DIFFERENT APPROACHES TO MARRIAGE DOWNGRADING: FROM AN ANTI-ELUSIVE MEASURE TO AN ANTI-DISCRIMINATORY CLAIM

DIFERENTES ENFOQUES SOBRE LA DEGRADACIÓN DEL MATRIMONIO: DE UNA MEDIDA ANTIELUSIVA A UN REMEDIO ANTIDISCRIMINATORIO

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ABSTRACT: The essay focuses on the different mechanisms of marriage downgrading. Given the principle of "cross-border continuity" of statuses, limits to this continuity are sometimes admitted and they are placed through downgrading mechanisms. That can occour in the case of same-sex marriages transcription in a Member State which does not allow such marriages, but which does allow same-sex registered partnerships. Downgrading mechanism has an anti-elusive function, but it is not without problems in terms of discrimination on the grounds of sexual orientation. A different approach is taken in the case of an opposite-sex couple requesting the downgrading of their marriage, celebrated before the Member State allowed access to registered partnerships for all sex couples. The element of voluntariness seems to be the prerequisite for a proper anti-discrimination rule.

KEY WORDS: Family; cross-border couple; marriage; registered partnership; downgrading; discrimination.

RESUMEN: *El ensayo se centra en los diferentes mecanismos de degradación del matrimonio. Dado el principio de "continuidad transfronteriza" de los estatutos, en ocasiones se admiten límites a esta continuidad y se colocan mediante mecanismos de degradación. Eso puede ocurrir en el caso de la transcripción de matrimonios entre personas del mismo sexo en un Estado miembro que no permite tales matrimonios, pero que sí permite las uniones registradas entre personas del mismo sexo. El mecanismo de degradación tiene una función anti-elusiva, pero no está exento de problemas en términos de discriminación por motivos de orientación sexual. Se adopta un enfoque diferente en el caso de una pareja del sexo opuesto que solicita la degradación de su matrimonio, celebrado antes de que el Estado miembro permitiera el acceso a las uniones registradas para todas las parejas sexuales. El elemento de la voluntariedad parece ser el requisito previo para una regla adecuada contra la discriminación.*

PALABRAS CLAVE: *Familia; pareja transfronteriza; matrimonio; uniones registradas; degradación; discriminación.*

TABLE OF CONTENTS: I. "CROSS-BORDER CONTINUITY" OF STATUSES.- II. DOWNGRADING MECHANISMS IN FAMILY LAW.- III. MARRIAGE DOWNGRADING AS AN ANTI-ELUSIVE MEASURE.- IV. MARRIAGE DOWNGRADING AS AN ANTI-DISCRIMINATORY CLAIM.- V. CONCLUSION.

I. "CROSS-BORDER CONTINUITY" OF STATUSES.

The protection of the "cross-border continuity" of statuses acquired abroad is a matter concerning, *inter alia*, the protection of human rights[1]. Two decisions of the European Court of Human Rights (ECtHR) on adoption are significant in this regard: *Wagner and JMWL v. Luxembourg*[2] and *Negrepontis-Giannisis v. Greece*[3].

From these decisions we derive the principle that the non-recognition of status constitutes a violation of the right to family life when the status corresponds to a family bond actually existing in social reality. On the other hand, similar references to the prevalence of an established social reality can be found – albeit limited to relations between EU Member States – in the case law of the Court of Justice of the European Union (CJEU) on the right to a name. The following cases are significant in this regard: *Garcia Avello*[4] (C-148/02) and *Grunkin-Paul*[5] (C-353/06). In both the decisions, the CJEU expressed its view on the necessity to harmonize national legislation with the needs of free movement and residence of EU citizens on the EU territory.

1 Franzina, P.: "Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad", *Diritti umani e diritto internazionale*, 2011, vol. 5, p. 614 f.: "from the standpoint of Article 8 of the ECHR, the shift towards «transnationality» in public policy is not just a cultural option, or a strategy that States are free to decide whether to implement, or not: it rather reflects the increasingly complex perspective from which private international law issues must be dealt with in Europe, i.e. a perspective where the point of view of the forum is no longer a merely «national» one, but embodies that State's international undertakings concerning, inter alia, the protection of human rights".

2 *Wagner and J.M.W.L. v. Luxembourg*, No. 76240/01, ECHR 2007-I, with note by Kinsch P.: *Note (1-2) sous l'arrêt de la CourEDH de 28 juin 2007, Wagner c. Luxembourg*, *Revue critique de droit international privé*, 2007, vol. 96, no. 4, pp. 815-822 and D'Avout, L.: *Note*, *Journal du Droit International-Clunet,* 2008, no. 1, p. 187 ff.

