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Jean Monnet Working Paper 06/10

Stefania Ninatti

**Adjusting Differences and Accommodating Competences:
Family Matters in the European Union**

NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at

www.JeanMonnetProgram.org

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ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
© Stefania Ninatti 2010
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

ADJUSTING DIFFERENCES AND ACCOMMODATING COMPETENCES: FAMILY MATTERS IN THE EUROPEAN UNION

By Stefania Ninatti*

Abstract

The transformation of family law, presently spreading throughout the entire land of Europe with different stages of development, questions the law discipline in a multifaceted way.

The scope of this paper is to approach this delicate issue from the point of view of the competences involved: drawing a line between the domestic and EU orders on family matter has been recently proved to be not an easy task. European Court of justice case law and, German and Italian constitutional case law will be placed side by side, in order to single out the challenging questions at stake and the dialogue currently occurring between Courts.

The highly controversial definition of marriage - within the wider territory of family law- will constitute the ideal landscape in which this inquiry will be placed.

* Associate Professor of Public Law, University of Turin, Italy; Stefania.Ninatti@unito.it.

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(As) a premise – The unsolved dilemma

«Comparative Law is somewhat like travelling. The traveller and the comparatist are both invited to break up the daily routine, to come up against the unexpected and perhaps to begin to understand what was previously unknown»¹.

Reading the renowned and intriguing statement by Frankenberg and comparing it with some evolutionary process of the EU order, we are tempted to affirm that diversity is gently fading away in the land of Europe. For good or for bad, the European legal scenario is rapidly changing and what was once firmly rooted in one system, and not acceptable to another, has to be seriously reconsidered nowadays.

More than 50 years of European integration have to be certainly considered at the heart of this thoughtful transformation.

The most recent step is the Lisbon Treaty, remarking this slow but relentless change, asking for a new stage in the process of creating ever closer union among peoples of Europe, thus suggesting an ambitious project of legal and political unification. Needless to add, the Treaty of Lisbon asserts also very distinctly that «the process of creating an ever closer union» (art. 1 TEU) will proceed hand by hand together with pluralism; nonetheless it fails to say how this process will actually respect diversity. Constituting an extraordinary laboratory, from this point of view Europe «illustrates, even sometimes caricatures, the disorder caused by the interactions within the legal order and changes in organizational levels and time»².

A special perspective to detect this phenomenon is indeed a highly sensitive field as family law, characterized by a recent and inexorable process of transformation.

Indeed, the common (and insightful) understanding of this special branch of law has always been grounded on the unchallenged recognition that «family law and public law affecting

¹ FRANKENBERG G., *Critical Comparison: Re-thinking Comparative Law*, Harv. L. R., 1985, p. 411.

² DELMAS-MARTY M., *Ordering Pluralism. A conceptual Framework for Understanding the Transnational Legal World*, Hart Publishing, Oxford, 2009, p. 151.

the family are not only systems of rules and procedures – they are also carriers of ideals and symbols that are constitutive of culture».³ Therefore, family law has always been studied as a field *per se*, differentiated from State to State, since national values and cultural traditions turn this subject into a peculiar branch of law that reflects the distinctive features of a legal order: hence the classical fragmentation of family law within the European legal landscape.

Some echoes of this classical reading can be tracked, more recently, in the notorious *Lisbon-Urteil*, when the German constitutional judge bluntly remarks that family law pertains to one of the five fundamental areas of law that has to remain close to the citizen and directly shaping the form of a constitutional State:⁴ in other terms, family law represents one of the inalienable competences of the national level of government.

Anyway, the traditional understanding of the specialty of this legal field – translated into EU law language - led to the consideration of the possible harmonisation or unification of family law as «a hopeless quest».⁵ And actually, for the aforementioned reasons, the European policy makers purposely separated the debate regarding a possible future harmonization or unification of civil law from the branch of family law. The European Council – while pondering a possible supranational regulation in civil matters – with a traditional approach pointed out that family law is not included in this project since it is «very heavily influenced by the culture and tradition of

³ GLENDON M. A., *Family Law in a Time of Turbulence*, in Id., *Traditions in Turmoil*, Sapientia Press, 2006, p. 239. Similarly MEULDERS-KLEIN M.-T., *Towards a European Civil Code of Family Law? Ends and Means*, in BOELE-WOELKI K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, 2003, p. 109, suggests that family law constitutes the hard core of any legal culture. See also MÜLLER-FREIENFELS, *The Unification of Family Law*, Am. Journ. Comp. L., 1968, p. 175.

⁴ This worry can be traced in many passages in many passages of the *Lisbon-Urteil* (judgment of the BVerfG, Second Senate, 30 June 2009, - 2 BvE 2/08 - 2 BvE 5/08 - 2 BvR 1010/08 - 2 BvR 1022/08 - 2 BvR 1259/08 - 2 BvR 182/09, in http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html): see in an exemplary way, besides para. 249, para. 252. Moreover, it has been doubted whether the choice of identifying 5 main areas of competence is a proper tool to set clear boundaries to the European integration: see for example, DENNINGER E., *Identität versus Integration?* JZ, 20/2010, p. 972.

⁵ KAHN-FREUND O., *Common Law and Civil Law – Imaginary and Real Obstacles to Assimilation*, in CAPPELLETI M., *New Perspective for a Common Law of Europe*, 1978, p. 141.

national (or even regional) legal systems»⁶. In other words, every State should be competent to protect the structure at the basis of every social community, i.e. the family, according to its own criteria and goals. And, as a matter of fact, from Finland to Greece the map drawing family laws and policies in Europe shows us a rich landscape, characterized by national differences.⁷

But this well known depiction is undergoing a radical change and the foundation of these classical statements seems to be unsteady⁸.

If we consider the highly controversial question regarding the definition of marriage and its evolution in recent time, in a limited period of about 20 years, we find out that 11 Western European countries introduced different kinds of legally sanctioned marriage-like unions *ex novo*. It all started by the late 1990s, when the idea of registered partnership moved from the Nordic region toward northern continental Europe: Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996) were the first States introducing a form of registered partnership. After some years, other European countries⁹ made a step in this direction approving new laws regarding different forms of registered partnership. And starting with the new millennium some States – namely, The Netherlands (2000), Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Portugal (2010) – opened the way for marriage for same-sex couples. Italy, Ireland and Greece have not adopted any legislation on this issue yet.

⁶ See Council Report on the need to approximate Member States' legislation in civil matters, 29 October 2001, nr. 13017/01. Nevertheless, we can immediately perceive, reading the 2001 Council report, that the aim of this statement is ambiguous: even if such Report was an answer to the *Commission's Communication on European Contract Law of July 11, 2001 (C-0471/2001)* on the need of harmonization of European contract law and it expressly excluded family law, the core issue of the inter-institutional debate focused on the need to exclude or not the latter from a supranational intervention. Thus, the resulting interpretation of these passages is rather shady. A recent study on the Europeanization of private law though confirmed that, for the time being, contract law has remained the most advanced subject of private law caught up in this process: «property law, family and law of succession have only marginally been affected» (ZIMMERMANN R., *Comparative Law and the Europeanization of Private Law*, in *The Oxford Handbook of Comparative Law*, Oxford, Oxford Un. Press, 2006, p. 570).

⁷ ISENSEE J., *Europäische Familienpolitik als Kompetenzfrage*, Deutsches Verwaltungsblatt, 13/2009, p. 801.

⁸ ANTOLSKAIA M., *Harmonisation of Family Law in Europe: a historical Perspective. A tale of Two Millennium*, 2006.

⁹ More precisely, limiting our consideration to the EU countries, they are: France (1999), Germany (2000), Finland (2001), the UK (2003), Luxembourg (2004), Czech Republic (2006), Slovenia (2006), Hungary (2009), Austria (2010). In addition Croatia has a law on same-sex civil unions which recognizes cohabiting same-sex couples for limited purposes. In addition to that, we have to consider that in other European countries reforms to give some kind of recognition to same-sex couples are in the governments agenda.

This extensive list is intended to offer a glimpse of a quantitative and normative changes presently occurring in European countries' family legislation: it seems to prove that something similar is indeed happening in the different legal orders. Moreover, the traditional reading according to which family law is a separate issue from the integration of Europe is beginning to lose ground. The attempt to trace back the underlining dynamics and streams of this phenomenon could grant us not only a comparative picture of the occurring transformation of family law in the European context but also, as a side-effect, a special unit of measure for the evaluation of the ongoing process of integrating Europe and its diverse legal orders.

As a premise, it should be pointed out that it is really difficult to capture the essence of this process solely relying on the typical dynamics within the classical framework of the relationship between the supranational and the national level, even if it has - indubitably - a relevant impact on this issue. It is hard to trace back and frame all the factors weighing on this radical evolution in European family legislation. Another equally important factor, as relevant as the aforementioned sort of vertical influence on the transformation of the family policy, is the «horizontal Europeanization»¹⁰, a general notion of pressure including «state-to-state learning and the effects that shared norms and notions of best practice created in the more informal policy networks that span various European institutions, such as the EU, the Council of Europe and the ECHR, have on domestic policies».¹¹ Political scientists have already observed in the past that «the overall outcome of Europeanization is neither convergence across the board nor continuing divergence», recognizing, on the contrary, a general pressure for adaptation that involves the study of the comparative politics and the legal systems of the member states. Thus, the constant process of integrating Europe resembles more a kind of «clustered convergence» among

¹⁰ BOERZEL T. and RISSE T., *Europeanization: the domestic impact of European Union politics*, in Jorgsen, Pollack, Rosamond (eds.), Sage Handbook of European Union politics, London, Sage, 2007, p. 497.

¹¹ K. KOLLMAN, *European institutions, transnational networks and national same-sex union policy: when soft law hits harder*, Contemporary Politics, 2009, p. 40. The author interestingly underlines that although judicial decisions, European Parliament resolutions etc, very rarely «contain legally binding mandates for relationship recognition itself, advocacy groups working at both national and transnational levels have been able to knit these disparate supranational norms, decisions and policies together to create a soft law norm – a shared non-binding principle – for the legal recognition of same-sex relationships» and this phenomenon has clearly «helped to define the rights of LGBT people as human rights» (p. 38).

countries on domestic policies facing the same adjustment problems.¹² And the latter – “domestic policies facing the same problems” – remains the relevant background for understanding the process of transformation of family law.

A preferred point of view to observe these new developments is the analysis of the European judges’ argumentative reasoning: it is not by chance that we chose the case law perspective since we live in times where everything – from politics, regimes, mores and tastes – changes rapidly and no other actors than the Courts can report these changes in an almost instantaneous way. And, actually, this judicial perspective perfectly fits in with the European integration history, given that the ECJ has been always recognized as the real engine of that process. Besides, we have to consider very carefully that in this field the s.c. “strategic litigation approach” has frequently been used: namely, the judicial territory has often been used as an alternative way to urge for a change in the regulation of the field thus short-cutting the difficulties present in some cases in the political process on this delicate issue. Accordingly, case-law and legislative reforms appears here to go hand in hand to a certain extent. In other words, cases are a good occasions to read the present status of the legislation and the possible legislative reforms against the light.

Therefore, in order to verify if family law is still one of the national identity cornerstones and one of the highest expression of the constitutional tradition of a legal order, it is particularly interesting to start with the case-law of the supranational Courts and the possible interaction with the national counterparts.

As it is well known, owing to the EU lack of competence, family law scholars focused at first on the role played by the European Court of Human Rights which could claim a direct competence on this topic thanks to art. 8 ECHR (private life) while the ECJ could not. It has to be noted on this matter that, in addition, the European Court of Human Rights very recently – and very relevantly – admitted also a complaint based directly on art. 12 (right to marry).¹³

¹² BOERZEL T. and RISSE T., *Europeanization: the domestic impact of European Union politics*, op. cit., p. 497.

¹³ ECtHR, Judgement of 24 June 2010, Nr. 30141/04: see especially para. 94, where the Court established for the first time that a cohabiting same-sex couples living in a stable *de facto* partnership falls within the notion of family

If it is true in principle that this issue was mainly the dominion of the ECtHR, lately the ECJ undertook more and more the role of protecting fundamental rights inside the EU territory thanks to a bold use of art. 6 TUE and of the non-discrimination policy and, to a certain extent, the Charter of Fundamental Rights. Therefore, the debate on the «respect for family life as a fundamental right»¹⁴ – once firmly confined to the national context or, in some instances, to the ECtHR reasonings – ends up penetrating the ECJ horizon.

It is not only the protection of fundamental rights that expands the material horizon of the Luxembourg Court as - over time - the ECJ faced family law indirectly when dealing with freedom of movement of persons, discrimination according to nationality and community citizenship. It goes without saying that we are referring to the controversial jurisprudence regarding family reunion in the EU. In other words, a unified market of 27 countries cannot ignore the existence of the s.c. “transnational family”¹⁵: this is just one of the good reasons to include the family in the realm of EU law. The strange tangle that family law creates with the non discrimination policy can be identified easily in this latter example. As we will see, the principle of equality is applied in this field not only from an external point of view – adjusting differences between domestic legislations – but also from an internal point of view, in the evaluation of the substance of this special sector.

In sum, the European Court of Justice sneaked in this topic slowly, taking advantage of the interaction with other EU policies and disciplines and almost concealing its progress because

life, whereas the previous jurisprudence used to refer to art. 9 on private life in order to decide cases on same-sex couples. Regarding to the interpretation of art. 12, the Court stated in this occasion that it “would no longer consider that the right to marry enshrined in art. 12 must in all circumstances be limited to marriage between two persons of opposite sex. (...) However, as matter stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the contracting states.” (para. 61) Besides, the Court explicitly envisages a future time when a consensus would emerge on same-sex marriage, recognizing the progressive process of transformation of this legal field and thus contemplating a possible change of its jurisprudence.

¹⁴ As defined by the Luxembourg Judge in its decision in case n. 540/03 of June 27, 2006, *European Parliament vs European Council, passim*.

¹⁵ In a very interesting way MIUR WATT H., *Family Law: European Federalism and the "New Unilateralism"*, 82 Tul. L. Rev. 1994, underlines that this specific sector is undergoing a process of real transformation due in part to «the emergence of a fundamental-rights approach to cross-border situations, which aims at protecting personal status and relationships from the adverse effects of heightened international mobility» and in part to «the discovery of non-discrimination as a principled basis for this change».

of the EU's direct lack of competence on family law issues. Obviously, the role played by the Court of Strasbourg – not only for the continuous interference with the ECJ – remains a reference point that cannot be missed in a research on this topic. Nonetheless, only the Court sitting in Luxembourg will be further examined in this paper in order to better highlight the question of the interactions of rights and competences in family law inside the territory of EU.

The issue is particularly hot because, according to some law scholars, thanks to the repeated cases decided by the ECJ, the field is ready for a possible EU harmonizing policy. If the starting point is the protection of single cases in front of the European judge, the outcome could be a law-making enterprise for the harmonization of family law in Europe. The ECJ should be paving the way for it, even if in a very initial and still uncertain stage.¹⁶ As we already underlined, we analyze cases but we are questioning - in the end - the evolution of family law as well, even if through a special kind of lenses.

Having thus outlined the very general frame of the discussion occurring in Europe with regard to family law, we set the scene by starting with a peculiar point of view: our aim is to address these new trends pervading family law in Europe through the analysis of common constitutional traditions in this field.

More precisely, we will start from the “European” side of the problem, briefly recalling the constitutive traits of the concept of common constitutional traditions in order to draw attention to its underlying transformation. We will then verify the use of this concept in the family law jurisprudence and its evolution. This issue needs to be clarified at the outset in order to understand the radical change of the ECJ reasonings over time on this topic: as a matter of fact, while for a very long period the guiding star of the judges was the reference to the common constitutional traditions, recently they opted for a very different argumentative path focused mainly, if not only, on the equality principle. We will try to detect the reasons underpinning this change.

¹⁶ W. PINTENS, *Europeanisation of Family Law*, in BOELE-WOELKI K., (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, 2003, p. 20.

The work simultaneously addresses the deep (and hidden at times) impact that this latter is provoking on the relevant and well defined constitutional traditions on family law of Germany and Italy and the continuous interactions between supranational and national legal orders: these two states seem to be very interesting in order to detect the impact on family competence brought about by the supranational legal order, both because they have a strong constitutional tradition of protection of family and marriage and (because) they adopted two very different ways to approach the issue at stake. This perspective obliges us to embark upon an intellectual enterprise which deals with the fragile and at the same time crucial balance existing between protection of national constitutional tradition (or identity) and the ongoing process of transformation of this field: the dialogue between Courts is used as a legal tool to better understand the state of this balance.

A final comment: in addressing the issue of drawing a line between national and supranational competence on this delicate matter, we purposely set the heart of this work not in the evaluation of the substantive issue at stake, i.e. the transformation of fundamental elements of family law. “Drawing a line” between supranational and domestic orders has to be considered as a value *per se* and as such, in the end, not totally detached by the analysis of the substantive question that the transformation of family law entails. Therefore, we are well aware that we are just looking at one side of the issue believing - though - that in this way we can contribute to a wider and deeper understanding of the overall picture.

First part: the evolution of common constitutional traditions and family matters

1. An overview on common constitutional traditions and legal pluralism.

At the beginning of this journey we imagined a completely different legal scenario.

In consideration of the evolution of the community structures and extension of the European territory we would have expected a partial weakening of the use of the common constitutional traditions. As a matter of fact, Europe has extended its frontiers to cover the significant number of 27 states (and almost 500 millions inhabitants), and has incorporated political, economic and juridical systems that cannot be entirely ascribed to the history and development of the European integration. Therefore, we had expected to discover an impoverishment of the vocabulary of the common constitutional traditions to the advantage of a “wide-mesh” system apt to leave room for the increasing discontinuity of Europe.

But this is not the case: an analysis of the EC case law and legislation has contradicted – at least in *prima facie* – the idea of a recession in the use of this instrument.

But let us proceed in an orderly way.

In short, reference to the common constitutional traditions is an interpretative instrument used by ECJ judges (or more frequently by the Advocate General) to fill a gap in the provisions of the Treaties. The judge, by means of this instrument, sounds in depth the national legal principles on the issue at stake in order to distil the European common constitutive notes: those latter will turn into the so-called general principles of EC law, directly applicable to the case.

This canon, when used, provides legal reasoning with a particularly strong and solid foundation, drawing openly on the law of the Member States considered as a whole. The symbolic value of this canon is even more important. Needless to say, the recognition of the European constitutional roots confers a special relevance to the criterion in question, since the respect of the diverse member States’ identities, together with the acknowledgment of all that unites them, has always constituted the heart of the community experiment, otherwise known under the saying “united in diversity”.

In this sense, the rhetoric relating to common constitutional traditions is most certainly very powerful: but, still, it resembles more a “rhetoric” rather than a technical vocabulary, since the choice to use the expression *constitutional traditions* instead of *constitutions* immediately proves a wider extension of such legal reasoning (and consequently major creativity by the judge who uses this expression).

If the criterion of common constitutional traditions works as a filter of different legal traditions existing in the European territory, this does not imply, though, an absolute correspondence of the final result with every single legal tradition: what is required is to carry out a synthesis through a more or less explicit comparative analysis of these traditions, on a case by case basis.

The scrutiny of the comparative study is remarkably detailed in the reasoning of the first judgments in which this interpretative canon was used.¹⁷

As we already mentioned, it is important to underline that this interpretative analysis can never be equated with a kind of mathematical sum of the legal traditions present in the territory since other factors - such as the concrete case discussed before the Court - influence the outcome. In this sense, the remarks raised by the Advocates general over time are helpful to understand the peculiar way in which comparative law is used by the ECJ, a way particularly apt to European integration.¹⁸ Thus, during the Sixties, Advocate General Lagrange observed that the reference to the national provisions aims not to pinpoint «common denominators» between national solutions but rather to choose, having regards to the objects of the Treaty, what «appears

¹⁷, Exemplary, in this sense, is the Joined Opinion of Mr. Advocate General Darmon, 18 May 1989, case 374/87, *Orkem SA*, and case 27/88, *SA Solvay and Cie.*, para. 98 – 123 in which a complete recognition of the different legal traditions regarding the right to know confidential information in a legal proceeding is carried out, in order to draw the general patterns which are common to different countries; finally, this result is applied to the case in question but at the same time the judge points out the non complete adherence to the European traditions due to the above-mentioned reasons.

