the same time, the proposed provisions included the option of excluding

Sejm of the 7th term of office no 554 and 555, p. 3; Legal opinion of Prosecutor General Andrzej Seremet to the Sejm Documents of the Sejm of the 7th term of office no 554 and 555, p. 4.

[39] MPs' draft law on civil partnerships, Sejm document 825 (Sejm of the 7th term of office); text available at http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?no.=825.

[40] M. ŁĄCZKOWSKA, op.cit., p. 171-208; D. DUDEK, 2012, no. 4, p. 175; R. PIOTROWSKI, *2012*, no. 4, p. 187–188.

[41] MPs' draft law on civil partnerships, Sejm document 2383 (Sejm of the 7th term of office), text available at http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?no.=2383; Draft law on marital equality, text available at https://mnw.org.pl/app/uploads/2017/08/MNW-projekt-ustawy-o-rownosci-malzenskiej-13.07.2017.pdf.

[42] Draft law on civil partnerships, text available at http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-956-2018/$file/8-020-956-2018.pdf.

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mutual inheritance when entering into a partnership. Additionally, the introductory provisions allowed for the recognition in Poland of a partnership contracted abroad, joint tax settlements of the partners (after a short grace period), and introduced the presumption of paternity in the event of the birth of a child in a partnership concluded by persons of different sex.

This project has not proceeded by the Sejm of the Republic of Poland of the 8th term of office, and has not continued by Sejm of the next term of office in accordance with the principle of discontinuation. Nowadays, no draft law is pending in the current legal status, nevertheless the draft presented above by Nowoczesna political party, with some amendments, is being prepared for submission to the current Sejm of the Republic of Poland. This is also subject to public debate.

As it can be seen even the Polish experience on the statutory legal formant has shown that unmarried same-sex couples are experiencing a difficult moment in Poland in terms of rights' recognition as well as a community's consent to fully understand and accept their own ideology.

5.1 THE PROTECTION OF SAME-SEX COUPLES IN POLAND: THE JUDICIAL LEGAL FORMANT

Cohabitation is a matter of fact and must be recognised by judicial decisions. At both national and European level, Courts have decided on the rights and obligations of heterosexual individuals remaining in these relationships as well as same-sex couples. These decisions, which have been upheld over the last twenty years, cannot be classified in a consistent legal consideration, but in recent years there has been a noticeable change in the approach of Polish Courts.[43]

A milestone in the change of the court approach are particularly the decisions of the Polish Supreme Court, dated 13 April 2005[44] and 28 November 2012.[45] In the first of the above-mentioned decisions, the Court raised the issue related to the

[43] Resolution of the Supreme Court [SN] of 30.1.1986, III CZP 79/85 (OSNC 1987, no. 1, item 2).
[44] Judgement of the SN of 13.04.2005, IV CK 648/04 (OSNC 2006, no. 3, item 54).
[45] Resolution of the SN of 28.11.2012, III CZP 65/12 (OSNC 2013, no. 5, item 57).

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inclusion of a person unrelated to the deceased individual by a formal relationship (*fiancée*) to the group of the closest family members according to section 446, paragraph 3, of the Polish Civil Code. Earlier, the Polish Regional Court stated in the grounds that it is necessary to fulfil several conditions to be considered as a closest family member.

According to the Court:

> […] the sense of closeness and community, emotional ties and feelings, and close economic community means that the closest family member - depending on the situation - may not necessarily be the closest relatives. The closest family member is not only mother, father, siblings and children, but partner who was in an informal relationship (cohabitation) with the deceased. These are not legal but actual ties that are decisive. What is relevant here is individually assessed degree of mental suffering, the degree of harm resulting from the loss of assistance and care of a close person, a feeling of loneliness, powerlessness due to life difficulties, the degree of intimacy, closeness and community that existed between the deceased and the closest person.[46]

The Supreme Court confirmed this position.[47]The second decision referred to herein was influenced by the jurisdiction of the European Court of Human Rights in Strasbourg, in particular the case of *Kozak vs. Poland*.[48]The Polish Supreme Court had to answer the question submitted by the Polish Regional Court: can the premise of actual cohabitation indicated in section 691, paragraph 1, of the Polish Civil Code, be understood as a bond connecting two individuals remaining in relationships such as spouses, also apply to individuals being in informal partnerships with people of the same sex.

In the claim presented by A. K. against the town of W. with the participation of the Helsinki Foundation for Human Rights, concerning the establishment, the Polish Supreme Court, after considering the case in the Civil Chamber on 28 November 2012, took the stand according to which a person actually remaining in cohabitation with a tenant – under the meaning of section 691, paragraph 1 of the Polish Civil Code – is a

[46] Judgement of the Regional Court in Łódź of 23.11.2018, I ACa 30/18; LEX nr 2625551.
[47] Judgement of the SN of 13.04.2005, IV CK 648/04 (OSNC 2006, no. 3, item 54).
[48] Judgement of the ECHR of 2.3.2010 Kozak against Poland, case no. 13102/02.

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person connected to the tenant by an emotional, physical and economic bond; this can be for the purpose of the same law even a person of the same sex.