3 *Negrepontis-Giannisis v. Greece*, No. 56759/08, ECHR 2011-I, with note by Kinsch P.: *La non-conformité du jugement étranger à l'ordre public international mise au diapason de la Convention européenne des droits de l'homme*, in *Revue critique de droit international privé*, 2011, vol. 100, no. 4, pp. 817-823 and Dionisi-Peyrusse, A.: "Convention européenne des droits de l'homme (articles 8, 14, 6 et article 1er du protocole nº 1)", *Journal du Droit International-Clunet,* 2012, no. 1, p. 215.

4 CJEU, Case C-148/02, *Carlos Garcia Avello v Belgian State,* [2003] ECR I-11613.

5 CJEU, Case C-353/06, *Grunkin & Paul*, [2008] EUECJ C353/06.

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Furthermore the Advocate General in the case *Dafeki*[6], on the free movement of workers and probative value to certificates of civil status, recognises that the protection of "cross-border continuity," deeply rooted in the idea itself of integration pursued by the European legal order, imposes the "immutability of status whenever [...] it constitutes an element of or prerequisite for a right of the individual"[7].

However, the need to take account of the requirements of protection of fundamental human rights and of European integration does not automatically give rise to an absolute obligation to recognise legal situations established abroad. In fact, on the basis of Article 8 of the European Convention on Human Rights (ECHR) itself, a margin of appreciation is ensured to the State[8]. It is worth highlighting that, since the rights guaranteed by Article 8 of the ECHR correspond to those guaranteed by Article 7 EU Charter, according to Article 52 EU Charter, the latter must be interpreted to be consistent with the former.

This assessment of the Member State may, of course, go so far as to sanction abuse of the right. In the case *Sayn-Wittgenstein* (C-208/09)[9] the CJEU supported the Member State from refusing to recognize all the elements of the surname of a national of that State, as determined in another Member State at the time of her adoption as an adult by a national of that other Member State. The reasons for the refusal are that the surname includes a title of nobility which is not permitted in the first Member State under its constitutional law. A different decision by the CJEU would probably have favoured conduct in breach of the law. The CJEU's decision is therefore clear in its determination not to give effect to anti-elusive conduct carried out in a transnational context. However, it should also be noted that, in the latter case, it would have been quite difficult to identify a violation of fundamental human rights in the non-recognition of a family name obtained through the adult adoption for the sole purpose of bearing a title of nobility and achieving social prestige.

6 CJEU, Case C-336/94, *Eftalia Dafeki v Landesversicherungsanstalt Württemberg*, [1997] ECR I-6761, Opinion of Advocate General La Pergola delivered on 3 December 1996, ECLI:EU:C:1996:462.

7 *Ibid.*, § 6.

8 It should also be borne in mind, at the actual level of the regulation on the circulation and cross-border recognition of public documents, the possibility of overlapping plans: over the broader aim of international harmonisation, which is precisely that of the Commission Internationale de l'État Civil, tends to prevail the intra-European integration expressed in the "Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No. 1024/2012."{COM(2013) 228 final}{SWD(2013) 145 final}.

9 CJEU, Case C-208/09, *Sayn-Wittgenstein*, [2010] EUECJ C-208/09. The case refers to an Austrian national, adopted by a German national with a title in his surname Fürst von Sayn-Wittgenstein (Prince of Sayn-Wittgenstein) and that thereby acquired the same surname. The entry of such surname was refused by Austrian courts due to the prohibition of titles of nobility, which is considered to be part of Austrian public policy.

The provision of cross-border continuity of subjective statuses therefore presupposes an assessment by the receiving Member State of their recognisability and the concrete possibility of attributing legal effects to them, which cannot derive from the mere capacity of those statuses to produce effects in the State of origin. It is thus possible to impose limits on the "cross-border continuity" of status, which can ensure the compatibility of the status with a given legal framework.

Differences being made, the CJEU rule of reason applied in the *Cassis de Dijon* decision[10] for goods also applies to the status[11]: national restrictive measures are permitted in the absence of common rules, provided that they pursue an objective of general interest which may override the principle of free movement.

II. DOWNGRADING MECHANISMS IN FAMILY LAW.

Domestic restrictive measures can be imposed by using adapted recognition mechanisms. These mechanisms mostly have an impact of a status-limiting character, and tend to take the form of downgrading.

A Council Decision of 2001 provides a definition of downgrading as follows: "The term 'downgrading' (*déclassement*) means a reduction in the level of classification"[12]. Applying this general scheme[13] in the context of private international law, it is possible to set up a downgraded recognition. This involves implementing a redevelopment technique whereby a situation created abroad can be recognised in a given State, after the same situation has been reconverted into one corresponding to that envisaged by the State itself.

Downgrading finds application in various areas of family law. In the cases (highlighted in the previous paragraph) of adoption and family name, and in other similar ones, namely the refusal to recognise foreign birth certificates stemming from international surrogacy arrangements[14]. The most frequent application, however, concerns marriage and, consequently, registered partnerships.

