



Homosexuality and Child Custody through the Lenses of Law: Between Tradition and Fundamental Rights

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In the course of child custody disputes, the application of the principle of non-discrimination concerning parents and their sexual orientation was internationally recognised by the decision in *Salgueiro da Silva Mouta v. Portugal*.¹ However, it does not yet seem to have been universally accepted, due largely to considerations regarding common morals,² where some individuals still have difficulty in admitting that the capacity of a person to be a parent is not determined by his or her sexual inclination, but rather by his or her parental skills. The aim of this paper is to verify the impact that morality has on the principle of non-discrimination, and on the principle of the best interest of the child, which is, instead, universally accepted as the main guideline in deciding child custody disputes. Thus, comparing some international trends with Italian case law, the author explores whether, in Italy as well as in other European legal systems, the contrast between legal issues and ethical values can be solved in favour of an evolution of the traditional meaning of the family.

1. Introduction

Values that define the personality of an individual first develop within the family environment. Anthropologists and sociologists³ have amply demonstrated that the family is more suitable than any other social structure to balance the contrasting values of different communities.⁴ Ethic, religious, and cultural values are inherent to the concept of the “family”

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¹ ECHR, 21st Dec. 1999, case *Salgueiro da Silva Mouta v. Portugal*, Hum. Rts. Case Dig., 10, 307-309 (1999) and Am. J. Int’l L., 95, 422-430 (2001).

² In this paper, the expression “common morals” includes cultural, religious and social values.

³ Paola Ronfani, *Il diritto e le nuove famiglie: una lettura sociologica di un rapporto complesso*, Min. e giust., Rome, 2, 13-26 (2008); Maurice Godelier, *Métamorphoses de la parenté*, éd. Fayard (2005); Agnès Martial, *L’anthropologie de la parenté face aux transitions familiales contemporaines: des interrogations en suspens*, La Découverte - Travail, genre et sociétés, 158-163 (2005); Gérard Lucas, *Quelques préalables à l’étude des parentalités homosexuelles*, Revue française de psychanalyse, Vol- 67, 229-240, (2003).

⁴ The topic has been first apprehended by social science. On these issues, see Douglas Laycock- Anthony R. Picarello – Robin Fretwell Wilson eds, *Same-sex marriage and religious liberty: emerging conflicts*, Lanham, Rowman & Littlefield Publishers (2008). Interdisciplinary legal scholars have further approached

while it reflects the social system at any given historical moment.⁵ In fact, the “family” has always originated from a confrontation between traditional values at any given moment in time with alternative values searching for affirmation in the social context.

Social sciences influence legal studies, because they provide interpretative instruments contributing to the construction of definitions, which are relevant to providing for legal solutions and, simultaneously, linking individuals and their relationships with the social environment.⁶ As a result, the western⁷ family has experienced both the rise and the fall of some core principles, a phenomenon that can be attributed to the development of social habits, over centuries, which seem to have isolated family law from private law. As an example, it is worth mentioning both the decline of the concept of the indissolubility of marriage, the “Immunity Doctrine”,⁸ and the affirmation – in the Italian system - of moral and legal equality between spouses and between legitimate and natural children.⁹

Within the context of family law, rights solicitations have developed (and are developing) into a larger social and legal process involving the promotion of civil and human rights. In this process, the affirmation of the principle of non-discrimination in the eyes of supranational institutions and European Union Law has played an important role. Within the EC framework, free movement inferred consequences in the debate about the evolution of the concept of the family and its different aspects within Member States.¹⁰ In fact, free movement

the argument through the lenses of other fields: see e.g. Nicholas Kasirer, *The dance is one*, Law and Literature, Los Angeles, Vol. 20, No. 1, 69–88 (2008).

⁵ Masha Antokolskaia, *Family law and national culture. Arguing against the cultural constraints arguments*, in K. Boele Woelki, Debates in *Family Law around the Globe at the Dawn of the 21st century*, Intersentia, 37-51 (2009); Marie C. Celerier, *La famille homoparentale: continuité ou rupture?*, Champ psychosomatique, n. 38, 167-170 (2005); Françoise Héritier, *Quel sens donner aux notions de couple et de mariage? A la lumière de l'anthropologie*, Information sociales, n. 122, 6-15 (2005).

⁶ See Norberto Bobbio, *L'età dei diritti*, Einaudi (1990).

⁷ In this paper, “western” refers to the western culture and to the so-called *Jewish and Christian roots of Europe*. During the draft of the Treaty establishing a Constitution for Europe, an important debate arose regarding the opportunity of including those values in the Preamble. Even though no mention about God or Religion has been made in the official texts, we cannot avoid referring to ethical values deriving from the Christian culture in a matter as tricky as the one we are going to analyse. See Salvatore Patti, *Tradizione civilistica e codificazioni europee*, Riv. dir. civ., Padova, pp. 521-531 (2004); Lorenzo Leuzzi – Cesare Mirabelli Ed., *Verso una Costituzione europea - Atti del Convegno Europeo di Studio, Roma 20-23 giugno 2003*, Marco Editore, II (2003); Giovanni Reale, *Radici culturali e spirituali dell'Europa – Per una rinascita dell'“uomo europeo”*, Raffaello Cortina Editore (2003); Pontifical Lateran University, *The common Christian roots of the European Nations: an international colloquium in the Vatican*, Le Monnier (2002); Mary A. Perkins, *Christendom and European Identity – The Legacy of a Grand Narrative since 1789*, Walter de Gruyter (2004).

⁸ The Immunity Doctrine meant that people belonging to the same family could not sue each other. An important Italian scholar compared the Family to an island that the sea of the law can only lap and never overstep. Carlo Arturo Jemolo, *La famiglia e il diritto*, Ann. Sen. Giur. Università di Catania, 1948, III, Italy.

⁹ Italian Constitution articles 29 and 30. See also Philippe Malaurie, Hugues Fulchiron, *La Famille*, Paris (2009); Stephen M. Cretney, Judith Masson, Rebecca Bailey-Harris, *Principles of family law*, Sweet & Maxwell (2003); Katharina Boele-Woelki, Brent Brat, Ian Curry-Sumner eds., *European Family Law in Action*, I – II- III, Intersentia (2003); Jacques Massip, George Morin, Jean-Luc Aubert, *La réforme de la filiation*, 3 Ed Defrénois (1976); Jean Carbonnier, Droit civil, tome 2, *La famille, l'enfant, le couple*, Paris (2002); Gillian Douglas, *An introduction to family law*, Oxford (2001). In a comparative perspective see Bea Verschraegen, v. Divorce, in *International Encyclopedia of Comparative Law*, Vol. 4, chapter 5.

¹⁰ The ECJ and ECtHR assume a leading role, since nowadays they are the best equipped instruments to reflect the needs, sensitivity and habits of member citizens. See Michael Bogdan, *Registered partnerships and EC Law*, in K. Boele-Woelki – A. Fuchs ed., *Legal recognition of same sex couple in Europe*, Intersentia, 171-177 (2003) and Helen Toner, *Immigration Rights of Same-sex couples in EC Law*, *ibidem*, 178-193 and Bea

could be limited only by objective considerations and in proportion to the legitimate aim being pursued, and in order to facilitate it, other fundamental rights relating to the family have been recognised. Indeed in the case *Grunkin and Paul*,¹¹ the European Court of Justice (ECJ) affirmed that “Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth”.

The recent but not yet entirely developed process of the harmonisation of European Family Law arises from the possibility of affirming the very same rights in front of a supranational court/institution “denied” by the legal system of one’s country. This supranational dimension is in reality the driving force of legal innovation on these issues across Europe. However, this process has evolved in the context of free movement of goods, services, people (including people who migrate with their cultural background, values and ideas). Nonetheless, the growing recognition of human rights in Community Law – and in particular in the European Convention on Human Rights (ECHR) - is capable of reaching and indeed overtaking the limits of Community competition. In other words, the Europeanization process, as a consequence of globalisation, has also reaffirmed fundamental rights in decisions of the ECJ and the ECtHR.¹²

Likewise, other Member States have not pursued significant changes to the concept of the “family”: the actual debate in Italy arises from the acknowledgement of partnerships¹³ originally intended exclusively for traditional families. On the one hand, this extension involves all the values belonging to the traditional western model of heterosexual couples and on the other hand the issue of the violation of the non-discrimination principle based on sexual orientation. The Italian debate¹⁴ challenges the very notion of the family that has been closely linked to reproduction, reflecting the traditional question surrounding the homosexual

Verschraengen, *The right to private life and family life, the right to marry and to found a family, and the prohibition of discrimination*, *ibidem*, 194-211; Patrizia De Cesari ed., *Persona e Famiglia - Trattato di diritto privato dell’Unione Europea*, Giappichelli (2008).