Proprietary issues between partners are resolved by the courts to the extent that they come under traditional civil law institutions. The Polish Supreme Court in its decision, dated 6 December 2007, states that the settlement of proprietary issues after the dissolution of personal relationship between same-sex individuals is conducted according to the provisions of the Polish Civil Code concerning personal relationships.[49]The Polish Supreme Court has previously taken a similar approach on proprietary settlements after the termination of a relationship.[50]Furthermore, the provisions of the Polish Family and Guardianship Code (1964) relating to matrimonial property may not be applied to settlements after the termination of a relationship. Indeed, the possible recognition of such legal provision would make the marriage and the informal relationship equal to some extent, and this imaginative legal environment does not have any legal ground (this fact is also pointed out in the Supreme Court's resolution of January 30, 1986).[51]The recognition of settlements of proprietary interests for same-sex couple is an essential need for those communities. Therefore, both the scholars' opinion and court decisions are trying to find legal grounds or legal justifications to regulate proprietary interests of those couples. For instance, they give rise to the following options: analogous application of the provisions on matrimonial property; application of the provisions on fractional joint ownership and its termination; application of the provisions on civil law partnership and application of provisions on unjust enrichment.[52]

It is also worth quoting the stand of the Polish Supreme Administrative Court, dated 20 March 2012, which in its judgment stated that: "the law-sanctioned civil partnership of two people of any sex is quite commonly understood as a registered partnership also called a formal partnership".[53] While making a reference to section 1,

[49] Judgement of the SN of 6.12.2007, IV CSK 301/07, (OSNC 2009, no. 2, item 29)
[50] Judgement of the SN of 16.5.2000, IV CKN 32/00, (OSNC 2000, no. 12, item 222).
[51] Resolution of the SN of 30.01. 1986, III CZP 79/85, (OSNCP 1987, no. 1, item 2).
[52] Judgement of the SN of 16.5.2000, IV CKN 32/00, (OSNC 2000, no. 12, item 222).
[53] Judgement of the Supreme Administrative Court [NSA] of 20.03.2012, II FSK 2082/10, see also I. NOWAK, 2017, no. 3 p. 55-83.

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paragraph 1 of the Polish Family and Guardianship Code, and the judgment of the Supreme Administrative Court dated 23 April 2008[54], the Court pointed out that the essence of the marriage was sufficiently regulated by the provision of section 1 and the following provisions of the Polish Family and Guardianship Code. According to the tax regulations, there is no reason to search for a different understanding of marriage than the one which was provided in in family law. There are no different regulations in these provisions that apply solely under the tax law, except for the institution of marriage specified in the provisions of the family law.

As it can be seen even in Poland there is a judicial activism alike the Italian experience. In particular, one of the main triggers that have activated such judicial protection has to be found in supranational provisions within the European Union.

5.2 REMARKS ON THE POLISH LEGAL FRAMEWORK IN RELATION TO SAME-SEX COUPLES

In Poland it is difficult to assume the possibility of adopting solutions modelled on the Italian ones (sections 3 and 4) into the family law under the current legal environment.

Section 18 of the Polish Constitution seems to effectively and ultimately block the inclusion of same-sex marriages or unions into the national legal system. However, the issue of establishing and legalizing same-sex relationships remains open.[55]If the lawmaker were to consider the regulation of same-sex relationships, it should be outside the field of family law. Family-law relationships under the Polish law are regulated under the provisions of the Polish Family and Guardianship Code, and arise from specific legal events. It is about marriage, establishing kinship (by birth or adoption). Family-law relations are also characterized by certain features that cannot be achieved by regulations out of the Codes or through the conclusion of an agreement. Indeed, the rights and obligations of the parties to such a relationship are

[54] Judgement of the Supreme Administrative Court of 23.04. 2008 r., II FSK 373/07, (Lex no. 485167).
[55] T. LITWIN, p. 167-191.

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clearly defined by the Code, which means that they are beyond parties' freedom and choice.

By its very nature, civil partnership established by an agreement is not included in the family law relations.[56]The fact that it has not been included *de lege lata* (of the existing law) to the family-law relations by the legislator means that its possible conclusion will have consequences only affecting the persons concluding such an agreement. One of the Polish scholars, Litwin adequately characterizes normative assumptions for such a relationship:

> A few basic assumptions should be made. The first is the recognition that a partnership cannot directly or indirectly reduce the care and protection guaranteed to the marriage by the state. The second assumption concerns the structure of the provisions so that they do not limit the rights of third parties to the extent they are sometimes limited by the institution of marriage. The third is to grant partners the rights that could now be obtained by people in an informal relationship, possibly such rights that apply not only to spouses and immediate family, but also to distant relatives or relatives by affinity or other persons not being relatives or relatives by affinity. The fourth assumption refers to the nature of informal relationships, where the partners define their private relationships themselves (e.g. faithfulness, mutual division of obligations, principles of financial settlement also of distant relatives or relatives by affinity), therefore, the civil partnership agreement should not set out the rules of private relationships between the partners". [57]

The following issues are indicated when it comes the extent that the partnership can be regulated under the Polish law. First of all, the lawmaker should specify how the partners conclude and terminate the agreement, regardless of whether this is cohabitation of heterosexual or same-sex partners. Leaving a civil partnership outside the family law brings the answer to the question about the subjective and objective premises for concluding such an agreement, in particular age, being married or being in partnership with another person.

Secondly, the property settlement should be left to the will of the partners, but the introduction of common regime of properties according to fractional joint ownership regulated by the Civil Code should be considered. Decision on the tax settlement

[56] Accurately M. ŁĄCZKOWSKA, op.cit., p.171-208.
[57] T. Litwin, *Instytucja związków*…, op. cit., p. 185.

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method would remain relevant in relation to property. The general axiology of the system does not support joint tax settlement similarly to the tax settlement by the spouses, but it does not exclude certain changes in the inheritance and donation tax.

Thirdly, the regulation regarding entering into a tenancy agreement after the death of the tenant does not require any changes (section 691 of the Polish Civil Code), because under the current legal status a person in cohabitation has already such right, therefore, no change is required in the regulation concerning receiving health information about the partner or providing medical records. This right can be exercised under the current legal status. The authorization to receive medical records can, however, be included *de lege ferenda* (with a view to the future law) in the civil partnership agreement.