10 CJEU, Case C-120/78, *Rewe-Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), [1979] ECR 649.

11 Borgmann-Prebil, Y.: "The Rule of Reason in European Citizenship", *European Law Journal*, 2008, vol. 14, no. 3, p. 349: "the rule of reason approach coined in Cassis remains the principal paradigm of Community free movement law."

12 Council of the European Union, "Council Decision adopting the Council's security regulations", Brussels, 28 February 2001, 5775/01, Section II, p. 18.

13 A similar notion of downgrading can also be encountered in non-European contexts, e.g. in the United States. Cf. the definition in the Electronic Code of Federal Regulations, 49 CFR § 8.5: "Downgrading means a determination by a declassification authority that information classified and safeguarded at a specific level shall be classified and safeguarded at a lower level." The text is available at *www.law.cornell.edu/cfr/text/49/8.5* (last visited: 4 July 2021).

14 Several refusals to recognise cross-border surrogacy arrangements and the various consequences entailed have been challenged before the ECtHR on the grounds of the violation of the child's right to respect for private and family life (article 8 of the European Convention on Human Rights). Cf. *Mennesson v. France*,

The downgrading of marriage to registered partnership leads to a sort of redefinition of the legal protection reserved to same-sex couples. The ECtHR does not seem to consider that the loss of the *nomen iuris* "marriage" in itself could determine an illegitimate interference with the right to family life[15].

In the case *Orlandi and others v. Italy*[16], the ECtHR states that the institution of registered partnership offers same-sex couples the possibility of achieving a legal status equal or similar to marriage in many respects. The assimilability of the two legal forms therefore leads the Court to hold that the possibility of transcribing and recognising same-sex marriage as a registered partnership is, in principle, a sufficient condition for meeting the standard of protection offered by the ECHR.

As a precedent for this approach, reference may also be made to the case *Hämäläinen*[17], which concerned the "forced" conversion of a marriage into a registered partnership, following the gender reassignment of one of the spouses. The case is clearly characterised by two peculiarities, which in themselves place it at the margin of the downgrading theme we are addressing. It has no cross-border dimension and concerns the issue of a change of sex with respect to a marriage already celebrated. However, the case is interesting because, in its decision, the ECtHR does not find a violation of the ECHR in the downgrading of a marriage into a registered partnership. According to the Court, in fact, a different formal union, which preserves the same rights and duties as marriage, achieves a fair balance of two competing interests[18]: the person's right to have his or her sexual identity recognised – even in the event of change of sex – and "the State's interest to maintain the traditional institution of marriage intact"[19].

The mentioned *Orlandi* case also provides an interesting insight that we cannot avoid considering. Of the six applicant couples, three were married in Canada, a fourth in California and the remaining two in the Netherlands. Only three of the six couples were in the State of celebration of the marriage for work purposes, whereas the others, even at the time of the celebration, were permanently resident in Italy.

No. 65192/11, ECHR 2014-III; *Labassée v. France*, No. 65941/11, ECHR 2014-V; *Paradiso and Campanelli v. Italy* [GC], No. 25358/12, ECHR 2017.

15 Scaffidi Runchella, L.: "Il riconoscimento e la trascrizione dei matrimoni same-sex conclusi all'estero alla luce delle recenti decisioni del Tribunale di Perugia e della Corte europea dei diritti dell'uomo nel caso *Orlandi ed altri c. Italia*", *GenIUS*, 2018, vol. 1, p. 147.

16 *Orlandi and others v.Italy,* Nos. 26431/12; 26742/12; 44057/12 and 60088/12, ECHR 2017. Cf. a comment to the decision in Deana, F.: *Diritto alla vita familiare e riconoscimento del matrimonio same-sex in Italia: note critiche alla sentenza Orlandi e altri contro Italia (Right to Family Life and Same-Sex Marriage Registration in Italy: The ECtHR Decision in Orlandi and Others v. Italy)*, *Rivista di Diritti Comparati*, 2019, num. 1, pp. 153-183.

17 *Hämäläinen v. Finland* [GC], No.37359/09, ECHR 2014-IV.

18 Salzberg, D.A.G.: "Confirming (the illusion of) heterosexual marriage: Hamalainen v Finland", *Journal of International and Comparative Law*, 2015, vol. 2, num. 1, p. 176.

19 *Hämäläinen v. Finland* [GC], cit., § 38.

With regard to these last three couples, therefore, it seems likely that they moved abroad with the intention of eluding the Italian law that prohibited them from getting married[20].

