HOMOSEXUALITY AND RIGHTS

By Ezio Menzione

Focus on Facts

A year of unfulfilled expectations. Small steps that leave us at the same point

Everybody knows that the rights of homosexuals do not enjoy good health in Italy

If it is true that historically and still to date the performance of sexual acts between persons of the same sex was never prosecuted in modern times in Italy, only just through administrative action for some years during fascism, it is equally true that the fundamental lack of recognition of full rights increased in the last decades. This lack of recognition did not mainly concern individual homosexuals and their orientation but homosexuals in their social and affective relationships. What is missing is above all the juridical recognition of homosexual relationships (marriage, or civil union or other, according to regulatory and subjective choices), including all the relevant consequential implications in the life of every homosexual. It is useless to repeat here that Italy – with few other countries – ranks last among Western countries on the subject of the rights of homosexuals.

Neither comforts us what is happening in other non-Western but fully developed countries such as Russia, where Putin has introduced the crime of "instigation" to homosexuality, or India, where the Supreme

Court of India reaffirmed the lawfulness of the penalty of up to 10 years of imprisonment for anyone who performs sexual acts with a person of the same sex.

Next to this issue there is the closely related one of homophobia, which is the taking place of homophobic acts that our judicial system

does not recognize as such and accordingly does not prosecute.

On none of the above issues did the lawgiver make some progress in 2013. With the difference that while on the issue of the rights the possibility to change the regulations has not even been considered, some progress has been made regarding homophobia (but we shall see that this was accompanied by a major setback); vice versa, in terms of judicial rulings, there were openings also in the past year in the wake of important precedents, whereas the opposite is true as regards homophobia ; and it is practically obvious that this takes place considering the criminal frame within which the issue is dealt with and, therefore, the principle of strict legality and the statutory obligations governing such a frame.

Killing oneself for being gay

20/11/12 a 20-year-old committed suicide for being gay;

28/05/13 a 16-year-old tried to commit suicide because he was bullied by his classmates for being gay;

08/08/13 a 14-year-old committed suicide for being gay;

28/10/13 a 15-year-old committed suicide for being gay.

Three suicides and an attempted suicide in Rome within one year: three teenagers and a 21-year-old.

Four episodes related to the discomfort of being gay in the capital of our Country; or, as it seems, at least in one case, related to the fact of being bullied for being gay, without even being one. This happened at an age when, very often, sexual identity is still far from being completely formed. Four episodes behind which one can easily detect the discomfort of feeling an "outsider", "out of the ordinary", "not accepted" and "not as accepted as the others": a gap between what we feel or think to be and our image that is perceived by other people in daily life. Statistics show that suicides among gay teenagers are three times more frequent than those committed by their peers in general. It is difficult to say which is the basis of these

data but it is certain that these four episodes in Rome make us face a tragic reality of discomfort.

The first thing that strikes us is that they are not connected only with the fact of being gay but also with being considered as such. Therefore, this has to do with the way gays are perceived by the others and by themselves.

At least one of these young people also called gay telephone help lines, but it was not enough. To be faced with the enormous implications of the gay image as daily perceived by a (perhaps) gay teenager was clearly too much in terms of personal dismay.

Movies, TV fictions, novels and *graphic novels* may comfort (including in the etymological sense of the term: give strength because we do not feel alone), but it is not enough or, at least, it is not enough for everybody.

Nor is the unchanged and unchangeable love of our parents enough, or the warm confidence with one or more female friends. At that age we ask – and rightly so – for more.

We ask to fully enter into the social life. We ask to take for granted – in the eyes of society – that we are as worth as our friend who already flirts with girls. We ask for equality and widespread awareness of such an equality, and – therefore – equal dignity and equal rights. Neither one nor the other are recognized in our Country as yet, at the end of 2013.

Homophobia: a harsh reality, a difficult fight

2012 had ended with very bad omens: on November 26 a 21-year-old committed suicide because he was gay in Rome. Just the umpteenth suicide but this time he was of age.

However, the first months of 2013 seemed to be better, breaking the tragic chain. It was not so. Always in Rome, on May 28, a 16-year-old tried to kill himself because obsessed and psychologically bullied by his schoolmates because of his being gay.

On 10 August, still in Rome, a 14-year-old committed suicide because of his being gay.

Again in the capital, on 12 November, a 15-year old committed suicide leaving an unequivocal message, for the same reasons (assuming that in these tragedies the reasons for this act may be clear and fully superimposable).

All these episodes have their roots, on the one hand, in the difficult acceptance of one's self, on the other hand in the social non-acceptance that is strongly felt by the victims who are often very fragile due to their age or other reasons; of course, the two reasons intersect and intertwine closely.

Close to these tragedies there are the predicaments – of which we know very rarely – of gays beaten because they kiss in public, teenagers bullied by their classmates, attacks against gay meeting places that are veritable punitive expeditions: a wide range of behaviours and practices marked by homophobic violence. According to the most careful observers, this phenomenon has been constantly increasing for years. It is not difficult to explain why, even if it is an empirical explanation: for as long as the homosexual orientation remained unsaid, homophobic practices had no reason for existing; the social "*coming out*" of gay and lesbians also at a very early age, in the last decades and in the last generations is an incentive for homophobic behaviours, from the simple word of scorn to bullying the most fragile individuals, whichmay lead to suicide.

Is a law enough?

Is a law enough to eradicate a way of thinking, a view that considers homosexuals not to be citizens in their own right and, therefore, legitimates not only discrimination against them but also violence and mockery? Is a law enough for overturning a time-honoured cultural attitude?