¹⁸ In this connection we have to underline that comparative law is strictly pertaining to Europe’s peculiar structure because of the co-existence of different systems which function alongside each other: the phenomenon of cross-fertilization between diverse legal experiences is a steady laboratory in Europe. Moreover, in European supranational Courts openness to foreign law is a natural experience and the strength of comparative law is not solely persuasive but becomes part of a wider strategy, especially in the European Union order where the aim of integrating Europe guides the interpretation of comparative law and transforms it radically.

to be the best or, if one may use the expression, the most ‘progressive’ [solution].»¹⁹ According to the Advocate General, this is the spirit which drives the judge in interpreting the different national legal systems and it corresponds, by and large, to the observations made by Judge Kutscher, when he claims that the Court taking into consideration the various domestic solutions «must carefully consider and evaluate the specific problem and try to find the most suitable solution»²⁰.

Likewise, according to Advocate General Roemer, it is not even relevant that the general principle is recognized by *all* the Member States, since – as already mentioned - other elements play a role on the final outcome, as the European integration factor with the implied dynamics and aims.²¹ More recently, Advocate General Léger clarified once more that it is sufficient for the principle at stake to be recognized “only” by the majority of the Member States, as well as the fact that the principle’s conditions and aims that vary from State to State «have no influence». It is enough for the principle to be «generally recognized».²²

In sum, filtering the common constitutional tradition in order to identify the general principle of EC law, the judge uses an argumentative path that starts from comparative law but immediately gets entangled with other factors: therefore, the doctrine remarked that this interpretative criterion resembles more a «judicial law-making guided mostly by common sense»²³ than a rigorous legal standard. However, the wide nature of legal reasoning when facing the comparative legal experience – its very fabric – was already foreseen in the first decisions

¹⁹ Such comments follow a detailed analysis of the legislation of the Member States regarding the repeal of an administrative act with retroactive effect: see the Opinion of Advocate General Lagrange, 4 June 1962, Case 14/61, *Hoogovens v High Authority* (1962) 1962, ECR, p. 282-284.

²⁰ KUTSCHER, *Methods of Interpretation as seen by a Judge at the Court of Justice*, Judicial and Academic Conference, 1976, p. 29.

²¹ Opinion of Advocate General Roemer, 13 July 1971, *Zuckerfabrik Schöppenstedt v. Council*, ECR, p. 989.

²² Opinion of Mr Advocate General Léger, 17 September 2002, Case C-87/01 P., *Commission of the European Communities v Conseil des communes et régions d'Europe* (CCRE), para 52.

²³ HERDEGEN M., *The Origins and Development of the General Principles of Community Law*, in BERNITZ U./NERGELIUS J., *General Principles of EC Law*, Kluwer Law International, 2000, p. 17: this is confirmed by the fact that no reference is made to a specific national provision but rather to «underlying ideas or principles».

referring to common constitutional traditions when the judges mentioned them as «source of inspiration».²⁴

Even just with this concise reconstruction of the main features of the canon referring to the common constitutional traditions, the doubts on its use once Europe has extended its territory to new legal orders, as well as the fears of comparative doctrine regarding a possible reversion proportionately corresponding to the enlargement of Europe and of its legal traditions²⁵ can be easily understood. The reason for such perplexity is quite evident: if the comparative discipline constitutes the skeleton for the analysis of the common constitutional traditions, the distillation of the general principle (through the recognition of the domestic rules on a defined matter and a subsequent synthesis of same) is influenced by the number of member States and the homogeneity of the context. But this does not appear to be the case today.

However, at a first glance, the atmosphere which pervades the decisions and opinions written by ECJ judges and Advocates general is not that of a recessive use of this canon: the so-called “Europe of rights” – that, for the sake of simplicity, we can date with the issuing of the Charter of Fundamental Rights of the European Union – transforms common constitutional traditions into its own emblem. Reference to it has become a topic which is stressed more frequently today than in the past; and even though it is difficult to establish the margins of this increase with accuracy²⁶, the quantitative data regarding its use has grown exponentially over the last ten years if compared to the past.

Most certainly, said increase has been influenced by the codification of the common constitutional traditions within the EC legislation (unlike the beginning of the history of the Community), as we can notice, for example, in the Preamble of the Charter of Fundamental Rights of the European Union and in numerous EU secondary sources of law: as a matter of fact, these acts become the parameters used for judging the cases. This is just one of the countless

²⁴ Judgment of the Court, 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*, and Judgment of the Court, 14 May 1974, Case 4/73, *Nold*.

²⁵ G. DE VERGOTTINI, *Tradizioni costituzionali comuni e Costituzione europea*, in www.forumcostituzionale.it, p. 1

²⁶ As the use of the criterion of the common constitutional traditions can also take place implicitly, by means of a comparative analysis of the legislations, researching same in case-law is not always feasible.

signs of a growing tendency toward the formalization of EC Law, part of a wider trend that affected (or influenced) the legal science.²⁷ But the data are still very interesting, above all if we try to read their actual evolution between the lines: if common constitutional traditions played a primary role in the past in order to fill the gaps in EC Law, their aim is different today, even if they are still in a central position: «the proliferation of community measures and the resulting polynomy makes the recourse to general principles equally necessary»²⁸. Needless to say, in this way the use of this instrument will suffer a dramatic transformation.

As is well known, the topic discussed through the prism of common constitutional traditions concerns, by and large, the guarantee of fundamental rights: without taking into consideration that line of cases regarding, in the widest sense, the democratic principle (right to vote, composition of parliamentary groups, right of access, right to good administration, division of powers etc.), the remaining case history concerns the analysis of the classical fundamental rights. And if a large part of same can be ascribed to the field concerning the right of judicial protection (with all those rights correlated to same, from right of defence and that of hearing, from presumed innocence to the right of an impartial court etc.); the residual other half focuses on different issues tied to the recognition and protection of traditional fundamental rights

Let us stop to consider this last species, since its variety allows us to proceed further with a more general reasoning.

The common constitutional traditions have kept their primary role constant in this field over a period of time, in particular as regards the identification of the so-called “new rights”, rights that have not yet been codified by EC law but have been recognized as a living experience on a national level.²⁹ The latest developments of this case law consider the fundamental social

²⁷ And that Sunstein, in another context, describes as «a period of enormous enthusiasm for rule-bound justice» (C. SUNSTEIN, *Legal Reasoning and Political Conflict*, New York, Oxford Un. Press, 1996, IX).

²⁸ T. TRIDIMAS, *The General Principles of EU Law*, Second Edition, Oxford University Press, 2006, p. 10.

²⁹ At this point digression is necessary. This case law inevitably clashed with the old dilemma of the nature of the Charter of EU Fundamental Rights: as it is well known, even though the Charter might foresee the right in question, it *could not have been applied* as it is not binding from a legal point of view (For obvious reasons reference is made to the pre-Lisbon Treaty situation). However, as Advocate General Maduro summarized in different opinions, the Charter acquires a double function in the judge’s reasoning; first the Charter creates the presumption of the existence of the right in question within the community context, but said presumption must be verified in the light of two

rights as undisputed protagonists; under the recognition of common constitutional traditions, over the last ten years the Court has progressively recognized the right to form and join trade unions³⁰, the right to strike³¹, the right to a minimum period of paid holidays³², etc.

Considering the development of our research, the most interesting point of view for the case law analysis on common constitutional traditions is certainly the principle of equality, or rather, the numerous facets that the principle of equality can assume. A recent highly debated case regards the ban on age discrimination³³ (*Mangold* decision), and the line of cases which were the result of the same³⁴. In this case the key point in order to assert the principle of age

distinct parameters concerning the recognition of a common constitutional tradition similar in that field or a provision of the same right within the Human Rights European Convention. Once the existence of the fundamental right has been recognized through one of these two parameters, the Charter becomes once again relevant for detecting the characteristics of this right. The Charter, therefore, acquires effectiveness through the double parameter of the common constitutional traditions or through the Human Rights European Convention, and in this sense it shares, at least in part - clearly, before the entry into force of Lisbon Treaty -, the same destiny of the common constitutional traditions (.See the exemplary opinion of Mr Advocate General Poiares Maduro, 14 December 2006, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, para 48 and similarly opinion of Mr Advocate General Poiares Maduro, 9 September 2008, Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, para 21) Besides, a reading of the Preamble and the case law concerning fundamental rights allows us to grasp that the Charter aims at representing the tangible expression of the fundamental community values shared by the member States, i.e. their constitutional traditions.

³⁰ Opinion of Mr Advocate General Mengozzi, 23 May 2007, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska*, para 77.

³¹ Opinion of Mr Advocate General Poiares Maduro, 23 May 2007, case C-348/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti*.

³² Opinion of Advocate General Trstenjak, 24 January 2008, e ECJ, 20 January 2009, *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund (C-350/06) and Stringer and Others v Her Majesty's Revenue and Customs (C-520/06)*. See particularly para 53 of the opinion. See also Opinion of Mr Advocate General Tizzano, 8 February 2001, Case C-173/99, *The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* – well known for having opened the way to utilizing the Charter of the Fundamental Rights even though acknowledging it was not legally binding.

³³ Reference to the textual basis of the principle of age-discrimination is quite recent, since it was only introduced by the Treaty of Amsterdam (art. 6a, now art. 13 UE). Furthermore, this provision limits the Council to take suitable measures in order to fight age-discrimination, amongst other things. On 27 November 2000, the directive which establishes the general outline regarding equal working and employment conditions was adopted. It ruled a general age-discrimination prohibition, besides other things, in the field of employment, but with numerous limitations. Finally, art. 21 of the Charter of Fundamental Rights of the European Union, prohibits any form whatsoever of discrimination based on whatever reason, amongst which age.

³⁴ Court Judgement, (Grand Chamber) 22 November 2005, Case C-144/04, *Mangold*: see Judgement of the Court, 11 July 2006, Case C-13/05, *Chacón Navas*, Court Judgement (Grand Chamber) of 16 October 2007, Case C-411/05, *Palacios de Villa* (a very controversial case), Court Judgement (Grand Chamber) 11 September 2007, Case C-227/04, P. *Lindorfer*, Court Judgement (Grand Chamber) 23 September 2008, Case C-427/06, *Bartsch*, Court Judgement, 5 March 2009, Case C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age*

discrimination, – despite the limits of the EC competence and the nature of the act in question (a directive whose term of implementation was not yet expired³⁵) – is discovered by the Court in the existence of a general principle of community law which can be applied to this case, extracted implicitly by the recognition of a common constitutional tradition in Europe. Thus, the Court is playing a sort of ‘trump card’, fit to overcome the obstacles represented by the boundaries of EC competences and by the not yet expired directive.

The following case law and the doctrinal debates offer a lively depiction of such varied and complex constitutional tradition and of the existence (or non existence) of a general principle thereof. A detailed analysis of same shows that only two constitutions – Finland and Portugal – foresaw this principle. Hence, the famous critical remark by Tridimas, according to which “the general principles of law are children of national law but, as brought up by the Court, they become *enfants terribles*: they are extended, narrowed, restated, transformed by a creative and eclectic judicial process» is indeed of the utmost relevance in the matter at stake.³⁶

However, said interpretation by the Court remains unquestioned in the following cases thanks to the adoption of a new reasoning: even in the absence of the recognition of a specific common constitutional tradition regarding age discrimination in the European legal context, the latter can however be admitted, thanks to an evolutionary reading of the general principle of equality, which instead, unquestionably, has always been one of the constitutive components of common constitutional traditions. In other words, the principle of equality in its general context is part of our common constitutional traditions and its criterion of comparison – the so-called *tertium comparationis* – must be read in an evolutionary perspective from which its possible expansion can be deduced with the passing of time, as recognized by the Court of Justice³⁷.

Concern England), Court Judgement, 18 June 2009, Case C-88/08, *Hütter*, Cort judgment, 10 January 2010, Case c-555/07, *Küçükdeveci*, Court Judgement, 12 January 2010, Case C-229/08, *Wolf*, Court Judgement, 12 January 2010, case C-341/08, *Peterson*.

³⁵ This is not the right time to analyse this complex judgement at length. We addressed it solely with regard to the discussion on common constitutional traditions. However, it is worth mentioning that in the case in question the directive had not yet expired and Germany had requested and obtained an extension of 3 years as to the expiry of the period fixed for the transposition of the directive.

³⁶ T. TRIDIMAS, *The General Principles of EU Law*, op. cit., p. 6.

³⁷ See the exemplary Opinion of Advocate General Sharpston, 22 May 2008, Case C-427/06, para.45-46

It is pointless to observe that said remarks did not go unscathed from criticism both from a doctrinal and a political point of view³⁸ and the following “response” of the German constitutional Court regarding the so-called *Mangold* case-law is extremely interesting, concerning directly the question of the control of competences. The German legal doctrine and some part of the political world was expecting a strong reaction against such ECJ trend, but this general expectation was openly let down. Many reasons could be pointed at grounding the position of the German constitutional Court – *inter alia*, the change of its president and the need to mitigate the bold statements included in the fiercely criticized *Lissabon-Urteil*.³⁹ In this judgment the German Court – stating a very broad standard for the control of EU competence⁴⁰ –, appears to be unconcerned about whether a principle like age-discrimination can be derived from the common constitutional traditions: after all, the Constitutional judge seems to say that even if the method in which the EU affirmed this principle was not correct, the EU did not end

³⁸ In order to understand the hostility which this type of case law is provoking, consult HERZOG R. and GERKEN I., *Stop the European Court of Justice*, EU Observer, 10/09/2008, p. 1 – 4.

³⁹ Judgment of the BVerfG, Second Senate, 30 June 2009, - 2 BvE 2/08 - 2 BvE 5/08 - 2 BvR 1010/08 - 2 BvR 1022/08 - 2 BvR 1259/08 - 2 BvR 182/09, in http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html

⁴⁰ Order of the Bundesverfassungsgericht, 6 July 2010, 2BvR 2661/06 – Constitutional complaint against a judgement of the Federal Labour Court on age discrimination, § 14.3 sentence 4 of the Act on Part-Time Work and Limited Employment, old version – ECJ’S *Mangold* judgement. It is not possible to enter in the details of this path-breaking judgment, but we can summarize that the core of this judgement concerns the thin line separating EU and national competences, aiming at defining in a more detailed way the possible BVerfG review on *ultra vires* acts from the part of the supranational institutions. According to the German Constitutional Court, a breach of competence by the European institutions is defined by being sufficiently qualified – see para 61: «Eine Ultra-vires-Kontrolle durch das Bundesverfassungsgericht kommt darüber hinaus nur in Betracht, wenn ersichtlich ist, dass Handlungen der europäischen Organe und Einrichtungen außerhalb der übertragenen Kompetenzen ergangen sind. Ersichtlich ist ein Verstoß gegen das Prinzip der begrenzten Einzelmächtigung nur dann, wenn die europäischen Organe und Einrichtungen die Grenzen ihrer Kompetenzen in einer das Prinzip der begrenzten Einzelmächtigung spezifisch verletzenden Art überschritten haben (Art. 23 Abs. 1 GG), der Kompetenzverstoß mit anderen Worten hinreichend qualifiziert ist.» - and by leading to a structurally significant shift to the detriment of the Member States in the system of competences between Member States and the EU – see para 64: «Rechtsfortbildung überschreitet diese Grenzen, wenn sie deutlich erkennbare, möglicherweise sogar ausdrücklich im Wortlaut dokumentierte (vertrags-)gesetzliche Entscheidungen abändert oder ohne ausreichende Rückbindung an gesetzliche Aussagen neue Regelungen schafft. Dies ist vor allem dort unzulässig, wo Rechtsprechung über den Einzelfall hinaus politische Grundentscheidungen trifft oder durch die Rechtsfortbildung strukturelle Verschiebungen im System konstitutioneller Macht- und Einflussverteilung stattfinden» - . First remarks for this judgment can be interestingly found in CAPONI R., *Karlsruhe europeista*, www.astrid-online.it, e FARAGUNA P., *Germania: Il Mangold-Urteil del BverfG. Controllo ultra-vires sì, ma da maneggiare europeistofreundlich*, www.forum-costituzionale.it.

up in creating neither a new competence area nor an expansion of an existing one⁴¹. Accordingly, while the debated issue on the respect of common constitutional traditions is fading away in the background of the case, we can vividly recognize a very *europafreundlich* response to the issue at stake. And this is another relevant point to keep in mind for the development of the research.

Letting aside the details of the case, the previous brief outlines introduce us to a different legal background in which the case-law on common constitutional traditions is placed; reference to same is not recessive but the way in which it is used has deeply changed and its comparative law fabric seems to lose strength. Furthermore, it should also be recalled that - with time - references to the expression “common constitutional traditions” increased, but at the same time they seem to lose the specificness of the argumentative path: common constitutional traditions begin to fade behind a “*clausola di stile*” that is tied – together with the recognition to the Convention for Human Rights – to the protection of the fundamental rights in EC order, ex art. 6 TUE.

In this sense, in order to better understand the legal environment relating to the matter, which will be examined further on, a recent argumentation carried out by Advocate General Poiares Maduro illustrates this new phase of the European integration in which the legal traditions seem to converge (and to change the related comparative study discipline) and that manage «to reconcile the unreconcilable»⁴² in this difficult task.

The Arcelor case and the opinion issued by Advocate General Maduro represent a prism through which one can read the different facets and paths of this special kind of legal reasoning.

In a very broad outline, the matter at stake in this case regards the respect of the principle of equality of a French decree implementing a EU directive regarding the EU Emission Trading Scheme.⁴³ Starting from the assumption that the principle of equality is also recognized on a

⁴¹ A political response by the German Constitutional Court to the a very intricate conflict, we would be tempted to comment. On this latter issue, see especially para. 78 of the Order 2BvR 2661/06, *supra*, note 40.

⁴² Opinion of Mr Advocate General Poiares Maduro, 21 May 2008, C-127/07, *Societe Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Ecologie et du Developpement durable and Ministre de l'Economie, des Finances et de l'Industrie*, para. 15.

⁴³ More precisely, the steel company Arcelor requested the repeal of art. 1 of the French decree nr. 2004/832 - the national transposition of the EU's Emission Trading Scheme (ETS) foreseen in the directive nr. 2003/832. Arcelor

community level and as provided by the principle of the separation of the national and EC order, the Council of State, reviewing the case, decided to refer the question to the Court of Justice for a preliminary ruling, asking to verify the validity of the directive in the light of said principle⁴⁴. However, after all, it is clear that the question put forward by the French judge concerns the respect, from the side of a community act, of the values and constitutional principles of a member State: this control, however, must be carried out through the recognition of the protection of the same right at a supranational level, as provided by the intervention of the common constitutional traditions. Thus, the Council of State requests that the Court of Justice - when judging the respect of the principles of equality on a Community level - takes into consideration the respect of the principle of equality as set down by its own constitution.

And it is in this context that the Advocate General's suggestion appears interesting: art. 6 TUE, by borrowing one of his expressions, has by now established a sort of «organic identity» – or even «a structural congruence that can be guaranteed only organically and only at the Community level» – amongst the national and community constitutional values, which requires a single parameter for the judgement: if this was not the case, the effect would be «paradoxically, to distort the conformity of the Community legal order with the constitutional traditions common to the Member States»⁴⁵.

On the basis of these statements we can incidentally infer that the criterion of the common constitutional traditions is beginning to shift from its own territory of an interpretative canon, rooted in the different expressions of the member states' constitutional orders, to a sort of

argued that the EU legislation is in breach of a series of constitutional principles, amongst which that of equality. The Council of State refused to check the legality of the EU emissions law under the French constitution, referring the case to the European Court of Justice (ECJ). As a matter of fact such request – the repeal of the French provision – is tantamount to a decision on the legality of the directive.

⁴⁴ Assemblée du contentieux sur le rapport de la 6^{ème} sous-section, Séance du 26 janvier 2007, Lecture du 8 février 2007, N°287110, *Societe Arcelor Atlantique et Lorraine et autres*, in www.conseil-etat.fr. The judgement examines the legal integration existing between the Member State and the European Union starting from a particularly interesting point of view: the possible contrast of national constitutional principles with a directive on one side, and the requirement (also constitutional) of transposition of same, on the other. (See also the judgement of the Conseil Constitutionell no. 2006-540 DC dated 27 July 2006).