¹¹ ECJ, 14th Oct. 2008, *Grunkin-Paul*, case C-353/06, available on the website <http://eur-lex.europa.eu>. See also Matthias Lehmann, *What’s in a name? Grunkin-Paul and beyond*, in *Yearbook of Private International Law*, 10, 135-164 (2008). The case concerns a child who was born in Denmark and registered in accordance with Danish law under the compound surname Grunkin-Paul combining the name of his father and that of his mother, even though he was of German nationality. After moving to Germany, German authorities refused to recognise his surname as it had been determined in Denmark, since Art. 10 EGBGB establishes that the name of a person is subject to the law of his or her nationality.

¹² For a detailed discussion concerning the European process of the harmonisation of Family Law, see Katharina Boele-Woelki, Brente Brat, Ian Curry-Sumner I. eds., *European Family Law in Action*, I – II- III, Intersentia (2003). In fact, in 2001 an international group of scholars established the Commission on European Family Law (CEFL), who aimed “to launch a pioneering theoretical and practical exercise in relation to the harmonisation of family law” in Europe. See also Maria C. Andrini, *Un nuovo diritto di famiglia europeo*, Cedam, (2007) and Laura Tomasi, *La tutela degli status familiari nel diritto dell’unione europea – Tra mercato interno e spazio di libertà, sicurezza e giustizia*, Cedam, (2007)

¹³ In Italy there is no legislation related to heterosexual couples, even if the EU legislator has referred to this principle in a number of persuasive acts and in the Directive 2000/78/CE, establishing a general framework for equal treatment in employment and occupation. See, Mark Bell, *We are Family? Same-sex Partners and EU Migration Law*, *Maastricht J. of Eur. Comp. L.*, 335 (2002). See also § 6 The Principle of non-discrimination.

¹⁴ See Francesco D. Busnelli, *La famiglia e l’arcipelago familiare*, *Rivista di diritto civile*, 509 – 529 (2002), Cesare M. Bianca, *Dove va il diritto di famiglia?*, *Familia*, 3-10 (2001), Gilda Ferrando, *Il matrimonio gay, il giudice e il legislatore*, *Resp. civ. prev.*, 2344 – 2353 (2008).

family debate. The problem therefore emerges clearly: which are the legal instruments capable of justifying an expansion and revision of the family concept in Italy? How could fundamental rights and the removal of social barriers allow a similar process?

The question can be contemplated by considering two variables. The first one concerns relationships between partners and the State, the second deals with the relationship between a homosexual parent and his or her child(ren). Normally, the debate about homosexual marriage (which, where it is provided for, has contributed to an evolution of a new concept of the family, also thanks to the higher consideration that the principle of equality—by which each individual is free to marry—has received through article 9 of The Charter of Fundamental Rights of the EU,¹⁵ Nice, 2000)¹⁶ and the debate regarding the acknowledgement of unions, without the recognition of *marital status*,¹⁷ are argued under the first variable. In contrast, the discussion about the possibility for a single homosexual or even homosexual couples to be entitled, or not, to parental rights, by means of either adoption or assisted procreation¹⁸ by one of the two partners and an adoption or custody order by the other one, is included in the second variable.

Custody and care of children has always been a challenging problem in all legal systems that have decided to regulate same-sex partnership. In any case, the connection between the two categories of matters related to homosexuality and filiation is often reduced to an ethical and moral debate concerning the granting of shared custody of a child to a homosexual parent. This is when a heterosexual family (married or not) breaks down because one of the two parents reveals their homosexual orientation and the relationship between parents and children has to be defined or assessed by judges. The subject of homosexuality and child custody demonstrates the effects of discrimination based on sexual orientation in everyday life and, in particular, towards relationships between the homosexual parent and his or her child(ren).

In fact, if parental rights were granted to homosexuals, traditional values would not only change; thanks to the full integration in society of people of all sexual orientations, all prejudices (and every form of discrimination) typical of modern western society would disappear.¹⁹ In this perspective, the family can be defined as a place, chosen by individuals,

¹⁵ After Lisbon Treaty, which has amended article 6 of the EU Treaty, the Nizza Charter is now binding.

¹⁶ In fact marriage from a traditional point of view must be related to reproduction.

¹⁷ The matter effects also free movement and immigration policies: *e.g.* in a recent decision, the Italian Supreme Court n. 6441/2009 (Cass. 17th Mar. 2009, *Fam. e Dir.*, 5, 454 (2009), commented by Maria Acierno) denied family reunification to a gay registered couple from New Zealand. See also Gilda Ferrando, *Il contributo della Corte Europea dei diritti dell'uomo nell'evoluzione del diritto di famiglia*, *Nuova Giur. Civ. Comm.*, 263 (2005); Vladimiro Zagrebelsky, *Famiglia e vita familiare nella Convenzione Europea dei diritti umani*, in Maria C. Andrini ed, *Un nuovo diritto di famiglia europeo*, Cedam, 115 (2007).

¹⁸ Unmarried woman's artificial insemination is legal in the UK and in some states of USA, such as California, Colorado, Illinois, New Jersey, New Mexico, Oregon, Washington, Wisconsin and Wyoming.

¹⁹ In this perspective, it is useful to mention the system approach in Quebec to homosexuality and family, where homosexual people obtained the acknowledgement of their parental rights (custody and visitation rights as well as suitability to adopt) two years before the affirmation of the right to get married. See Court of Appeal of Québec, 19th Mar. 2004, *Catholic Civil Rights League c/ Hendricks*, available on the website www.canlii.org which stated that "there is no longer any obstacle to the solemnization of the respondents' marriage by a competent officer, and the order the respondents seek to that effect will be issued. Accordingly, after publication of the notice provided for in article 368 of the *Civil Code of Quebec* and in the absence of valid opposition, since homosexuality is not a valid ground of opposition, the respondents' marriage may be solemnized in accordance with the law". Susana Navas Navarro ed., *Matrimonio homosexual y adopcion – Perspectiva nacional e internacional*, DBT (2006). See also footnote 37. However,

where they can express feelings and live together, support each other and, also, conceive and/or raise children.²⁰

Our aim is to investigate whether the time has come to decide that in some instances several universal principles should be affirmed on a global level, even if such principles could undermine the identifying values rooted in the sense of belonging to a given nation.²¹ To this end, this paper introduces in the first part the main ethical and legal issues emanating from the theme of “homosexuality and the family”. The second part consists of a more specific juridical analysis of the relationships between homosexual parents and their children, focusing on the three different approaches elaborated by US Courts. From the comparative analysis of supranational and some national case law and legislation, two main relevant ways capable of solving, from a legal point of view, the ethical questions in cases concerning children and homosexual parents become evident: the first one is related to the pursuit of the best interest of the child for custody – which is discussed in the third and in fourth section of the paper – and; the second solution, to be analysed in the final section of this paper, concerns the application of the principle of non-discrimination based on sexual orientation.

2. Homosexuality and the Family: An Unresolved Problem in Europe

In the past,²² homosexuality was considered in western society as a form of perversion or a mental disease, and was often put in the same category as prostitution, paedophilia and pederasty.²³ In fact, society’s repulsion of homosexuality caused an increase of homophobic conduct, ranging from simple embarrassment at the sight of homosexual people to actual persecution.²⁴ More recently, medical and psychological contributions have managed to separate “homosexuality” from physical sexual acts, allowing homosexuality to develop

in Belgium, for example, the institute of marriage was opened up to include homosexuals in 2003 whereas only three years later did the law grant parental rights to homosexual couples.

²⁰ François Héritier, *Quel sens donner aux notions de couple et de mariage? À la lumière de l’anthropologie, Information sociales*, n. 122, 6-15 (2005).

²¹ Barbara Henry, *Identità territoriali nella società globale*, ETS (2005) and Barbara Henri – Anna Loretoni eds, *The Emerging European Union – Identity, Citizenship, Rights*, ETS (2004).

²² For an exemplification of Homosexual persecutions since 776 B.C. to XIX century, see Luis Crompton, *Homosexuality and Civilization*, Harv. Un. Press (2003).