This anti-elusive mechanism operated at the time of celebration of the six marriages in a legal system – the Italian one – which did not offer yet same-sex couples any form of recognition, leaving them in a legal vacuum. When the ECtHR's decision passed, in 2017, Italy already had adopted the model of registered partnerships for same-sex couples. But a different form of anti-elusive mechanism – the downgrading of marriage to registered partnership – is still effective in the State, as it is based on domestic legislative provisions and is confirmed by case-law of the Italian Supreme Court of Cassation.

III. MARRIAGE DOWNGRADING AS AN ANTI-ELUSIVE MEASURE.

In its decision of 21th July 2015, case *Oliari and Others v. Italy*[21], the Strasbourg Court condemned Italy for the failure of the legislature, despite numerous reminders from its superior courts[22], to provide for a legal institution distinct from marriage that would recognise a relationship between persons of the same sex, since the lack of legal recognition of such unions resulted in a violation of the right to respect for private and family life as set out in Article 8 of the Convention.

In light of this condemnation by the Strasbourg Court, Italy thereafter passed Law No. 76 of 20 May 2016, which entered into force on 5th June 2016, and the subsequent implementing decrees (Legislative Decrees No. 5, 6 and 7 of 19th January 2017).

The law, which is the result of a troubled parliamentary process, was drafted using a regulatory technique that is unusual in civil law systems: that of a single article composed of several (precisely: 69) paragraphs.

20 Scaffidi Runchella, L.: "Il riconoscimento", cit., p. 140, *sub* note 40.

21 *Oliari and Others v. Italy*, No. 18766/11 and 36030/11, ECHR 2015. Cf. the following comments to the decision: Lenti, L.: "Prime note a margine del caso Oliari c. Italia", *Nuova Giurisprudenza Civile Commentata*, II, 2015, pp. 575-581 and Winkler, M.M.: "Il piombo e l'oro: riflessioni sul caso *Oliari c. Italia*", *GenIUS*, 2016, no. 2, pp. 46-61. For further details, see also: Venuti, M.C.: "La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia", *Politica del diritto*, 2016, vol. 47, p. 95 ff. and Winkler, M.M.: "Same-Sex Marriage and Italian Exceptionalism", *Vienna Journal on International Constitutional Law*, 2018, vol. 12, pp. 433-456.

22 Corte Cost., 15th April 2010 No. 138, in *Giurisprudenza Costituzionale*, 2010, no. 2, pp. 1604-1628, with note by Romboli, R.: *Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" o "troppo poco"*, in the same review, pp. 1629-1642 and Cass. civ., sez. III, 15th March 2012 no. 4184, in *Famiglia e diritto*, 2012, no. 7, pp. 665-691, with note by Gattuso, M.: *"Matrimonio", "Famiglia" e orientamento sessuale: la Cassazione recepisce la "doppia svolta" della Corte europea dei diritti dell'uomo.*

Paragraph 1 defines a registered partnership ("*unione civile*") between persons of the same sex as a specific social formation pursuant to Articles 2 and 3 of the Italian Constitution. It thus includes this social formation among those protected by the State, because it is the "place" where the personalities of the individuals, who are part of it, take place. The explicit reference to social formations makes it possible to create a legal link between the constitutional protection of the person's fundamental rights and personal freedom[23].

However, regulating registered partnerships as social formations and not as a family is a controversial solution[24], as it excludes the possibility of referring to a plural concept of a (matrimonial) family, extended to the point of including same-sex couples[25].

In spite of this dogmatic approach, there are similarities between marriage and registered partnership. In fact, previous marriage is an impediment to a registered partnership (cumulation of marriage and registered partnership is not allowed) and the conversion of a marriage into a registered partnership is foreseen if one spouse changes his or her sex. In addition, the last name of the "united" partners is common, and there is provision for extending any reference to "spouses" to the case of "united partners" (if only for the effectiveness of protection). The "united" partners are conferred the typical rights and duties of spouses and, lastly, the need for the joint determination of the life in common is established.

On the other hand, there is no obligation of fidelity, which is present in marriage, and no right to adopt the child of one of the "united" partners, a right recognised in marriage.

The notable omission[26] of fidelity in registered partnerships is the matter of reflection in legal doctrine[27]. Although fidelity in (heterosexual) marriage is to be seen in relation to the presumption of paternity, which cannot be expected in the

23 On constitutional protection and private autonomy: cf. Pace, A.: *Problematica delle libertà costituzionali. Parte generale*, Padova, 2003, p. 20.

24 It does not seem to be the competence of the ordinary legislator to define the constitutional classification of the issued norm. Cf. De Cristofaro: "Le «unioni civili» fra coppie del medesimo sesso. Note critiche sulla disciplina contenuta nei commi 1°-34° dell'art. 1 della l. 20 maggio 2016, n. 76, integrata dal D.lgs. 19 gennaio 2017, n. 5", in *Le nuove leggi civili commentate,* 2017, no. 1, p. 118: "*non può né deve essere attribuita soverchia importanza alla statuizione del comma 1°, che definisce in termini di (mera) formazione sociale la coppia del medesimo sesso che abbia costituito una unione civile. Non è infatti certamente compito del legislatore ordinario individuare la corretta qualificazione di una fattispecie ai fini del suo inquadramento in questa o quella disposizione della Costituzione*".

