In the various phenomenologies of family, as in today’s social context, next to the relevant legal structures like family based on marriage, mixed, natural, adoptive and foster, and within certain limits the so called de facto family, these strictly characterized and centered upon a heterosexual couples with eventual offsprings, are now emerging other forms of cohabitation of the family type between persons of the same sex; cohabitations that if on one hand are beginning to ask legal protection, on the other hand, with progress of opinions even wider, vindicate not only social dignity but also a precise legal protection analogous to that accorded to the family.

According to this phenomenon one cannot but notice that for many centuries such relationships, either casual or expressed in a stable cohabitation, beyond negative valuation, morally and religiously, have always been a subject of social and legal discriminations and also persecution even if the sexual anomalous behavior was taking place in the privacy of the bedroom.

The persecutions, which under the form of penal repression and whose solution was torture and sometimes capital punishment, are the outcome of a history of oppressions, revenge, bloodshed and abuse of power to which the Catholic Church was not at all alien.

In fact, the social discrimination against homosexuals is born in the Christian Middle Ages, when the Church referring to the Holy Scripture considered such practice a disgraceful vice and condemned it. The Church took the position of defending the moral and social values of the family based on marriage and consequently channeled every expression of sexuality, finalizing it to procreate a progeny, in the nucleus of the legitimacy of family.

Indeed this posture of condemnation has never been discontinued, in fact most recently this line of thinking was clinched in the declaration of the Congregation for the Doctrine of Faith. In highlighting such a document, which goes back to July of 1992, that the homophile tendency is a subjective derangement, it is denied the subsistence of a “right to homosexuality”. Even though recognizing that homosexuals are “human beings” having the same rights as all other persons, it is accepted that such rights can be limited legally because their external behavior is objectively abnormal.

Along the same line of the Church, with discriminatory interventions determined by the principle that the phenomenon of the homosexuality is an affront to the moral order of the family, for many centuries laws have been established from various States. It is not necessary to look back too far when one considers that the last repressive laws in England were abolished only in 1967. The repressive legislations in matters of military service, teaching, residences, custody of minors of the north-American systems are still in force. Furthermore, the Greek legislation imposes penalties on homosexuality and the
same heavy depositions discriminatory toward homosexuals are evident also in the penal codes of Bulgaria, Cyprus, Estonia, Hungary and Lithuania.

On the opposite side, rising as a vanguard in accepting the phenomenon, are instead the legislations of the Scandinavian States and particularly Holland that allows the gay couples to marry and also to adopt minor children.

In Europe, specifically the European Parliament has undertaken the issue of discrimination, either social or legal, of people with anomalous sexual orientation. It issued a resolution on February the 8th 1994 on the equal rights for homosexuals in the Community in which it asked the Commission to propose the Counsel of the European Union the enactment of a directive that invites the member states to:

- eliminate every legal discrimination linked to sexual behavior, guaranteeing absolute equality in the treatment of homosexuals and heterosexuals inside the Community;
- allow access of the unisex to marriage or to other alternate legal institution such as the registered union for same sex couples;
- to permit them access to the institution of the adoption.

While this resolution was being discussed, it precipitated very animated debates among the European delegates that in due time had a wide echo in the public Italian opinion taking diverging sides and a predicted negative reaction from the Catholic Church. The Roman Supreme Pontiff Pope John Paul II with exacting clarity defined that “The legal endorsement of the homosexual act is not morally admissible...With the resolution of the European Parliament, it is asked to legitimize a moral abnormality. The Parliament has unlawfully conferred an institutional value to deviant behavior non-conforming to God’s plans...It was recognized that the true right of men is the victory over oneself to live in conformity with the straight conscience. Without the fundamental consciousness of the moral principles, human life and man’s dignity are exposed to decadence and destruction. Disregarding Christ’s words - truth will make you free – it was attempted to show to the residents of our Continent the bad moral, the deviation, a certain slavery as a way of deliverance, falsifying the very essence of the family”.

Such reaction from the Catholic Church, even though it was the subject of a harsh controversy, certainly is not of any concern of the jurists to perform a valuation negative or positive for the position of blame. The position that the Church has always undertaken regarding the deviate sexual orientation in general and the same sex couples in particular is not exclusively the domain of the Christian doctrine for it is also shared by the Jewish and the Islamic doctrines. It is not, after all, the right time to question if the ecclesiastical intervention in this case constitutes an illegal interference in the legal authority of the member States of the European Union.