²³ Only in 1973 was homosexuality removed from the Diagnostic And Statistical Manual of Mental Disorders (DSM) by the American Psychiatric Association and in 1993 by the World Health Organization (*The ICD-10 Classification of Mental and Behavioural Disorders: diagnostic criteria for research*, Ginevra) See John C. Gonsiorek, *The empirical basis for the demise of the illness model of homosexuality*, in John C. Gonsiorek, James D. Weinrich (Eds), *Homosexuality: Research Implications for Public Policy*, Sage Publications, 115-136 (1991); Bernard F. Riess, *Psychological tests in homosexuality*, J. Macmor ed., *Homosexual Behavior: A Modern Appraisal*, Basic Books, 298-311 (1980); David S. Dooley, *Immoral because they’re bad, Bad because they’re Wrong – Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, *California Western Law Review*, San Diego, 26, 393 (1990).

²⁴ Homosexuality has been illegal for a long time in many jurisdictions, for example, in the US until 2003, see the U.S. Supreme Court’s decision in *Lawrence v. Texas*, 26th Jun. 2003, 123 S. Ct. 2472; 156 L. Ed. 2d 508. According to the Court the Texas anti-sodomy law (Tex. Penal Code § 21.06[a], 2003) and all other anti-sodomy laws violated the Due Process Clause of the 14th Amendment of the U.S. Constitution and for this reason they were held invalid. In Europe, much of the legislation banning homosexuality was considered under the ECHR, see for example, the English case, ECtHR, 22nd Oct. 1981, *Dudgeon v. RU*, S. A, n° 45 also available in *Cahiers de Droit Européen*, 1982, 221, commented by Gérard Cohen-Jonathan; *Annuaire français de droit international*, 1982, 504, commented by Robert Pelloux. See also ECtHR, 26th October 1988, *Norris v. Irland*, S. A, n° 152 concerning Ireland’s ban on homosexual acts and, for the Cyprus experience, see ECtHR 22nd April 1993, *Modinos v. Cyprus*, S. A, n° 259.

deeper connotations, such as emotions, feelings and relational attitudes, in terms of morale.²⁵ Moreover, the de-criminalisation²⁶ of sodomy and the progressive recognition of homosexuals' individual rights have laid the foundations for the acknowledgement of homosexual couples' rights.²⁷

Despite the more positive connotations regarding homosexuality that are emerging from arguments evident in case law, the *Sacra Romana Rota* in 1994 defined homosexuality as “an abnormal structure of personality” counter to the goals of marriage itself “because it prevents the affected from practising marital love in order to procreate, to use marriage to reach this “*fine modo humano*”, to preserve conjugal faithfulness as exclusively binding and to establish a lifelong union also aimed at mutual support”.²⁸ In the same year in which the *Sacra Romana Rota* published this statement, the European Parliament adopted a Resolution on equal rights for gays and lesbians within the EC,²⁹ asking the Commission to issue a recommendation with the aim of passing legislation to provide for homosexual persons access to “marriage or an equivalent legal framework”, to allow for the “adoption and fostering of children” and to guarantee to “one-parent families, unmarried couples and same-sex couples rights equal to those enjoyed by traditional couples and families, particularly as regard to tax law, pecuniary rights and social rights”. In the 16 years that followed, various suggestions aimed at abolishing discrimination³⁰ were made. Although – and paradoxically – the Netherlands, Belgium, Spain, Norway and Sweden are celebrating their first same-sex marriages, the data concerning common feelings and thoughts is not actually encouraging:³¹ over 72% of Italians and 50% of Europeans interviewed continue to perceive substantial discrimination as far as sexual orientation is concerned.

²⁵ John C. Gonsiorek, *Results of psychological testing on homosexual populations*, in William Paul- James D. Weinrich - John C. Gonsiorek- Mary E. Hotvedt (eds), *Homosexuality. Social, Psychological and Biological Issues*, Sage Publications, 71-80 (1982); see also Gabriele Prati, Luca Pietrantonio, *Sviluppo e omogenitorialità: una rassegna di studi che hanno confrontato famiglie omosessuali ed eterosessuali*, in *Riv. Sper. Freniatria*, 2, 71 (2008).

²⁶ For example, homosexual acts were decriminalised in Poland in 1932, Denmark in 1933, Sweden in 1944, in the United Kingdom in 1967 and, more recently, in Texas in 2003 (see footnote 43) and in India in 2009.

²⁷ Vittoria Barsotti, *Privacy e orientamento sessuale una storia Americana*, Giappichelli (2005).

²⁸ *Sacra Romana Rota*, 19th Dec. 1994, *Ius Ecclesiae*, 1996, 601. Author's translation.

²⁹ Resolution on equal rights for homosexuals and lesbians in the EC, 8th Feb. 1994, in *Official J. of the European Communities*, C 61, 28.2.1994, 40.

³⁰ As an example the “Resolution on the Respect for Human Rights in European Union for 1998-1999” adopted by the European Parliament, on 16th March 2000, asked member states “to guarantee one-parent families, unmarried couples and same-sex couples rights equal to those enjoyed by traditional couples and families, particularly as regards to tax law, pecuniary rights and social rights”. Moreover, at §57, the European Parliament “notes with satisfaction that, in a very large number of Member States, there is growing legal recognition for extramarital cohabitation, irrespective of gender; calls on the Member States - if they have not already done so - to amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women; calls on those States which have not yet granted legal recognition to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender; considers, therefore, that rapid progress should be made with mutual recognition of the different legally recognised non-marital modes of cohabitation and legal marriages between persons of the same sex in the EU”.

³¹ See the Eurobarometer 2008 Report on Discrimination in the European Union, available online at: http://ec.europa.eu/public_opinion/archives/flash_arch_en.htm.

In Italy, the *Corte Costituzionale* (Constitutional Court) decided³² an issue raised by the *Tribunale di Venezia* on 3 April 2009³³ and the *Corte di Appello di Trieste* on 20 July 2009³⁴ regarding the constitutional legitimacy of some articles of the Italian Civil Code,³⁵ especially those concerning the prohibition of same-sex couples to marry. The Court stated that it has no jurisdiction in the introduction of same-sex marriage because the legislator has the power to decide if and in which terms homosexual unions, which are included in the concept of social formation contained in article 2 of the Italian Constitution, should be protected. Even though the Constitutional Court did not recognise same-sex marriage, the acknowledgement that homosexual couples came within the scope of social formations, according to which people can realise their personality, constitutes an important step in the extension of the definition of the family, especially in a country such as Italy, where the affirmation of the rights of homosexual couples faces many obstacles.³⁶ Although this decision is limited to the debate about the matrimonial rights of homosexual couples, another important aspect, which must also be considered, concerns filiation³⁷ relationships.³⁸

In Europe the question surrounding adoption by homosexual couples remains controversial, in spite of hopes for a harmonised solution proposed by the European Convention on the Adoption of Children.³⁹ In fact, according to its revised version signed in Strasbourg on 27th November 2008, the discussion is still open. As far as the requirements needed by petitioners are concerned and according to art. 7, par.2, the Convention gives each State the possibility to choose whether or not to grant the effects of the Convention “to same-sex couples who are married to each other or who have entered into a registered partnership together” and to the “different sex couples and same sex couples who are living together in a stable relationship”.

The cautious perspective of the Convention of Strasbourg stems from a decision of the ECtHR⁴⁰ in which it was established that in a State recognising adoption by a single parent the refusal by the authorities to grant adoption to a homosexual petitioner (after having verified

³² C. Cost., ord. 15th April 2010, available in the website www.cortecostituzionale.it.

³³ *Tribunale di Venezia*, 3rd Apr. 2009, *Famiglia Min.*, *Luglio*, 18-22 (2009) and *Fam. dir.*, 82 (2009).

³⁴ *Corte d'Appello di Trento*, 20th Jul. 2009, and then *Tribunale di Ferrara*, 14th Dec. 2009, www.personaedanno.it; see also *Corte d'Appello di Firenze*, 30th Jun. 2008 and *Corte d'Appello di Roma*, 13th Jul. 2006, *Foro it.*, I, 3695 (2008) case note by Francesco Dal Canto.

³⁵ In particular, Articles 93, 96, 98, 107, 108, 143, 143 *bis* and 156 *bis* of the Italian Civil Code.

³⁶ Gilda Ferrando, *Il matrimonio gay, il giudice, il legislatore*, *Responsabilità civile e previdenza*, 2344 (2008) and Francesco Bilotta, *Matrimonio (gay) all'italiana*, *Nuova Giur. Civ. Com.*, I, 91 (2006).

³⁷ In order to understand the extent of the discussion concerning joint custody and parental responsibilities of homosexuals we cannot avoid mentioning the age-old question of adoption by either same sex couples or single homosexuals.