25 Scaffidi Runchella, L.: "Il riconoscimento", cit., p. 143.

26 Sesta, M.: "La disciplina dell'unione civile tra tutela dei diritti della persona e creazione di un nuovo modello familiare", *Diritto e Famiglia*, 2016, vol. 10, p. 886: "*con riferimento ai rapporti personali tra le parti dell'unione civile, resta la* vistosa omissione *dell'obbligo reciproco di fedeltà*" (emphasis added).

27 Fidelity was included in the original text of the draft law, but was deleted by a subsequent – and controversial – amendment. Cf. Ferrando, G.: *Diritto di famiglia. Unioni civili e convivenze. Aggiornamento 2016*, Torino, 2016, p. 7.

case of homosexual unions, nonetheless there seems to be a determination on the part of the Italian legislature not to give relevance to sexual relations in (same-sex) registered partnerships. If so, such a determination should, however, be supposed in relation to outdated moral judgments[28]. This certainly cannot be disregarded in the case of a "forced" downgrading of a same-sex marriage (celebrated abroad) into a registered partnership under Italian law.

Among the aforementioned implementing decrees of the law establishing registered partnerships, Legislative Decree no. 7 of 19th January 2017, at Article 1, amends Law no. 218 of 31th May 1995. In particular, it inserts in that law a new article, Article 32 *bis*, that provides that marriage contracted abroad by Italian citizens with a person of the same sex produces the effects of a registered partnership regulated by Italian law[29].

The text of Article 32 *bis* is not clear: marriages celebrated between two Italians are certainly included in its provision, and marriages between two foreigners are reasonably excluded[30]. On the other hand, it is doubtful whether the rule is applicable to marriages celebrated between an Italian national and a non-national. The interpretation according to which, for the application of the Italian law on registered partnerships, the Italian nationality of one of the spouses is sufficient seems to be preferred[31].

The *ratio legis* of Article 32 *bis* is clearly identifiable. It is attributable to the intention to prevent Italian nationals, who in their own State are not allowed to contract a marriage with a person of the same sex (but only to enter into a registered partnership) from celebrating a marriage abroad and subsequently obtaining recognition of it in Italy. On the absolute presumption of a *fraude à la loi*, Italian law is made applicable to these marriages. A forced downgrading of marriage in registered partnerships is thus actuated[32]. In this way, a significant *deminutio* is

28 Sesta, M.: "La disciplina dell'unione civile", cit., p. 886.

29 Legislative Decree of 19th January 2017 no. 7, G.U. 27th January 2017 (Amendments and re-ordering of the norms of private international law for the regulation of civil unions, pursuant to Article 1(28)(b) of Law no. 76 of 20th May 2016): "Art. 1, Modifiche alla legge 31 maggio 1995, n. 218: 1. Alla legge 31 maggio 1995, n. 218, sono apportate le seguenti modificazioni: a) dopo l'articolo 32 sono inseriti i seguenti articoli: Art. 32-bis. (Matrimonio contratto all'estero da cittadini italiani dello stesso sesso). - 1. Il matrimonio contratto all'estero da cittadini italiani con persona dello stesso sesso produce gli effetti dell'unione civile regolata dalla legge italiana".

30 Same-sex marriages concluded abroad by non-Italians, even if recognised as such, will be transcribed in Italy in the specific partnerships register, in the part reserved for registered partenerships celebrated in a foreign country, pursuant to Article 134-bis of Law No. 218 of 31 May 1995 (amended by Legislative Decree no. 7 of 19th January 2017). Cf. Scaffidi Runchella, L.: "Il riconoscimento", cit., p. 142.

31 Biagioni, G.: "Unioni same-sex e diritto internazionale privato: il nuovo quadro normativo dopo il d.lgs. n. 7/2017", *Rivista di diritto internazionale*, 2017, no. 2, p. 498.

32 Boele-Woelki, K.: "The Legal Recognition of Same-Sex Relationships Within the European Union", *Tulane Law Review*, 2008, vol. 82, no. 5, p. 1967 ff.: "This means that the foreign institution is recognized as the national institution of the jurisdiction where recognition is sought. This can either lead to an upgrade or a downgrade depending on (1) which institution is to be recognized and (2) where the institution is to be recognized. This leads to entirely different results. In those countries where a domestic form of registered

realised with respect to the institution of marriage, not only in order to the *nomen iuris* in itself – which in the case of marriage certainly has greater evocative force and recognised social impact – but also with concern to the relational sphere, with the exclusion of the obligation of mutual fidelity. In addition, other exclusions and limitations are provided, first and foremost that relating to adoption.