Fourthly, the issue of inheritance, support obligations and custody of the partner's children is yet to be decided. The system arguments in this matter are against equating the situation of partners with that of the spouses.

Fifthly, changes in the specific acts can be considered, *e.g*. in the act on cemeteries and burial of the deceased, giving the right to decide on the method of burial of the partner.[58]

6 THE EUROPEAN LEGAL FORMANTS: THE JUDICIAL FORMANT *VIS-À-VIS* THE STATUTORY FORMANT

A strong impulse for the revision, by the Italian judges, of the old way of understanding the family has certainly came from the fact of belonging to the European supranational organizations, which, for a long time, have encouraged the countries of the Old Continent to guarantee (fundamental) rights to same-sex couples.

[58] M. ŁĄCZKOWSKA, p. 171-208; T. LITWIN, p. 167-191.

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The European Union, since the 1990s, has been trying to eliminate the discrimination based on the sexual orientation[59] (above all, thanks to a series of interventions by the European Parliament[60] and the European Commission).[61]

This principle has been explicitly enshrined for the first time at the supranational level in section 13 of the Treaty of the European Community (EC Treaty), which, after the modifications introduced by the Treaty of Amsterdam, gave the European Council the power to issue "appropriate measures to combat discrimination based on sex, race or ethnical origin, religion or personal convictions, disability, age or sexual tendency".[62]

Nowadays also section 21, paragraph 1, of the Charter of Rights of the European Union (fully binding by virtue of the Treaty of Lisbon) provides that:

> […] any form of discrimination based on, in particular, sex, race, skin colour or ethnic or social origin, genetic characteristics, language, religion or personal convictions, opinions concerning politics or any other matter, being

[59] See G. COSCO, 351 ss.

[60] Examples of such activism can be seen with the resolutions of the European Parliament dated 8 February 1994 and 16 March 2000, where Member States and the European Commission were asked to eliminate any form of discrimination against homosexual couples, granting them an access to civil marriage or to a legal equivalent. Furthermore, it is worth to mention the resolution dated 16 January 2001, the resolution on homophobia in Europe dated 18 January 2006; the resolution dated 26 April 2007, which urges the countries of the EU to adopt legislative provisions that would put an end to the discrimination towards the same-sex couples in matters of succession, property, lease, pensions, taxation, social security and others. Furthermore, the resolution dated 14 January 2009 on the situation of fundamental rights in the European Union, which contains an invitation to the countries of the EU to recognize the rules adopted by other Member States. Finally, in 2012 it has been issued a report on equal rights for women; the resolutions of the European Parliament dated 22 April 2015, 9 June 2015 and on 8 September 2015.

[61] On 16 March 2011, the European Commission presented two proposals for regulations (COM (2011) 126 FINAL and COM (2011) 127 FINAL) regarding respectively marital property regimes and the registered unions. The documents were resisted by some of the Member States, concerned about the risk that an implicit recognition of the registered homosexual union could be reached by such means. Thus, however, the proposals clarify that the notion of "registered union" is defined only in relation to the Regulation (while its specific content and preliminary issues such as the existence, validity or recognition of the institute in question should continue to be defined by the national legislation of the Member States) and that "the recognition and enforcement of a resolution relating, in whole or in part, to the patrimonial aspects of the registered unions, could not be denied in a Member State when the national legislation does not recognize or contemplate them different patrimonial aspects" (just as in recital n. 23 of the second of the aforementioned texts).

[62] In similar ways, section 19 TFEU (which speaks of "sexual orientation"). An express position in this regard had not yet been made by the ECHR which, in art. 14, states: "The enjoyment of the rights and freedoms recognized in this Agreement must be guaranteed without distinction, especially for reasons of sex, race, color, language, religion, opinions on politics and other subjects, national or social origin, membership to a national minority, fortune, birth or any other situation".

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> a member of a national minority, heritage, birth, disability, age or sexual orientation.

Such regulatory provision is explicitly repeated by European directives no. 2000/43 and 2000/78[63], which institute the principle of "equal treatment of people", stressing that it applies "(…) regardless of religion, personal beliefs, age, disability and sexual orientation" (section 1 of the Directive 2000/78). In the same fashion, Directive 2004/38 concerning the right of citizens of the EU and members of their families to move and reside freely within the territory of Member States, highlights in recital n. 5, specifying in section 1 that "family member" also means "a partner with whom the citizen of the Union has entered into a registered union, in accordance with the legislation of a Member State" (this is also the limit of the regulations in question, only "if the legislation of the host member state gives registered unions equal treatment of marriages and in accordance with the conditions established in the applicable legislation of the host member state").

Despite what is stipulated in section 9 of the Charter of Fundamental Rights of the Union, which does not seem to introduce the obligation of Member States to guarantee adequate forms of guardianship of domestic partners[64] (otherwise, the scope of action of the European Bill of Rights itself is quite limited, taking into account

[63] The European sources in question have been transposed in Italy through legislative decrees no. 215-216 / 2003.

[64] The Commentary on the Charter of Rights of the European Union, drawn up in 2006 by the network of independent experts on fundamental rights of the EU, states the following in relation to Article 9 of the Charter: "There are visible trends and modern developments in the national legislation of different countries towards greater openness and acceptance of homosexual couples despite the fact that some states still have public policies and / or regulations that explicitly prohibit the notion that same-sex couples have the right to marry. There is currently an extremely limited legal recognition of same-sex relationships in the sense that same-sex couples cannot marry. The national legislation of most states presupposes, in other words, that those who want to marry are of a different sex. However, in some countries, for example in the Netherlands and Belgium, gay marriage is legally recognized. Others, such as the Scandinavian countries, have passed a law on registered unions, which implies, among other things, that most of the provisions relating to marriage, for example their legal consequences, such as the distribution of property, inheritance rights, etc., are also applicable to these unions. At the same time, it is important to underline that the definition of "registered union" was intentionally chosen to avoid confusion with marriage, and was established as an alternative method for the recognition of personal relationships. This new institution is, therefore, a norm accessible only to couples who cannot marry, and the same-sex union does not have the same status and benefits of marriage. (...)".