³⁸ See art. 115 Civil Code of Quebec that extends full parenting rights to lesbian and gay couples after the amendment was unanimously and without abstentions voted into law by the Quebec National Assembly in 2002: “Where the parents are of the same sex, they are designated as the mothers or fathers of the child, as the case may be”. See also art. 578.1 relating to adoption by homosexual couples: “If the parents of an adopted child are of the same sex and where different rights and obligations are assigned by law to the father and to the mother, the parent who is biologically related to the child has the rights and obligations assigned to the father in the case of a male couple and those assigned to the mother in the case of a female couple. The adoptive parent has the rights and obligations assigned by law to the other parent. If neither parent is biologically related to the child, the rights and obligations of each parent are determined in the adoption judgment.” See Mireille D. Castelli – Dominique Goubau, *Le droit de la famille au Québec*, 5 ed, Les presses de l'université Laval (2005).

³⁹ European Convention on the Adoption of Children, available online at: <http://conventions.coe.int>.

⁴⁰ ECtHR, 22nd Jan. 2008, *E.B v. France*, case 43546/02, *Fam. e Dir.*, Milano, 221 (2008) and *Actualité Juridique Famille*, 118 (2008).

his or her educational and human fitness) based solely on his sexual orientation⁴¹ leads to discrimination which cannot be justified only on the basis of the absence of a father figure for the child. The process of harmonisation has been suspended in favour of a wider freedom for individual States in deciding whether or not to permit adoption by a single parent. It can therefore be assumed that many nations in Europe are hesitant about accepting a widened notion of the family, similar to that accepted in The Netherlands and Sweden in 2001 and 2002 respectively by providing for same-sex couple adoption.⁴²

Elsewhere and by comparison, in certain American States (Massachusetts, Vermont, New York and in the District of Columbia), *co-parent adoptions* – where the minor is the natural or adoptive child of one of the partners and he or she establishes a parental relationship with the other partner – are clearly permitted, while in other States, such as New Jersey, it is even possible to adopt a child not related to the family. These are called *stranger adoptions*.⁴³

3. Relationships between Homosexual Parents and Children

As far as the evaluation of the educational fitness of homosexual parents is concerned, Europe and the USA have taken the same steps, even though their primary agendas differed to some extent. In fact, before referring to the distinction between homosexual and heterosexual people as a choice related to private life, some states had given sexual orientation different levels of importance.⁴⁴ In the USA, the common law system has facilitated an elaboration by the courts of three different approaches relating to the matter of shared custody of children in cases concerning homosexual parents. A comparative analysis of the US Courts' approaches, concentrating, in particular, at instances where European legal systems analysed differently or offered similar solutions, allows us to conclude that each different approach represents one more step towards the construction of a novel system of values within familial relationships.

⁴¹ According to the decision the woman “doesn't (didn't) fulfil enough guarantees from an educational, psychological and familial point of view”.

⁴² For The Netherlands, see 1st Apr. 2001 Act; for Sweden, see the Ministry of Justice's report about “Homosexual partnership and adoption”, available at www.riksdagen.se in which Swedish Government explains the reasons for the 6th Jun. 2002 Act. See also the EFL Commission, in looking for a common core in European Family Law, stated, concerning same-sex adoption, that it is not possible to find a common core but in the states which allowed it, it seems to be «the only way for a parent's partner to acquire full parental responsibilities jointly with the child's parent», Katharina Boele-Woelki et al. eds, *Principles of European Family Law regarding Parental Responsibilities*, Intersentia, 47 (2007).

⁴³ See for example, *Cox v. Florida Dep't of Health & Rehabilitative Servs.*, 656 So. 2D 902, 903 (Fla, 1995); *M.M.D. v. B.H.M.*, 662 A.2d 837, pp. 857-861 (D.C. 1995). See also Arthur S. Leonard, Paul Finkelman eds, *Homosexuality and the Constitution*, Taylor & Francis (1997).

⁴⁴ It is important to stress that, in the last 10 years both ECtHR (*Salgueiro da Silva Mouta c/ Portugal*) and the Supreme Court of U.S. (*Lawrence v. Texas*), have tackled homosexuality highlighting the importance of privacy with respect to personal liberty and the significance of the home as a place of safety from the omnipresence of the state. Ben C. Morgan, *Adopting Lawrence: Lawrence v. Texas and discriminatory adoption laws*, Emory L. J., Atlanta, 57, 1491-1531 (2004).

Step 1: The Rejection of the “Family - Homosexuality” Combination

The early decisions rejected: i) petitions of adoption issued by homosexual couples, ii) child custody claims filed by the biological parent and iii) instances of foster custody⁴⁵ by the homosexual partner of the biological parent. Those decisions were based on the concept of homosexuality as a disease or a psychological deviance.⁴⁶ This is known as the “*per se* approach”,⁴⁷ developed in case law, through which it is possible to grant child custody to a homosexual parent only if he or she avoids living such an alternative lifestyle and if he or she creates a healthy and traditional environment where the child can grow up. The highly discriminatory nature of these kinds of decisions is due to the fact that homosexuality is banned *a priori* with no recognition of the actual facts of the case, nor of actual family bonds and feelings among the individuals involved.

Step 2: The Middle-ground Approach

The second step in the USA is characterised by the rejection of custody or adoption petitions based on the best interest of the child.⁴⁸ In these types of cases, homosexuality is not viewed as a disease or a perversity, but instead doubts are raised that the best interests of children could be impaired by raising them in these non-traditional families. Such decisions are often accompanied by the perception that adoption or custody petitions are promoted in order to satisfy the homosexuals’ egoistic desire to become parents, even if they are not able to ensure that the child grows up in a stable environment which facilitates the development of his or her personality, while that should be the first priority at all times.⁴⁹ According to the *middle-ground approach*, as it is called,⁵⁰ parental sexual orientation is an evaluation criterion in child custody claims.

Paradigmatic of this trend is the *M.J.P. v. J.G.P.* Oklahoma Supreme Court case,⁵¹ where the lesbian mother should have proved⁵² that her son would not suffer prejudices by living with her – a clear inversion of the burden of proof: it is the mother who has to show that she is fit

⁴⁵ Foster-custody consists of the enjoyment of parental rights and duties upon the biological child of each partner.

⁴⁶ Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, Indiana L. J., 71, 623-671 (1996); Elizabeth E. Bosquet, *Contextualizing and analysing Alabama’s Approach to Gay and Lesbian Custody Rights*, Alabama L. Rev., 1625-1649 (2000).

⁴⁷ In Kentucky, Mississippi, Missouri, Nevada, North Carolina, Tennessee and Virginia courts follow the *per se* approach. Some cases, in particular, are remarkable, such as *S v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980); *White v. Thompson*, 569 So.2d 1181 (Miss. 1990); *J.P. v. P.W.*, 772 S.W.2d 786 (Mo. Ct. App. 1989); *G.A. v. D.A.*, 745 S.W.2d 726, 727-28 (Mo.Ct. App. 1987), *Daly v. Daly*, 715 P2d 56 (Nev. 1986); *Newsome v. Newsome*, 256 S.E.2d 849 (N.C. Ct. App. 1979); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. 123, *29, 30 (Tenn. App. Mar. 30, 1988); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

⁴⁸ Theresa Glennon, *Divided Parents, Shared Children. Conflicting approaches to relocation disputes in the USA*, in K. Boele-Woelki, *Debates in Family Law around the World at the Dawn of the 21st Century*, *ibidem*, 83-106.

⁴⁹ See *H.J.B v. P.W.*, 628 So 2d 753 (Ala. Civ. App. 1993); *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987); *Constant A..v. Paul C.A.*, 496 A2d 1 (Pa. Supr. Ct. 1985) in which one parent’s homosexuality is considered as a relevant issue in deciding about child custody and visitation rights. See also an interesting decision of the Court of Appeal of Ontario, Canada, which states that “homosexuality is not in itself alone a ground for refusing custody. The question, which must be decided on the evidence, is what effect that aspect of the parent’s make-up and lifestyle has on the welfare of the children”, *Bezaire v. Bezaire*, 20 R.F.L. (2d) 358, 1980 Carswell Ont 324 (Ont. C.A. 1980).

⁵⁰ *Ibidem*.

⁵¹ *M.J.P. v. J.G.P.* 640 P.2d 966 (Okla, 1962).