The Italian Supreme Court of Cassation – with Judgment no. 11696 of 14th May 2018 – ruled on the issue of the recognition of same-sex marriages celebrated abroad[33]. The Court operates by way of interpretation with respect to Law no. 76 of 20th May 2016 and the implementing decrees. It admits that the text of Article 32 bis, inserted by means of the implementing decrees, leaves unresolved a specific aspect: the question relating to the transcription in Italy of marriages contracted abroad between persons of the same sex, in case one of them is an Italian national and the other a non-national. However, it seems clear to the Court that Art. 32 *bis* expresses a legislative choice in favour of the registered partnership model, in so far as it is a provision aimed precisely at regulating the circulation and recognition of the effects of marriage acts celebrated by same-sex couples abroad.

The downgrading of marriage is considered appropriate by the Court[34], which does not perceive the *fumus* of discrimination on the basis of sexual orientation, since – as established by the European Court of Human Rights in 2015 in the case *Oliari et al. v. Italy* –[35], same-sex partners must be guaranteed the right to private and family life, pursuant to Article 8 ECHR, without it being possible to impose on the single State the adoption, in a specific way, of marriage instead of registered partnership. It is however significant that, referring to the conversion of marriage into a registered partnership, the Supreme Court of Cassation uses the English expression "downgrading"[36] twice in its Judgment, drafted in Italian. This expression manifests – as noted above – in an objective manner a "demotion". The clear awareness of the fact that it is allowed a "forced-lowering" of the union – legally constituted in the form of a marriage in another State – between two persons on the ground of their sex, characterises the Court's decision in a particular way.

partnership has been created, same-sex marriages celebrated abroad are often afforded recognition as the domestic form of registered partnership".

33 Cass. civ., sez. I, 14 May 2018 No. 11696, in *Familia*, 2019, num. 5, pp. 473-511, with note by Ramuschi, M.: *Sul matrimonio celebrato all'estero tra un cittadino italiano e uno straniero del medesimo sesso.*

34 Cf. Tonolo, S.: "La tutela internazionale del diritto fondamentale alle relazioni interpersonali e l'introduzione nell'ordinamento italiano degli istituti delle unioni civili", in AA.VV.: *Diritto, economia e società. In ricordo di Luisa Cusina*, Trieste, 2018, p. 255.

35 *Oliari and Others v. Italy*, cit.

36 Cf. Cass. civ., sez. I, 14th May 2018 No. 11696, cit. The use is noticeable in the decision, at § 9.1 ("*L'applicazione del cd.* downgrading *(ovvero l'applicazione della disciplina normativa delle unioni civili)*") and § 13.2 ("*l'applicazione del cd.* downgrading *ovvero la conversione della loro unione matrimoniale in unione civile*").

IV. MARRIAGE DOWNGRADING AS AN ANTI-DISCRIMINATORY CLAIM.

It is easy to perceive that a forced downgrading of marriage into a registered partnership represents, for those who suffer it, a sort of "demotion" of their formally constituted relationship. This may also have implications on a social level, since the denomination "marriage" implies full, agreed acceptance of the bond. On the other hand, if the downgrading is not the result of a legal imposition, but constitutes an option, albeit temporary, offered to the married parties, the perspective changes completely. The parties can freely exercise a right relating to the qualification of the legally established bond and they can do that on the basis of equal treatment, without distinction with regard to their sex (or sexual orientation). The most significant hypothesis is related to a different scenario from the one laid out in the previous paragraph, as the downgrading does not concern same-sex marriages, but opposite-sex marriages.

The condition is that the possibility of entering into a registered partnership was not available to heterosexual couples at the time of their marriage and was subsequently allowed. This can only be the case when a State, as has frequently occurred, has offered registered partnership (reserved for same-sex couples) as the first form of recognition for same-sex couples. In subsequently admitting same-sex couples to marriage, some states have prohibited the formation of new registered partnerships (allowing already registered partnerships to upgrade their union to marriage). Others have simply allowed same-sex couples to choose between entering into a marriage or a registered partnership. This has led to a discriminatory situation to the detriment of heterosexual couples, which has only been remedied by extending to them the possibility of entering into a registered partnership.