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the provision contained in section 51 of the document[65]), the Court of Justice of the European Union has ruled on many occasions on the need not to create inequality of treatment based on sex (and has been obtained in this way, in terms of direct or indirect recognition of the rights of same-sex couples, results that would have been impossible to achieve should the rules contained in the text proclaimed in Nice in 2000 had been used).[66]

In particular, in 2001[67], dealing with the legality of a rule of the Staff Regulations, it has clarified that:

> […] section 1, paragraph 2, letter a), of Annex VII of the Statute, which reserves the family allowance to the married official, cannot be considered discriminatory based on the sex of the interested party since the principle of equal treatment can only be applied to people who are in comparable situations [and] the situation of an official who has registered a relationship in a Member State cannot be considered comparable, for the purpose of applying the Staff Regulations, to that of a married official.

Subsequently, in 2004 with the case *KB judgment v. National Health Service Pensions Agency*, case C-117/01, (then resumed on 27 April 2006, *Richards v. Secretary of State for Work and Pensions*, case C-423/2004), which recognized the rights of a transsexual individual to widowhood (confirming the incompatibility with the principle of non-discrimination on the grounds of sex of the United Kingdom legislation

[65] The provision states that "1. The provisions of this Charter are addressed to the institutions, bodies and bodies of the Union, within the respect of the principle of subsidiarity, as well as to the Member States only when they apply Union law. Therefore, they will respect the rights, observe the principles and promote their application, in accordance with their respective powers and within the limits of the powers attributed to the Union in the other parts of the Constitution. 2. This Charter does not extend the scope of application of Union Law beyond the competences of the Union, nor does it create any new competence or mission for the Union, nor does it modify the powers and missions defined in the other Parties of the Constitution".

[66] Vid., for all sentences of April 17, 1986, subject C-59/85, *Reed*; June 22, 2000, subject C-65/98, *Eyup*; March 23, 2006, subject C-408/03, *Comisión v. Bélgica*.

[67] Judgment of the Court of Justice of May 31, 2001, accumulated cases C-122/99 P and C-125/99 P, *D. and Kingdom of Sweden v. Council of the European Union*, *Compilation of Case Law* 2001 page I-043191. But, after all, on February 17, 1998 with the *Grant* judgment, case C-249/96, the Community court had stressed, in paragraph 35, that "in the current state of law within the Community, stable relationships between two persons of the same sex do not equate to relations between married persons or stable relations without marital ties between persons of different sexes. Consequently, Community law does not require an employer to match the situation of a person who has a stable relationship with a same-sex partner to that of a married person or who has a stable relationship without a marital relationship with a partner of the opposite sex".

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that did not allow the registration of the change of sex in the Register and, therefore, the possibility of marrying the transsexual who has changed sex).[68] A similar right has been recognized later, in the judgment of the Court of Justice, dated 1 April 2008 (case C-267/06, Tadao Makuro v. VddB), where the court recognised the rights of partner of a homosexual union (underestimating the argument related to an alleged violation of family constitutional norms, since "prohibition of discrimination is a general principle of Union law" and "Union-law supersedes also national constitutional law").

The jurisprudence of the Court of Justice becomes even more severe towards the Member States that disregard the rights of same-sex couples after the Lisbon Treaty enters into force.

Interpreting sections 1 and 2 of the aforementioned Directive 2000/78, which focus on the establishment of a general framework for equal treatment in employment and occupation, the Luxembourg court, in 2011, with the relevant judgment *Jürgen Römer* states that such provisions:

> (…) oppose a national provision by virtue of which the beneficiary who has established a stable, officially registered couple receives a supplementary retirement pension in the amount lower than that guaranteed to the married beneficiary who does not live permanently separated, and if in the Member State marriage is reserved exclusively for people of different sex and coexists with the system of registered couples, a system reserved exclusively for people of the same sex, and there is direct discrimination on the grounds of sexual orientation, due to the fact that, in the National law, the aforementioned registered stable couple is in a legal and factual situation analogous to the one of a married person for the purpose of the pension in question.[69]

In 2013, with the sentence of *Frédéric Hay,* it states that:

[68] Bear in mind that with the judgment in question the Court considers that the impact of European fundamental rights in the area of the Civil Registry, which is no doubt beyond the competence of the Union, is considered flexible regarding the supranational protection of that law.

[69] Judgment of the Court of Justice (Grand Chamber) of May 10, 2011, Case C-147/08, in *Compendium of Jurisprudence* 2011, I-03591. The judges further affirm that "The assessment of whether similar situations fall under the responsibility of the referring court and should focus on the respective rights and obligations of the spouses and of the persons that constitute a stable registered partner, as regulated by the framework of the corresponding institutions, which are relevant in view of the object and conditions of recognition of the benefit in question".

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> […] it opposes a provision of a collective agreement, such as the one in dispute in the main proceedings, by virtue of which a worker who celebrates a *PACS* with a person of the same sex is excluded of the right to obtain certain advantages granted to workers on the occasion of their marriage, such as certain days of special paid leave and a salary premium, when the national regulations of the Member State in question do not allow marriage between persons of same sex, to the extent that, given the object and the conditions for granting such advantages, the said worker is in a situation similar to that of a worker who marries.[70]

6.1 THE TREATY OF NICE AND THE POLISH NON-DISCRIMINATORY APPROACH

There have been attempts in public discussion to redefine the concept of marriage since

the beginning of the 21st century.[71]There is a strong position in Polish studies that these postulates violate the international provisions of the treaties adopted under the auspices of the United Nations and the Council of Europe. In accordance with section 16 of the Universal Declaration of Human Rights (1948), the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.[72]

A similar character of marriage has been provided for in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). According to section 12: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”.