The easy answer is “No.” As in many other social phenomena, roots are so deep that it takes more than a law. A painstaking educational and training work is needed. However, a criminal law, although not a harsh law – nobody would want such a law – always implies and represents a deterrent (“general preventive deterrent”, if we want to use a technical term) that may give good results in the long run.

Provided that, as it has already been said, this crime does not become an opinion-related offence, otherwise the *rebound* effect is around the corner.

We should ask ourselves why to attack a synagogue is considered a very serious crime while to attack a completely harmless gay meeting place is tolerated and barely prosecuted. Why is nobody using any longer words such as “nigger” or “dirty Jew”, while “faggot” is used daily? Evidently because, also in our lexically lax Italy , some behaviours have been taken up by the majority as unlawful (and this is where the legal ban comes in), but even more than that as unjustified, improper and unfair (and this is where the cultural dimension kicks in). Between these two extremes – law and culture – the interaction is continuous, both positively and – alas! – in the negative sense. You cannot create a culture if you do not set legal limits by law; the result is poor if you just set those limits without supporting them by cultural growth. The law makes the culture; the culture sets out the path for and supports the law.

However, in the case of homophobia, you cannot reason in regulatory terms by only referring to discriminatory acts or violence. As a matter of fact, discrimination against homosexuals is part of our legal system as a whole, especially if one considers the huge chasm that originated from the non-recognition of same-sex unions . Discriminations, homophobic acts and even the suicides of homosexuals are rooted and find their nourishment in the failure to recognize the full rights enjoyed by homosexual persons. The Governor of Apulia was referring to this during an interview in the

aftermath of the attempted suicide of a young Roman on 28 May 2013. The reasoning – which came to light in that tragic circumstance, but was finally made clear and explicit – obviously points to much more significant regulatory initiatives than the law against homophobia - even if this law is needed.

Against such widespread backwardness, "cultural behaviours" should be seen that, whilst not being homophobic, are certainly such as to fuel and promote homophobic declarations or actions. The case (obviously mainly created by the media) of Barilla's CEO that was widely covered by the press throughout the month of September does not relate to explicitly homophobic declarations.

Mr. Barilla only said that for advertising his pasta he would not use gay couples because the only family is the "traditional one" - a mild statement compared with what Giovanardi and Co. daily fork out.

Still, it caused a sensation (and was poorly patched up) because it came from a member of what is commonly called the "enlightened bourgeoisie", owner of a renowned *brand* the advertising of which is generally focused specifically on the family; in other words, the entrepreneur excluded an entire segment of the population, gay persons, from his cultural and commercial horizon.

It could be argued that the exclusion made by Barilla provides support to and is also the consequence of the much more serious exclusion made by our legal system, which like Barilla cannot make any room available for the recognition of same-sex unions. The Barilla case seems to be the paradigm of the need to take steps on both the cultural and the regulatory level, and by the latter we do not mean only the law against homophobia.

Homophobia: an invention by the gay lobby

Homophobia was allegedly invented by the gay lobby. Gays, more and more organized and aggressive in sticking to their rights, have reportedly invented an enemy for a twofold purpose: on the one hand,

to project their own guilt feelings onto others; on the other hand, to put the muzzle on anyone who expresses views on homosexuality and gay rights other than those held by homosexuals themselves.

This rhetorical argument is nothing new even in Italy and is well-known abroad.

A massive tome organized as an encyclopaedia and structured according to entries in alphabetical order was published in Bologna in 2003. Its title is "Lexicon" and takes into consideration all the issues (especially psychological ones) concerning the family. It is printed by the Pontifical Council for the Family, written by many different "experts", and edited by Cardinal Trujillo Lopez (later on bound for the glory and splendour of the Papal Curia). The "Lexicon" was primarily intended for Catholic psychological operators (but also for simple parish priests, considering the easy structure of the volume). In short, it aims to be considered as the Bible on the family.[1]

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1 At least in a footnote, it seems useful to deal more in detail with the "Lexicon" because it had a judiciary development worthy of attention.
In April 2003, when "Lexicon" was published, some parents of homosexual children, members of AGEDO (Italian Association of Parents of Homosexual Children), immediately pointed out that the content of the entries "Homosexuality' and Homophobia" and "Children" was violently homophobic. A sort of equation was made between pedophiles and homosexuals and – indeed – it was even argued that homosexual couples wanted to marry and become parents in order to have children to abuse - a child adopted by a same-sex couple "*easily becomes a victim of their sexual needs*" (entry "Children"); in fact, it took up and revamped (entry "Homosexuality and Homophobia") the ancient view of homosexuality as a treatable condition that had been taken off the list of psychiatric illnesses allegedly through the pressure of the powerful gay lobby, basing the text on concepts such as "*Homosexuality is in contrast with social bonds*"…"*homosexuality is not the subject of rights because it has no social value"…"(Homosexuality) remains a psychological tangle that society cannot establish socially"*. Lastly, on homophobia*, "(it) is an issue of bad faith and a product of the anxiety of homosexual psychology. In the name of homophobia, militants want above all make heterosexuals feel guilty"*.
AGEDO, through its Chairperson, understanding the potential distorting and aggressive charge of such writings, wanted to file a complaint for defamation with the competent public prosecutor of Bologna the following June, and it also requested the seizure of the book throughout the Country. The public prosecutor got away arguing that AGEDO, not being mentioned in the book (as it is obvious!), was not entitled to consider itself a victim of any crime and to file a charge.
At that point, a group of 32 homosexuals from all over the country filed a complaint because they felt libelled by the very serious allegations in that text. Faced with the reaction of several homosexual citizens, the prosecutor of Bologna and the competent Judge duly ordered the dismissal of the charge arguing that, in the end, it was just an opinion and that, as such, it was outside the realm of criminal law in pursuance of Articles 19 (freedom of religion), 21 (freedom of thought and press freedom) and 33 (freedom of arts and sciences) of the Constitution of the Italian Republic, as