⁵² In this case she did not satisfy the burden of the proof, *ibidem*.

to care for the child, not the State which is called to prove she is unfit to do so. Even though the reasons behind this approach show, in this case as in other similar ones, a certain openness to the issue of homosexuality, courts have continued, in fact, to reject granting child custody to the homosexual parent because of the assessment of other factors, such as the risk of psychological suffering linked to sexual identification which could occur because the child does not live in a traditional family.

In Europe, a Portuguese judge applied the same *ratio*, in the Court of Appeal case that eventually led to the ECtHR decision in *Salgueiro da Silva Mouta v. Portugal*.⁵³ Even without making direct moral judgements on homosexuality, the Court of Appeal⁵⁴ reduced the visiting rights of Mr Salgueiro based on evidence produced by the mother that the child was being stigmatised as a result of the father's sexual orientation. The tribunal considered this factor decisive.

Based on this concern, it becomes natural for homosexual parents to conceal their homosexuality, from their social community and even within their own family. This happens most frequently when the other parent and his or her *entourage* appear to be bothered by homosexuality.⁵⁵ Undoubtedly, in this case, the parent-child relationship would be belittled. Several studies⁵⁶ refer to the different ways of involving children in claims regarding their custody. Nowadays minors are usually heard in proceedings concerning themselves. Many other studies, instead, deal with the opportunities and approaches through which a parent might inform his or her child about his or her homosexuality.⁵⁷

Psychologists and psychiatrists have devised different possible strategies in order to make the child's potential stigmatisation by his or her peers less traumatic, once his or her parent's homosexuality is known.⁵⁸ However, in order to achieve integration in a society that strongly discriminates against minorities, it is necessary, first of all, to create openness within the family itself. This is because the family is the first social structure in which a human being starts to form his personality, and such openness will subsequently enable the child to brave his or her community (school, work place, etc.) and, eventually, to obtain full equality. In fact, institutions that acknowledge homosexual families evidence a higher level of integration and the perception of homosexual families is more esteemed.⁵⁹

⁵³ See *Salgueiro da Silva Mouta v. Portugal* *infra* §6 Principle of non-discrimination.

⁵⁴ In the decision *Salgueiro da Silva Mouta v. Portugal* it is underlined that the Portuguese Court of Appeal had noted first that the applicant was a homosexual and living with another man, then the court had stated: "the child must live in a traditional Portuguese family" and "it is unnecessary to examine whether or not homosexuality is an illness or a sexual orientation towards people of the same sex. Either way, it is an abnormality and children must not grow up in the shadow of abnormal situations".

⁵⁵ Frederick W. Bozett, *Gay Fathers: How and Why They Disclose Their Homosexuality to Their Children*, Family relations, USA, 29, 173-179 (1980).

⁵⁶ See Editors of the Harv. L. Rev., *Sexual Orientation and the Law*, 129 (1990). See also, Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, *Am. Psychol.*, 941-43 (1989); Adele E. Gottfried – Allen W. Gottfried eds, *Redefining families – Implications for children's development*, Plenum Press (1994).

⁵⁷ Martin P. Levine (Ed.), *Gay men: The sociology of male homosexuality*, Harper & Row, New York (1979).

⁵⁸ Frederick W. Bozett, *Gay Fathers: How and Why They Disclose Their Homosexuality to Their Children* Author(s), *ibidem*; Robert L. Barret – Bryan E. Robinson, *Gay fathers*, Lexington Books (1990); Laura Benkov, *Reinventing the family: The emerging story of lesbian and gay parents*, Crown (1994); Albert Steckel, *Psychosocial development of children of lesbian mothers*, in Frederick W. Bozett (Ed.), *Gay and lesbian parents*, 75-85 (1987).

⁵⁹ Eurobarometer 2008 Report on Discrimination on European Union, *supra* footnote 31.

Step 3: Nexus Approach between Equality of Treatment and the Best Interest of the Child

The next phase, depicted from an analysis of American case law, demonstrates an overturn of the presumption of the *middle-ground approach*. While in Europe decisions⁶⁰ refusing homosexual parent custody claims are overturned during the appeal process through the use of the principle of non-discrimination, in the USA case law has developed the *nexus approach*, based on the assumption that exclusive custody of the child will be granted to the heterosexual parent only when there is a proven impedimental effect deriving from the other parent's homosexuality.⁶¹ Some scholars⁶² have affirmed that judges may indeed be influenced by their moral values, even though they refer to the *nexus approach*, which is supposed to grant equal treatment to homosexual and heterosexual people: the discretion of the judge is forceful in evaluating the best interest of the child.

A remarkable case, demonstrating this, is a decision by the Missouri Court of Appeal.⁶³ Here, the court acknowledged the lesbian mother's parental skills, but considered it unsuitable for the child to be placed in the care of its mother in a small and conservative community of only 5,500 inhabitants where homosexuality was not completely accepted. In any case, it is not certain that these types of decisions truly reflect the best solution regarding the child's upbringing, in particular since it has not, as yet, been clarified by superior courts whether or not homosexuals should enjoy parental rights.

In many civil law countries, case law has impacted the development of statute law in favour of adoptions by homosexual couples in order to compel courts to apply an equal treatment approach based on the assessment of parental skills regardless of any declared sexual orientation. In Spain,⁶⁴ for example, courts are accustomed to base their decisions on the best interest of the child, which is a principle completely unrelated to the sexual orientation of parents and its social perception. To this end, the section of Catalonia law on unmarried unions n. 10/1998 relating to homosexual unions grants shared custody to both homosexual partners living together with children.⁶⁵ To understand fully the differing perceptions of the

⁶⁰ See, for example, the Portuguese case law, paragraph 6.

⁶¹ *Ex multis: Bezio v. Patenaude* 410 N.E.2d 1207, 1216 (Mass. 1980) in which it was specified that the State of Massachusetts doesn't deny parental rights to homosexuals, unless their behaviour is harmful to children; *Hodson v. Moore*, 464 N.W.2d 699 (Iowa Ct. App. 1990); *Lundin v. Lundin*, 563 So. 2d 12732 (La. Ct. App. 1990); *Whitehead v. Bleacc*, 2, *Family L. Rep.* (BNA) 2593 (Maine Sper. Ct. Cumberland County, June 1976); *Hertzler v. Hertzler*, 908 P2d. 946 (Wyo. 1995).

⁶² Deirdre L. Runnette, *Judicial Discretion and the Homosexual Parent: How Montana Courts are and should be considering a parent's sexual orientation in contested custody cases*, *Montana L. Rev.*, 57, 177- 209 (1996). For more information about Legal Realism, see Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice*, Chicago University Press (1962); Jerome Frank, *Law and the Modern Mind*, Brentano's Publications (1930).

⁶³ *S.E.G. v. R.A.G.*, 735 S.W. 2d 164, 167 (Mo Ct. Ap. 1987).

⁶⁴ An interesting account is given by Encarna Roca, *Homosexual Families: Adoption and Foster Care*, Wellchi Working Paper Series - Barcelona: Children 's Well-being International Documentation Centre, Barcelona, 6 (2007). See also Susana Navas Navarro ed, *Matrimonio homosexual y adopcion – Perspectiva nacional e internacional*, DBT (2006).

⁶⁵ Art. 31, *Ley 10/1998*, 15th July, "De uniones estables de pareja" states "Al cesar la convivencia, los miembros de la pareja, en el caso de que tengan hijos comunes, pueden pactar con cuál de los dos van a convivir, y el régimen de visitas, de estancia y de comunicación con el miembro de la pareja con quien no vayan a convivir. Si no hay acuerdo, la autoridad judicial decide en beneficio de los hijos, escuchándolos previamente si tienen suficiente entendimiento o si tienen, como mínimo, doce años." See Francesc Jaurena i Salas, *La llei d'unions estables de parella a través del dret civil català i constitucional*, Llibres de l'Index (2000) and Pedro A. Talavera Fernández, *Les unions homosexuals en la llei d'unions estables de parella:*

principle of the best interest of the child in the USA and in Europe, it is necessary to analyse how the common morale has affected the application for custody by homosexual parents in European countries.

4. The International Relevance of the Best Interest of the Child

When facing a family crisis and assessing the relationships between parents and children, judges must find a solution that is in the *best interest of the child*. According to international instruments, the judge's discretionary power is in fact governed by this principle. For instance, article 3 of the United Nations Convention on the Rights of the Child states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".⁶⁶ Signatory states are invited not only to enact statutes aiming to protect children's rights but also, and above all, to bind themselves to adopt social regulations consistent with the interest of the child, which must be pursued by all public institutions, including judicial ones.