[70] It mentions the sentence of the 12 of December 2013, asunto C-267/12.

[71] P. KASPRZYK, *Kilka uwag o potrzebie instytucjonalizacji homoseksualnych związków partnerskich i „małżeńskich” w polskim prawie rodzinnym, in: Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego*, p. 239–263; P. PILCH, *Modele regulacji prawnych dotyczące związków partnerskich obowiązujące w krajach europejskich – rys historyczny*, in: *Orientacja seksualna i tożsamość płciowa. Aspekty prawne i społeczne*, R. Wieruszewski, M. Wyrzykowski ed., Warszawa 2009, p. 121–123; P. MOSTOWIK quoting A. MĄCZYŃSKI, *Konstytucyjne*…, p. 774–776; T. SMYCZYŃSKI, *Małżeństwo–konkubinat – związek partnerski in: Związki partnerskie. Debata na temat projektowanych zmian prawnych*, ed. M. ANDRZEJEWSKI, Toruń 2013, p. 72.

[72] Similar guarantees are defined in the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966.

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What is crucial in the discussion and worth emphasizing is that these are the national laws that govern how the exercise of this right in detail.[73]

Family law in the European Union is not common, which means that marriage is not perceived in the same way in all Member States. The opposite conclusion, of a consistent nature, cannot be derived from the applicable law. Neither the founding treaties of the European Economic Community, nor the later rules of the functioning of the European Communities, and now the European Union, give grounds for accepting the accuracy of the claim that marriage is to be understood in a consistent manner. The law in this area has not been made as common law. Family law depends on national legislators.[74]Nevertheless, marriage is mentioned in section 9 of Charter of Fundamental Rights of the European Union. As it can be seen, the content of section 9 of the Charter differs from traditional conventions. The provision does not make an explicit reference to women and men, and its wording indicates the separation of the right to marry and the right to found a family. At the same time, as emphasized by Mączyński, a leading representative of the family law studies in Poland:

> […] the provisions of Charter of Fundamental Rights apply to Member States only to the extent that they apply the EU law and do not extend the scope of application of the EU law, do not establish new competences or tasks of the EU, and do not change the competences and tasks of the EU. The European Union has no competence to standardize the substantive family law of the Member States. However, the EU may take actions aimed at harmonizing the norms indicating the applicable law, defining the state whose courts have jurisdiction, as well as harmonizing the norms regulating the effectiveness of judgments issued in one EU country in other countries. The EU law acts issued under this competence cannot lead to the establishment of a harmonized concept of marriage and family.[75]

[73] P. MOSTOWIK, *Międzynarodowe prawo prywatne i postepowanie cywilne w dekadę po wejściu w życie Traktatu Amsterdamskiego, Przegląd Sądowy* 2010, no. 2, p. 33–60; P. MOSTOWIK, *O postulatach zaświadczania przez kierownika urzędu stanu cywilnego o możności zawarcia za granica małżeństwa bez względu na płeć drugiego nupturienta in: Rozprawy z prawa cywilnego, własności intelektualnej i prawa prywatnego międzynarodowego. Księga pamiątkowa dedykowana profesorowi Bogusławowi Gawlikowi*, ed. J. PISULIŃSKI, P. TERESZKIEWICZ, F. ZOLL, Warszawa 2012, p. 467-486.

[74] P. MOSTOWIK, *Kilka uwag o ochronie małżeństwa na tle Konstytucji i prawa międzynarodowego in: Wokół problematyki małżeństwa w aspekcie materialnym i procesowym*, ed. J.M. ŁUKASIEWICZ, A. ARKUSZEWSKA, A. KOŚCIÓŁEK, Toruń 2017, p. 40-61.

[75] A. MĄCZYŃSKI, *Małżeństwo jako instytucja prawa konstytucyjnego in: Czynić postęp w prawie. Księga jubileuszowa dedykowana Profesor Birucie Lewaszkiewicz-Petrykowskiej*, ed. W. Robaczyński, Łódź 2017, 473.

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It is essential to clearly separate marriage as the basis of the family, *i.e*. the natural and basic cell of life, from the relationship as one of the ways of shaping private life. (MĄCZYŃSKI, p. 473-474) The Charter neither gives status to or forbids same-sex marriages. It is the sole competence of the Member State to decide whether the marriage is only a relationship between a woman and a man or a same-sex relationship. It means that in strict terms or at least from a purposive rule of interpretation Poland's support of the traditional understanding of marriage, namely as the union of a man and woman, under this competence cannot be treated as a violation of the prohibition of discrimination (MOSTOWIK,2017, p. 40-61).

6.2 THE ECHR: FROM THE SOFT APPROACH TO A STRONG STANDING

The role played by the European Court of Human Rights in development - especially, but not only in Italy - of a strong openness towards the constitution of family models other than the traditional one has also been particularly important.

In the case-law formed on the ECHR there has been a slow but incisive evolution in the protection of the right in question.[76]

The Court, originally provides a literal interpretation of section 12 of the 1950 Convention on Human Rights (right to marry and to found a family) by which it establishes that a family could only be founded on marriage between a man and a woman[77], but later - particularly in judgment *B. c. France* (source n. 13343/87) of 25 March 1992 - argues that the refusal of the application to register the change in the

[76] To analyse the first decisions of the Court in that matter, see F. UCCELLA, *La giurisprudenza della Corte europea dei diritti dell'uomo su alcune tematiche del diritto di famiglia e suo rilievo per la disciplina interna*, in *Giur. it*., 1997, IV, p. 134.