Under the entry "Homosexuality and homophobia" (and it is already strange for these two concepts to be considered jointly in the title), and more precisely in the paragraph titled: "Homophobia and homosexual anguish" (and here too the combination is unusual and interesting), the following can be read alongside an incredible jumble of concepts such as homosexuality as a medical condition, homosexuality opposed to social bonds, the purposeless nature of this "self-representation", and much more: namely, that the inability to make sense of their own condition generates "*an anxious powerlessness that personalities made fragile by their narcissism try to eliminate through social recognition*". This would account for the need to depict a homophobic enemy and the building up of a "*police of ideas in the name of homophobia in order to put the blame on heterosexuals*" (and, please, note the ease shown in appropriating the concept of "police of ideas" created by Foucault for this short title).

The "*strategy of monitoring and denunciation*", if not even "*censorship*", "*developed by the gay lobby*" through the concept of homophobia "*is a question of bad faith and a product of the anxiety of the homosexual psychology. In the name of homophobia, militants want above all to make heterosexuals feel guilty*". Instead, it is homosexuals that are heterophobic*," i.e. (they are) afraid of the other sex*"; homosexuals consider themselves as a veritable "*sect*" requiring "*a political adhesion that produces the dictatorship of the costumes*".

This book of Catholic or rather - more accurately – Vatican inspiration would appear therefore to follow the old adage whereby attack is the best defence. Homophobia was invented and cultivated

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it was a matter of freedom of conscience.
The outcome of the judicial proceedings was almost predictable but the fact remains that a group of a few dozens of homosexuals, having no associative links among them, for the first time did not hesitate to expose themselves personally as homosexuals and claimed the removal of a publication that was seriously detrimental to the dignity and the very existential profile of a great number of citizens.

by heterophobic homosexuals and, please, do not tell us that we are the ones to be homophobes.

At first sight, the position of the "Lexicon" is as rough as it is insubstantial; however, it was taken up repeatedly in manifold versions over the years .

In the aftermath of the judgment by the Supreme Court of the United States (of 26 June 2013) that legitimized gay marriage throughout the U.S.A., Lucetta Scaraffia – a free-lance journalist – wrote a long article on Giuliano Ferrara's newspaper "Il Foglio", with tones far removed from those of the Lexicon, but taking up some stances. She argued that from now on it would have been practically impossible to declare oneself as opposed to same-sex marriages, which would have resulted into a severe limitation not only on people's language but also on everyone's freedom of thought. In short, the view held blithely also by the distinguished Ms. Scaraffia – who writes for every possible newspaper and magazine but mainly for "L'Osservatore Romano" – it is not gays who would be daily limited in their rights and public behaviour, as it is gays who allegedly impose limitations on those who happen to think and behave differently from them. The victims are thus turned into the offenders, according to a sort of global Stockholm syndrome. After all, she already wrote as early as in 2010: "*The world is upside down! Nowadays to be normal is a defect. They want to lynch us because we want the world to go as it has always being going until some decades ago*" (on "Il Riformista" of 18 November 2010).

Discrimination and violence

15/03/12 Rome. Same-sex Unions The Civil Court of Cassation did not recognize the marriage contracted by two Italian gays, but recognized that they were entitled to the same rights as a married couple (Judgment 4184/12 – First Section)

29/03/12 Rome . **Same-sex unions** The Court of Appeal of Milan (Judgment 407/12) granted a gay person in a same-sex couple the same insurance coverage as applied to the other member of the couple

20/11/12 Rome . **Homophobia.** A laughed at and bullied 15-year-old gay boy committed suicide in Rome. He was labelled as gay and became known as "the boy with pink trousers"

11/01/13 – Rome. Same-sex unions. The Civil Court of Cassation stated that the mere fact of being a gay couple did not prevent granting custody to one of the partners

14/03/13 – Rome. Homophobia. A couple of gay doctors was verbally attacked in a bank in Rome: "You are not men but fags"

29/03/13 – San Donà del Piave (VE). Homophobia
Fists and kicks against two gay persons kissing,

13/04/13 Rome. Same-sex unions . The Chairman of the Constitutional Court reiterated: "It is necessary to proceed to the recognition of gay couples"

27/04/13 Rome. Homophobia. A group of bullies attacked and wounded a gay couple with a broken bottle. The attackers were identified and arrested but immediately released

30/04/13 Palermo. Homophobia. A gay was assaulted with a hammer

17/05/13 Homophobia. International Day Against Homophobia. President Napolitano, Ms. Boldrini [Chair of the Chamber of Deputies] and Ms. Idem intervened. According to the EU, one homosexual out of four is the victim of an aggression.

22/05/13. Rome. Homophobia. Amnesty International denounced Italy for the large number of homophobic incidents.

28/05/13. **Rome. Homophobia.** A 16-year-old Roman gay attempted suicide by jumping from the window

02/07/13 Milan. Homophobia. A man was insulted and beaten for being gay in Milan

20/07/13 Genoa. Same-sex unions. A Brazilian man married with an Italian in Portugal was granted the residence permit in Italy

08/08/13 Rome. Homophobia. A 14-year-old boy committed suicide by jumping from a balcony for being gay

19/09/13 Rome. Homophobia. The Chamber of Deputies passed an anti-homophobia bill with a very questionable amendment.