⁴⁵ Opinion of Mr Advocate General Poiares Maduro, 21 May 2008, C-127/07, *Societe Arcelor Atlantique*, *supra*.note 42, para. 16.

founding principle of the common values of the European Union. The common constitutional traditions affecting separately and over time the EU legal order are now transformed in a sort of “European tradition” that is reshaping values and rights of EU countries.⁴⁶

Said depiction on the existing relationship between Member States orders and the EC outlined by the ECJ - from an internal perspective of a much wider context - puzzles the reader. The Court describes the relationship between member states and EC order almost as an organic identity during one the heaviest political crisis in European history. But this is only one of the latest expressions of the separation between political and juridical integration, the constitutive features of which had already been identified many years ago.⁴⁷

We have to underline, though, that a really interesting point is thus singled out on this issue. Relevant comparative law scholars already proved in the past that the interaction of different legal orders – through borrowing from one another – did not succeed in creating some coordination and uniformity between legal orders: as a matter of fact, the relationship of these matters with the «conceptual mould forged by history» appears to be too strong, so much so that the borrowing manages to reach only the surface of legal system.⁴⁸ But, if we transfer this observation to the supranational level the context appears to be very different: international law, more generally speaking, acknowledges a much less restrictive influence of the weight of traditions and history. Or better still, borrowing from legal orders appears to be the very structure of this discipline, and different cultures are its common fabric.⁴⁹ Accordingly, once transferred to the supranational level, common constitutional traditions become, necessarily, very different from what we are used to considering them at national level

⁴⁶ BELVISI F., *The “Common Constitutional Traditions” and the Integration of the EU*, *Diritto e Questioni Pubbliche*, 6/2006, p. 32, observes that «the common constitutional traditions have the “virtue of transforming,” or Europeanising the different national concepts of the meaning of fundamental rights. In this way fundamental rights-and-values will be transformed into principles that can and must be developed by the ECJ, going beyond controversy over the true essence of a particular right according to a particular national legal tradition».

⁴⁷ WEILER J.H.H., *Il sistema comunitario europeo: Struttura giuridica e processo politico*, Bologna, Il Mulino, 1985.

⁴⁸ See SACCO R., *L’idée de droit commun par circulation de modèles et par stratification*, in DELMAS-MARTY, MIUR-WATT and RUIZ FABRI, (ed.), *Variations autour d’un droit commun*, Paris, Société de Legislation Comparée, 2002, p. 195.

⁴⁹ See, for more details on this issue, DELMAS-MARTY M., *Ordering pluralism*, op. cit., p. 21.

Anyway, this tangle between the protection of rights and constitutional traditions on a supranational level represents the hallmark of the legal pluralism⁵⁰, which, as recalled in the above-mentioned opinion, characterizes European integration. It is well known that the national Supreme Courts should cooperate in close connection (or dialogue) with the ECJ by means of the preliminary reference in order to steadily deepen it

In the following pages we intend to debate the core of these conclusions, in the light of case-law regarding family matters and of the corresponding dialogue between the Courts.

Once that the criterion regarding the recognition of rights on a supranational level – no longer obtained by the ECJ through a comparison between the internal legal systems (not forgetting the subsequent “adjustments”) but through the application of a direct EC rule justified by Art. 6 TUE⁵¹ – is changed, will the interlocutors of the ECJ (i.e. national courts) be ready to accept the interpretation of the ECJ? In other words: taking for granted common constitutional traditions – as they evolve with the passing of time – could be a risky choice from the point of view of acceptance of EC case law in the national environments. At the same time, more importantly, this inquiry could allow us to perceive the degree of pluralism actually existing in Europe.

⁵⁰ The literature on this topic is rather immense: if you want to have a recent and in-depth overview of the problems at stake look at ICON monographic issue, Volume 6, Issue 3-4 July-October, 2008, on the symposium “*Constitutionalism in an era of globalization and privatization*”. More specifically on the EU legal pluralism one can read, for example, N WALKER, *Sovereignty and Differentiated Integration in the European Union*, in BANKOWSKI and SCOTT (eds), *The European Union and its Order: The Legal Theory of European Integration*, Blackwell, Oxford 1999, p. 32 ff., M P MADURO, *Contrapunctual Law: Europe’s Constitutional Pluralism in Action*, in N WALKER (ed), *Sovereignty in Transition*, Hart, Oxford 2003, N MACCORMICK, *Juridical Pluralism and the Risk of Constitutional Conflict*, in N MACCORMICK, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, OUP, Oxford, New York 1999), p. 97 ff.

⁵¹ From, another perspective we could describe the passage as follows: «whereas initially it was the member States’ courts which had to force the Court of Justice to adopt a fundamental rights standard at all, and more precisely a standard such as they applied in their national constitutional system, now the tables have turned. The member State authorities are supposed to respect, and member States courts are supposed to apply, a standard as determined and developed by the Court of Justice» (L. BESSELINK and J. H. REESTMAN *The relative Autonomy of the EU Human Rights Standard*, Eur. Const. L. R., 2008, p. 200).

2. *Common constitutional tradition and the definition of marriage*

Before going into the merits of the question regarding this new transformation (or even disappearance) of the standard common constitutional tradition in current family law jurisprudence, its previous application within the few cases regarding, in a more or less direct way, the definition of marriage, singleness, widowhood, and other forms of civil (marital) status must be outlined. Since it is a very well-known case-law, it will be briefly recalled whilst focusing on the heart of the matter. We are fully aware that, as mentioned above, it is useful to keep side-effects resulting from cross-border family issues in mind as well. Nevertheless, our research is better served by a direct inquiry on the essential issue of the definition of marriage. This issue obviously falls within the domestic exclusive competence of EU member states. The *fil rouge* of this complex analysis – certainly involving many other relevant issues – is mainly the weight of the common constitutional tradition criterion on the reasoning of the judgments.

The first case that the Court addressed on this topic is *Reed* (1986). The Luxembourg judge had to address the delicate issue regarding the meaning of “spouse” according to Regulation 1612/68⁵². The main question raised in the case is whether a partner with a stable relationship with a person can be considered as spouse for the purpose of a residence permit ex art. 10 of the regulation.

The referring Court was actually asking for a dynamic interpretation of the provision at stake that could take into account the modern developments of family life. Advocate General Lenz, denying this possibility, reminds that the term spouse has a specific meaning in Community Law. More importantly, the latter is the starting point to interpret the provision, not a single member state’s legal point of view.

The argument against such a broad interpretation of art. 10 is given further support by the fact that companions can certainly not be treated in the same way as spouses in all

⁵² Judgment of the Court, 17 April 1986, Case 59/85, *State of the Netherlands v Ann Florence Reed*: Mr Reed was the unmarried partner of a UK national working in The Netherlands who asked for a residence permit on the basis of family rights provided for by the aforementioned regulation. The request was refused by the public authorities, since art 10 of the regulation 1612/68 refers only to spouses and dependents as categories of family members.

Member States in view of the fact that their cultural, social and ethical traditions vary widely in some respects. If the term in community law were nevertheless interpreted as broadly as the respondent suggests the result could be indirect discrimination against nationals of the countries whose laws do not permit them to bring foreign companions to live with them⁵³

Even if we would be tempted to be attracted first and foremost by the initial part of this statement, the last part would become - over time - ground for the reasoning of this particular case law. Thus, the ECJ supported the refusal of a dynamic reading of the term “spouse” – on the basis of the absence of developments in social and legal conception visible in the whole community, and connected to this, the absence of any consensus that unmarried companions should be treated as spouses⁵⁴ – and eventually applied the reasoning implied in the Advocate’s general statement, in the classical reading of the discrimination according to nationality. If a member state allows the unmarried partner of its nationals (also if the latter are not nationals) to obtain the residence permit, the same advantage has to be granted to migrant workers (para. 50).

A similar question, in a different context and many years later, is present in *Grant* (1997). Reading the judgment, we can perceive that time has passed and that the question at stake has not found an easy answer yet. In this case, Lisa Grant applied for a family benefit provided for in her work contract. The request was denied on the grounds that her partner was not of the opposite sex. According to the company regulation, the term ‘spouse’ in this context is referred either to a married partner or to a “common-law opposite sex spouse” with whom the employee has a meaningful relationship. Ms. Grant claimed that this refusal was not consistent with Community law, namely with art. 119 of the Treaty and the Equal Pay Directive. This claim is undoubtedly

⁵³ Opinion of Mr Advocate General Lenz, 19 February 1986, Case 59/85, *State of The Netherlands v Ann Florence Reed*, ECR, 1986, p. 1294. The statement regarding the powers of a Court is not less interesting: «serious doubts arise in the matter of legal certainty. As the legal situation shows, if companions are to be treated in the same way as spouses it is imperative to lay down limits, criteria and conditions (...). These are matters for the legislature, and can hardly be determined by the Court of justice in the course of interpretation of a regulation intended to cover other cases.»

⁵⁴ Judgment of the Court, *Reed*, para 10 – 15. The reference to a consensus among the Member States recalls first the reasoning of the ECtHR (where the recognition of a strong consensus reduces the margin of appreciation left to the Member States and, on the contrary, a weak consensus allows the States to make use of a wider margin of appreciation) and second, in a more general way, the classical terms of the debate regarding democracy in Europe.

directed to hit a possible sexual orientation discrimination – in simpler terms, the case essentially regards the definition of sexual discrimination – but the key point for our research is whether this possible discrimination could find a cause of justification on the ground that same-sex relationships are not generally considered as equivalent to marriage in the European Union territory.

The Advocate’s general reasoning, according to which judges should follow an objective criterion in order to single out a sexual discrimination should be recalled to better understand the case:

It is important to bear in mind that, in examining whether there is gender discrimination, a purely objective assessment must be made. (...) The Court has thus confirmed that the Treaty cannot be interpreted on the basis of the moral conceptions of a Member State⁵⁵

Indeed, everyone agrees with the profound meaning of this observation, still a *nuance* of this statement might be misunderstood: the interpretation of an EC provision has to be carried out through an objective analysis, but if it encroaches upon other fields belonging to domestic competences (and state’s choices) – in a transversal way - the issue appears to be more problematic than it appeared at a first reading. The Advocate General is aware of this problem when he adds that in any case, if a choice has to be made at EU level between the different views of morality held in the member States, this is not a task for the judge but for the legislature.⁵⁶

The ECJ decided not to follow the argumentative path of the Advocate General (according to which this is a case of discrimination not consistent with EC law) and to focus the reasoning on the fact that same-sex couples are not to-date recognized in the majority of the

⁵⁵ Opinion of Advocate General Elmer, 30 September 1997, C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd*, para 17. On this issue see also Advocate General Van Gerven, 11 June 1991, case 159/90, *Society for the Protection of Unborn Children (Ireland) Ltd (SPUC) v Grogan*, *passim*.

⁵⁶ *Id.*, para. 41.

member States on an equal footing of heterosexual couples.⁵⁷ Therefore, given that neither in the great number of Member States nor at international level (since the Court finds support in the ECtHR case-law and takes into account various international treaties as well) an obligation to treat homosexual and heterosexual couples in the same way exists, the judge states that we cannot infer that obligation from the Community level. Considering the above, «it is for the legislature alone to adopt, if appropriate, measures which may affect that position»⁵⁸.

Even if the result is, broadly speaking, in line with *Reed*, the ECJ takes a decisive step, unveiling a delicate issue on the object of the judgment: according to the ECJ judges this is not sex-discrimination but the matter falls within the more sensitive issue of the treatment reserved to homosexuals and should be evaluated as such.

This statement has been fiercely criticized: first and foremost because it appears at odds with a previous case regarding transsexual rights (*P v S.*, 1995) in which the Court decided that a dismissal of a transsexual on the ground of a sex change operation was contrary to the Equal Treatment Directive.⁵⁹ In this case a courageous step toward a dynamic reading of the transsexual rights either from the part of the Advocate General and from the part of the ECJ was undertaken, since the directive did not expressly take into consideration transsexuals. The reasoning of the Advocate General Tesauro is entirely and solidly grounded on the recognition of the changes occurred in these last years in the different legal systems of the Member States. Tesauro not only explains the details of the Member States legislations on this issue, but also considers the affirmative position of the ECtHR with various cases facing this issue at length. As

⁵⁷ Judgment of the Court, 17 February 1998, Case C-249/96, *Lisa Jacqueline Grant v South-West Trains Ltd.*, para. 32: «As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognized in any particular way.»

⁵⁸ *Id.*, para. 35-36.

⁵⁹ Judgment of the Court, 30 April 1996, Case C-13/94. *P v S and Cornwall County Council*: as pointed out by Advocate General Elmer, in *P v S* non discrimination was not confined to victim of one sex but included also discrimination against a person due to his/her gender reassignment. It could be useful to recall that starting from the positive result of this judgment the British lesbian and gay rights lobbies opted for a «strategic litigation approach» in order to short-cut the difficulties present at that time in the political process. See for wider details, BELL M., *Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT*, ELJ, 1999, p. 68.

if it had not been enough, the Advocate General recalls a well known case tackled by the German Constitutional Court in support of the case at stake⁶⁰. Not surprisingly, the Court follows the Advocate's general reasoning.

Reading *P v S* together with the *Grant* decision, we could argue that according to the ECJ there is a higher degree of consensus between EU Member States on the recognition of transsexual rights than on homosexual's ones. And actually one can get the same impression reading the famous case *K.B.* (2004): the Court clearly distinguishes the case of transsexuals and in the judgment it analyzes both the state's member legislation and case-law and ECtHR jurisprudence at length (not to mention the particular condition in which the ECJ is elaborating this reasoning, given that *Goodwin* decision had just been enacted⁶¹) thus recognizing without uncertainty a «common legal tradition» in this issue (since at that time 13 of the 15 countries of the Union acknowledged such right):

From a legal point of view, the desire of transsexuals to marry on the basis of their acquired gender has been addressed both in the legislation and administrative practice of the Member States and in case-law, in particular the case-law of the European Court of Human Rights. Those factors are of the utmost importance for the purpose of the analysis which the Court of Justice must carry out, since a general principle of Community law may be derived from a constitutional tradition common to the countries of the European Union or from guidance given by international treaties concerning the protection of human rights ratified by all the Member States.⁶²

Going into the merits of this well known case is not possible, since it differs from the present ones inasmuch as it does not concern inequality of treatment (in *Grant* case a widower's

⁶⁰ For all these comparative law experiences see Opinion of Advocate General Tesauero, 14 December 1995, Case C-13/94. *P v S and Cornwall County Council*: para 9- 13, and para 21 for the BVerfG decision.

⁶¹ ECtHR, judgment of 11 July 2002, *Goodwin v United Kingdom and I. v United Kingdom*

⁶² Opinion of Advocate General Ruiz-Jarabo Colomer, 10 June 2003, Case C-117/01, *K.B. v The National Health Service Pensions Agency and the Secretary of State for Health*, para. 27. As it has been observed (JONES J., *Common Constitutional Traditions: can the Meaning of Human Dignity guide the European Court of Justice?*, Public Law 2004, Spring, p. 182), the Advocate General also imports principles from the case law of the BVerfG and some general statements of the German Court regarding the need to recognize the adapted sex of an individual even if an express legislation on such matter did not exist at that time.

pension) but a «necessary precondition for the grant of such a pension: namely the capacity to marry». ⁶³ It is clear, though, that even if the case is not directly related to the issue at stake, it is strictly tied to the field of non discrimination based on sex: but we recall it just to emphasize the fact that Court considers the transsexual's case in a different way from the homosexual's one, relying on a different legal recognition of the latter within EU Member States.

Coming back to the statement drawn in *P v S* and recalled in *Grant* – regarding the nature of fundamental right of sexual discrimination, defining it in such broad terms as «...sex itself ought rather to be thought as a *continuum*...it would not be right to continue to treat as unlawful solely acts of discrimination on ground of sex which are referable to men and women in the traditional sense of those terms, while refusing to protect those who are also treated unfavorably precisely because of their sex and/or sexual identity»⁶⁴ – this latter inevitably would lead to apply the same outcome also for the homosexual's rights. Hence perplexity risen by the *Grant* decision.

And thus we face the second critical point, regarding the comparators chosen to review the possible discrimination: if in *P v S* the comparators are very broadly defined, in *Grant* the Court seems to opt for «an unsettled approach to the definition of sex discrimination»⁶⁵, taking into consideration not a comparison between a treatment of a woman who has a female partner with that of a woman with a male partner but rather a comparison between the two more “similar” circumstances, namely a woman and a man each of whom has a same-sex partner. It has been critically observed, that this notion of discrimination is grounded on an «equal misery argument»: if both the categories are treated badly, there is no discrimination. More interestingly,

⁶³ Judgment of the Court, 7 January 2004, Case C-117/01, *K.B. v National Health Service Pensions Agency and Secretary of State for Health*, para. 30. In this line of cases, see also the judgment of the Court, 27 April 2006, Case 423/04, *Sarah Margaret Richards v Secretary of State for Work and Pensions*.

⁶⁴ *Id.*, para. 17: in a more concise way but with a similar strength, see also the ECJ judgement, *supra*, note 64, para. 19-22.

⁶⁵ BAMFORTH N., *Sexual Orientation Discrimination after Grant v. South West Trains*, MLR, 2000, p. 702.

as it has been sharply observed, the comparison test appears not to be an easy task and does not always represent an appropriate tool to understand these cases properly.⁶⁶

But disappointing as it might be, the Court eventually suggests that any substantial change in this field has to be undertaken by legislative measures, thus – relying on the close entry into force of the Amsterdam Treaty – foreseeing the future development of this case-law:

It should be observed, however, that the Treaty of Amsterdam (...) provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (...) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.⁶⁷

On one hand the Court of Justice is accepting a certain degree of discrimination within the Community – based on the absence of a shared position between the various Member States legislations, thus placing considerable weight on their different points of view on this sensitive issue – on the other hand it is also identifying a possible remedy in the new provisions introduced by the Amsterdam Treaty.

In 2001 the Court faced a similar question, but in a further more complex version: the definition of “married employee” was at stake (as it was in *Reed* and later in *Grant*). In this case the Court was not tackling with a de facto same-sex relationship but with a same-sex registered partnership, recognized in its country (Sweden) almost as equivalent to marriage. In this occasion the Luxembourg judge had to review a previous judgment of the Tribunal of First Instance dismissing a claim against the Council’s refusal to grant Mr. D. a “household allowance”. Accordingly, the main question of the case concerned the treatment to reserve to the

⁶⁶ BELL M., *Shifting Conceptions of Sexual Discrimination at the Court of Justice: from P v S to Grant v SWT*, op. cit., p. 66.

⁶⁷ Id., para 48. MCINNES J., *Case C-249/96*, CMLR, 1999, p. 1055, defines this approach of the Court «deferential» and raises doubts about the fact that «consideration of policy should come in the way of legal principles, particularly where individual fundamental rights are at stake». According to the author, we can infer or not the possible role of the ECJ as a Constitutional Court from these positions.

same-sex registered partnership of Mr D., a Council employee, given the fact that the EC's Staff regulation does not provide for it.⁶⁸

The debated issue is read by the Court through an analysis aimed at verifying if we can consider marriage and same-sex registered partnership as similar: this is the first step in order to apply the comparison test. But this examination brings the Court to observe that – even if relevant changes occurred since 1989 in the EU territory and an increasing number of Member States have recognized, alongside marriage, different forms of union between partners of the same sex or of the opposite sex – for the time being the definition of marriage generally accepted by EU Member States is «a union between two persons of the opposite sex» (para. 35). Therefore,

the fact that, in a limited number of Member States, a registered partnership is assimilated, although incompletely, to marriage cannot have the consequence that, by mere interpretation, persons whose legal status is distinct from that of marriage can be covered by the term married official as used in the Staff Regulations.⁶⁹

Needless to say, the argument regarding the discrimination is accordingly dismissed with a few sentences stating that the rule of the EC Staff regulation is gender neutral.