The same approach assumes a greater importance in EU member states in that they are compelled to grant every child the right to a personal relationship and regular direct contacts with both parents.⁶⁷ Both "best interest of the child" and "biparentalness" can also be interpreted with regard to the protection and respect of private and family life, in accordance with article 8 ECHR.⁶⁸ In this sense, the Strasbourg Court has, in many decisions, observed that joint custody grants the same treatment to both parents and allows "respect for family life", unless exceptional circumstances, referring to the best interest of the child, are evidenced and may in fact pose a risk and lead to the breakdown of the familial link.⁶⁹

In the same way, in Italy – as in France – the best interest of the child is achieved by ensuring that the child maintains direct relations with both parents, through the dispositions of custody modalities reflecting biparentalness.⁷⁰ Accordingly, the decisions rendered by the French

Aproximació crítica, 2, *Revista Jurídica de Catalunya*, Icab, 333 (2000).

⁶⁶ That is an extension of the main standard applied since 1993 by the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁶⁷ See article 24, paragraph 3 of The Charter of Fundamental Rights of the European Union. See also Principles of European Family Law Regarding Parental Responsibilities, in particular, see Principle 3:3, regarding the best interest of the child; Principle 3:10, concerning Effect of dissolution and separation and Principle 3:11 in reference to Joint exercise.

⁶⁸ Fulvio Uccella, *La giurisprudenza della CEDU su alcune tematiche di diritto di famiglia e suo rilievo per la disciplina interna*, *Giurisprudenza italiana*, IV, 125 (1997).

⁶⁹ In this way ECtHR, 24th Mar. 1988, *Olsson v. Sweden*, S. A, n° 130; ECtHR, 19th Sep. 2000, *Gnahoré v. France*, 2000-IX, § 50; ECtHR, 6th Jul. 2004, *Piss v. France* all available on the website www.echr.coe.int.

⁷⁰ For example, article 373-2 French Civil Code, which affirms that the breakdown of a relationship has no effects upon parental authority dispositions; see also the Belgian Civil Code articles 373 and 374; the British Children Act 1989, as modified in 2002, and the Italian Law of 8th Feb. 2006, n. 54, also available on the website <http://www.parlamento.it/leggi/060541.htm>.

Katharina Boele-Woelki, *The CEFL principles regarding parental responsibilities: predominance of the common core*, in Katharina Boele-Woelki, Tone Sverdrup (eds), *European Challenges in Contemporary Family Law*, Intersentia, 63-91 (2008); Katharina Boele-Woelki et al (eds), *Principles of European Family Law regarding Parental Responsibilities*, *ibidem*; Alessandra Arceri, *L'affidamento condiviso*, Ipsoa (2007); François Boulanger, *Applicabilité directe de la Convention de New York et intérêt supérieur de l'enfant*, *Recueil Dalloz*, 554 (2006); Katharina Boele-Woelki Brente Brat, Ian Curry-Sumner I. eds., *European Family Law in Action*, III, Intersentia (2003); Frédéric Vauvillé, *Du principe de coparentalité*, *Petites*

Cour de Cassation (on 20 February 2007)⁷¹ and the Italian *Corte di Cassazione* (on 18 June 2008)⁷² considered the principle of biparentalness as a priority in deciding child custody in the instance of a family breakdown. Both courts pointed out that only the presence of attested impedimental reasons to *coparentalité* and *affidamento condiviso* may lead the judge to opt for *unilatéral/esclusivo* child custody (*i.e.* exclusive custody). In particular, the Italian decision proposes three conditions as examples which may be construed as impedimental to joint custody: abnormal living conditions, an irretrievable conflict between parent and child and effective long distance. Certainly, the judge still must evaluate the facts of every case on their own merits, but there is a real possibility that homosexuality will indeed come under the ambit of abnormal living conditions.

5. Homosexual Parent and the Best Interest of the Child

Although a parent's homosexuality does not imply his or her parental unfitness or a lack of ability to provide education, this nature could, as outlined above, be arbitrarily considered an abnormal lifestyle.⁷³ In particular here, reference should be made to countries, such as Italy, where homosexual unions are not yet legally provided for and indeed outside the legal context face many social obstacles. The results of this can give rise to concerns from an ethical point of view when one of two parents openly declares himself or herself to be homosexual. The same ethical and moralistic doubts that prevent the acceptance of the idea of the "homosexual family" in (Italian) society become greater when the relationship between the homosexual parent and his or her offspring is considered.

If doubts can be raised regarding the lack of parental figures of both sexes in the case of adoption by a homosexual couple, it stands to reason that they cannot be opposed in cases concerning custody of the biological parents of the child. In fact, nobody has the power to deny a biological parent his or her *status*.⁷⁴ In such cases, some perplexities relate to the opportunity to reduce parental responsibilities and rights, such as shared custody or visitation rights, because of the impact a sexual orientation disclosure by a parent could have on the life of a son or daughter, already suffering because of the family's breakdown.

Affiches, n° du 18 octobre, 4-11 (2002); Jay Folberg ed (1991), *Joint custody and shared parenting*, 2 ed, Guilford Publications; Salvatore Patti, *L'affidamento condiviso dei figli*, Fam. pers. Succ., 300 (2006) and Francesca R. Fantetti, *Codificazione europea per l'unificazione dei procedimenti di separazione e divorzio*, Fam pers. Succ., 346 (2008).

Some examples of Case law: *Cour de Cassation*, *Ire civ.* 14th March 2006, *Recueil Dalloz*, 881 (2006); *Corte di Cassazione*, 18th June 2008, n. 16593; Court of Appeal of Paris 24e ch., 29th Novembre 2001 n° 2001/07965, *Actualité Juridique*, 2002 p. 64; *Grissom v. Grissom*, Court of Appeals of Mississippi 20th March 2007, 952 So. 2d 1023(Miss. App. Lexis 171 2007), in affirming, the appellate court determined that a modification of child custody was not warranted because an award of joint custody did not require consent where it was determined that this was in the best interest of the child.

⁷¹ *Cour de Cassation*, 20th Feb. 2007, n. 06-14.643, *Actualité Juridique Famille*, 189 (2007). See also Michel Thizon, *Pour améliorer encore la coparentalité*, *Actualité Juridique Famille*, 302 (2003).

⁷² *Corte di Cassazione*, 18th Jun. 2008, n. 16593, *Fam. e dir.*, 1106-1108 (2008) case note by Denise Amram, *Il Foro It.*, I, 2446 – 2448 (2008), case note by Geremia Casaburi, *Nuova Giur. Civ. Comm.*, I, 70 - 78 (2009) case note by Manuela Mantovani.

⁷³ However this kind of approach has been criticised by the ECtHR in the *Salgueiro da Silva Mouta v. Portugal* decision *infra* - because it is in contrast with the pursuit of the superior interest of the minor.

⁷⁴ In this sense, see *Salgueiro da Silva Mouta v. Portugal*, footnote 1.

There are three main reasons for concern which lead to the presumption in case of the middle-ground approach – or to the assumption, behind the burden of proof, in the case of “nexus approach” being applied – that custody granted to the homosexual parent is not in the best interest of the child.⁷⁵ The first one is often referred to as “social stigma”, which is to say that in a society which is highly discriminatory and hostile towards homosexuality children living with a homosexual parent will be ostracised and scorned by the rest of the community and will suffer the embarrassment of being different from the majority.⁷⁶ Whilst there may be some justification for this first objection,⁷⁷ the same cannot be said for the second one, which has no scientific foundation.

The second reason manifests itself in the argument that children will potentially be subject to a confusion of identity when cohabiting with two mothers or two fathers. However, sexual identity refers to gender distinction and not to sexual orientation: to be homosexual or heterosexual does not relate to being female or male⁷⁸ and, moreover, statistics not only disagree with the idea that the children of homosexuals are more likely to externalise homosexual tendencies, but often provide proof of their well-being and their absolutely “normal” development.⁷⁹ Nonetheless, it is opined that a son or daughter brought up in a homosexual family will be deprived of the contributions from distinct parental figures and will suffer serious difficulties in recognising roles in society.⁸⁰ Even though it is becoming increasingly rare, we can uncover evidence of this assumption in French decisions⁸¹ in which judges have refused to allow a heterosexual parent share his parental authority with a homosexual parent, based on the risk of psychological prejudice to the offspring derived from being in a same-sex relationship.⁸²

Finally, “immorality” and “illegality” considerations of homosexuality play an important role when deciding whether or not to grant the custody of a child to a homosexual parent. Often, so as to increase his or her own chances of obtaining custody, the heterosexual parent not only

⁷⁵ Very interesting considerations can be found in Bruce D. Gill, *Best interest of the child? A critique of judicially sanctioned arguments denying child custody to gays and lesbians*, Tennessee L. Rev., Knoxville, 68, 361-393 (2001).