25/09/13 Parma. Same-sex unions. Guido Barilla declared: "No gay families in spots"

28/10/13 Rome. Homophobia. A 20-year-old gay committed suicide in Rome, leaving a letter in which he told about his difficulties; he had asked for help from a gay telephone help line.

04/11/13 Milan. Homophobia. Bottles filled with urine were thrown from a car against the customers of a gay place in Milan

20/11/13. Rome. Same-sex unions. The Conference of the National Notaries Association proposed a "notary's solution" for de facto unions.

30/11/13 Vicenza. Homophobia. They bullied their classmate believing he was gay. The police intervened.

04/12/13 Palermo. Same-sex unions. The Juvenile Court of Palermo granted temporary custody of a child to a gay couple.

19/12/13 Rome. Homophobia. A 20-year-old student was beaten

and insulted for being gay at Porta Maggiore in Rome.

It is believed that aggressions suffered by homosexuals amounted to 50 in Rome in 2013.

FROM ABROAD

22/04/13 France. Same-sex unions. – The law establishing gay marriage was passed in France. It came into force on 18 July.

11/06/13 Russia. Homophobia. Duma unanimously passed (with 1 abstention) Putin's law against the promotion of "non-traditional sexual orientations" in Russia.

26/06/13. USA. Same-sex unions. – The Supreme Court of the United States declared the constitutionality of gay marriage.

Legislation and Policies

Same-sex unions and the silence of the lawgiver: a year was wasted.

The year had started under the continuing influence of an important pronouncement of the Civil Court of Cassation (First Section – judgment 4184/12 of 15 March 2012) denying a gay couple the right to recognition of the marriage contracted abroad, but granting their claim to enjoy the same rights as those resulting from marriage or equivalent unions. This pronouncement was in line with what had already been ruled by the Constitutional Court (judgment 138/10) in 2010; whilst not recognizing the right of same-sex couples to unite

civilly (with or without marriage), the Court had urged the lawgiver to intervene to fill a gap that undermined legality and consequently constitutionality. Otherwise, the Court itself would step in if faced with the persistent legislative silence. On the other hand, the Court clearly said that a series of rights could not be granted to gay couples as well, which rights said gay couples might be awarded in court through a legal action. With the aforementioned judgment, the Court of Cassation had reiterated exactly this conclusion. Therefore, it was a strong, clear and important signal, since, as we shall see, it was promptly picked up by some trial judges in lower courts.

The issue of the recognition of same-sex unions through marriage was marked by two events of paramount importance on the international scene.

This issue almost monopolized the debate in France, where there were the PACS (Patti Civili di Solidarietà – Civil Solidarity Pacts) already, but where Holland had promised the introduction of same-sex marriages and the right to adopt also for gay couples during his election campaign. A promise fulfilled. The law was finally passed on 22 April and entered into force on 18 May, 2013. Controversy and opposition were certainly not lacking but clear political will prevailed. This will prevailed because based on sound legal foundations, since the Constitutional Court, involved in the issue of conscientious objection raised by some mayors opposing gay marriage, established the groundlessness of the right to object through its judgment of 17 October 2013.

On the other side of the Atlantic, the USA were waiting with bated breath to know the decision of the Supreme Court, invested with the question as to the legitimacy of marriage between persons of the same sex, which was recognized in some States and denied in others. On 26 June, 2013, the Supreme Court, with a majority decision (a majority including at least one "conservative" judge), established not only that same-sex marriage was in accordance with the Constitution, but also that opposing such marriage was

unconstitutional, thus paving the way for the recognition also in states that until then had been silent on the subject or were even going to introduce overriding provisions forbidding same-sex marriage. After the judgment, received with appropriate euphoria by the gay community but also without much kicking out by opponents, marriages of homosexual couples have now become daily routine (and those marriages were "legalized" that, for example, had been contracted in California where gay marriage was authorised to be then, three years ago, swept away by a referendum).

Therefore, there was a very favourable climate – among the best - for taking into consideration the need to afford same-sex couples the right to marry to a civil union.

Nobody could realistically imagine that the declining Monti government and the 16th legislature might take into consideration this type of legislation. It seemed more logical, at least during the campaign for the political elections that would lead to the 17th legislature, that the latter legislature would face this issue head on. In fact, already in the first weeks of the legislature old and new Deputies submitted or re-submitted bills aiming to introduce civil unions and/or marriage between persons of the same sex; those bills were multifarious and often differed in terms of the rights being granted especially as for the right to adopt. We would like to point out here the bill signed by Senator Manconi, who submitted it to the Senate on the first day of the legislature; his bill focused on the establishment of civil unions.

This wealth of proposals (note, however, that the 13 bills tabled in the Chamber concerning this issue are in the company of many other bills that specifically aim to limit marriage and the recognition of unions to heterosexual couples) would have let one imagine that the new Parliament would quickly discuss the issue and pass legislation, perhaps in a spirit of compromise but anyhow consistent with the ruling of the Constitutional Court and Court of Cassation – which had set the impassable lower threshold.

On 12 April, 2013, Franco Gallo - the Chairman of the Italian Constitutional Court – had called upon the lawgiver to address the issue of civil unions, gay marriage or, anyhow, the recognition of same-sex unions. The Chairman had authoritatively said "*It is necessary to regulate*". However, even this appeal fell on deaf ears.