Interestingly enough, according to the Advocate General, the ECJ's research of an autonomous definition of marriage able to respect all Member States is consistent with the need for uniform application of EC law and with the principle of equality that requires an EC rule not to make express reference to the law of the Member States.⁷⁰

The Court also dismisses the claim regarding a possible discrimination based on nationality and the obstacle to the freedom of movement of workers for procedural reasons. But

⁶⁸ According to the EC's Staff regulation, this kind of benefit could be obtained only by married officials, unmarried/widowed/divorced/legally separated officials with dependent children or an official who, while not fulfilling the previous condition nevertheless assumes families responsibilities.

⁶⁹ Judgment of the Court, 31 May 2001, Joined cases C-122/99 P and C-125/99 P, *D and Kingdom of Sweden v Council of the European Union.*, para 39.

⁷⁰ Opinion of Mr Advocate General Mischo, 22 February 2001, Joined cases C-122/99 P and C-125/99 P, *D and Kingdom of Sweden v Council of the European Union*, para. 44. Reading the opinion we can grasp the absolute continuity of this line of cases, starting from *Reed*, passing through *Grant* and reaching *D and Kingdom of Sweden*.

it is relevant for the purpose of the future use of this argument to read the answer given by the Advocate General on this point: in his reading freedom of movement does not mean that in the new social security system a worker is entitled to the same benefit he/she was entitled in the previous one.⁷¹

What can we infer from the reasoning of these cases? First, one can easily detect a marked *fil rouge*, namely a deliberate respect (or deference) towards the member States legislations on this sensitive issue regarding family law. The use of common constitutional tradition resembles the “old way” style – but it has to be noted that the cases were not recent – and it is crucial in order to decide the case. The judges and, above all the Advocates General take the living constitutional traditions within the member states seriously (some scholars could even remark “too” seriously) and they start from that analysis to argue the case, without even trying to venture into the quicksand of the ongoing transformations in this field.

⁷¹ Id., para. 105 and 106, in which it is stated also that if by contrast this kind of plea «seeks to obtain, in the context of the new social security system, the benefits accorded to others within that system, in the present case married officials, the plea is in fact identical to that relating to equal treatment». Critical on this point CANOR I., *Sweden v. Council*, Col. J. Eur. L., 2002, p. 92.

Second part: an intermitting dialogue between courts and the effects of non-discrimination policy

1. Recognizing or reshaping constitutional tradition? The Maruko decision of the ECJ

At a first glance, the *Maruko* decision of the European Court of Justice (April 1, 2008) might seem to be a prevalently technical issue and could be approached as another case within the wide and composite jurisprudence concerning the recognition of benefits linked to the family status of the workers provided by the employer, and especially referring to a possible different treatment of same-sex partners. But things have changed.

A very first reading of this case strikes for the absolute silence on the common constitutional tradition of the member states in this field and for a totally different approach of the reasoning of the European Court of Justice. And actually, some recent legislative EU developments⁷², as well as some following national judgments on the same, issue a warning about *Maruko*'s possible implications: the case appears to be exemplary for our analysis.

What are the reasons underlying this change?

It is not possible to detect all the possible explanations of such an (apparently) different approach. Yet, a decisive element should be taken into consideration while analyzing at large this particular case law: Directive 2000/78 addressing the issue of equal treatment in employment and occupation was enacted. It partly changes the general landscape of this field which has already been object of extensive study. This latter act represents the constitutional turn of this case-law.

This shift was not only anticipated to a certain degree by some previous ECJ judgments referring to a future legislative intervention on this topic in order to better address it, but it is somehow strictly connected to the afore-mentioned transformation in the reading of the common constitutional tradition. As we said, the shift from an interpretative criterion to a constitutive

⁷² See in an exemplary way the resolution of the European Parliament on the status of fundamental rights in the European Union and the proposal of the new directive 2008/0140, that will be addressed in paragraph 4 on recital 22 of the directive 2000/78 EC.

element of a founding principle of the European common value reflects a more general transformation of the debate regarding the protection of fundamental rights in Europe.

In fact, the (problematic) application of the Council Directive 2000/78⁷³ establishing a general framework for equal treatment in employment and occupation unveiled a sneaky transformation in the debate on the protection of fundamental rights in the EU space, as we already mentioned referring to the evolution of the use of the common constitutional tradition canon. Not only the legislature passed an act dealing also with sexual discrimination – making the use of common constitutional traditions apparently pointless⁷⁴ – but this directive also shows a radical change in the multilevel protection of fundamental rights. Such development is no longer dealing with a possible deficit occurring at national or at supranational level rather than with the coexistence of a different interpretation – or a different standard – of the same fundamental right.⁷⁵ And it is no surprise that this phenomenon becomes even more evident with the application of the principle of equality since, in a certain sense, its employment with the aim of developing an authentic integration of Europe in all fields is part of EU's *dna*. Hence the particular sensitivity showed by the supranational institutions in the application of this fundamental principle can be easily explained, although recently the signs of something new⁷⁶ can be perceived: in order to emphasize this special moment, it could be useful to draw attention to the fact that this directive is the first EC law document ruling out discrimination based on

⁷³ Directive 2000/78 EC, of 27 November 2000, OJ L 303, 2 December 2000, p. 16-22.

⁷⁴ We should also bear in mind that the legal traditions on family law are currently undergoing a radical change, thus making the use of this canon less feasible.

⁷⁵ CLASSEN D., *Freiheit und Gleichheit im öffentlichen und im privaten Recht – Unterschiede zwischen europäischen und deutschem Grundrechtsschutz?*, EuR, 2008, 628. According to the author, we should bear in mind that art. 3 GG was written in 1948/1949, while art. 13 EG (antidiscrimination principle) was added in the Amsterdam Treaty (1997). Consequently, the wording and the interpretation of these two provisions are very different.

⁷⁶ ERIKSSON A., *European Court of Justice: Broadening the scope of European nondiscrimination law*, ICON, 2009, p. 752, having analyzed recent cases of the ECJ involving the application of the equality's principle – namely, *Mangold*, *Maruko*, *Feryn* and *Coleman* – observes that now the reasoning of the ECJ includes a «general sociopolitical objective» unknown previously: «the spirit and purpose of European nondiscrimination law, in the Court's interpretation, involves not just the protection of the individual against unfair or detrimental treatment on the basis of particular attributes but also fight against all forms of discrimination within the member states in order to ensure the development of "tolerant societies"», as it is written for example in the recital 12 to the Preamble of the Race Directive.

sexual orientation. More importantly, the *Maruko* case is the first time the ECJ applies it as provided for in the directive.

Looking at this issue from a more general point of view, we cannot but recall the doubts and questions raised in occasion of the approval of the European Charter of Fundamental Rights. As it is well known, the Preamble points out to a very general reference to the common values of the peoples of Europe and the Union's spiritual and moral heritage. The hot issue of combining these European common principles with the diverse national legal traditions was, though, not explicitly addressed in its operating criteria: strangely enough, after 50 years of ECtHR experience with the national margin of appreciation criterion, the EU decided to deal with this topic not providing for any plain criterion for the unsolved dilemma of two different levels of protection of the same fundamental right but a very general rule about competences.

The question became sharper once that the Treaty of Lisbon entered into force on the first of December 2009 and the Charter of Fundamental Rights became legally binding: in the new Treaty – while reaffirming in a high-sounding way that «the provisions of the Charter shall not extend in any way the competences of the Union» (art. 6, c. 2), thus recalling the wording of art. 51 of the Charter⁷⁷ - it is not clearly explained how the Charter has to be interpreted or applied when conflicts arise from the interpretation of a certain fundamental right provided for in the national order and in the European Charter and how it is possible to harmonize the national legal traditions and in the same time respect pluralism in Europe.⁷⁸ Lacking this operating criterion, the key point becomes in a remarkable way the dialogue between national and supranational Court: as it is more generally observed, dialogue, though, «does not provide a solution in case of conflict and each judge decides on a case by case basis. Interpretation is therefore of utmost

⁷⁷ Art. 51, c.2, of the Charter of Fundamental Rights affirms that: «The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.»

⁷⁸ Laconically art. 52, c. 4, of the Charter of Fundamental Rights states: «In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.»

importance»,⁷⁹ as we will see in the analysis of this case and the dialogue intercourse between the German Constitutional Court and the ECJ.

Actually, the real confirmation provided by the Lisbon Treaty thanks to the new formulation of art. 6 TUE is the primary role accorded to the ECJ in the protection of fundamental rights. And even if this has to be confined in the realm of EU law, the competence of the Luxembourg Court, together with the ECtHR and the domestic constitutional courts is now fully recognized.⁸⁰

This is a sort of premise to introduce the reading of the case.

The *Maruko* case is concerned with the possible recognition in Germany of an entitlement to survivor benefits by a homosexual partner who had established a registered same-sex life partnership with the deceased, pursuant to art. 1 of the German life-partnership law, (LPartG). The request had been rejected by the German pension institution because these benefits were reserved by law only to “widowers”. Mr. Maruko thus decided to appeal to the *Bayrisches Verwaltungsgericht* asking it to interpret the term “widower” in broader terms, since the new legislation on registered same-sex life partnership placed by and large partnership and marriage on equal footing: therefore, according to Mr. Maruko, to limit survivor benefits only to spouses would constitute indirect discrimination against homosexual couples united by a registered life partnership.

To unravel the heart of the controversy, the first question the European judge has to face is whether directive 2000/78 on equal treatment in employment and occupation applies to the case at stake: more specifically, the Court has to ascertain whether the pension scheme involved

⁷⁹ On this thorny issue, see DELMAS-MARTY M., *Ordering Pluralism*, op.cit., p. 23.

⁸⁰ Interestingly, two recent decisions of the Italian constitutional court approached the issue of these coexisting different levels of protection of fundamental rights. Even if the judgement of the It. Const. Court 311/09 and 317/09 deals more precisely with the ECHR system, the considerations there expressed are by and large relevant also for the protection of fundamental rights accorded by the ECJ. The first point to stress is that these complex interactions bring about an expansion of the protection (see judgement 317/09, para 7, where it states that «il confronto tra tutela convenzionale e tutela costituzionale dei diritti fondamentali deve essere effettuato mirando alla massima espansione delle garanzie, anche attraverso lo sviluppo delle potenzialità insite nelle norme costituzionali che hanno ad oggetto i medesimi diritti»). Furthermore, the Italian constitutional judge observes that the domestic Court cannot substitute the supranational Court in the interpretation of its provision: still «può valutare come ed in quale misura il prodotto dell'interpretazione della Corte europea si inserisca nell'ordinamento costituzionale italiano» (id., para 7)

can be qualified as equivalent to a state social security scheme, as intended by the directive and whether the widower's pension could be defined as pay. Once these first preconditions are satisfied, the judge can focus on the delicate issue involved in this case, namely the possible discrimination between legally married couples and couples united by a registered same-sex life partnership, and the equally delicate matter on the exclusive member state competence on matters of marital status.

Letting aside, for the moment, this latter thorny problem, the interesting point of the sentence is the judge's decision to consider the case not as one of indirect discrimination – as suggested by the plaintiff, the Commission and even the Advocate General – but as direct discrimination.

The distinction is decisive.

If there were indirect discrimination – as the Advocate General had claimed⁸¹ – the decision would rest on the assumption that a condition of entitlement such as the state of widowhood to enjoy survivor's benefits discriminates homosexual individuals, as they are not allowed, by law, to marry. And this seemed to be the choice most readily feasible, also on the strength of the precedents in case law.

The ECJ judge, however, decided to take a different road, relying heavily on the observations made by the referring Court (*Bayerisches Verwaltungsgericht*). According to the latter, thanks also to the latest legislative amendments (*Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, 15.12.2004), registered life partnership have gradually gained equivalent consideration with the institution of marriage, so that the two institutions – even though they cannot be defined as identical – enjoy the same position with regard to the benefits due to survivors. It follows that refusal of the pension constitutes direct discrimination (para. 68-72).

This choice of the Court is much more significant, because it places the two institutions on equal footing, while in case of indirect discrimination the categories are still differentiated

⁸¹ See Opinion of Advocate General, Ruiz-Jarabo Colomer, 6 September 2007, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, para. 96-104.

(and, therefore, cannot be compared directly): we could lament, though, that the grounds underlying this choice are not appropriately explained in this concise reasoning.

The shift of the ECJ has been defined by the German doctrine as path-breaking,⁸² above all considering the previous position of the majority of legal scholars as well the constant case law in this Member State. Furthermore, the Luxembourg Court's choice for the direct discrimination could prevent Germany from relying on its traditional justification in order to legitimize the different treatment between married couples and partners, based on the special protection accorded to marriage by the German basic law: direct discrimination can be warranted only on the basis of the justification grounds expressly provided for under directive 2000/78, and this latter is not included.⁸³

Certainly, to understand the reasons for that decision, it is necessary to consider – as we already mentioned – that this is the first time in which the Court of Justice applies directive 2000/78 in ruling a case. Moreover, the same directive contains a legal definition of direct and indirect discrimination in art. 2, c. 2, *a* and *b*. Opting for direct discrimination the Court seems to move away from a narrow definition (both formal and substantial direct discrimination) in order to admit a wider approach based on a provision that could also be considered formally neutral but *de facto* has the same effects of a provision directly discriminating.⁸⁴

⁸² LEMBKE M., *Sind an die Ehe anknüpfende Leistungen des Arbeitgebers auch an Lebenspartners zu gewähren?*, NJW, 2008, 1632- 1633: the author explains in the details the general previous reading of this kind of discrimination as indirect, considering the fact that according to the German judge the two comparable situations have to be identified as the married couples and the unmarried ones (and within this last category judges have then to verify if the homosexual couples are the majority of the comparable group). The ECJ, in a very simple way, changes this approach: «Er stellt die Frage, ob Ehegatten mit eingetragenen Lebenspartner vergleichbar sind, und bejaht sie implizit».

⁸³ ERIKSSON A., *European Court of Justice: Broadening the scope of European nondiscrimination law*, op. cit., p. 744. The a. supposes that there are two likely reasons for this conclusion: the first one is to «render a decision that was “true-to-life”» and the second one could be considered the effects of this option, namely the absence of room for state justification (p. 743).

⁸⁴ For more details on this point, see TOBLER C. e WAALDIJK K., *Comment to Case C-267/06*, in CMLR, 2009, p. 735-741: they especially underline this new drift in the interpretation of discriminations according to which «direct discrimination now also includes cases where reliance on a formally neutral criterion in fact only effects one protected group, be it by nature or because of a rule that has the force of law. In contrast, indirect discrimination relates to cases where an apparently neutral criterion has an effect that is less far-reaching but still reaches the required level of disparate impact or particular disadvantage.» (p. 740)

The relevant impact of this case appears slightly shaded by the fact that the decision upon the merits whether to align the two institutions or not is left in the hands of the national judge – who, in the specific case at hand, had already expressed himself in this sense in his reference for an ECJ preliminary ruling. Given that the Court points out very clearly the position of the referring Court, we could be tempted to assume that the Court is already «anticipating» the solution of the case at national level.⁸⁵ Or at least, the ECJ is giving a delicate boost to the likely interpretation of the referring national Court, an interpretation that is not consistent with the previous German case law.

The outcome of this kind of reasoning is in any case ambiguous, given that, after all, the object of the comparison is ambiguous.

Some scholars identified it in very broad terms, implying a comparison between the two institutions based on the family status in general and on every duty and benefit linked to it⁸⁶: this approach could be problematic considering the German legal system, as we will see. Some others, on the contrary, stressed the fact that the comparison is not abstract or general but strictly confined to the pension system:⁸⁷ it is not marriage *per se* (as an institution reserved by the German system to heterosexual couples) in question, but more simply a benefit linked to this institution. This ambiguity is the source of the ongoing *querelle allemande*, a pretty classical clash between the German highest Courts and the ECJ.

On one side, we could be tempted to consider this sending back the question to the national judge as an «elegant example of judicial subsidiarity»⁸⁸, even if this statement is in a

⁸⁵ BELL M., *Equal access to workplace benefits for same-sex couples: reflections on the Maruko case*, European Anti-Discrimination Law Review, 2009, p. 13.

⁸⁶ From this point of view, the outcome of the judgment has been considered as «unzutreffend», because whether the couple is homosexual or heterosexual becomes for the ECJ irrelevant (see LEMBKE M., *Sind an die Ehe anknüpfende Leistungen des Arbeitgebers auch an Lebenspartners zu gewähren?*, op. cit., p. 1633).

⁸⁷ For all see BRUNS M., *Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung*, NJW, 2008, p. 1931: «Entscheidend ist nicht die generelle Vergleichbarkeit von Ehe und Lebenspartnerschaft, sondern ob sich Ehegatten und Lebenspartner in Bezug auf das streitige Arbeitsentgelt in einer vergleichbaren Situation befinden».

⁸⁸ TOGGENBURG G. N., *LGBT go to Luxembourg: on the stance of Lesbian, Gay and Transgender Rights before the European Court of Justice*, ELR 5/2008, p. 182. The author strongly criticizes this choice of the Court and suggests, on the contrary, that «judicial subsidiarity can be granted in a second moment, namely when discussing whether or

certain sense unavoidable (or obvious), for the comparability of marriage and life partners are Member States' competence. The strong decision on direct discrimination is therefore balanced by the recognition of the domestic jurisdiction on this matter. We can also easily imagine different faces of the EU directive's application depending on the member State's position on this legal issue. It has critically been advanced that this solution «could also turn out to be a slap in the face of any *effet utile* reasoning so commonly used by the Court of Justice».⁸⁹ In a more moderate view, we can also consider the hypothesis that in this way the national legislator could feel compelled to rule on this issue in order to clarify these conflicting views raised by the ECJ.⁹⁰ And actually, as we will see, although not first and foremost only in a legislative way, this happened.

On the other hand, we cannot consider the court as a “third party” in this case, since applicability of the directive depends on this decision. Therefore there is a clear interest in the outcomes of the ECJ's judgment⁹¹: this judgment has been properly read as another sign of the stronger and stronger influence of EU system over domestic ones.

But there is an alternative way – in part related with the thesis of judicial subsidiarity - that appears to be more consistent with the previous ECJ jurisprudence to read this fact: we can indubitably speculate that the comparability test will bring very different outcomes considering

not an identified discrimination is justified by a legitimate aid.» Even more strongly, read KOCHENOV D., *Options of Citizen and Moral Choices of States: Gays and European Federalism*, Ford. Intl. L. J., 2009, p. ...

⁸⁹ Id., p. 182.

⁹⁰ This is the relevance of the case from a «rechtspolitische» point of view according to BRINKTRINE R., *Anmerkung*, JZ, 15/16, 2008, p. 792: the ECJ judgment «öffnet gleichzeitig dem nationalem Gesetzgeber die Räume, durch Änderungen der Rechte und Pflichten der verschiedene Familienstände diese so anzunähern, daß die Frage der Vergleichbarkeit sich in Zukunft gleichsam von selbst beantwortet.»

⁹¹ It is important to recall that in the period following the enactment of the abovementioned directive and before the Maruko judgment, the highest Courts in Germany recognized in several similar cases of different treatment between homosexual couples and heterosexual ones the existence of non discrimination and did not apply the directive mostly on the ground that this European act does not affect the personal status. See BVerfG, 6. 5. 2008 – 2BvR 1830/06, NJW 32/2008, p. 2325, BVerfG, 20. 9. 2007 – 2 BvR 855/06, NJW, 4/2008, p. 209 and BVerwG, 26.1.2006 - 2 C 43/04 (VG Mannheim), NJW, 25/2006, p. 1828, BVerwG, 25. 7. 2007 – 6 C 27/06 (VG Koblenz), NJW, 4/2008, p. 246. Accordingly, FASTENRATH U., *BVerfG verweigert willkürlich die Kooperation mit dem EuGH*, NJW, 2009, p. 275, points out that this German case law patently controverts the doctrine of judicial cooperation established long ago with the Maastricht Urteil and in the long run this could give grounds for a claim in front of the ECtHR for a violation of the principle of the fair process (art. 6 ECHR): «das BVerfG sollte einer Straßburger Korrektur seiner Rechtsprechung zuvorkommen» (Id., p. 276).

the specific and (slightly or not) different legal situation in each Member State.⁹² In other words, we can imagine a different application - from State to State - of the principles established in the directive. Even if the majority of scholars read this fact as a regretful lack of uniformity, we could also consider it as intended by the ECJ. After all, as it has been observed commenting another famous cases involving the protection of fundamental rights in Germany (*Omega*⁹³), the ECJ already admitted that it is not necessary that all the Member States apply the same standard for the protection of fundamental rights, accordingly allowing the German state to apply a stricter standard: «it can be hoped that this sensitivity for the variety of national standards remains».⁹⁴

Be as it may, seen through a long run perspective, one could have the impression that the Luxembourg judge is kindly trying to force the national colleagues to express their opinions and rule accordingly. Where, it will be noted, the word “colleagues” leaves room for a very wide range of judges, at all levels.