The case in point specifically concerns the United Kingdom. Despite the fact that due to the Brexit vote this State, as of 31th January 2020, is no longer a member of the European Union[37], it offers a very interesting scenario that could potentially occur also in other Member States in the future. It should furthermore be borne in mind that three different legal systems coexist in the United Kingdom. This makes the reconstitution rather complex. Until 2019, the situation was as follows: opposite-sex and same-sex couples in England and Wales and in Scotland were allowed to marry without any distinction; in Northern Ireland, only heterosexual couples were allowed to marry, whereas all same-sex couples were admitted to

37 Dagilyte E.: "The Promised Land of Milk and Honey? From EU Citizens to Third-Country Nationals after Brexit", in S. Mantu, P. Minderhoud and E. Guild (ed.): *EU Citizenship and Free Movement Rights*, Leiden, 2020, pp. 351-352. On the effects of Brexit on family law, from a transnational perspective, cf. Ruggeri, L.: "Brexit and new European framework in family property regimes', in *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings*, 2019, pp. 59-64.

register their union; opposite-sex couples were not allowed to register their union in the whole United Kingdom[38].

In 2014, while the "Equal Civil Partnerships" movement was growing in the Country, Rebecca Steinfeld and Charles Keidan, de facto heterosexual cohabitants, took legal action, claiming discrimination in the Civil Partnership Act of 2004, which did not allow same-sex couples access to registered partnerships[39]. Their reasons were not recognised at first instance and on appeal[40], but in 2018 the Supreme Court found that there was a clear difference in treatment to the detriment of opposite-sex couples[41]. According to the Court, at the same time as the enactment of the Marriage (Same Sex Couples) Act of 2013 (which allowed same-sex couples to enter marriage), the Civil Partnership Act of 2004 should have been repealed or provided for to be extended to opposite-sex couples[42]. In fact, sections 1 and 3 of the Civil Partnership Act 2004, which do not allow a heterosexual couple to register their union, are incompatible with section 4 of the Human Rights Act 1998. The Court also notes a clear conflict between this Act and Article 8, in conjunction with Article 14, of the ECHR.

Although the Supreme Court could not repeal the law, it recognised the discrimination taking place and made a strong recommendation for the Government of England and Wales to reform registered partnerships[43]. In response to this solicitation, the Government launched a legislative initiative that ended on 16 March 2019, with the enactment of the Civil Partnerships, Marriages and Deaths (Registration etc) Act.

On 13th January 2020, in Northern Ireland, the Marriage (Same Sex Couples) and Civil Partnership (Opposite Sex Couples) (Northern Ireland) Regulations 2019 came into force. The 2019 Regulations allow same-sex marriage and at the same time, applying the reasoning of the English Supreme Court ruling, amend the Civil Partnership Act 2004 and also allow heterosexual couples to enter into

38 Garetto, R.: "Opposite-sex registered partnerships and recognition issues", in Kramberger Škerl, J., Ruggeri, L. and Viterbo, F.G. (eds): *Case Studies and Best Practices Analysis to Enhance EU Family and Succession Law. Working Paper,* Camerino, 2019, pp. 89-90.

39 Garetto, R.: "Civil Partnerships: the EU Framework for Cross-Border Couples and the Recent Legislative Reform in the UK", in *6th SWS International Scientific Conference on Social Sciences. Conference Proceedings,* 2019, p. 66 f.

40 Hayward, A.: "Relationships between adults: Marriage, Civil Partnerships, and Cohabitation", in Lamont, R. (ed.): *Family Law*, Oxford, 2018, p. 50 f.

41 *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*, [2018] UKSC 32, no. 3: "same sex couples have a choice. They can decide to have a civil partnership or to marry. That choice was not - and is not - available to heterosexual couples".

42 *Ibid.*, no. 48.

43 Hayward, A.: "Equal Civil Partnerships, Discrimination and the Indulgence of Time: R (on the application of Steinfeld and Keidan) v Secretary of State for International Development", *Modern Law Review,* 2019, vol. 82, p. 925.

registered partnerships[44]. On 23th June 2020 the Scottish Parliament enacted the Civil Partnership (Scotland) Act 2020, that enables persons of different sexes to be in a civil partnership. It received royal assent on 28th July 2020, entered into force on 30th June 2021, and now awaits further secondary legislation from the Scottish Parliament.

The most interesting situation, however, occurred in Northern Ireland. On 7th December 2020 the Marriage and Civil Partnership (Northern Ireland) (no. 2) Regulations 2020 came into force. They provide a conversion mechanism. The Regulations indeed allow for a three-year period in which couples in a same-sex civil partnership formed in Northern Ireland may upgrade to a marriage, and couples in an opposite-sex marriage formed in Northern Ireland may downgrade to a civil partnership. As explicitly stated by the UK Government, the possibility of conversion introduced by the Regoulations "aims to be fair to both same-sex and opposite-sex couples in Northern Ireland who have historically not had access to certain legal relationships'[45]. In this sense it can be considered an adequate response to anti-discriminatory claims. In any case the Regulations provide that all conversion rights will then be brought to an end after three years.

Conversion right for married opposite-sex couples is provided only in Northern Ireland at the moment, due to a very recent legislation.