Nothing of this happened. The preliminary discussion on gay marriages or unions at the Senate was concluded in the Justice Commission at the end of the year, with a deadline set in the next year for the writing of a new possibly consolidated text, the submission of amendments and so on. A year was wasted.

An even more bitter conclusion can be drawn: in August, the lawgiver enacted the law (preceded by a decree) on the so-called "feminicide". Among the aggravating circumstances for the several offenses already provided for it includes the circumstance whereby the violent partner and the victim are linked by an "affective relationship". The title of the decree, for what it is worth, refers to "gender-based violence" and, therefore, seems to assume a gender difference between the violent offender and the victim. Not so the wording of Section 1 nor in the subsequent sections, which generally refer to "*persons*". We must, therefore, conclude that it is also applicable to the violence between persons of the same sex: they can be linked by an "*affective relationship*" and it actually happens. Therefore, assuming that the aggravating circumstance is rightly applicable to the heterosexual couple, we cannot see why it should not also be applied to the same-sex couple (and, in actual fact, there are many violence acts that can take place in the life of a homosexual couple, even if they are reported less frequently for obvious reasons).

Therefore, we are faced with a tragic inconsistency – namely, for our legal system the fact that two homosexuals are united as a couple has no legal significance and social dignity, but their love, whether existing or past, is an aggravating criminal factor.

"Eppur si muove" (And yet it moves): the judicial decisions

We have already gone back to 2012 to recall the judgment of the Court of Cassation No. 4184 of 15 March 2012.

Let us remain for a moment in 2012 to recall also the judgment of the Court of Appeal of Milan, Labour Division, No. 407/12 of 29 March 2012, which upheld the decision by the lower court by rejecting the appeal submitted by an Italian bank (the "Cassa Banche di Credito Cooperativo") and ordered that said bank should also cover the cohabiting homosexual partner; to that end, it referred quite simply and convincingly not only to the two aforementioned judgments of the Court of Cassation and, even before, to judgment No. 138/10 of the Constitutional Court, but also the judgment of the ECHR (the European Court of Human Rights), First Section of 24 June 2010 *Schyalk and Kopf v. Austria*, where it was stated that the right to the respect of private and family life enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms required considering as families also same-sex unions. Similarly, and fully in line with the said judgment, the Milanese Court ruled as follows: "*The pronouncements thus far mentioned allow, therefore, arguing that in the current political and social reality, the more uxorio cohabitation, understood as a communion of life characterized by stability and mutual support, is not only the one consisting in the union of individuals of different sex, but also includes same-sex unions to which a socially widespread perception recognizes the right to family life in its full sense*".

Exactly in the first days of 2013, on January 11, the Court of Cassation published a pronouncement concerning custody of children to each of the parents in a separated couple, and ruled that the fact that one of the parents was gay was not an impediment to granting custody. A homosexual person can be an excellent parent as well.

Let us still deal with parenting and the like. In July, the Judge supervising guardianship at the Court of Parma entrusted a young girl in temporary custody to a male gay couple. A debate in the media followed. On 19 November the Juvenile Court of Bologna

confirmed the custody, adopting the usual parameters of balance, stability, parental adequacy, best interests of the child which until then had been used only for heterosexual couples (but also for singles, being a case of temporary custody and not an adoption).

It is legitimate to wonder why exactly in the most delicate area, that of gay parenting, one is making steps forward through judicial decisions whereas this is not the case in the areas dealt with by the lawgiver, such as the full-fledged recognition of same-sex unions. Probably, this is due to the fact that parenthood is an ineluctable matter of fact that cannot be eliminated even for homosexual couples or singles and this creates situations that demand to - and can - be recognized and regulated through the intervention of a court. The mere fact of having brought a child into the world raises the issue of whether that child ought to be entrusted to the gay parent or not. And someone has to decide (if there is a dispute). This is where the sometimes "evolutionary" decisions of the courts come from . When, instead, the recognition has ineluctably to go through the law, in this case we are still lagging behind.

We add a case resolved administratively but by having regard to the above mentioned judicial decisions.

In July 2013, the Police Headquarters in Genoa, issued a residence permit to the Brazilian spouse of a Genoese citizen. The couple had married within the EU, exactly in Portugal. It was not the first time that the issue of a residence permit intermingled with homosexuality and already in the past some applications had been granted (with different solutions). What is interesting in this case is that the case found its solution by drawing inspiration from the two aforementioned judgements by the Constitutional Court and the Court of Cassation : Judicial recognition of same-sex marriages celebrated abroad is not permitted, but it is possible to afford a couple linked by family ties the same rights a married couple is entitled to.

Homosexual unions and the solution according to private law

20 November, 2013 - the Notaries' National Congress launched a proposal: on 30 November, the Notaries would receive, for free, unmarried couples– and, therefore, also couples formed by partners of the same sex – that, in the absence of a recognition of their bond corresponding to marriage or something similar to it, wanted to regulate their mutual rights and duties. There was the possibility to regulate, by way of a private deed, issues such as housing and rental agreements, contribution to domestic life and financial support in the event the cohabiting partner was in a situation of need, ownership of assets including the possible joint or separate estates régime. Moreover,, there was the possibility to include legacy clauses in favour of the partner or, in the case of serious debilitating diseases, to appoint the partner as "Amministratore di sostegno" (lit. "supporting manager"). In short, the point was to protect the weaker partner of the couple as it happens with marriage and as it might be the case following the recognition of civil unions.