2. The German constitutional Court under pressure: fine-tuning the comparability test

We ended the analysis of *Maruko*'s case observing that with this judgment the ECJ was undertaking a sort of forced dialogue with its national counterparts. This latter question is the watershed in order to understand the delicacy of the case at stake, and illustrates, in a so-called sensitive matter, the fragile balance existing between the national and supranational legal traditions.

Indeed, just few days after the Advocate General Colomer published his opinion on the *Maruko* case, the BVerfG had to decide whether subsidies to the family (s. c. *Familienzuschläge*

⁹² For an overview of the different problems arising from the comparability test in the different countries see BELL M., *Equal access to workplace benefits for same-sex couples: reflections on the Maruko case*, op. cit., p. 14-15.

⁹³ Judgment of the ECJ, 14 October 2004, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*. See, for instance, para. 37: «It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.»

⁹⁴ Editorial, LB/JHR, *The relative autonomy of the EU human rights standards*, Eur. Const. L. R., 2008, p. 204.

der Stufe 1) were consistent with the equality principle of the German Basic Law: the Second Senat of the BVerfG - reading art. 3 (principle of equality) connected with art. 6 (protection of the family) of the *Grundgesetz* – confirmed the constant domestic case law differentiating family from partnership and accordingly did not recognize a violation of the equality principle.⁹⁵ The reason for that distinction is identified by the German constitutional judge in the special protection afforded to the family by the German constitution, according to which «marriage and the family shall enjoy the special protection of the State».

The determination that there would not be a discrimination of gender derives from this assumption, since what is required, is simply a combination of genders as the condition of a marriage and consequent formation of a family, regardless of their sexual orientation⁹⁶. In this way, the principle of equality has to be read through the glasses of the special protection of family ex art. 6 GG, and the combination of these constitutional principle justifies the difference of treatment of the two types of cases. Therefore, as already established in the famous case addressing the constitutionality of the *Lebenspartnerschaftsgesetz* (*LpartG* – Registered Lifetime Partnership Act for Homosexual Relationships⁹⁷), the Karlsruhe Tribunal ruled that the point is not the homosexuality or heterosexuality, but the combination of genders, as the fundamental constituent of the family.⁹⁸ And, actually, the fear of a possible Constitutional Court ruling against the LPartG because of the special protection accorded to marriage ex art. 6 GG

⁹⁵ BVerfG, 20 settembre 2007, 2 BvR 855/06.

⁹⁶ The constitutional judges clearly remarked that the discrimination according to sexual orientation has been explicitly dismissed during the Constituent Assembly debate, thus referring to the so-called original intent understanding the provision and accordingly avoiding to take into account this point. Even if the article is gender-neutral and despite the fact that the BVerfG has a long history of expansive interpretation of freedoms, marriage in Germany has always been accepted as a hetero-normative institution and, therefore, banned to same-sex couples.

⁹⁷ *Lebenspartnerschaftsgesetz* (Life Partnership Law) of February 16, 2001, published in the Bundesgesetzblatt of February 22, 2001, pt. I, no. 9 and entered into effect in August First, 2001.

⁹⁸ BVerfG, July 17, 2002, 1 BvF 1/01, 1 BvF 2/01, in NJW 2002, p. 2543. As J. JONES, *The prospect of legal recognition of same-sex marriage in Germany*, Eq. Opp. Int.l, 3/2009, p. 222, points out that the presence of children slightly changes the scenario, since children cannot choose the form of relationship of their parents and - still - they need equal protection: « the legal concept of the „family“ therefore has been more malleable, expanding to encompass other forms of living together. However, despite often being conflated, the concept of the „family“ is distinct from the „marriage“». Interestingly, the recent claim (lately dismissed) of the Bavarian government against the law reviewing the LPartG (Gesetz zur Überarbeitung des Lebenspartnerschaftsrecht - LpartUbarbG) followed the same reasoning: see BVerfG, July 31, 2009, 1BvF 3/05.

was at the origin of the governmental choice to opt for a bill modeled neither on the form of marriage for homosexual couples, nor on the form of an institution open to both heterosexual and homosexual couples.⁹⁹

The special protection accorded by the German Basic law was thus respected, since according to the BVerfG, the new act on life-time partnership was simply not dealing with marriage, but with homosexual couples: accordingly, the constitutional judge restated once again that «marriage, then, is the union of a man with a woman in a permanent life partnership, based on their free decision, with the assistance of the state».¹⁰⁰

This background provided for by the German Constitutional Court has been constantly confirmed in the lower court cases that we will not discuss presently. Such background enables us, *a contrariis*, to perceive the absolute novelty of the *Maruko* decision: and, as already mentioned, the judges sitting in Luxembourg were certainly well aware of this general stand of the German case law when they decided the case.¹⁰¹

A further breaking point of the 2007 constitutional decision, strictly related to this issue, is the claim of the obligation – ex art. 101 GG – to refer the case to the ECJ while, on the

⁹⁹ If this was the first obstacle the bill encountered in the path of the approval procedure, the second one is even more interesting: since the government doubted about the approval of the bill in the upper Chamber (Bundesrat), it split the proposal in two different bills. The first part created this new institution, granting it a certain number of rights as the adoption of a common name, the right of maintenance or the right of reunification (and this was the law approved in 2000, LPartG). On the contrary, the second part – that included many financial and tax benefits for the homosexual couples – did not get the necessary votes to be approved in the Bundesrat: «as a result, the LpartG was a much less comprehensive law than many same-sex union schemes adopted in other countries» (K. KOLLMAN, *European institutions, transnational networks and national same-sex union policy: when soft law hits harder*, Contemporary Politics, 2009, p. 46, to be referred to for further details regarding the approval of LPartG)

¹⁰⁰ More details in MILLER R. & RÖBEN V., *Constitutional Court Upholds Lifetime Partnership Act*, Geman L. J., 8/2002. After this judgment the Government decided to present again the second part of the law with greater financial and tax benefits not yet adopted. It was eventually approved in 2004 (*Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts*, 15. 12. 2004, Bundesgesetzblatt Jahrgang 2004 Teil I Nr. 69, p. 3396).

¹⁰¹ See for example BVerwG, July 25, 2007, NJW 2008, p. 246. See also BVerwG, November, 15, 2007, NJW, 2008, p. 869: in this case we can notice once more that, even if the *Maruko* opinion was well known to the German Administrative Court, the latter decided not to wait for the ECJ judgment and hurried up to deny a general comparability of marriage and lifetime partnership. For a concise depiction of these jurisprudence in comparison with the ECJ judgment see CLASSEN C. D., *Anmerkung*, JZ, 15/16, 2008, p. 794: by and large the author, taking into consideration also the issue regarding the possible violation of the obligation to refer the case to the ECJ (see next footnote), ironically observes that the BVerfG's position appears to be «untauglich, um im Sinne eines echten "Kooperationsverhältnisses" Konflikte mit dem EuGH zu vermeiden» (p. 796).

contrary, the BVerwG omitted to do it¹⁰². The constitutional Court found that the BVerwG did not violate art. 101 GG, since there was a consistent ECJ case law justifying the different treatment of married couples and life partners concerning some employment benefits.

The same story recurs again a month after the Court of Justice delivered the *Maruko* decision, since the *Bundesverfassungsgericht* replied without mincing words to that judgment.

A small digression on this issue: we could raise doubts that the timing of these judgments is accidental. The content of the judgments provides evidence of the urgency felt by the constitutional judges to guide the ordinary judges in the future interpretation of similar cases.¹⁰³ In other words, it seems aimed at mitigating the severe ECJ assessment regarding the direct discrimination of married couples and lifetime partners.

The Second Senat of the BVerfG in 2008 answered back to the European judges - and to the inferior German Courts? - that both the German constitutional principles and the European legislation admitted a different treatment in additional salary (namely, a family subsidy) for a married couple and a couple united by a lifetime partnership.¹⁰⁴ The judges relied on its previous judgment of 2007 in order not to enter into the merits of the case, regardless of the fact that in the meantime the *Maruko* decision was issued by the ECJ. They specified that *Maruko* decision dealt with a different claim (a survivor's pension) and not with the claim at stake in this case (a

¹⁰² The issue regarding the possible application of Directive 2000/78 to the subsidies for the family (*Familienzuschlag*): was at stake: see BVerwG, January 1, 2006 (2 C 43.04) in NJW, 2006, p. 1828. Relying on recital 22 of the directive – which excludes the national competence on family law from the sphere of application of the directive– the administrative judge decided not to refer the case to the ECJ. Both the judgments of the BVerfG and BVerwG have been analyzed in-depth in the literature on this issue: «Es kann daher nicht verwundern, dass die Entscheidung des EuGH über die Vorlage des VG München mit besonderem Spannung erwartet worden ist». (BRINKTRINE R., *Anmerkung*, op. cit, p. 790).

¹⁰³ MÖSCHEL M., *Germany's Life Partnerships: Separate and Unequal ?*, Col. J. Eur. L., 2009, p. 58, makes reference to a sort of «strategic thinking» of the Karlsruhe Court.

¹⁰⁴ BVerfG, May 6, 2008, 2 BvR, 1830/06. THÜSING G., *Europarecht aus Karlsruhe – Nicht jede Benachteiligung diskriminiert*, NJW, Editorial, 25/2008, in <http://rsw.beck.de>, pinpoints that: «Fanfarenstöße, der EUGH habe hier die Gleichstellung erzwungen, waren verfrüt. Denn über die Frage der Rechtfertigung einer mittelbaren Diskriminierung entscheidet eben das nationale Gericht, nicht der EUGH». Some months later also the Federal Administrative Court (Bundesverwaltungsgericht, 2 C 33.06, 15.11.2007), rejected the comparability of marriage and partnership since there are still meaningful differences – regarding, for example, social benefits for civil servants, in tax legislation and joint adoption – and the intention of the legislator was not aimed at fulfilling a general equalization between them.

family's subsidy). Nonetheless, they felt the need to specify that partnership and marriage are not in a comparable situation – and this was exactly the question raised by the ECJ judges in *Maruko*, sending back the case to the referring judge for the decision – and therefore we do not face a direct discrimination in the case of the grant of a family subsidy. The tone of the reasoning is resounding, beginning with the clear statement that according to German law there is no general obligation to treat life partnership and marriage on the same footing: the legislation clearly opted for a separation of legal regimes, establishing two different institutions and only for some aspects – indeed, an increasing number of aspects, above all after the modification of LPartG – married couples and life partners are ruled through a common framework, but in any case not for the issue at stake.

This kind of reasoning could appear striking if we read the referral order of the Bavarian Court to the ECJ for the *Maruko* case: in that specific occasion the German judge, considering the progressive trend towards a sort of equalization of the two institutions, was ready to recognize a comparable situation *de iure* and *de facto* of partnership and marriage.

As in the previous constitutional court's decision, the judge's reasoning is directed to two different, but strictly related, questions: besides the analysis of the discrimination principle, the Court has to face the claim about the respect of the lawful judge (art. 101 GG) and the lack of referring the question at stake to the ECJ. Once again, the constitutional judge justified it on the strength of the Community case law *D and the Kingdom of Sweden vs. the UE Council*, that had rejected a similar request to the matter pending before the German judge, on the grounds of the marital requisite as a precondition for the benefit. The substantial uniformity of positions of the two courts (ECJ and BVerwG) justified, therefore, to the eyes of the German constitutional court, the decision not to refer the case to the colleague sitting in the Luxemburg's bench.

Having thus clarified this framework, how was the *Maruko* case decided by the referring Court in the end?

The Verwaltungsgericht of Munich awarded a survivors pension to Mr. Maruko, since it found out that surviving partners and surviving married partners are in a comparable situation compared to survivor's benefits. The judge recognized that survivors benefits are substitutes for

alimony and alimony duties are the same in marriage and life partnership according to German civil law: the judge expressly took distance from the BVerfG decision, but he grounded its position on the fact that alimony is different from family subsidies¹⁰⁵. And in the following months a similar position recurred in other cases decided by other ordinary judges¹⁰⁶.

The point is relevant because it shows two different ways of considering the question raised by the case at stake: by and large, the superior German Courts (BVerwG and BVerfG) decided to approach it in general terms, namely considering the comparability of the two institutions from a marital status point of view. On the contrary, the referring Court and the ECJ considered the case from a very specific and material point of view: they just looked at the pension legislation and compared the two institutions with respect to this aspect. This approach is «*sachgerecht*»¹⁰⁷, concrete, *de facto*: the key point becomes not a general comparability between marriage and lifetime partnership but – more simply – an analysis regarding a norm warranting a kind of pension and two possible subjects entitled (or not) to claim it.

But time passes and the BVerfG tunes up its position: the decision of the First Senate of the Bundesverfassungsgericht (July, 7, 2009), represents the apex of this complex saga.¹⁰⁸

¹⁰⁵ VG München, Urt. v. 30.10.2008 – M 12 K 08.1484 (Rs. Maruko – Hinterbliebenenversorgung der Versorgungsanstalt der deutschen Bühnen), para. 27.

¹⁰⁶ See, for example, BAG, Urt. v. 14.1.2009 – 3 AZR 20/07; AG Karlsruhe, Urt. v. 5.5.2009 – 2 C 16/09 (Hinterbliebenenversorgung der Versorgungsanstalt des Bundes und der Länder – VBL); VG Berlin, Urt. v. 6.5.2009 – 5 A 99.08 (Hinterbliebenenpension). By and large, before the decision of the BVerfG (7 July 2009) there has been continuing conflicting case-law by lower instances Courts on the question whether family allowance (Familienzuschlag) bestowed on married civil servants has to be granted also to civil servants living in a life partnership: in a more detailed way, see the Country report (Germany) written by Matthias Mahlman for the European Network of legal experts in the non-discrimination field, www.non-discrimination.net/en/countries/Germany, fn. 43.

¹⁰⁷ On this point see STÜBER S., *Was folgt aus "Maruko"?*, NVwZ, 2008, p. 750. The author underlines that this implies a crucial difference in the reading of the German case law: the issue according to the constant German case law previous to this judgment concerns the definition of „married couple“ or „lifetime partners“ (civil status) and not the sexual orientation of the persons involved. And sexual orientation belongs to a personal character strictly related to the causes provided for in art. 3, c. 3 GG, hence the requirement of a strict scrutiny.

¹⁰⁸ BVerfG, 7. 7. 2009 – 1 BvR 1164/07, in JZ, 1/2010, p. 37. HOPPE T., *Gleichstellung eingetragener Lebenspartnerschaften: Zu den Auswirkungen der Entscheidung des Bundesverfassungsgerichts zur Hinterbliebenenrente*, Deutsches Bundestag, 2009, WD 3 – 429/09, p. 9 – 10, underlines the fact that this judgment comes from the First Senate, where on the contrary the case law analyzed was enacted by the Second Senat, and that this could be also read as a possible conflict between the two Senats in the interpretation of this issue.

First of all, the Court clearly stresses that the different treatment regarding survivor's pension under an occupational pension scheme (VBL) constitutes a violation of the equality principle as provided for by art. 3, c. 1, GG and there is no justification for this violation. Moreover, it demands a strict scrutiny according to the principles of proportionality since a differentiation based on sexual orientation is at stake.¹⁰⁹ The strength of this assessment is justified by the recognition that this kind of discrimination concerns - contrary to the previous case law - the personal characteristic of sexual orientation: as we will see, the radical change in the reading of the case is singled out in the recognition that this is the only real difference between the two institutions.

The reason why a «*strenger Kontrollmaßstab*» is required for the discrimination concerning sexual orientation not surprisingly corresponds – borrowing the words of the Karlsruhe judge – to the European law. In this general classification the Courts refer “indistinctly” to art. 13 and 21 of the Charter of Fundamental Rights and to a famous decision of the ECtHR (*Karner gegen Austria*). Further on, the constitutional judge criticizes the previous too formal approach according to which there is no discrimination based on sexual orientation, since this appears not corresponding to the real situation, namely registered life partnership concerns homosexual couples and marriage heterosexual ones.¹¹⁰ Therefore, the Karlsruhe Court decides for a discrimination based on sexual orientation and expressly recalls the *Maruko* judgment.¹¹¹ By way of parenthesis: strangely enough, the Court stated that the claim concerning

¹⁰⁹ BVerfG, 7. 7. 2009 – 1 BvR 1164/07, para 85, a): «Im Hinblick auf die Ungleichbehandlung von Verheirateten und engetragenen Lebenspartnern (...) ist ein strenger Maßstab für die Prüfung geboten, ob ein hinreichend gewichtiger Differenzierungsgrund vorliegt.»

¹¹⁰ Id, para. 88 and 92. More specifically the Courts observes that this criterion used in the previous judgments «ist zu formal und wird der Lebenswirklichkeit nicht gerecht.»

¹¹¹ In this sense, we have to recall the statement of Advocate General Ruiz-Arabo Colomer in *Maruko*'s opinion, according to which there is an essential difference existing between the discrimination on grounds of sexual orientation and the one attributed to the prohibition of discrimination on grounds of age in Case C-144/04 *Mangold*. Only the first one can be defined as «*fundamental in nature*» and therefore claim protection under the EU system pursuant to art. 6 EU (Opinion of Advocate General Ruiz-Arabo Colomer, 6 September 2007, case C-267/06, *Maruko*, para 78)

art. 101 GG can remain open. This answer seems to be at odds with the relevance recognized to European law in such decision.¹¹²

At this point, it is evident that the really interesting point concerns the interpretation of art. 6 GG: the new reading provided for by the Court does not consider it any longer as a possible cause of justification for special protection of marriage. *Viceversa* the special protection of the family accorded by the Constitution is in a certain way turned upside down: according to the constitutional judge, special treatment to marriage cannot be read as a justification to disadvantage other forms of relationship.¹¹³ In other words, from now on, if we want to differentiate marriage and life-partnership we cannot simply rely on the justification provided for by art. 6 GG but we need to find a cause of justification. We could define it a sort of reverted reasoning.

Very interestingly, in order to support this reasoning, the Court turns to the causes of differentiations between partnership and marriage and deals with the thorny problem of having children as a possible difference between them: in the traditional interpretation, in fact, a different treatment concerning the survivor's pension could be justified by the recognition of some gaps in the employment biography there due to the bringing up of children. But the Courts points out that nowadays, from one side, not every marriage has children and, on the other side, there are registered civil partnerships with children – and even if their number is lower than married couples': «it is, however, by no means negligible».¹¹⁴

Given that the survivor's pension has to be considered as part of the remuneration and from this point of view married employees and employees bound with a civil partnership are in a comparable situation, we should apply the same standard. Relying on this reasoning, the Court ruled that Sec. 38 VBLS (concerning the survivor's pension recognized to married employees) is

¹¹² Id., para 123.

¹¹³ More precisely we can read in the English press release nr. 121/2009, 22 October 2009, p. 2: «For the authority of giving favourable treatment to marriage doesn't give rise to a requirement contained in art. 6.1 GG to disadvantage other ways of life in comparison to marriage. It cannot be justified constitutionally to derive from the special protection of marriage a rule that such partnership are to be structured in a way distant from marriage and to be given lesser rights.»

¹¹⁴ BVerfG, 7. 7. 2009 – 1 BvR 1164/07, Para 104, 105 and especially 112.

not void, but has to be applied to registered civil partners by supplementary interpretation with effect from 1 January 2005. And this final provision is extremely significant and raises relevant problems as well.