In Scotland secondary legislation still needs to be progressed, and this issue is not yet settled. A possibility similar to that of Northern Ireland is currently under consideration in England and Wales. In July 2019 – a few months after the enactment of the Civil Partnerships, Marriages and Deaths (Registration etc) Act – the Government Equalities Office (GEO) published a paper and consultation "Implementing Opposite-Sex Civil Partnerships: Next Steps, Implementing Opposite-Sex Civil Partnerships: Next Steps'[46]. It sought views on proposals to introduce the right for opposite-sex couples to convert from a marriage to a civil partnership for a limited period of time.

V. CONCLUSION.

It may be said that there is – in specific situations – a transversality between marriage and registered partnership. The conversion from one form to the other may take place by choice of the parties or by legal obligation.

44 McCormick, C. and Stewart, T.: "The Legalisation of Same-Sex Marriage in Northern Ireland", *Northern Ireland Legal Quarterly*, 2020, vol. 71, no. 4, p. 565.

45 HM Government, *Marriage and Civil Partnership - Conversion entitlements in Northern Ireland. UK Government consultation response*, 22 October 2020, p. 3.

46 Government Equalities Office (GEO), *Implementing Opposite-Sex Civil Partnerships: Next Steps*, July 2019.

The first hypothesis is certainly very interesting. It occurs after a Member State has intervened in its own regulations on marriage, allowing access to this institution for same-sex couples, who previously only had access to registered partnerships (expressly reserved for them). This sequencing of the development is not a general rule, of course, since there are Member States (e.g. Spain) that have introduced same-sex marriage without going through the previous step of registered partnership. But in case gradual legislative interventions are provided, couples who had previously entered into a registered partnership are very often given the possibility of upgrading their union to the status of "marriage." This is particularly the case when, at the same time as same-sex couples have gained access to marriage, they have no longer been allowed concluding registered partnerships[47].

It may occur that a Member State has maintained, on the contrary, the institute of registered partnership for same-sex couples and has subsequently extended it to heterosexual couples. It is possible for that State to allow heterosexual couples to downgrade their marriage to a registered partnership. So far it is only the case of Northern Ireland, analysed in the previous paragraph, where opposite-sex couples were given the possibility of opting for downgrading.

Such transversality, if it allows the parties to freely exercise an option, seems desirable. Even in case the upgrading from a registered partnership to a marriage or the downgrading from a marriage to a registered partnership have consequences with regard to the reciprocal obligations of the parties or the rules governing the dissolution of the bond, the conversion of the union does not seem to pose any particular problems, in case the parties are aware and free in their determination. Specific attention must be paid, if anything, to the possibility of a weaker and more vulnerable party. In fact, a downgrading from marriage to registered partnership could cause damage to this party. The formal expression of the will to convert the union, on par with the requirement of formality at the time of its constitution, should in any case be considered sufficient.

The hypothesis in which the downgrading from marriage to registered partnership operates *ope legis* is quite different. In this instance, there are possibilities of discriminatory treatment. In the Italian case examined, the Supreme Court of Cassation found no violation of the principle of equality (enshrined in Article 3 of the Italian Constitution) and found no conflict with Articles 8 and

47 Denmark, Finland, Germany, Ireland and Sweden prohibited the establishment of new registered partnerships, but the ones previously established are still valid, if the parties did not opt to convert them into marriage. Cf. Garetto R.: "Taxonomic variety of registered partnerships in the European Union", in Cazorla González, V., Giobbi, M., Kramberger Škerl, J., Ruggeri, L. and Winkler, S. (ed.): *Property Relations of Cross-Border Couples in the European Union*, Napoli, 2020, p. 88.

14 of the ECHR[48]. We can maybe disregard the "suspicion" that cross-border couples married abroad who request the transcription of their marriage in Italy could be treated differently according to the composition of the couple itself (in other words: according to the sex and the sexual orientation of the parties). But it is objective that there is a disparity of treatment among (cross-border) same-sex couples themselves, depending on whether one of the parties is an Itlian national or not. In case the parties request the transcription of their marriage in Italy, if one of them is an Italian national, they suffer the downgrading of their marriage into a registered partnership. In case both the parties are not Italian nationals, their marriage is not formally downgraded (but it is transcribed in the register of partnerships and not in the register of marriages). It should also not be overlooked that in Italy the rules governing marriage and registered partnerships diverge, as already emphasised, on several points. A "forced" downgrading may thus have "worsening" consequences on the regulation of the relationship.

The conversion of the union by imposition of law does not therefore appear to be a desirable solution. On the contrary, leaving it up to the autonomy of the parties to decide whether to convert their union from marriage to registered partnership (or vice versa, from registered partnership to marriage, as occurs in many Member States since years) seems consistent with the right to respect for one's private and family life enshrined in Article 8 ECHR.

48 Cf. Cass. civ., sez. I, 14th May 2018 no. 11696, cit., at § 9.1.

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