[77] See the sentence from the 17 of October, 1986, *Rees v. Reino Unido* (source no. 9532/1981), however, the Court was aware of "the seriousness of the problems affecting transsexuals and their discomfort," and recommended "a constant screening, considering, in particular, scientific and social advances. "In the *Cossey case c. The United Kingdom*, decided by a sentence of September 27, 1990 (appeal No. 10843/84), the Court reached a similar conclusion, noting that the link to the traditional concept of marriage provided "sufficient reasons to continue applying biological criteria to determine the sex of a person for the purpose of marriage" and the States have the power to regulate with their own laws the exercise of the right to marry (repeated concept in the detention *of Sheffield and Horsham v. United Kingdom* of July 30, 1998 , sources Nos. 22985/93 and 23390/94).

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Civil Registry put women "in a daily situation incompatible with respect for their private and family life".

It is precisely this last right to a family life that shall be recognised as the fundamental right (more than that concerning marriage and founding a family) on which European judges have focused in order to ensure an adequate protection for *de facto* families (and, therefore, also for the same-sex couples[78]).

Indeed, from the *Marckx judgment c. Belgium* (appeal No. 683/74) on 13 June 1979, the Court extends the concept of family life contained in the ECHR to the illegitimate family that, in this case, consisted of a mother and daughter born out of wedlock.[79] While in the case *Keegan c. Ireland* (appeal No. 34615/97), the Court states that the notion of family referred to in section 8 is not limited to relationships based on marriage, and may in fact overcome family ties when the parties coexist *more uxorio*; and in sentence *X, Y and Z c. The United Kingdom* (source no. 21830/93), the Court recognises the existence of a family life between a transsexual and the son of his partner, since from the moment that X acted as "father" of Z in each field from birth. In such circumstances, the Court considers that the three appellants are united by family ties.[80]

However, the most significant step in this matter occurs with the *Goodwin c. United Kingdom* (source no. 28957/95), in which while estimating the claim of a woman, who had suffered significant discrimination due to sex change in many fields - ranging from the workplace, social security and pensions, to the respect and a possibility of getting married - the Court found a violation of section 8 (right to respect for private and family life): "since no relevant factor of public interest contrasts the applicant's interest in obtaining legal recognition of sex change".

[78] In the judgment of January 5, 2010, *Jaremowicz c. Poland* (source n. 24023/03), clarifies the "structural" differences between the right to marry and the right to respect for family life and the consequent differences in the scope of appreciation granted to the Member States: in the case of art. 12 ECHR, in fact, control of compliance of the Convention should be limited to the verification of the arbitrariness and disproportion of the choices made by the Signatory Countries of the Convention (§ 50).

[79] And with the sentence of January 6, 1992, *Alilouch El Abasse c. The Netherlands*, (source no. 14501/89), it has been clarified that "the relationship between a bigamist father and the son that he had with his first wife classifies as a family life".

[80] Just like in the section 37.

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Furthermore, section 12 ECHRs is also questioned because there would be "no justification for depriving transsexuals of the right to marry in any circumstance". [81]

The fundamental basis on which European judges support many of their decisions in favour of the rights of same-sex couples is based precisely on the principle (reiterated by the Parliamentary Assembly of the Council of Europe through the Recommendation of September 26 2000, No. 1474) of non-discrimination due to sexual orientation.[82]

Such rule, therefore, applies in the matter of custody and safekeeping of children after separation[83]; of adoption by homosexuals, when state legislation allows adoption to single persons[84]; of subrogation in the lease of common housing[85]; of adoption by people who live *more uxorio*[86] and of the stepchild adoption[87]; to see that

[81] Regarding the rights of transsexuals and a possible harm to their interests, it is necessary to highlight other important sentences of the Strasbourg Court, such as the *Parry c. Regno Unito* y *R. e F. c. Regno Unito* (source no. 25748/05) from 28 of the November 2006; the *L. c. Lituania* (source no. 27527/03) from 11 of September 2007; the *Schlumpf c. Svizzera* (source no. 29002/06) from 8 of January 2009; la *P.V. c. España* (source no. 35159/09) from 30 of November 2010; the *P. c. Portugal* (source no. 56027/09) from 6 of September 2011; and the *Van Kück c. Alemania* (source no. 35968/97) from 12 of June 2013. And more recent sentences such as *Hämäläinen* (source no. 37359/09) from 16 of July 2014 (in *Nuova giur. civ. comm.*, 2014, I, 1139 ss., with comment from A. LORENZETTI and a A. SCHUSTER, *Corte costituzionale e Corte europea dei diritti umani: l'astratto paradigma eterosessuale del matrimonio può prevalere sulla tutela concreta del matrimonio della persona trans*) e *Y.Y. c. Turchia* (source no. 14793/08) from 10 of March 2015.

[82] Worthy of mention are also the Recommendations of the Parliamentary Assembly of the Council of Europe no. 924 (1981); 1470 and 1474 (2000); 1547 (2007); and no. 1728 (2010); as well as the Recommendation of the Committee of Ministers CM/Rec (2010)5.

[83] Reference is made to the *Salgueiro da Silva Mouta judgment c. Portugal* (source no. 33290/96), of December 21, 1999.

[84] See the judgment *E. B. c. France* (source no. 43546/02), of January 22, 2008. On the contrary, it is not considered a violation of the ECHR to prevent homosexual couples from accessing adoption (which is permitted, however, to opposite-sex couples), provided for in the French legal system. See sentence *Gas and Dubois c. France* (source No. 25951/07), of March 15, 2012.