The intention of the Notarial Association was praiseworthy: while obviously pursuing the goal of expanding their scope of activity and therefore their customers' portfolio, it proved not to be insensitive to the issue of the lack of legal recognition for unmarried couples and, therefore, to the fact that millions of couples, including homosexual ones, are claiming for the same rights as the couples that are allowed to marry.

Of course, the limit of this proposal is clear. Basically, all matters concerning the status of individuals cannot be solved through a notarial deed; and the issues concerning property involved in the above status may not be solved through a notary either – e.g., the reversibility of the partner's pension in the event of death; or the very limited available share in the event of succession as compared with the share the heirs are entitled to, and so on.

It should be noted that the practice of private agreements governing some aspects of the life of a homosexual couple has already been tested within the homosexual community by gay couples, in particular

when they have a child who is formally going to be only the child of one of the two partners but who – however – is entitled to be the subject of rights and duties with regard to both components of the parental couple - and here we would like to point out the issue of the rights of children – whilst both parents must have equal rights and duties towards the child as well. It is not widespread as a practice (but in Italy even making a will is a practice rarely used, given the pervasiveness of the Italian legal system); however, this practice has already been studied and applied by some law firms specializing in gay rights.

We welcome the suggestions and solicitations of the notaries but we cannot fail to acknowledge that contract law (because this is the point whether you go to a notary or not) will never lead – at least in our country – to the full recognition of the gay couple as having the same rights as a heterosexual couple. There is always a need for legislative intervention.

The proposal to regulate the relations within the homosexual couple by a notarial agreement was explicitly made at the time the DICO were being envisaged ("Diritti e doveri delle persone stabilmente conviventi" - Rights and Obligations of Cohabitants) by those (Catholic extremists) to whom even such a weak instrument seemed to imply the dismantling of the traditional family. In line with this proposal, there has always been (and still there is) the one put forward by those who declare themselves willing to recognize the rights of individuals within the couple, but not the couple itself as entitled to its own rights. And there were some endorsing this view even among left-wing MPs, such as Mr. Veltroni.

Not to mention the fact that the recognition of the couple and not just of its individual components has, per se, a definite value of social achievement with its strong symbolic content. Sticking to the sole recognition of the rights of the individuals leaves out all those legal situations that – as mentioned before – have to do with the status of being a component of the couple recognized as such. The symbolic

value that is the foundation of social value is also missing.

10 December, 2013: the National Bar Association through its own circular letter urged lawyers to take an interest in the legal position of unmarried couples, whether heterosexual or homosexual. In practice, the Bar, faced with Parliament's unwillingness to regulate such unions, which left millions of couples deprived of major rights, urged lawyers to take care of the problem by thinking about instruments (private deeds, agreements, testamentary provisions, etc.) that could be proposed to the couples for affording a minimum of rights that are not otherwise recognized by law. The National Bar Association – perhaps encouraged by the position taken by the notaries 20 days before – addressed the problem determinedly and, as we have seen, examined and discussed again the issue of the agreements and instruments the legal science may enable lawyers to suggest to their clients.

However, even the lawyers' stance shows the same limits as those already highlighted for the notaries and, in general, for those who purport to address the lack of legal recognition of same-sex couples by considering it merely as related to individual rights. Some issues may not be addressed by way of private law, whilst others may only be remedied through private law. Resolving the juridical gap by only relying on the rights vested in individuals is a false solution, primarily designed to justify the inaction (or worse) of the lawgiver. In addition to this, there is the traditional distrust of Italian citizens towards acting "on their own" whereas (rightly, we might say) these are issues that need to be tackled in the context of statutory public laws- as is the case with marriage for heterosexuals. Not to mention the very important fact that only the public recognition of the union between persons of the same sex gives those persons a social dignity that is otherwise difficult to achieve on an equal footing with respect to heterosexual couples.

Fight against homophobia

For years now it has been argued that action is needed, even with a

law; but practically nothing was done even in 2013. Indeed, in some respects, there is a risk to move backwards.

There were various bills introduced in both the Chamber of Deputies and the Senate at the beginning of the term, after the previous legislature had undermined any possibility to pass an acceptable law.

The Chamber of Deputies, also under the pressure of serious homophobic incidents, started working on this topic in late spring and just when the approval of the text seemed imminent - in late July – it adjourned the discussion after the summer break. The works actually resumed in September. The bill simply provided for the extension of the aggravating circumstance consisting in motives related to sexual orientation to include homophobia or transphobia as regarded the discriminatory acts and offenses for which an aggravating circumstance had been in place for many years following the so-called Mancino Law (Law of 13 October 1975 No. 654, as amended by Decree-law No. 122 of 26 April 1993), that is the fact of having acted for racial, ethnical, national or religious reasons. The wording of the proposed rule was clear and balanced: no new crime was introduced, but, on the one hand, homophobic or transphobic discrimination was to be punished like the other types of discrimination based on other grounds; on the other hand, an aggravating circumstance was acknowledged: which means that a criminal or unlawful act must have been committed beforehand such as an act of discrimination or violence or harassment, or the criminal incitement to perpetrate them or some other act. Prosecution focuses not so much on those who do not appreciate homosexual or transgender orientation, but on those who actually carry out acts that amount to criminal offences aggravated by homophobia or transphobia motivations. This has nothing to do, then, with opinion-related offences. It is not the opinion that is being prosecuted but the criminal act in the light of the aggravating circumstances prescribed by law.