This reasoning could turn out in the future in a step by step equalization of all the different laws still distinguishing the two institutions: the essence of the judgment is to expand in a very general way the same protection provided for by art. 6 GG to the registered life partnership. As a matter of fact, it is not difficult to imagine a possible application of this constitutional interpretation also for the aforementioned family's subsidies, because they are considered part of remuneration, as well as the survivor's pension.¹¹⁵ Accordingly, it has been critically remarked that the principle of differentiating marriage from other forms of relationship established in the classical reading of art. 6 GG linked to art. 3 GG has been in this way silently buried and that the Court ends up creating an arguably «*Entkoppelung von Ehe und Familie*».¹¹⁶

But the effects are even more profound than a possible disregard for the previous case law: the disregard seems to be aimed at the text of art. 6 GG itself, given its totally different interpretation provided for by the Karlsruhe Court. The presumption is inverted here: the special protection accorded by the Constitution to the family is no longer deemed by the constitutional judge as a possible ground of distinction with other forms of partnership, but - on the contrary - we have to justify why these other forms should not be considered equal to marriage. According to this reading of art. 6 GG, the presumption is that a distinct consideration of marriage leads inevitably to a disadvantage of registered partnership.¹¹⁷ The constitutional judge thus manages to controvert the value embedded *per se* in art. 6 GG and requires a ground of justification if we want to support that value: it has been defined as a «*eklatante verfassungsrechtliche*

¹¹⁵ More details of this specific issue can be read in VIOLINI L., *La Corte Costituzionale tedesca a confronto con la sentenza Maruko: un dialogo tra sordi?*, Quad. Cost., 2009, p. 412.

¹¹⁶ GRZIWOTZ H., *Anmerkung: Keine Ungleichbehandlung von Ehe und Lebenspartnerschaft bei der betriebl. Hinterbliebenenversorgung*, FamRZ, 23/2009, p. 1983, reads this decoupling of family from marriage as highly controversial.

¹¹⁷ The opinion of C. HILLGRUBER, *Anmerkung to BVerfG, 7. 7. 2009 – 1 BvR 1164/07*, JZ 2010, p. 42 is indeed very critical: «Eine Begründung dafür, warum das Gebot besonderen Schutzes zugunsten der Ehe (Art. 6, c. 1, GG) keinen (...) prinzipiellen verfassungsrechtlichen Differenzierungsgrund abgeben soll, bleibt der Erste Senat dabei schuldig»

Missachtung»¹¹⁸ of the value of the constitutional provisions at stake. We should recall here the fact that in occasion of the before mentioned judgment on the constitutionality of LPartG, the constitutional judge made clear that the new institution (life partnership) was not in competition with the old one (marriage), since they represent two different cases: the judgment ruled that life partnership was not a marriage with a different label, but a really different thing, an «*aliud*».¹¹⁹ Now the Court seems to say that even if it can be defined as an *aliud* we assume that it is the same, and for this reason if we want to differentiate the two we have to find a justification and this justification will be reviewed with a strict scrutiny standard.

It is difficult to evaluate this new constitutional turn.

In this step by step equalization plan that the Karlsruhe Court set up in this last judgment, the doctrine sees a reflection of a discussion till now rather neglected by the German parliament, aiming at leveling the significant difference still existing in this field, namely the adoption of children. In this way the Court ends up sneaking into a political question, leaving aside the juridical foundation of the German system.¹²⁰

Could we state that this turn adopted by the German constitutional Court in the interpretation of art. 6 (linked with the principle of non discrimination) was just the effect of the *Maruko* judgment and of a more general European influence? Reading the case, we do not have this impression: we do not find this reading of the Court as a kind of “*europarechtskonform*” interpretation. Certainly, we can trace back a crystal clear influence of the supranational order – both the EU and ECHR – on this radical change, yet there are really many other factors, not always openly detectable, bearing on it.

3. Still pending: the conclusions of Römer case... has the better still to come?

But the issue has not come to an end: just a few days after the ECJ’s enactment of the *Maruko* judgement, the Arbeitsgericht in Hamburg referred a case for preliminary ruling on a

¹¹⁸ Id, p. 42.

¹¹⁹ BverfGE 105, 313, p. 351.

¹²⁰ C. HILLGRUBER, *Anmerkung to BVerfG*, 7. 7. 2009, op. cit., p. 44.

very similar issue tackled in *Maruko*:¹²¹ the case deals with a higher retirement pension for an employee with a married partner compared to the case of an employee with a life partner. The German judge is asking the ECJ if the *Maruko* jurisprudence can find application also in this case.

The conclusion of the General Advocate Jääskinen is remarkable to further deepen the kind of reasoning adopted in this line of cases.¹²² Even if the Finnish Advocate is in favour of the application *ratione materiae* of directive 2000/78 to supplementary pension payments provided by the *Freie und Hansestadt Hamburg* from the beginning of his reasoning (hence claiming a case of direct discrimination) and even if he strongly denies the applicability of the recital 22 to this specific case – thus overcoming the obstacle regarding the competence still reserved to the national states on this topic, simply considering the issue at stake a question of payments due to their work contracts and not a question of civil state of the persons involved –, the most interesting part is the alternative reasoning proposed to the Court in case this latter would opt for the non applicability of the directive 2000/78 to the issue at stake.

As a matter of fact, the General Advocate holds that - more generally speaking - the German provision distinguishing the condition of supplementary pensions between married couples and life partners is not consistent with a general principle of Community law, concerning the discrimination according to sexual orientation. Not surprisingly, the General Advocate is recalling the *Mangold* case and the definition there provided for the general principle of age discrimination. The argument is simple: if the general principle is recognized regarding age discrimination, why should this not be possible regarding sexual orientation?¹²³

¹²¹ Reference for a preliminary ruling from the Arbeitsgericht Hamburg (Germany), lodged on 10 April 2008, *Jürgen Römer v Freie und Hansestadt Hamburg*, Case C-147/08, in 2008/C 171/26.

¹²² Conclusion of General Advocate N. Jääskinen, 15 July 2010, *Jürgen Römer v Freie und Hansestadt Hamburg*, Case C-147/08.

¹²³ See conclusion, para 122 and following, especially para 129: «A mio parere, sul piano strettamente giuridico, non esiste alcuna giustificazione per applicare il principio della parità di trattamento in maniera meno rigorosa nel caso delle discriminazioni in base all'orientamento sessuale che non in quello delle discriminazioni fondate sugli altri motivi indicati all'art. 13 CE. Ammettere che in tale settore esistano sensibilità particolari giuridicamente rilevanti significherebbe che la Corte attribuisce importanza a pregiudizi ingiustificati, quale che sia la loro origine, e nega una tutela giuridica paritaria a persone di orientamento sessuale minoritario». Interestingly, all the aforementioned

The case is still pending and we have to wait for the judgement of the Court, but what we want to highlight here is the reasoning pervading this landmark decisions on family matters and the equality principle, a sort of *fil rouge* emerging throughout the cases: one gets the strong impression that the equality language is more and more belying the substantive issue at stake. This observation is striking, considering that in Germany there is also a constitutional provision (art. 6 GG) conferring special protection to marriage. The General Advocate is aware of that, but he is also aware that by and large community law breaks national law (also national *constitutional* law) and, first and foremost, that the BVerfG has already laid down its own arms on the meaning of that constitutional provision, reading it according to the criteria offered in *Maruko* by the ECJ.¹²⁴

The outcome of this way of reasoning, if accepted by the Court, is the recognition of a general principle applicable in all the 27 member states, no matter if the state allows registered partnerships or not.

Within the silence of the legislator, we face a sort of escalation of judicial statements (national and supranational ones strictly intertwined) on this issue.

4. Competences or rights? A small digression on the legislative side of this debate: the role of recital 22 of the Preamble to Directive 2000/78 and the debate surrounding the Maruko decision.

In the analysis of the European cases we left temporarily aside the debate regarding the attribution of competence in this field. At the end of this excursus, a doubt still remains unsolved: is this discussion on rights or competences? We also have the impression that if a decision regards competences or rights, the standards the Court will use to solve the case could be very different.

In order to understand this slightly shaded dilemma – rights or competences –, it can be useful to recall the legislative side of this debate, namely the discussion for the approval of the

debates on the way in which the ECJ extracted the definition of general principle for age discrimination seem to be totally forgotten, or accepted from the outset.

¹²⁴ See very interestingly para 164-169

recital regarding the family law competence within directive 2000/78 and the present state of the new directive 2008/0140 on this same issue.

In fact, the dialectics between the legislator and the Court(s) on the state of this problem is not less interesting than the single analysis of the case-law developments in this field. This issue that we analyzed from the judges' perspectives is indeed a complex entanglement in which we have also – if not first and foremost – to take into account the well-defined position of the national government.

In *Maruko*, whilst deciding in favor of application of the directive 2000/78 to the case, the ECJ judge promptly came up against the obstacle of the lack of community competence in matters regarding civil status, as foreseen by recital 22, this being a matter in which the member States still have exclusive jurisdiction. The problem, though apparently technical, touches on an extremely delicate point regarding the force of law to be recognized to the recitals of the Preambles: the question about the value of recitals has become more and more common since the European legislation has started to be heralded by long preambles: and the longer they are, the more problems they raise.¹²⁵

In this specific case the judge overcomes this obstacle with a brief reasoning based on the following argument: in the first place, even if a matter is of State and not Community competence, the member State must comply with Community law in implementing domestic policies – and needless to say, if the issue is related to the principle of non-discrimination.¹²⁶ Furthermore, it would be a contradiction to claim that a recital, not taken up in any later article of the same act, could «affect the application of the directive».¹²⁷

We could skeptically speculate at this point about the meaning of that recital. Letting aside this question, a brief analysis of the approval of directive 2000/78 can be useful to better understand the question at stake. First of all, the Commission's proposal did not provide for this

¹²⁵ On this topic see TOBLER C. e WAALDIJK K., *Comment to Case C-267/06*, op. cit., p. 730.

¹²⁶ Judgment of the Court (Grand Chamber), 1 April 2008, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, C-267/06, para. 59.

¹²⁷ Id., para 60. Also the Advocate General Colomer in his Opinion (para 76) recognized the function of assisting interpretation to the recitals, as a sort of assisting role to the reading of the text. The issue arises when there is not a corresponding provision in the text linked to the recital.

exemption: in the preparatory work of the directive we can read that the Commission considered the addition of this kind of specification redundant. Recital 22 was requested by Germany and Ireland to add something relating to an exemption on this issue and then discussed with other states. Since it was not possible to reach an agreement on this point, eventually, the chosen solution was to leave the text of the directive untouched and to add the recital.¹²⁸ Approving it, in any case, at least 3 States (Italy, Ireland and UK) read recital 22 as a ground to allow a favorable treatment to married couples. Therefore, we can understand that the issue was already an open question in the approval of the text.

The already mentioned statement of the ECJ in this case – repeating the recurring axiom that Member States should respect community law in the exercise of the domestic competences – actually raises a question about the nature of the Member States competences, as if these latter «are not “exclusive” in the sense that national legislation is immune from EC law».¹²⁹ This is a very delicate point, above all when the competences at stake concern traditional States reserve as family law.

It may be interesting to observe how this point is expressly taken up in the Commission’s proposal for a directive instructing application of the principle of equal treatment among persons regardless of their religion or personal convictions, disability, age or sexual orientation (2008/0140). The foreword of the legislation states that «if national law recognizes the

¹²⁸ And actually, reading the complete version of the recital, the directive distinguishes married and unmarried couples, not married couples and registered partnership comparable to marriage: see STÜBER S., *Kein Familienzuschlag für Lebenspartner?*, NJW, 25/2006, p. 1776. See Council of the European Union, *Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation*, Document nr. 6941/00, Brussels, 31 March 2000, in <http://register.consilium.eu.int>, for a reading of a first proposal of the recital (11A): «This Directive is without prejudice to national laws on marital status and does not therefore oblige Member States to extend the benefits accorded to married partners to non-married partners». The following discussion included these different positions: IRL/UK put scrutiny reservations; B/S want to delete end of recital after "*marital status*"; D/IRL prefer full text; the Commission does not consider this new recital necessary but it can accept either version (long or short); the Presidency proposes replacing the end of the recital, after "*marital status*", with "*and benefits dependent thereon*".

¹²⁹ TOBLER C. e WAALDIJK K., *Comment to Case C-267/06*, op. cit., p. 734.

comparability of registered partnerships to marriage, the principle of equal treatment is applicable», referring thus directly to the *Maruko* case.¹³⁰

The points of friction in the matter gradually became apparent during the discussion of the Commission's proposal, in the same way as they became evident in the *Maruko* case: the directive pinpoints that this act is without prejudice to the national laws on the subject of marital status or family and reproduction rights. This latter point directly responds to the question underlined by the Court in *Maruko*, according to which recital 22 is not legally binding till it is not included in an article. Nevertheless: at this stage the recital is included in the very text of the proposal. This was a very delicate point, also in the implementation of the directive 2000/78: actually, some states reproduced recital 22 in a provision of the law implementing the directive, and after the *Maruko* judgment excluding the validity of that recital since it was not reproduced in the texts, part of the doctrine had even advanced the hypothesis that these laws were not consistent with the directive.¹³¹

What can we infer from this very short account of the legislative developments following the first application of the non-discrimination directive? Underlying the analyzed conflict between Germany and the ECJ, there is indubitably a very delicate issue about family law competences and, a more general complaint against the expansive attitude of European Union

¹³⁰ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2. 7. 2008, COM/2008/0426 final - CNS 2008/0140.

At the same time, attention should be drawn to the recent resolution of the European Parliament on the status of fundamental rights in the European Union mentioning *Maruko* case expressly and demanding its implementation in legislative terms. While the European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008, para 36-37 welcomes the Commission's proposal for a Council directive implementing the principle of equality regardless of religion or belief, disability, age or sexual orientation (COM, 2008, 0426) - thus implementing Article 21 of the Charter (and not just referring to art. 13) and extending the scope of Directive 2000/43/EC to further forms of discrimination - , the Parliament highlights the persistent use of "escape clauses" that "may actually serve to codify existing discriminatory practices". In particular the resolution "reminds the Commission that the directive must be in line with existing case-law in the area of lesbian, gay, bisexual and transgender (LGBT) people's rights, notably the *Maruko* ruling"

¹³¹ Significantly, part of the doctrine (MÖSCHEL M., *Life Partnerships: Separate and Unequal in Germany*, Colum. J. Eur. L., 37, 2009-2010, p. 42, and WAALDIJK/BONINI, *Sexual Orientation Discrimination in the European Union: National Laws and Employment Equality Directive*, Asser Press, 2006, p. 43) had hypothesised the unconstitutionality of domestic laws that reproduced the recital in the implementing law of the directive, thus giving way to the strange case of a non legally binding recital of a directive reproduced in a legally binding article of the implementing law.

law toward the Member States. This attitude, from a judicial point of view, is made easier by the equality principle that naturally leads the Court to stretch EU competences.

Therefore, a wide disappointment to this kind of evolution amid EU member States can be easily perceived, as evident in the various reservation clauses (including some remarkable opting out to the European Charter of Fundamental Rights) to the Lisbon Treaty. Again, Germany is exemplary in this perspective: the notorious Lisbon-Urteil, as we already mentioned, bluntly remarks that family law pertains to one of the five fundamental areas of law that has to remain close to the citizen and directly shaping the form of a constitutional State.¹³²

In this sense, the general climate in which this judicial dialogue is occurring should be kept in mind: as we already mentioned in the first paragraph, authoritative German scholars and politicians were seriously disappointed by the last interventions of the ECJ.¹³³

A last reflection: we have unveiled two different kinds of narratives, coexisting in the very same moment on the very same issue. On one side, from a judicial point of view we observe a shift from EU to the Member states - indeed connoted by a certain degree of discontinuity, as we will see - proceeding gradually toward a sort of homogenization of the field. On the other side, from a legislative (political) point of view, the narrative seems to follow an opposite direction, a resolute reaction of the member States to stop this trend.

5. A totally different scenario? The Italian way to adjust differences and to accommodate competences

The second example we will provide of a significant constitutional tradition regarding family law differs from the previous one in an important detail: this country offers no legislation at all regarding the different kinds of partnership/marriage etc. What happens in this case?

¹³² *Supra*, note 4.

¹³³ HERZOG R. and GERKEN I., *Stop the European Court of Justice*, op. cit., p. 1 – 4. See also the interview with H. J. PAPIER (former President of the BVerfG), *Das muss sich ändern*, FAZ, July 24, 2007, p. 5. See also KOKOTT J., *The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration*, German Law Review, 2010, p. 113, stating in a more general way that «we have moved a long way away from the enthusiasm on integration from the early years of the Federal Republic under the newly-minted Basic Law because of the changed general conditions that are a result of globalisation and supranationalisation.»

Germany is a State providing a possible different treatment between married couples and couples bound by a form of partnership. This is a necessary premise in the dialogue with the supranational level. But what if a legislation for this forms of relationship does not exist?

This is the case of Italy.

Italy represents an interesting perspective through which we can explore the one-fold functioning of the equality principle. We analyzed the application of the equality principle (or of the non discrimination policy) from an “internal” point of view, thus a legal paradigm gradually pervading the case-law and legislation regarding family law. We named it “internal” in order to pinpoint its function within the legal reasoning applied in the case-law or in parliamentary debate to adopt new legislative acts. It is internal since it pertains to the structure of the matter at stake. Whether it is always an appropriate tool to work on family law could be questioned. Yet, the point is that this principle works from the inside of the matter at stake. An “external” use of non-discrimination, entirely based on the *sui generis* functioning of the EU system should also be pointed out, as influential as the other use of the equality principle.

Let’s recall some exemplary Italian judgments on this issue starting from an attempt of direct dialogue with the ECJ.

The tribunal of Milan referred to the Court of Justice (and, at the same time, to the Italian Constitutional Court for violation of a series of Italian constitutional principles as well for violation of EC law), a case regarding the question whether a national rule providing a different treatment between surviving spouses and surviving cohabiters is in breach of EC law. As the previous cases analyzed, the main question concerns the granting of a survivor’s benefit in an employment litigation whose recognition is different depending on the condition of marriage or cohabitation.

Interestingly enough, the referring Court based its doubts relying on art. 12 and 13 EC treaty, on the Charter of Fundamental Rights, on a series of cases regarding the non discrimination policy and, above all, it recalls the *Maruko* decision and directive 2000/78, thus inferring that the equality principle has to find application in the field of cohabitation *more uxorio* as well.

The idea of this referral order to the ECJ is very simple: Ms Mariano explains that if she had cohabited with a citizen of a different state or if her partner had had the accident in another EU country, she would have perceived the survivor's allowance. She grounded her claim also on the legislations of different EU countries granting the same treatment to married couples and couples bound by other forms of partnership.

The answer provided by the ECJ is straightforward: the judge distinguishes *Mariano*'s situation from *Maruko*', and concludes recalling that «Community law does not impose a prohibition of all discrimination, the application of which the courts of Member States must ensure, where the allegedly discriminatory treatment has no link with Community law»¹³⁴. Thus, this case is purely internal (therefore the ECJ cannot apply art. 12 EC Treaty) and the principle of equality provided for in art. 13 EC Treaty and in the directive 2000/78 applies only to the expressly foreseen provisions (in this sense *Maruko* is different from *Mariano*) and cannot be applied in a State where there is no comparator, since no legislation exists on this issue.

The *Mariano* decision appears to be direct and easily understandable, devoid of any perplexity: we would even be tempted to read it as an attempt of the Luxembourg judge to clarify the limits to the application of *Maruko*'s criteria and to reaffirm a coherent frame for the definition of competences between the domestic and the supranational level. In short, the Court clearly reaffirms the well-established principle that in order to apply EC provisions the case should have a connection with EC law. The Court is particularly clear when it insists on a point that could seem to be self-evident:

Neppure il riferimento alla Carta dei diritti fondamentali può venire a sostegno di una conclusione diretta a far entrare il presente procedimento nella sfera di applicazione del diritto comunitario. A tal riguardo basta sottolineare che, conformemente all'art.51, n.2, di detta Carta, quest'ultima non introduce competenze nuove o compiti nuovi per la Comunità europea e per l'Unione, né modifica le competenze nonché i compiti definiti nei Trattati. Inoltre, conformemente all'art.52, n.2, della stessa Carta, i diritti riconosciuti dalla stessa che trovano il

¹³⁴ Order of the Court (Seventh Chamber), 17 March 2009, Case C-217/08, *Mariano v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro*, see especially para 22 and 23. It is not available an official translation in english of the present order.

loro fondamento nei Trattati comunitari o nel Trattato sull'Unione europea si esercitano alle condizioni e nei limiti dagli stessi definiti.¹³⁵

The tribunal of Milan, as already mentioned, referred a similar question to the Italian Constitutional Court: the referring judge had doubts regarding the violation of various constitutional principles (first of all the equality principle) and also on the two constitutional provisions regarding the Italian participation in the European Union, since this case represents a possible breach of EC law. Even if the constitutional judge admitted the side-claim regarding the discrimination between a natural and legitimate child, he did not consider the main claim regarding the different treatment between married partner and partners *more uxorio*, restating the constant principle of Italian constitutional case-law supporting a substantial difference between a de-facto family and a married family, with particular reference to the pension's questions¹³⁶. More generally, this judgment is part of the constant interpretation given by the Constitutional Court and the ordinary judges of art. 29 It. Const. Law, according to which «the family is recognized by the Republic as a natural association founded on marriage».