[85] See the *Karner* judgment *c. Austria* (source n. 40016/98), of July 24, 2003, and *Kozak c. Poland* of March 2, 2010 (source no. 13102/2002). In the *Kozak case c. Poland*, in particular, the Court reverts to the right to subrogate oneself in the lease agreement signed by same-sex couples and notes the violation of section 14 ECHR in relation to section 8 of the ECHR. To the attempt of the Polish authorities to justify the difference in treatment between heterosexual and same-sex couples on the basis of the need to protect the family based on the union of a man and a woman, in accordance with art. 18 of the Constitution, the European judges have responded by emphasizing that, although such justification may be theoretically acceptable in principle, in the specific case the State could have adopted various measures to achieve its objective, thus reconciling, by virtue of the evolution of society, the conflicting interests that underlie the protection of the family in the traditional sense and the protection of the rights of sexual minorities.

[86] See the judgement *Moretti e Benedetti c. Italia* (source no. 16318/07) 27 April 2010.

[87] *X y a. c. Austria* (source no. 19010/07), of February 19, 2013.

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their own relations of stable coexistence are treated as families as well as opposite-sex couples[88] and to enjoy, where appropriate, the same forms of guardianship provided for heterosexual de facto couples[89] (although, by the contrary, it does not impose on the country the obligation to grant the persons who live together the same rights as those granted to spouses).[90]

6.2.1 Oliari and Others v. Italy: The Italian and Polish Perspective

On 21 July 2015, the Strasbourg Court decides, however, to take a firm stand against Italy and with the sentence *Oliari and Others v. Italy* (sources Nos. 18766/11 and 36030/11) [91] condemns the latter for violation of section 8 of the ECHR by repealing the legal provisions set forth in the Convention on the requirement of prior exhaustion of national remedies for the presentation of the application before the Strasbourg court.[92]

The Court considers that, in the absence of marriage, same-sex couples have a particular interest in obtaining the possibility of forming a civil union or registered union, since it would be the most appropriate way to achieve legal recognition of their relationships and with it, they would guarantee their relations with proper protections - in the form of protectable rights in a stable and committed relationship.

Even considering the coexistence agreements and civil union registrations in Italy, European judges consider that such instruments are insufficient to guarantee recognition and effective protection for same-sex couples. In respect to the

[88] See *Schalk and Kopf c. Austria* (source no. 30141/04), of 24 June 2010.
[89] It is significant in case of the sentence (of the Great Hall) *Vallianatos c. Greece* (sources numbers 29381/09 and 32684/09), of November 7, 2013.
[90] See the sentences *Saucedo Gómez c. Spain* (source no. 37784/97), of January 26, 1999; *Shackell c. United Kingdom* (source no. 45851/99), dated April 27, 2000; *Burden e Burden c. United Kingdom* (source no. 13378/05) of April 29, 2008*; Courten c. United Kingdom* (source no. 4479/06), of November 4, 2008.
[91] Among the many comments to the sentence, see *F. ALICINO, Le coppie dello stesso sesso. L'arte dello Stato e lo stato della giurisprudenza*, at www.forumcostituzionale.it; *C. NARDOCCI, Dai moniti del Giudice costituzionale alla condanna della European Court of the Diritti dell'uomo. Brevi note a commento della senteza Oliari e altri c. Italy*, at www.forumcostituzionale.it.
[92] The Court considered that in the case of a persistent situation, due to the permanent legal gap, there is a continuous violation in accordance with its jurisprudence and, therefore, the six-month period cannot be considered as elapsed (see par. 97 of the decision).

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coexistence agreements, in fact, it is evidenced that they are strictly economic and require coexistence, and experience shows that there are stable unions (and marriages) that do not meet this requirement.[93]In relation to the records of civil unions, it is stressed that their character is merely symbolic and that, even while being relevant for statistical purposes, they do not grant any official civil status, and even less rights of any kind to homosexual couples (in addition it also has none of the probative value of the stable union for national courts).[94]

The Court observed that, despite some attempts, over the course of thirty years, the Italian legislator has failed to pass an adequate law to protect same-sex couples and that it violates the wishes of the national community, including the population (within which there is already visible - as official studies on the subject show - an absolute acceptance of homosexual couples as well as broad support for their recognition and guardianship) and the highest judicial authorities (which have repeatedly emphasized the need to guarantee the rights and duties of same-sex unions).[95]

The European judges conclude that since the Italian government did not address a prevalent public interest, and in light of the fact that the conclusions of the national courts in this matter have been left dead, the State has exceeded its margin of discretion and has not fulfilled the obligation to ensure that the plaintiffs have a specific legal framework that provides for the recognition and protection of their homosexual unions.[96]Italy is condemned to pay compensation of € 5,000.00 to each

[93] See point 169 of the sentence.
[94] Just like in point 168 of the sentence
[95] According to the Strasbourg Court, this repeated failure by the legislator to comply with the judgments of the Constitutional Court or with the recommendations contained therein can potentially weaken the responsibility of the judiciary and in this case has left those interested in a situation of legal insecurity that must be taken into account.
[96] Having found a violation of section 8 ECHR, the Court considered that it was not necessary to examine the violation of section 14 ECHR in relation to section 8 ECHR and declared the claim inadmissible in relation to the violation of section 12 ECHR, alone or together with section 14 ECHR, while noting, however, that section 12 ECHR should no longer be construed as limited to male / female marriage. However, since there is no consensus on this point (only eleven members from forty-seven total recognize same-sex marriage), the issue is left to the discretion of the States that have a wide margin of appreciation in this matter.

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of the couples for the non-property damage (*in re ipsa*) suffered and also to pay all legal costs of the appellants.