As in previous legislatures, opposition, especially from Catholic leaders, was immediately intransigent. Their – unfounded – fear was that the provision might also impact the mere expression of contrary or somehow derogative opinions on homosexuality and transsexuality – 99% of the opinions that can be heard on this subject from the pulpit, but not only. Obviously, this was not the purpose of this law.

However, exactly for "shielding out" the law in this sense, the opposition asked for and obtained that the text should be discussed after the summer. Indeed, in September, the following paragraph was included in Article 3: "*Pursuant to this law*, discrimination or incitement to discrimination shall not include *the free expression and manifestation of beliefs and opinions related to the pluralism of ideas, provided that they do not incite to hatred or violence, nor shall they include any conduct in accordance with applicable law also when taking place within organizations engaged in political, trade unions, cultural, health care*[2]*, educational activities or religious or worship activities, regarding the implementation of principles and values of constitutional relevance specific to said organisations*".

On 19 September, 2013, the law was passed with the above amendments. This provision leaves one frankly puzzled: no problem with the initial part (up to the words "*provided that they do not incite to hatred or violence*") because, as already mentioned, the law does not intend to prosecute opinions or ideas. The first concerns arise from the following clause: "any conducts *in accordance with*

2 Many wondered why also "*health care organizations*" had been included when dealing with the issues of homophobia and transphobia. Obviously, this shows that public attention is poor and short-lived. Indeed, until 2001, a ministerial circular forbade homosexuals to donate blood: as such they were considered at risk for HIV+ and possibly AIDS. The ministerial regulation, obviously as well as unjustifiably discriminatory in nature, was revoked by the Health Minister Umberto Veronesi at the request of the then existing and active Commission for Equal Opportunities at the Prime Minister's Office.
However, it is proven that, despite the withdrawal of the circular, in many health facilities, especially private and of Catholic "inspiration", this discrimination has been reintroduced and is still practiced as such.

applicable law": indeed, it is obvious that behaviours and acts "*in accordance with applicable law*" may not be prosecuted either as discriminatory acts or as criminal, possibly aggravated acts.

But one is dismayed by the inclusion of the exemption for those who commit acts – obviously not in accordance with the applicable law - "*within*" (to be read as "*in the name of...on behalf of...et similia*") political, trade union, health care, educational, religious or worship organizations. This opens up a law-free area where any kind of discrimination (and not only discrimination based in homophobia and transphobia) is justified by the fact of belonging to a wide range of organizations. Nor is the reference to "*principles and values of constitutional relevance* " of any help, since those principles are trampled per se by the wording of such a provision.

Conversely, Section 2 of the bill is more interesting and can be supported; it requires the "Istituto Centrale di Statistica" (Italian Central Statistics Institute) to carry out surveys, at least every four years, on the enforcement of this law, on discriminations and violence based on "*xenophobic, anti-Semitic, homophobic or transphobic" grounds*, "*measuring its fundamental characteristics and identifying those most exposed to risk*".

It is good that there is a centre with the task of monitoring, among others, homophobic and transphobic phenomena, and also enquiring who and why one behaves like that. In such a way, the International Convention on the Elimination of All Forms of Racial Discrimination is fully implemented, which was opened for signature in New York on March 7, 1966, and provided for such a monitoring activity; Law No. 654 of 13 October 1975 ratified this Convention. Moreover, if you like to split hairs, one might wonder why the terms "*racial, ethnical, national or religious reasons*" have been substituted in this section (and in this section alone) by the more restrictive "*xenophobic and anti-Semitic*" ones. In addition, could not this monitoring be carried out on a yearly basis so as to increase its dynamicity and incisiveness?

This was the balance point (awful, as far as the former section is concerned) for the Chamber of Deputies to pass bill No. 1052. The fact that the first signatory is one of the very few openly gay MPs is very sad.

The bill was then forwarded to the Senate, where it remained for months and was then taken up by the Justice Committee in December and briefly discussed during a night session (this being generally reserved for extremely urgent issues, under very tight deadlines); the 20th of December was the deadline set for the submission of possible amendments and the discussion of such amendments along with the voting of the consolidated text by the Senate was adjourned to the new year.

It remains to be seen how the law will be released by the Senate; if the disputed paragraph will be crossed out or if, by confirming it, the law will be finally passed. Frankly speaking, one would almost hope that nothing comes out of it all rather than seeing such a vast area of discrimination to become "lawful".

Continuing on the theme of homophobia, there is another suspended matter that does not seem to ever find its solution. It is the introduction of the National Day against homophobia. It is a bit confusing that, on one hand, homophobia is not even considered an aggravating circumstance for criminal actions already carried out while, on the other hand, there is the intention to introduce and celebrate a national day against homophobia.

At least theoretically, the two things can certainly coexist, considering the Day as a time for reflection that should lead to a civil and cultural growth of the country and of its social components in all areas making up the social system.

A bill for the introduction of such a Day was already (commendably) submitted and cared for by Senator Lo Giudice, former historic president of Arcigay.

The inconsistency referred to above can be accounted for by the

fact that the European Parliament established 17 May of every year as the day against homophobia in Europe, through a resolution on homophobia, passed on 26 April, 2007. Since then, also in Italy this date has always provided a useful opportunity to find expressions of condemnation against homophobia: in 2010, President Napolitano gave a speech on it; in 2011, the Chairman of the Chamber of Deputies received the LGBT organizations; in 2012, the Minister of Education sent a circular on this issue to be explained in all Italian schools; in 2013, significant events took place involving a great number of people all over Italy even obtaining the "attention" of the media.