The possible violation regarding EC law has not been taken into consideration inasmuch too generic and not sufficiently grounded. In this sense, Mariano's case teaches us that the typical attempt to let the supranational system define what the referring Court would like the national constitutional court or legislature to rule does not always work.¹³⁷

But the story does not end here.

¹³⁵ Id., para 29.: accordingly, the solution adopted by the ECJ is that «la questione sollevata deve essere risolta nel senso che il diritto comunitario non contiene un divieto di qualsiasi discriminazione di cui i giudici degli Stati membri devono garantire l'applicazione allorché il comportamento eventualmente discriminatorio non presenta alcun nesso con il diritto comunitario. In circostanze come quelle della causa principale, gli artt. 12 CE e 13 CE non creano di per sé un tale nesso» (para 30).

¹³⁶ Corte Costituzionale, 27 March 2009, nr. 86. The It. constitutional court also recalls in this case some previous judgments in support of this kind of reasoning, as the order of the Constitutional Court nr. 121/2004 (for art. 29 Cost.) and nr. 444/2006 (for the Italian pension policy). For further reference on the peculiar way that the Italian referring Court adopted in order to have a judgement both by the ECJ and the Italian Constitutional Court see A. ROVAGNATI, *Nuove scelte giurisprudenziali in tema di doppia pregiudizialità (comunitaria e costituzionale)?*, Quad. Cost., 3/2009, p. 717 ff.

¹³⁷ NASCIBENE B., *Unioni di fatto e matrimonio fra omosessuali. Orientamenti del giudice nazionale e della Corte di giustizia*, Corr. Giur., 1/2010, p. 107.

Four claims against a possible discrimination of non-married couples (more precisely, same-sex couples) have been raised before the Constitutional Court questioning the traditional reading of art. 29 Cost. and relying on a combined reading of art. 2, 3, and 29 it Const.¹³⁸ together with art. 117 of It. Const., according to which «legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by European Union law and international obligations».

Although the referring courts (Firenze, Trento, Venezia and Ferrara¹³⁹) combined the afore-mentioned constitutional provisions in different ways, one should be able to outline the general frame of the common reasoning underlying these cases. In sum, the reasoning with the recognition that a traditional reading of the family as a natural association founded on marriage is no longer possible, since *that* tradition is no longer existing.¹⁴⁰ Therefore, judges and public administration should apply a dynamic reading of article 29 Const.

The reference to EU and international obligations in this reasoning serves rather as reinforcement of this new constitutional reading than as an isolated ground. Its use is really diversified and never systematic, as we already noticed in the German constitutional court case. In fact, the EU Charter of Fundamental Rights, the Universal Declaration of Human Rights, the European Charter of Human Rights, various interventions of supranational institution (even a *proposal* for a EP resolution of 1983), some judgments or legislative acts of other EU countries are all used to “support” such thesis without being necessarily grounded nor relevant. We would be tempted to identify in this case another example of the well known “cherry picking” judicial

¹³⁸ We already mentioned the text of art. 29 Const.; regarding art. 2 It. Const., it states that «The republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality, and it ensures the performance of the unalterable duty to political, economic, and social solidarity.» Art. 3, c. 1, declares: «All citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions, and personal or social conditions.»

¹³⁹ Tribunale di Venezia, 3 April 2009; Corte d’Appello di Trento, 29 July 2009 (both already published in G.U., n. 117 e n. 248, 2009), Corte d’Appello di Firenze, 3 December 2009 and Tribunale di Ferrara, 14 December 2009 (not yet published in G.U.)

¹⁴⁰ It can be interesting to point out– as in the reading of the cases of the ECJ – that the unjustified different treatment of transsexuals compared to homosexual couples is highlighted in most claims. Law 164 of 1982 was issued to recognize sex change but the Constitutional Court also ruled the constitutionality of the same law (Decision nr. 161/1985).

attitude when confronted with the use of “foreign law” in constitutional adjudication. It is not a surprise that the doctrine is very critical of this part of the reasoning regarding international and European references and ends this debate stating that, at the end of the day - for the time being - it is not possible to pinpoint an international or supranational obligation to equalize marriage to same-sex marriage or same-sex partnership.¹⁴¹

The answer provided by the Constitutional Court on 15th of April 2010 is very plain and at the same time out of the ordinary: the constitutional judge, coping directly with the question on the dynamic interpretation that should be conferred to art. 29 Cost. (and more generally on the constitutional provisions dealing with fundamental rights), states that even if the juridical concepts are flexible and change according to the period in which they are developed, the Court’s interpretative effort cannot ever go beyond and transcend the core of the provision, modifying it so as to include in it issues not considered when the former was issued.¹⁴² Thus, the Constitutional Court intends to set clear-cut boundaries to the activity of judicial interpretation, with regard to new interpretation of said provision, so as to adapt it to the recent and ongoing developments and to the supranational context.

As a matter of fact, specifically with reference to the latter aspect which we are particularly interested in, the Italian constitutional judge observes – thus re-organizing the

¹⁴¹ NASCIBENE B., *Unioni di fatto e matrimonio fra omosessuali. Orientamenti del giudice nazionale e della Corte di giustizia*, op. cit., p. 107.

¹⁴² As already discussed in doctrine (T. EPIDENDIO, *Dialogo su diritti fondamentali, giustizia sovranazionale e prassi quotidiana dei tribunali*, 7 maggio 2010, typewritten text) we are facing an interesting conjugation of the doctrines on the “intangible nucleus of the provision” and the so-called “original intent”, in that the boundary of the intangible nucleus of the regulation is set as negative, where the original intention of the Constituent assembly (in this sense, see the reference of the Constitutional judge to the Assembly preparatory works), had not at all been taken in due consideration. Consider, more specifically, the Italian Corte Costituzionale’s decision n. 138/20101, 15 April 2010, para 9: «Ciò posto, è vero che i concetti di famiglia e di matrimonio non si possono ritenere “cristallizzati” con riferimento all’epoca in cui la Costituzione entrò in vigore, perché sono dotati della duttilità propria dei principi costituzionali e, quindi, vanno interpretati tenendo conto non soltanto delle trasformazioni dell’ordinamento, ma anche dell’evoluzione della società e dei costumi. Detta interpretazione, però, non può spingersi fino al punto d’incidere sul nucleo della norma, modificandola in modo tale da includere in essa fenomeni e problematiche non considerati in alcun modo quando fu emanata.» The Court also adds that the meaning always attributed to art 29 Cost. «non può essere superato per via ermeneutica, perché non si tratterebbe di una semplice rilettura del sistema o di abbandonare una mera prassi interpretativa, bensì di procedere ad un’interpretazione creativa».

aforementioned referall orders – that the relevant provisions for the judgment are art. 12 ECHR and art. 9 of the European Charter of Fundamental Rights. The constitutional court is well aware that, in the course of the trial, the Lisbon Treaty entered into force thus conferring to the Charter of Fundamental Rights a new *status*, namely the same force of the Treaty; still, this point is not relevant for the case at stake since art. 9 of the Charter of Fundamental Rights (as well as art. 12 ECHR) «nell’affermare il diritto di sposarsi rinvia alle leggi nazionali che ne disciplinano l’esercizio. Si deve aggiungere che le spiegazioni relative alla Carta dei diritti fondamentali, elaborate sotto l’autorità del praesidium della Convenzione che l’aveva redatta (e che, pur non avendo status di legge, rappresentano un indubbio strumento di interpretazione), con riferimento al detto art. 9 chiariscono (tra l’altro) che “l’articolo non vieta né impone la concessione dello status matrimoniale a unioni tra persone dello stesso sesso”». (see para. 10 of the decision).

Therefore, according to the reading of this provision, the regulation of this field is a domestic competence

By and large, the discretionality of the legislator thus becomes the fulcrum of said decision. This not only in consideration of supranational law – leaving the State the discretion on whether to adopt or not a law in this regard and thus being free in the choice of that law, as proven by the existence of the numerous different legislations in Europe – but also in the light of art. 2 Cost. It. and not of the equality principle, ex art. 3 It. Cost. The Court in fact reaffirms that this is not a case of discrimination since the two situations are not homogeneous. Recognizing and granting human inviolabile rights, “as an individual or in *social groups*” the Court thus lets the State free to choose time, ways and limits for the recognition of same-sex unions. (see para 8).

Without entering in the wide doctrinal discussion¹⁴³ opened by this judgment, it is worth pointing out that this decision recalls the issue of competences as a starting point of the

¹⁴³ Id., para 8. The case - quite understandably - gave rise to a wide range of doctrinal reflections which can be followed in the “Forum dei Quaderni Costituzionali” webpage (<http://www.forumcostituzionale.it/site/>): see D’ANGELO L., La Consulta al legislatore: questo matrimonio “nun s’ha da fare”, CROCE M., Dalla Corte un deciso stop al matrimonio omosessuale, SPINELLI S., Il matrimonio non è un’opinione, SILVIS C., Il matrimonio omosessuale, tra l’art. 29 e l’art. 2 della Costituzione, CALZARETTI F., Coppie di persone dello stesso sesso: quali

examination of the issue – with no doubts whatsoever on the national competence of the same - but stresses more importantly, and with particular emphasis, the limits of the judicial activity and the boundaries of interpretation within it. The preceding paragraphs have outlined this especially delicate issue.

It should also be recalled that in a case in particular, the referring judge (tribunal of Venezia) made reference to a different question, that we distinguished from the present kind of reasoning as it implies an external application of the equality principle: the judge asserted that if our country does not recognize foreign same-sex marriage or partnership, this will cause the rise of the s.c. “*matrimoni claudicanti*”, legally binding depending on the State in which the couple resides. But, on the contrary, if Italy will recognize foreign same-sex marriages without providing for a new legislation on this topic, it will cause an indirect discrimination toward its citizen.

Apparently, there is no alternative.

We already analyzed the key elements of this kind of argument interfering with a different – but strictly connected – issue in the *Mariano* case. This is actually a very well known area for the scholar exploring the evolving field of family law, connected with the problematic issue of the s.c. trans-border family. Although – as we mentioned at the beginning of the paper – it is not our intention to go into the merits of the wide ECJ jurisprudence and EU legislation on this topic, we would like to highlight its reflections in the Italian system because it can be helpful to attest the ongoing changes in the domestic policies due – in a more direct or indirect way – to the supranational level influence.

prospettive, MELANI A., Il matrimonio omosessuale dopo la pronuncia della Corte costituzionale: la questione resta aperta, PUGIOTTO A., Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio, and in the “Associazione Italiana dei Costituzionalisti” webpage (<http://www.rivistaaic.it/>): PEZZINI B., Il matrimonio same sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sentenza n. 138/2010 della Corte costituzionale, MANETTI M., Famiglia e Costituzione: le nuove sfide del pluralismo delle morali, ROMBOLI R., *Il diritto “consentito” al matrimonio ed il diritto “garantito” alla vita familiare per le coppie in una pronuncia in cui la Corte dice “troppo” e “troppo poco”*, DAL CANTO F., Le coppie omosessuali davanti alla Corte costituzionale:dalla “aspirazione” al matrimonio al “diritto” alla convivenza, CRIVELLI E., *Il matrimonio omosessuale all’esame della Corte costituzionale*. See also GATTUSO M., *La Corte costituzionale sul matrimonio tra persone dello stesso sesso*, Famiglia e Diritto, 2010, p. 653 ff.

The question regarding the registration to provide for (or not) different forms of partnership or marriage not recognized in a EU country but legally valid in other EU countries has become a hot issue in the relationship between European Union law and domestic law. This problem, well known by and large also outside the EU context, is grounded directly in the fundamental freedom of movement and pertains mainly to the EU migration policy: the migrant worker has thus become over time a *passpartout* to open the doors of domestic family law policies.¹⁴⁴ Accordingly, decisions regarding family law – like the registration to be granted to different models of partnership and marriage existing in the EU territory but substantially different from country to country – are discussed and approved within the context of acts regarding the EU freedom of movement.

In this sense it can be very interesting to outline briefly what happened in Italy with reference to Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

As it is well known, the definition of “family members” in art. 2, c.2, states that – besides the spouse – a family member can be also «the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State». In the Italian law implementing the directive, this provision has been simply reproduced with the identical words, thus rising doubts and uncertainties in the reader, since in Italy there is no law on this issue. Art. 3 of the directive, seems to come to the aid of those States that do not provide for such a legislation stating that «without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, *facilitate* entry and residence for the following persons...».

¹⁴⁴ The literature on this topic is indeed extensive. As for the legislative side of this discussion, one of the clearest and earliest examples can be found in Regulation 1612/68 on the free movement of workers, [1968] O.J. Spec Ed (II) 475, and the most relevant nowadays is the Directive 2004/38, 2004 O.J., L 158/77.

And accordingly, the question becomes again a question of interpretation, namely the meaning to provide for the expression «*facilitate* entry and residence» for this kind of European citizens.¹⁴⁵

As a matter of fact, the Italian minister of Interior with an administrative act (Circolare applicativa¹⁴⁶) simply decided to require foreign couples to prove with appropriate foreign documentation the kind relationship they have. Needless to say, in this case, an Italian couple not bound by marriage (but de facto in an equivalent position of a foreign partnership etc) will not be able to be recognized in another EU country since they do not possess any form of legal recognition. But, even more important than a possible reverse discrimination is the fact that same-sex marriage is “silently” (not applying the existing rules of recognition provided for in Italian international private law) legally recognized by the Italian legal system.

Always on this issue, the question regarding the recognition to be granted to a same-sex partner is faced directly by the Italian Supreme Court (Corte di Cassazione) in a recent judgment.¹⁴⁷

¹⁴⁵ Even if these acts are apparently neutral – directive 2004/38 is exemplary in this sense – the supranational government has a clear interest to favour the migrant worker’s (and his/her family) freedom of movement. Just to provide an example of this interest from the EU side, one should recall that the European Commissioner for Justice, when the governments of the Baltic States and Poland ruled against legalizing homosexual marriages, announced emphatically that any member state that does not eliminate all forms of discrimination, including the refusal to approve homosexual marriage, will be subject to sanctions and eventual expulsion from the European Union. Ironically, the Commissioner who uttered said statement was Frattini, presently an Italian Minister. For further details on this fact, see BOELE-WOELKI K., *The legal recognition of same-sex relationships within the European Union*, Tul. L.R., 2008, p. 1961. See also

¹⁴⁶ Circolare applicativa nr. 200704165/15100/14865, 18 July 2007, Ministero degli Interni italiano. More precisely, the act refers to the «documentazione dello Stato del cittadino dell’Unione, titolare del diritto di soggiorno, dalla quale risulti il rapporto parentale ovvero la relazione stabile, registrata nel medesimo paese.»

¹⁴⁷ Judgment of the Corte di Cassazione, 17 March 2009, nr. 6441. A short summary of the case: a couple composed by an Italian citizen and a New Zealand one, bound by a same-sex relationship legally recognized by the New Zealand legal order, decides to move to Italy. The New Zealand partner applied for a residence permit for family reasons, but the application was dismissed, hence the claim to the tribunal of Firenze (4 July 2005). The judge accepted the claim – also relying on the EU Charter of Fundamental rights and on the directive 2004/38, even if not yet implemented – and recognized the right of the claimant to a residence permit for family reason. The Court of Appeal of Firenze (6 December 2006), on the contrary, rejected the previous statement of the Tribunal, since the directive does not find application when the country is a third country (New Zealand) and the New-Zealand law is in any case contrary to the Italian public policy. The Corte di Cassazione intervenes in this very puzzled legal framework finally rejecting the claim of the couple.

Without entering in the details of this indeed rather complex case, the Supreme Court observes, first and foremost, that the exclusion of a same-sex partner from the category of family members does not violate any Italian constitutional provision, thus restating the special protection conferred to the “traditional marriage” by art. 29 It. const., and recalling very precisely the constant constitutional court case law. An expanding interpretation of family members – according to the Supreme Court – is not even required by the supranational sources of law: both the ECHR and the EU system still leave the family competence on this issue to the discretionary power of the member states. The question regarding a possible reverse discrimination towards its citizen (it could be interesting to observe that the same argument was also briefly mentioned in the German Constitutional Court judgment of 2009) is as well discarded, since this special kind of discrimination is characterized by the fact to be purely internal and caused by the application of EC law: in this occasion, though, the case deals with an extra-UE citizen asking for a reunion with an Italian citizen residing in Italy and, accordingly, did not call the application of EU law in question directly.

A very Italian way to end a discussion and, we would add, to close our eyes in front of a reality that, in spite of what the judge formally writes in the judgement at stake, is present to the extent that it has been described as a “second family law” (besides the one enacted by the It. Parliament) introduced by the EC law.¹⁴⁸

¹⁴⁸ It is enough to consider, for instance, the afore-mentioned example of the (almost) automatic recognition of EU member states form of relationship.

The problem raised by the existing international private law provisions theoretically regulating this issue should also be analyzed. See CALÒ E., *Matrimonio à la carte. Matrimoni, convivenze registrate e divorzi dopo l'intervento del diritto comunitario*, Milano, Giuffrè ed., 2009, p. 83-84 observes that «il diritto comunitario finisce quindi per incidere in modo decisivo sul diritto di famiglia degli Stati membri, senza necessariamente averne i poteri, e per il tramite, in questo caso, della libertà di circolazione. La norma di conflitto, in tutto questo, è totalmente assente, e quindi assistiamo, accanto al tramonto della connotazione nazionale del diritto di famiglia, pure alla trasformazione (o al declino?) del diritto internazionale privato.»

Conclusion - European States at a crossroads

At the end of this inquiry we face a quite impressive and more or less silent transformation of family law, both at supranational and national level. To a certain extent it needs no further explanation. Yet, we would like to draw some conclusions in order to highlight the numerous still open questions regarding family law in Europe and, more specifically, the existing difficulties to draw a clear line between the supranational and national competence on this issue. Or, in other words, the numerous open questions created by a certain a movement (spontaneous or forced as it may be) toward a uniformation of family laws and the discretion of the State to choose their own rules in this fundamental area of competence.

The first observation is that family law is no longer so differentiated from State to State as we traditionally thought it would be: the considerable diversity existing in this field throughout Europe is gently fading away. And – regretful or desirable as it might be – this is not an isolated example of what the European Union is bringing about together with integration. In this sense, we should bear in mind that family law is not so unresponsive to the pressure of Europeanization (and, more generally, of globalization).¹⁴⁹ Actually, this statement also represents a remarkable achievement of some comparative lawyers of the end of XXth century who began to employ comparative law tools also in a sector traditionally described as the product of the distinctive culture of each nation.¹⁵⁰

This statement calls for further clarification at this stage: for the time being, the European landscape is still reproducing considerable differences between domestic family regulations. The latter is actually the source of the many conflicts we scrutinized.

Secondly, we observed that the guiding star of this transformation appears to be - at all levels - the equality principle: whether we analyze it from the perspective of equality between

¹⁴⁹ Interestingly, KAHN FREUND O., *On Uses and Misuses of Comparative Law*, Mod. L. R., 1974, p. 13-17, shows that the use of legal transplanted is actually working well in family law in wide geographical areas characterised by similar cultural frameworks, contrary to the idea that precisely in this special sector the approximation of legal culture would have be extremely difficult, since «What can be closer to the moral and 'religious convictions, the habits and the mores and also the social structure of a community than the making and unmaking of marriages and their effect on the legal position of the spouses, including their property?»