The decision in *Oliari and others v. Italy* was severely criticized in Polish literature on the one hand[97], on the other, its relevance was emphasized in relation to the situation in Poland(PAWLICZAK,2015) First of all, the attention has been drawn to the issue of the alleged need of the institutionalization of same-sex relationships with the structures typical of family law institutions, particularly the marriage(MOSTOWIK,2017).This construction brings reservations, in particular because it can be executed under another name, for instance civil union.[98]The problem of redefinition of marriage signalled before, raises similar doubts. Polish family law studies agree that it is difficult to assume the obligation to institutionalize same-sex life cohabitation to marriage between spouses. Section 8 of the European Convention on Human Rights cannot form the grounds for such claims.[99]This provision concerns the protection of private and family life. It is not disputed that the founders of the Convention and the States that signed it were concerned with ensuring the protection of the privacy of the individual, including protection against state interference. It was not the intention of the Convention – contrary to its section 12 – to impose on the states the obligations to redefine the existing concept of marriage and to limit the freedom of national legislators. There is no need for a broader interpretation of the protection of social phenomena that were unknown to the states at the time they signed the Convention. Civil partnerships, also same-sex partnerships, existed back then (MOSTOWIK,2017).

[97] P. MOSTOWIK, *Brak „strasburskiego" bądź „luksemburskiego" obowiązku instytucjonalizacji pożycia osób tej samej płci oraz regulacji związku partnerskiego kobiety i mężczyzny in: Związki partnerskie. Debata na temat projektowanych zmian prawnych*, ed. M. ANDRZEJEWSKI, Toruń 2013, p. 219; K. MICHAŁOWSKA, *Uzasadnienie braku obowiązku instytucjonalizacji upowszechniających się zjawisk społecznych na przykładzie projektów ustaw dotyczących związków partnerskich, Zeszyty Naukowe* 2014, no. 2, p. 105.

[98] The opinion of the Supreme Court of August 4, 2011 on the draft of the bill on "Partnership agreement" Biuro Studiów i Analiz I 021–135/11 (document of the Sejm of the Republic of Poland of the 6th term of office No. 4418).

[99] See also judgment of the Grand Chamber ECHR of 7.11.2013 r., *Vallianatos and others' v. Greece* (case no. 29381/09, 32684/09).

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On the other hand, despite confirming the immediate interest in the matter, the chances of adopting a similar solution in Poland seem to be insignificant. Firstly, because the Polish Constitutional Tribunal did not adopt a stand on the rights of same-sex partners or about the legalization of such relationships. Secondly, public support for the same-sex relationships is not high in Poland, and the European Court of Human Rights also took these factors into account when issuing the decision (PAWLICZAK,2015).

7 FINAL CONSIDERATIONS

This paper has provided an updated description and "legal image" of two different European legal systems, namely Italy and Poland. The description of such legal systems has been conducted according to the legal formant theory of Sacco. On the one hand, we have examined the statutory legal formant. In this light, the Italian experiences of *Pacs*, *DiCo*, *Cus*, and *DiDoRe* have shown a direct legislative failure in terms of formants, although in Italy the so called *Cirinnà* law in 2016 has for the first time granted some fundamental rights to same-sex couples.

The same cannot be said for Poland. Here, the public opinion is still highly against the ideologies behind same-sex couples. Furthermore, the Polish legislative bills for granting rights to same-sex couples have always failed the approval of the Parliament. This circumstance has given rise to judicial activism in both countries. In particular, we have noticed how the recognition of certain rights to same-sex couples directly derives from a judicial application of super-national or international legal principles that are for instance provided in the Universal Declaration of Human Rights and the ECHRs. Those declarations and international treaties have created a supremacy of the international level to which the domestic is subject. Furthermore, such event has also confirmed that the law on same-sex couples is complex. Indeed, such complexity derives from the inclusion of domestic legal systems within international legislative frameworks that have a universalistic spirit and that they aim

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to openness of borders as well as to an extension of civil rights. We define such approach as a multi-level legal order where the apparent complexity of the law at the international level represents at the same time the means through which national legal systems can develop and evolve towards a fairer and one could say a more inclusive legal environment. Indeed, it is well known that the original grounds for discrimination against unmarried heterosexual couples (*de facto* couples) has now been almost definitively superseded, although much more steps are needed for the recognition of full civil rights to unmarried same-sex couples.

In the backstage of such indirect discrimination we have seen how the national constitutions represent the last possible rampart against social changes and reforms (for instance, the Italian definition of legitimised family based on a natural union formed on marriage). Nonetheless, we have also highlighted as a purposive interpretation of the law can essentially constitute the possible basis for the extension to further rights to same-sex couples especially if those domestic constitutions must be read in conjunction and within the international legal and judicial frameworks of rights. In other words, we believe that a possible way of political transformation for societies in Poland and Italy as well as in other European Member States shall be to minimise the seriousness of marriage. Marriage or wedding in its formal and vivid expression shall simply go. We like to remember once again the Oscar Wilde's play the "Importance of being Earnest" when Algernon discusses household finances by referring to marriage as a "demoralising" instrument due to the fact that in "married households the champagne is rarely of a first-rate brand". The comedy and the ridicule image of marriage serves as a powerful instrument through which the same domestic constitutional texts in Italy and Poland shall acknowledge the evolving feature of time and social changes. This because the same conception of morality shall not be included in the law, but shall be kept in secret personal beliefs if ever needed to be kept. By contrast, the role of the law shall be to include rather than excluding, shall be to recognise rather than differentiating, shall be to equalise rather than discriminating. Only in this fashion, the law as a legal formant can be essentially reformed in a comparative law perspective and in turn the judicial interpretation can be better placed

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on the construction of “better laws” and one could say on fairer systems of rights within an equilibrated and harmonised multi-level legal order.

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[Received/Recebido: Janeiro 19, 2021; Accepted/Aceito: Março 30, 2021]