At present, the bill does not seem bound to become a law in a short time. But you never can tell.

…AND THEN, ALL OF A SUDDEN…

It is sometimes the case that a stalemate situation gets unstuck all of a sudden, and rights for whose recognition one has been knocking for years on doors that remained shut are recognised expressly or, in any case, can take a huge leap forward in one day. This happened in the case of same-sex marriages and homosexuals' right to parenthood (and not only in those cases) thanks to judicial decisions that impacted on such issues.

On 9 April 2014, the Constitutional Court ruled that it was illegitimate to ban heterologous fertilization for sterile couples, thus sealing the fate of Law No. 40/2004 on medically assisted reproduction. The bans on trading gametes, surrogate pregnancies, heterologous fertilization for non-heterosexual couples, heterologous fertilization for non-sterile couples affected by genetically transmissible diseases all remain in force along with other prohibitions: still, the pillars of the Law received a deadly blow.

On the same day, it was reported that the Court of Grosseto had recognised the right to have a same-sex marriage celebrated abroad entered into the Register of births, marriages and deaths of a

municipality – if that marriage was permitted abroad. This only applies to registration of marriage, as the ban for homosexuals to get married in our country was left unprejudiced. Thus, the Court of Grosseto departed from the case-law of the Court of Cassation, which had prohibited the municipality of Latina from registering the marriage celebrated in the Netherlands between two homosexuals. Conversely, the Court followed the stance taken by the Constitutional Court and the Court of Cassation, which had both ruled that, being prevented from getting married, homosexual couples were entitled to the recognition of equal rights and had called upon Parliament (repeatedly) to pass legislation to that effect. The public prosecutor's office from Grosseto has already stated that they will appeal the decision.

In the preceding weeks there had been judicial decisions setting out, on the one hand, that it was not a criminal offence to enter as parents - in the Register of births, marriages and deaths – couples that had relied on donated gametes (in countries where this is permitted) and surrogated pregnancies and, on the other hand, that doing so did not give rise to alteration of a person's status as per Section 567 of the Criminal Code (which is punished by imprisonment for 5 to 15 years) as it rather consisted in making untrue statements to a public official on a person's identity, which is punished under Section 495(2) of the Criminal Code by imprisonment for 2 to 6 years – thus making it rather unlikely that the sentence will be enforced.

These judicial decisions impact substantially parent-child relationships, family law, and civil rights in general. For instance, it is untrue that making heterologous fertilization lawful will result into a drop in adoptions. This was not the case in the more advanced countries where heterologous fertilization has been permitted from the start. Conversely, it is a fact that such a decision will make adoption procedures more expeditious, streamlined and straightforward. By the same token, it is untrue that all couples suffering because the female partner is unable to get pregnant or all homosexual couples will scramble frantically to get to those countries where surrogated

pregnancies are permitted and regulated by law. Nor is it true that the right to registration of a marriage celebrated abroad is the same as recognising the right to civil marriage or to civil unions; still, it goes in that direction, and it is accordingly a good thing along with the other judicial decisions that were issued of late. Increased freedom of choice, increased awareness and accountability, civil and moral growth of both individuals and our country as a whole.

But there is one fact to be highlighted: one is faced, in each and every case, with judicial decisions. Once again, whilst politics turns a cold shoulder, it is the judiciary that affords some room to civil liberties under the pressure of reality.

This might be a cause for concern. Politically speaking, this might be so because one can hardly endorse a system where only prohibitions are rife. On the other hand, one might legitimately be afraid of the consequences resulting from letting the judiciary alone fill the gaps left behind by politics, answer the questions that have yet to be tackled. One would expect these judicial decisions to start a virtuous circle of legal and cultural discussions based on scientific evidence and rational considerations, so as to finally introduce legislation to consolidate this subject matter as well as other issues. Still, for the time being one has to make do with the replacement role played by courts and welcome these small steps forward.

In fact, would anyone bet that this Parliament, if it ever were to enact legislation on these issues, would not fall a prey to political blackmail (travestied as ethically motivated) from the Catholic world and the right-wing parties that are subservient to it - as well as to the ambiguities of the left that is an accomplice to that world? One is tempted into concluding that this step-by-step process based on judicial decisions, this stop-and-go approach by courts hitting the target variably is much preferable over the stepping-in of Parliament, which – one can bet – would end up doing away with what the courts have been granting little by little.

Recommendations

1. Providing, by way of suitable legislative measures, for the recognition under public law of the union between same-sex persons.
2. Passing urgent legislation to apply family law safeguards to "de facto" children and parents of homosexual couples.
3. Fostering full-fledged affirmative actions regarding adoption and custody rights for homosexual couples.
4. Finally passing a law against homophobia and transphobia in order to do away with the "exemption" consisting in acting in the name and on behalf of political, trade union, cultural, health care, educational, religious or worship organisations. Obviously, freedom of expression and thought must be safeguarded.
5. Setting up a body consisting of culturally influential members along with members skilled in exploiting both old and new communication and social media, to detect and adequately report not only cases of overt homophobia, but also subtler forms of denial of rights. This body should also work to emphasize positive practices, favourable decisions and regulatory instruments widening the rights of homosexual persons.
6. Addressing issues related to the rights of homosexual persons in the schools of every level and type.
7. Setting up a Central Observatory on the judicial handling of the rights of homosexual persons to also bring legal actions aiming to the recognition of rights that are denied today. Such a body might also be entrusted with the task of encouraging and possibly acting with regard to the relationships with the other EU member states and the ECHR (the European Court of Human Rights) itself.