¹⁵⁰ See for all, GLENDON M.A., *The Transformation of Family Law*, University of Chicago Press, 1989.

different forms of relationships (partnership, cohabitation etc.) or from the perspective of equal recognition between different national regulation on this issue, the functioning of this principle in the regulation of relations within the family is equally meaningful. This is not surprising, since this principle is the cornerstone of every legal order and it unquestionably represents one of the most important achievements of the evolution of western constitutionalism. And still, whether the equality principle – as we often found out reading the judgments on this issue – is always fit to mainly lead this process of transformation or not could be questioned. Certainly, it is a part – a fundamental part indeed! – of the discussion at stake, but the overall picture is made up of various other multifaceted elements that need to be equally taken into consideration

This latter is actually the reason why we adopted, as a preferred point of view, the perspective of constitutional traditions, being certain it could provide us with a more complete framework for the research: as we often underlined in the course of this inquiry, while once family law was thought to be fundamentally a problem to be solved within the national borders, today there are other supranational and international factors interfering with it. In other words, nowadays we are facing the fascinating and problematic encounter between domestic constitutional traditions in family matters and the supranational system. Accordingly, if the issue regarding the new balance to be found between the fundamental principles underpinning family law is very delicate and essential, the question regarding what level of competence should better deal with it is not less delicate and substantial than the previous one. It not only implies the protection of fundamental rights but also the respect of diversity within the European borders and, last but not least, democracy. The evolving domestic constitutional traditions and the EU's corresponding counterpart, common constitutional traditions and their development, constitute the grounds on which the research question should to be placed.

Trying to capture some conclusive remarks from said legal scenario, that was widely developed in the course of the research, we would like to focus on the tools that drive this capital evolution in family law and ultimately also EU integration, with the aim of starting (or, better, continuing) a debate rather than providing answers. In other words, our intention is to further reason on how this transition phase is handled. In fact, around in the Sixties, Europe

witnessed the emergence of changing models in people's perception of family matters. Today interdisciplinary scholars are still unable to fully explain this change that spontaneously led European states to reform their family law, even if the rhythm and variety of content changed from State to State. As such, this phase is far from being close to its conclusion, as notoriously claimed by Rheinstein: «family law is a law in flux», more than any other field of private law and «it has not yet reached a new stage of stability»,¹⁵¹ today more than ever before. The challenge for judges and legislatures in Europe lies within this ongoing process of transformation: the capital question becomes the “destination” of this process and by what means it will be carried out. And legal studies have still a remarkable role to play in shaping the family's new image, obviously affected also by ideas and behavior.

We have to start from the almost self-evident observation that case law appears to be predominant in this discussion and legal reforms in family law are lead more by Courts than by legislature.¹⁵² If this statement could be easily explained simply through the influence of the method adopted for the development of this work – that was precisely to analyze cases and to look into the dialogue between domestic and supranational supreme courts on the issue at stake – still, this is not enough to provide a solid explanation of the evolution of the scenario that appeared before us at the completion of our research. In fact, we have a strong impression that this first finding is part of a more general trend: judgments referring to rights are, to a certain extent, becoming more relevant than the Charters foreseeing those rights. Or else, the dialogue between Courts is becoming more decisive in this regard than legislative debates. Even if this statement provides a sense of *déjà-vu*, or of nothing new under the sun, in the progress of our

¹⁵¹ RHEINSTEIN M., *The Family and the Law*, in CHLOROS, RHEINSTEIN, GLENDON (eds), *Persons and the Family*, Vol. IV of the International Encyclopedia of Comparative Law, J.C.B. Mohr, Tubingen; Martinus Nijhoff, Leiden, Boston 2007, p. I-18.

¹⁵² Interestingly, these are by and large the result of a wider research on this field: see BOELE-WOELKI K., (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Antwerp, Intersentia, 2009, p. 405-406. The A., underlines that «the Courts often decide that the legislature should take action because the current law violates international obligations or because it does not provide answers to new developments in society. This can be demonstrated in the field of the recognition of same-sex relationships (...) The Courts paved the way for legal reform and, as a result, in the last twenty years or so more and more national legislatures have adopted legislation which is aimed at providing a legal status for same-sex couples.»

research we noticed that this observation in the special context of family matters gains a peculiar force and sheds light, as a prism, into the issue at stake in a multifaceted way. More precisely, as it has been authoritatively underlined, this observation placed in the area of competence of family matters acquires the bitter taste of an «unforeseeable and imperceptible sideways approaches that take them [the European institutions] also into the realm of substantive law».¹⁵³

Thus, cross-reference of judgments throughout Europe is becoming more and more widespread (keeping also in mind that such borrowing may often not be traceable) and, by and large, its effects are unpredictable: the dialogue between Courts – implying all the different ranks of decision, from ordinary judgment to constitutional court decisions, from domestic tribunals to supranational judges – represent a clear example of it in the *Maruko case*. Furthermore, the fact that – at present – the *Maruko* doctrine is recalled in the debate for the approval of other European Union acts and in different domestic disputes (as in Italy) is another example. But a single case cannot always be reproduced in other contexts, in other states: nevertheless, we witness a strong pressure to share the results of the judicial activity beyond domestic boundaries. Not always, as we observed in the analysis of the cases, with the due accuracy. Thus, it follows that even if a judgment always starts from a single case, its effects go far beyond it. And, consequently, the logic that emerges from the single case, to a certain extent, ends up prevailing on the logic inherent in the general written provision. In fact, as it may be inferred reading *Mariano*, the Court seems to limit and correct the bold principles that grounded its decision for the *Maruko* case, but it appears to stress them once again in *Römer's* opinion. General principles are at stake, but within specific cases, and this original framework cannot be fully erased.

And this is exactly the weak point of such a legal system, i.e. that if cross-reference creates dialogue, this latter does not provide a general rule neither for unclear cases nor in the

¹⁵³ MEULDERS-KLEIN M.T., *Towards a Uniform European family Law? A Political Approach. General Conclusion*, in ANOKOLSKAIA M., (ed.), *Convergence and Divergence of Family Law in Europe*, Intersentia, Antwerp, 2007, p. 274.

event of conflict. As it is widely known, this old dilemma gave rise to a extensive and rather spirited discussion among the scholars and the debate is still open.¹⁵⁴

Without entering into the merits of the nature and the criticalities of the dialogue between the Courts, we rather clearly pointed out that dialogue needs interpreters.¹⁵⁵ Judges' interpretative activity becomes indubitably the key factor of the matter at stake. Needless to say, the ECJ rises to an ordinary driver of this legal network of interpreters.

We should now insert a marginal note on above. It has been often recalled that the ECJ «has no adjudicative power to eliminate differences across the laws of the various member states not even as regards those member states' readings of European Community law itself.»¹⁵⁶ In fact, the interpretative framework proposed originally by art. 177/234 and now by art. 267 of the Treaty foresees that the ECJ should pronounce on what it regards as the correct interpretation of European Community law; then it is up to the national courts, embedded as they are in diverse legal cultures, to apply the law, including European Community law. Accordingly, reading the text of the provision, its structure shows how differences across legal orders are not meant to be erased. Still, the issue of interpretation is yet extremely delicate and decisive, above all – needless to say - if it pertains to a sensitive issue like family matters.¹⁵⁷

¹⁵⁴ One of the most recent new reading of this phenomenon can be found in SABEL C.F. and GERSTENBERG O., *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, ELJ, 2010, p. 511 ff., with a synthesis of the main theories in this regard. According to the authors, (p. 512) «the potential clash of jurisdiction is being resolved (...) by the formation of a novel order of coordinate constitutionalism (...). This coordinate order extends constitutionalism – understood as the legal entrenching fundamental values rather than the founding act of political sovereignty – beyond its home territory in the nation state through a jurisprudence of mutual monitoring and peer review (...)». See also (pag. 547) their interesting outline of the possible inter-relations between courts.

¹⁵⁵ There is no need to explain the observation of Tulkens according to which, if the central point of this complex system becomes judicial interpretation, the following risk is to have – as he observes - «Human rights *à la carte*» (DELMAS-MARTY M., *Ordering Pluralism.*, op. cit., p. 26.)

¹⁵⁶ See for example LEGRAND P., *Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?*, in BEAUMONT/LYONS/WALKER (ed.), *Convergence and Divergence in European Public Law*, op. cit., p. 253

¹⁵⁷ See, for example, ANTOKOLSKAIA M., *The Better Law Approach and the Harmonization of Family Law*, in BOELE-WOELKI K., (ed.), *Perspective for Unification and Harmonization of Family Law in Europe*, Intersentia, Antwerp, 2003, p. 175: «the Courts have to decide cases in a Europe divided into conservative-progressive family ideologies, and the composition of the judges, representing the Contracting States, also reflect this divide. One thing and the other oblige the Courts to be cautious in using their powers»

At this point, it is evident that the comparative analysis becomes a fundamental element of this evolution and that the degree of consideration it obtains by the ECJ is sign of the vision the judges have of Europe. Just like the ECHR system used the consensus standard doctrine, the EU used to respect member states' constitutional traditions in the formulation of the general principle applicable in all member states¹⁵⁸: in sum, the ECJ launched a new step for integrating the domestic legal order only when it was sure that there was a common constitutional tradition underpinning that principle. As we noticed, the more the European integration developed, the more the borders between common constitutional traditions and a European constitutional tradition began to fade. With regard to fundamental rights, the scholars thus started by observing that the development of an autonomous safeguard system was, in a certain sense, independent from member states' own legal systems,¹⁵⁹ to such an extent that they recognize the coexistence of different standards of protection in Europe at present, and among them a special place has to be reserved to the EU one (even if it is not fully clear the stand the ECJ will take on this issue¹⁶⁰). We observed that the non-discrimination policy, as developed by the EU institutions thanks to art. 13 and as interpreted and applied by the ECJ, illustrates this evolution in an exemplary way.

¹⁵⁸ The classical answer to the question whether Community law owes any substantial debt to comparative legal studies lied for a long time in a summary of the practice of the Court given by Pescatore which it is equally true for the whole range of uses of the comparative method in the Community context. As BENOS G., *The practical debt of Community law to comparative law*, Rev. Hell. Droit International, 1984, p. 254, quotes, «le rôle du droit comparé dans la pratique de la Cour des Communautés européennes montre que les rares références à cette méthode dans les arrêts ne sont que, pour employer une image familière, la pointe visible de l'iceberg. En réalité, la méthode comparative est utilisée tous les jours, même si, dans l'effet final, ses résultats sont absorbés dans l'interprétation d'un droit qui s'affirme avant tout comme un droit commun et autonome. Mais ces accents unitaires, volontiers mis en évidence, n'effacent pas le fait que le droit communautaire plonge des racines profondes dans les systèmes juridiques des Etats membres».

¹⁵⁹ See, for example, DE BURCA G., *Convergence and Divergence in European Public Law: The Case of Human Rights*, in BEAUMONT/LYONS/WALKER (ed.), *Convergence and Divergence in European Public Law*, Oxford, Hart, 2002, p. 132: «From one perspective, it could be said that the EU's influence on the nature and content of human rights norms within member states is at best a derived and indirect one, since the human rights principles recognised within EU law are actually drawn from the ECHR and from the national legal systems in the first place. However, the position is more complex than this. While there is clearly - as there is in various other fields of administrative law- some kind of reciprocal relationship between the development of legal principles within the EU legal system and within member states' legal systems, the EU is arguably developing what might be called an autonomous, rather than a parasitic or purely derivative human rights competence.»

¹⁶⁰ See the observation regarding *Omega* and *Schmidberger* cases developed by L. BESSELINK and J. H. REESTMAN *The relative Autonomy of the EU Human Rights Standard*, op. cit., p. 199 ff.

In this sense, the use or not of the comparative law tools by supranational judges is tantamount to a certain vision of Europe and a certain understanding of the European integration.

But after all, what we are arguing seems to be – by and large – nothing more than a repositioning of the worries already extensively expressed in doctrine, specifically with the regard to the competence of rights with the adoption of the EU Charter of Fundamental Rights and the “pitch invasions” that may arise therefrom:¹⁶¹ American history, from this perspective, clearly displays the rift given rise to in the competences sector by the – central – issuing of a catalogue of rights. In general terms, the logic of such general rights guarantee underlying each federal legal order is evident: it is up to the central State to guarantee the implementation of all the essential values of the model in each legal system, first and foremost personal rights. This can only lead to a widening of the competences of the central state¹⁶². Exactly on these grounds the Charter clearly clamps down on this in art. 51 (2) to avoid this possible drift: «This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties».¹⁶³ And for the very same reason the Treaty of Lisbon, while sanctioning the Charter of Fundamental as legally binding, reaffirmed once again that «the provisions of the Charter shall not extend in any way the competences of the Union» (art. 6, c. 2).

¹⁶¹ And, indeed, it is this worry of “unhinging” the European system, based upon the attribution of competences and limited power of the Community that gives rise to bold objections toward the adoption of a European Bill of Rights. As outlined in authoritative doctrine, the community’s initiative in the field of fundamental rights might seem «ingenuous or fraudulent» if the EU would not endow itself with the necessary competences to carry it out: see P. ALSTON/J. H. H. WEILER, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, in P. ALSTON, *The Eu and Human Rights*, Oxford, Oxford University Press, 1999, pp. 22-23.

¹⁶² See for all G. BOGNETTI, *Federalismo*, (voce), in «Dig. Disc. Pubbl.», vol. VI, Torino, Utet, 1991, pp. 282.

¹⁶³ It is important to recall also the first comma of art. 51: « The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.» With regard to the Charter of Fundamental Rights we can also recall that if certainly the Charter shapes the exercise of competences, it does not set new ones or widen existing ones, as established in art 52, para. 2 «rights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.» Furthermore, art. 52, c. 4, of the Charter of Fundamental Rights states – indeed in a slightly obscure way -: «In so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.»

And we now reach the main claim of our research: we chose to verify the state of the Union through the test of the transformation of family law, and more specifically we selected a detail within this vast issue – and, still, one of the most sensitive issues in the field –, namely the recognition of same-sex unions. As underlined again and again in the course of the research, according to European Union Law, family law is a clear domestic competence, and the issue we inquired pertains indubitably to the field of the domestic legislator. And, again and again, we stressed that this is a s.c. sensitive issue, strictly connected to the domestic legal tradition¹⁶⁴ – so much so that the German constitutional court defined it as one of the core competences of the State – and that this topic is continuously subject to a flux of changes. We are thus entering in a very special realm, that David Bradley named «the intimacies of Nations».¹⁶⁵ Comparative law (and respect of common constitutional traditions) and competences are therefore the constituent pillars of this field when the EU has to deal with it.

And it can happen – actually, it is happening more and more – that the EU deals with family matters because a rather peculiar phenomenon takes place when we deal with competences in the EU realm: we could call it a sort of “dragging effect”. The fact that the EU has certain competences in the socio-economical field seems to “drag” with it also part of the competence in family matters, when this field overlaps the previous one: obviously, the social and economical policy of the European Union should not trespass on the autonomy of the member States in the field of substantive family law. It is easy to recall many passages of the analyzed judgments stressing again and again that they are not dealing with family status but with a single detail of a pension system interfering with family matters, etc. And still many doubts arise on the fact that the judge, by touching on more and more single socio-economical

¹⁶⁴ Very interestingly, BRADLEY D., *A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics*, Oxford U Comp. L. Forum, 2005, par. 6, observes that «In general, convergence in family law will depend on “top-down” pressure, including development of a global economy and cosmopolitan human rights law or, in Europe, political integration. Uniform family laws will signal the demise of nation states, if not the end of politics». In other words, breaking the existing link between family law and National competence implies a considerably different (and some also call for a more modern) interpretation of the nature of the state.

¹⁶⁵ BRADLEY D., *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, in BOELE-WOELKI K., (ed.), *Perspective for Unification and Harmonization of Family Law in Europe*, op. cit., p. 65 ff.

details of the field, is – in a not so much «imperceptible sideways»¹⁶⁶ – ending up to affect also its substance.

Anyway, this is an old and very disputed issue, through which the EU managed to expand its competences over time. But, as Isensee acutely observes, this process of expansion of competences had its *raison d'être* during the creation of the European Communities. A flexible and broad interpretation of competences was instrumental to instil courage in the supranational subject at the beginning of its operations. As the stage of maturity has been reached and its force is settled, from a judicial point of view the control of its limit becomes a primary objective. In other words, we reached a stage in which competences cannot be interpreted in the light of a wider European integration, as in the past – and thus with a mobile boundary –, but they have to be taken literally (or seriously).¹⁶⁷

It is thus not surprising that, both the *Lissabon-Urteils* and *Mangold* case of the German Constitutional Court share the same reflection even if they bear different tones: a renewed call for the respect of competences and for the safeguard of national identity, together with a general fear of a further overstretching the Community's competences. As we remarked, the Italian Constitutional Court – when faced with the same question on the influence of supranational law within family law – answers rather abruptly and refers to the established allocation of competences between the EU and member States. Actually in reforming the Treaty (or in the new secondary legislation) the States expressed a special emphasis on the limited nature of the European Union and the call for the respect of the competences attributed therein.¹⁶⁸ This remark

¹⁶⁶ *Supra*, note. 153.

¹⁶⁷ ISENSEE J., *Europäische Familienpolitik als Kompetenzfrage*, op. cit., p. 806: the author argues that even if the EU can serve as a coordination forum, it cannot provide suggestions or fund certain policies and not others. The use of interpreting is not free and is subject to the limits attributed to competences: «Kompetenzen sind nicht käuflich, und sie stehen auch nicht zum Verkauf.» To provide further reference on how to interpret competences, the author sceptically observes that «Kompetenzrecht wird mehr oder weniger wie soft law behandelt. Wo die Verträge enden, waltet das Parkinson'sche Gesetz. Die supranationale Regelungsmaschinerie läuft als *perpetuum mobile*. Das Kontrollkriterium der Subsidiarität greift praktisch ins Leere; es dient lediglich als Beruhigungs- und Trostpflaster für nationale Empfindlichkeiten.» At times, governments contribute to this situation by turning to the supranational level each time they feel that a certain statement might prove to be unwanted or unwelcome at a national level.

¹⁶⁸ For the doctrine see, for example, WEATHERILL S., *Competence and Legitimacy*, in BARNARD C. and ODUDU O. (ed.), *The Outer Limits of European Union Law*, Oxford and Portland, Oregon, 2009, p. 29: «In the Lisbon Treaty

is striking if compared with the trend analyzed in the case-law – whereas for sure, as it is a case-law story, there are breakthroughs and standstills and no excessive generalization is thus possible.

In sum, European union law is progressively approaching and touching on domestic family law, gently forcing the transformation of this field within a supranational framework: the clear impression we got from the series of cases analyzed in this work is that Europe is - more or less purposely – deconstructing aspects of national family laws piece by piece.¹⁶⁹ Many issues are at stake in this process, if we look at it from the perspective of the relations between member states and European Union: not only the meaning of comparative law and competences in the EU context but also the substance of pluralism in Europe. Judges, legislatures and legal scholars are now facing the fascinating – and risky too – challenge of handling this evolution: how the EU law and its institutions will choose to accompany this process of transformation of family law and how the domestic legal orders will maintain a relevant say in the matter is an open – and crucial – question for the future of Europe.

there is an abiding concern to clarify more aggressively that the Member States are the source of the competences which are conferred on the Union. This is visible in the addition to the paragraph 1 of Article 1 EU. Moreover, the Treaty broadcasts the point that competences not conferred on the Union rest with the Member States. This is visible in what will become Articles 4 and 5 ED, once the Lisbon Treaty enters into force. This is not new as a matter of law, but the explicit hammering home of these points in the Treaty reflects the political desire to emphasize still further the limited nature of the EU's powers and functions.»

¹⁶⁹ MEULDERS-KLEIN M.T., *Towards a Uniform European family Law? A Political Approach. General Conclusion*, op. cit., p. 278 is really critical toward this recent evolution of family law in general: «Hence the central question: namely, whether the Member States are still free to decide on their own substantive family rules, or only under the governance of a benevolent Big Brother. Moreover, how much further might this new imperialism grow by unpredictable side roads approaches?»