⁷⁶ e.g. Alabama Supreme Court G.M.F 730 So.2d 1190 (Ala 1998) in which the potential embarrassment and the humiliation of the child, related to the fact of living with the mother and her partner, was considered an obstacle to the disposition of his custody to the homosexual parent. See also *Bezio A. B. v. Patenaude M.*, 410 N.E.2d p.1207 (Mass.), in which it was stated that “in total absence of evidence suggesting correlation between mother’s homosexuality and her fitness as parent, finding that a lesbian household would adversely affect children is without basis”.

⁷⁷ i.e. the avoidance of suffrage of children due to the feeling of not being accepted in the society where they live, because of the homosexuality of his or her parent.

⁷⁸ Martine Gross et al., *Homosexualité, mariage et filiation – pour finir avec les discriminations-*, Paris, 57-59 (2005). Authors relate to a study made in 2002 by the American Psychiatrists’ Association, according to which there are no behavioural or mental differences between people brought up in same-sex families as opposed to those reared in traditional family units. For this reason a declaration was made in favour of adoption by homosexual couples.

⁷⁹ E.g. *J.M.F.*, 730 So. 2d at 1193 in which a psychologist testified that the child’s relationship with her lesbian mother was excellent and that the child exhibited no pathology or mental illness.

⁸⁰ *Ex multis Collins v. Collins* No 87-238-II, 1988 WL. 30173, at *3 (Tenn. Ct. App. Mar. 30, 1998).

⁸¹ Court of Appeal of Paris, 20th May 1996, Juris-Data 021705 and Court of Appeal of Grenoble 20th Jul. 1988, Juris-Data- 044724.

⁸² In an important study considering 34 decisions, the Author underlines that in more than 70,5% of them judges provided for shared-custody, while in 23,5% they opted for excluding the homosexual parent from sharing the parental authority, meaning that in only two decisions was the care of the child granted to the homosexual parent. Annie Gouron Mazel, *Juge de la famille et homosexualité*, Droit de la famille, Jan., 4-10 (2002).

attempts to denigrate the sexual habits or speculate on the probable lifestyle of the other parent, but also describes stereotypical behaviours of the other parent in order to portray as immoral what might in fact be absolutely normal situations.⁸³ In a recent Italian case,⁸⁴ for example, the mother accused her former husband, who had declared himself homosexual, of wanting to bring their daughter to a Greek island renowned for its sexual tourism, when in fact the booking had been for an absolutely normal family holiday on the island of Samos. In this case the judge restrained himself from falling into the moralisation pitfall the mother had prepared and in permitting the father's vacation with his daughter took advantage of the occasion to grant shared custody.

Analysis of Italian case law seems to suggest that moralistic intentions are bound to fail, paving the way for a firm belief in biparentalness based on the best interest of the child.⁸⁵ In this light, accusing the other parent of an irregular lifestyle in the hope of gaining favour with the courts does not yield the expected result: the parent who shows a lack of respect towards the other parental figure in front of the children inadvertently sets a bad example, and thus may be punished, even to the extent that the custody may be awarded exclusively to the other parent.

Suitable parents raise their child to be tolerant towards different cultures and to oppose all forms of prejudice, be it racial hatred or intolerance towards homosexuals. Moreover, in highly conflicting situations due, for example, to the breakdown of a relationship, lack of respect of the heterosexual parent towards the homosexual parent could be interpreted as mis-education as defined in article 24, par. 3 of the Charter of Fundamental Rights of the European Union. On this subject, Italian case law, after the adoption of law n. 54/2006 on shared parental custody, when dealing with a declaration of homosexuality from one of the two parents, has always rejected the request for exclusive custody by the heterosexual parent.⁸⁶ In fact, judges have found that there are no reasons for interfering with the sharing of parental authority and responsibilities towards the development of their children. The cited cases can be viewed as modern and open-minded, and they indeed represent a significant juridical step towards child custody by homosexual parents.⁸⁷

⁸³ See Adeline Gouttenoire – Cornut, *Autorité parentale et homosexualité*, *Droit de la famille*, 3, 29 (2000); Thierry Fossier, *Homosexualité et divorce*, in Rubellin-Devichi ed., *Droit de la Famille*, JCP G, 1270 (1998). See Virginia Supreme Court *Roe v. Roe*, 324 S.E.2d 691 (Va 1985). Instead, in *TCH v. KMH*, 784 S.W.2d 281, 284- 285, the mother's lesbian relationship and the "series of lies" she told about her homosexuality were presented as proof of her immorality.

⁸⁴ *Tribunale di Bologna*, 15th Jul. 2008, *Giur. it.*, 5 (2009).

⁸⁵ This is true unless the consideration about the fact that Italian judges use to evaluate conflicts between parents not as an obstacle to shared custody. See also *Tribunale di Nicosia*, 22nd Apr. 2008, *Foro It.*, 1914 (2008).

⁸⁶ See *Tribunale di Venezia*, 19th Nov. 2008, or *Tribunale di Napoli*, 28th Jun. 2006, also confirmed by Court of Appeal 11th Apr. 2007. Moreover, the *Tribunale di Bologna* 15th Jul. 2008, stated that "the simple fact that one of the two parents is homosexual doesn't justify – and does not permit any justification- to decide for exclusive custody in favour of the heterosexual parent".

Alberto Figone observed that «sexual orientations don't determine a parent's fitness, since only the capability to educate, take care of, to maintain children in a serene environment in order to let the child's personality well brought up», comments on *Corte di Cassazione* 17th Oct. 1995, n. 10833, *Fam. e dir.*, 25 (1996). More recently, the well known decision of *Tribunale of Napoli*, 28th Jun. 2006, stated that «during personal separation, one spouse's homosexuality, as well as homosexual relationships, are *per se* irrelevant, in evaluating a parent's fitness for custody».

⁸⁷ Indeed, they were mostly in line with "warnings" provided by the Italian Supreme Court in Cass. n. 16593/08.

Another recent decision states that lesbian couples and the biological child of one of two women constitutes a “typical familial scheme” that should be protected.⁸⁸ In this perspective, the recognition of a homosexual parent’s parental responsibilities could also be considered an economical child protection measure. In fact, according to Family Law, parents should maintain, educate and take care of their children and if parental skills were not acknowledged that would imply immunity from parental responsibilities in same-sex families,⁸⁹ which exist as *de facto* entities not codified by the law.

However, what is more surprising is the sensational way in which these decisions were received by public opinion.⁹⁰ In particular, public opinion perceived these decisions as innovative, as a new and pioneering legal development, even though these sorts of stances had already been accepted not only by the ECtHR nine years previously, but even earlier, as is clarified below, illustrating that the application of the principle of non-discrimination relating to sexual orientation in the family context – and in particular relating to child custody disputes between a homosexual parent and a heterosexual one – was not and perhaps has not yet been completely accepted.

In truth, in a recommendation issued on 1 October 1981 the European Council announced that child custody, visiting rights and housing should not be limited based solely on the sexual orientation of the father or mother.⁹¹ Moreover, the ECtHR had already stated the principle of non-discrimination on 21 December 1999, in the case of *Salgueiro da Silva Mouta v. Portugal*.⁹²

6. The Principle of Non-discrimination

In the *Salguero* decision the ECtHR ruled that the negation of custody to a homosexual parent is a violation of art. 14 of the ECHR, which prohibits discrimination in exercising rights and freedoms guaranteed by the same Convention. In this case the right at issue was the right to respect for private and family life as expressed in art. 8 ECHR. The petitioner was deprived of the custody of his daughter who, it was argued, should live “in a traditional Portuguese family” and not “in the darkness of abnormal situations”. The ECtHR affirmed that, in this instance, there was no reason or rational justification for discrimination because the measure used (the negation of custody) was absolutely disproportionate to the aim pursued (to let the child grow up in the midst of a traditional Portuguese environment).

⁸⁸ *Tribunale per i Minorenni di Milano*, 20th Oct. 2009, available in the website www.lider-lab.eu.

⁸⁹ David Hill, *The recognition of homosexual parents in the United Kingdom*, in Katharina Boele-Woelki, Tone Sverdrup, *European challenges in contemporary family law*, ibidem, 113-129.

⁹⁰ The media portrayed this decision as an innovative one. It is important to stress that not only associations linked to homosexuality (such as *Arcigay*, *Arcilesbian* etc.) published this news, but also websites, newspapers and newscasts affiliated with other topics, such as consumers (*Aduc* - Italian Association of Consumers) or non-profit associations (*UAAR*, *Studenti.it*) and others (*Padridivorziati*); important Italian newspapers (not only local ones), such as *Il Corriere della Sera*, *Repubblica* and *Il Giornale*; and also online Legal Journals, such as *Famiglia e Giustizia* and *Persona e Danno*.

⁹¹ In the French text we can read: “*le droit de visite et l’hébergement des enfants par leurs parents ne doivent pas être limités pour la seule raison du penchant homosexuel de l’un d’eux*”.

⁹² *Ibidem* see footnote 1.

The rationale behind the decision to exclude the homosexual parent from custody was based on the protection of the child from isolation and scorn by a strongly intolerant society. But in achieving non-discrimination it is necessary to create opportunities of integration so as to overcome stereotypes and prejudice assumed by public opinion.

As an instrument of soft law the Principles of European Family Law regarding Parental Responsibilities state a general principle of non-discrimination which should be applied not only to children, but also to whomever is responsible for them (Principle 3:5).⁹³

For these reasons, judges must attempt to balance the pursuit of the well-being of the child on the one hand and the equal treatment of both parents on the other. In particular, courts may consider the child's feelings during the process, perhaps consult a family guidance counsellor so as to assist the decision making process particularly with regard to the child and also make provisions to follow the child's development in the new family organisation. In fact, custody orders can be updated if they are incapable of ensuring child protection and care or if actual circumstances have changed. In this perspective, in most cases the protection of the child against the intolerance of the social community is unimportant.⁹⁴

As mentioned above, the supranational institutions are a guarantee of rights aimed at sensitising, persuading and often securing the process of self-determination in individual states. For these reasons they can be interpreted as a means of action in every national court. In other words, the EU institutions and the institutions associated with the ECHR work as receptors of violations of individuals' rights and their decisions regarding whether or not to accept these rights affect all members or signatory states. Indeed, their decisions become "precedents" (in case of judicial decisions) for the national courts or maximum indications (in case of persuasive efficacy acts) or coercive (in case of regulations and directives) for state legislators and national courts.

The important dialogue between Communitarian, European and national institutions permits the former to give voice to the needs of single individuals and ensure their protection in the latter institutions. Moreover, it allows the comparison of solutions and difficulties, given for the same issues by the different countries. These perspectives include all decisions related to the recognition of partnerships rights.⁹⁵ For example, in the case of *D. and Kingdom of Sweden v. Council of E.U.*⁹⁶ the petitioner and his partner, legally enrolled in the register of Swedish civil unions, were excluded from the right to family allowances granted by the *Staff*

⁹³ Katharina Boele-Woelki et. al., *Principles of European Family Law Regarding Parental Responsibilities*, *ibidem*, 44-48.

⁹⁴ See the European Convention on the Exercise of Children's Rights, Strasbourg 25th Jan. 1996, and in particular art. 3, which states that the child is entitled to be consulted and express his or her views in all proceedings where he is involved. See also Art. 9 §2 of the Convention on the Child's rights, by which: "In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known".

⁹⁵ See ECtHR 7th January 2004, *K.B. v. National Health Service Pensions Agency*, case C-117/01, *Racc.*, 541 (2004); ECtHR 24th Jul. 2003, *Karner v. Austria*, case C-40016/98, *Racc.*, 197 (2003); ECJ 31st May 2001, *D. and Kingdom of Sweden v. Council of E.U.*, case c 122/99 and c 125/99, available in the website <http://curia.europa.eu>; ECtHR 17th Feb. 1998, *Grant v. South-West Trains Ltd*, case C-249/96, *Racc.*, 621 (1998). See also Stefano Fabeni – Maria G. Toniollo ed., *La discriminazione fondata sull'orientamento sessuale – L'attuazione della direttiva 2000/78/CE e la nuova disciplina per la protezione dei diritti delle persone omosessuali sul posto di lavoro*, Ediesse (2005); Helen Toner, *Partnership rights, free movement, and EU law*, International Specialized Book Services (2004).

⁹⁶ ECJ 31st May 2001, *D. and Kingdom of Sweden v. Council of E.U.*, case c 122/99 and c 125/99, *ibidem*.

Regulations of Officials of the European Communities on the basis that they were reserved only for married employees. In its decision, the ECJ argued that “marriage” should be taken to mean a union between persons of different sexes, and thus the failure of payment did not constitute discrimination (at that time Directive 2000/78 was not effective), nor was it a violation of Art. 8 ECHR. Ten years after that decision, a law was passed in Sweden permitting homosexuals to be united in marriage.

As this case shows, the dialogue began between Swedish society and European institutions at a time when it was impossible to extend the economic right concerned to a person related *more uxorio*. It has led, by means of this distant institutional dialogue, to new stimuli up to the point of being able to guarantee homosexual couples the same rights as heterosexual couples, in Sweden at least. At the EU level, the principle of non-discrimination, which has a significant place in Art. 13 of the EC Treaty, is one of the most efficient instruments for human rights protection. In fact, according to that provision, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to fight discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or, last but not least, sexual orientation.

7. Conclusions

Discrimination against a person because of his or her sexual orientation results in the deprivation of dignity, freedom, choice and self-determination. In fact, homosexual persons belong to a minority, one which is slowly affirming its own rights, both as individuals and as couples.⁹⁷ Institutions are called upon to protect this minority in all areas of life against intolerant behaviour and unequal treatment.

Despite the role played by many normative and juridically relevant supranational documents and covenants, the principle of non-discrimination regarding sexual tendencies has not been completely accepted by all countries when it comes to homosexual rights. Following a number of decisions, such as the ones mentioned above, involving the theme of “family, parenthood and homosexuality”, public opinion remained divided between those who strongly support and agree with the new rights and those who perceive these decisions as scandalous.⁹⁸

Topics dealing with ethically and morally sensitive issues tend to enhance the two different reactions just mentioned. This occurs in a continuously evolving society, in which culture and traditions inevitably meet and contrast with technological, social and economic developments. The merging of these different topics will never produce a unique line of action by institutions, without having consequences for the entire range of human values.

In other words, the issue of “family, parenthood and homosexuality”, and in particular the aspect regarding the parental skill of a person who is openly homosexual, whichever way one would want to interpret it, forces every member of this society to think about their personal scale of values and verify to what extent the parameters of judgement must or might be modified and to what extent one is ready to abandon traditional ways of thinking which have been around for almost two millennia. For example, thanks to scientific research, our societies

⁹⁷ See footnote 95.

⁹⁸ *Tribunale di Venezia*, 14th Nov. 2008, *ibidem*, *Tribunale di Bologna*, 15th Jul. 2008, *ibidem*; *Tribunale di Napoli*, 28th Jun. 2006, *ibidem*; Court of Appeal 11th Apr. 2007, *ibidem*.

have more cognitive instruments that allow us to overcome traditional prejudices in the light of scientific evidence. Nowadays, homosexuality is no longer considered a mental disease by medical science, or, according to social science, an immoral lifestyle. On the contrary, it meets the requirements of a way of being, and it is no longer seen as a crime by the law.

In reality, the Italian legal system is going through a transitional phase in which a new concept of the family is developing and spreading, not only in judicial decisions or law schools, but also among the population as a whole.

The notion of homosexual parenthood is also becoming more widely accepted thanks to the application of the principle of non-discrimination based on sexual orientation, not exclusively in child custody disputes but also in other types of dispute. The recognition of shared custody is also being accepted as the main way to serve the best interest of the child. In fact, the import from supranational institutions of all the above mentioned principles and their application in courts has led to a broad discussion in Italy of the traditional idea of the family and to petitions to its highest court whether denying homosexual people the right to marry might be in conflict with its Constitutional values.

However, as far as homosexual parents are concerned, nowadays the diffusion of these elements continues to raise many issues in society, since to a great extent many people are still very much attached to their own traditions. Thus, while from a legal point of view, Italy could be ready, using the international principles of the best interest of the child, shared parenting and non-discrimination, to permit homosexuals to create families, in order to actually harmonise its legislation with other European countries that already provide for same-sex marriages or homosexual adoptions, a significant change of traditional culture is required. Immigration, free movement and scientific progress in general have accelerated the laicisation of moral values. Nonetheless, so far the process does not seem to have been completely concluded.⁹⁹

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⁹⁹ See Corte Costituzionale 15th Apr. 2010, *ibidem*.