Always with harsh controversies between contrasting orientations favorable or opposite to the analogous negative reaction of the Church, a wide echo in the Italian public opinion has caused the most recent resolution of the European Parliament on the respect of human rights in the European Union of March the 16th 2000, intended specifically to eliminate the legal discriminations
and the disparities of treatment of the homosexual couples with the heterosexual couples and the family.

Notably this act of the institution of Strasburg which follows in principle the same line of the resolution of February the 8\textsuperscript{th} 1994, on one hand invites the member States to “…guarantee to the single parent families, to the non married couples and to the same sex couples equal rights as the couples and traditional families… in matters of fiscal legislation, patrimonial regulations and social rights …", on the other hand urges the member States that have not yet provided “to conform their own legislations to introduce the registered cohabitation between same sex persons acknowledging them the same rights and duties expected from the registered cohabitation between men and women”, and lastly "regrets that in the penal code of some member States there are still in force discriminatory dispositions on the age of the consent of minors for homosexual relationships in addition to other discriminations…and rivets its own request to repeal them”.

At any rate, beyond the moral and religious aspect of the phenomenon in question and leaving out of consideration every moral and political valuation of the problem, it is quite evident the importance that these resolutions of the European Parliament assume. Independently of their legal value, they represent the first phase of the position of a European institution favorable to the recognition of the right to marriage and to the adoption by the same sex couples, and also, in general terms, to the legislative unification, within the legal ordinances of the member States, of the prescribed rule for the legitimate family extended to the cohabitation like marriage and the homosexual unions.

Altogether, though, it is important to highlight that presently there is a strong resistance from the European legal ordinance to the contemporary petitions of the homosexual couples.

Initially, the stable jurisprudence of the Court of Justice, from the end of the eighties, had decreed that "...it cannot and must not let include in the notion of marriage situations of cohabitation or \textit{de facto} union, or in the notion of husband and wife the simple \textit{status} of cohabitant; “the committed relationships between same sex persons are not equal neither to those ones regarding married people nor to committed relationships outside of marriage between persons of opposite sex”; and “the difference and non-assimilation between the matrimonial situation and the registered homosexual union “since with the term marriage, according to the definition commonly accepted by the member States, is defined as a union between a man and a woman and the rules establishing the relationships of homosexual couples foreknown by certain member States thus remain however dissimilar to marriage, creating very delicate problems of agreement among the legislations of the interested nations in the Union and the Community law”.

Furthermore, not even the “European Constitution” solemnly signed by the 25 member nations in Rome in the Orazi and Curiazi Hall on October the 29\textsuperscript{th} 2004 seems in favor of the aforementioned entreaty.

If indeed the letter of the article II-9 embodies a relevant different wording regarding the ratified article 12 of the "Convention for the protection of the rights
of mankind and of the fundamental freedom” signed in Rome in November of 1950, when no reference is being made to the gender of people who benefit from these rights while before an explicit reference was made to a man and a woman, it is clinched that the rights of which are discussed “are guaranteed according to the national laws that regulate the practice”.

That indicates that the drafters of the constitutional Chart have borne in mind that a total innovative concept of the matrimonial institution, largely confined in the various member States of the Union still as legal relationships between subjects of different biological sex, would have been at least not congruous and, therefore, rather than establishing a new common principle, have expressly recognized that the protection of the existing regulation must be offered by each legal system.

As to the Italian legal system from the combined provision of sections 29, 30, and 31 of the constitutional chart, it specifies a precise preferential choice for the heterosexual couple united in marriage. In fact, only the family can ensure, among the major guarantees of certainty and stability of conjugal bond, the continuity of life through progeny, assuring to the minors, on the level of emotion and education, the harmonic development in all its aspects including its social growth.

The legal system does not exclude in the meanwhile that other forms of cohabitation could evolve into “social shaping”, also of family nature and certainly extended in a gauge in which they become a universe of emotions, a stable nucleus founded on values of solidarity, unity and equality, and a community of interests capable of guaranteeing to the participants, even though in the diversity of organizational methods, the elaboration of values and development of the personality anticipated in the section 2 of the Constitution, that is the cohabitation like marriage and between homosexuals.

But the consideration of these last forms of cohabitation is exhausted immediately in the negative position of abstention of the Italian legislator by obstructing interferences, remaining excluded other legal interventions meant to extend to such phenomenon the access to marriage and the protection foreseen for the institutionalized family. Such norm, in recognizing the inviolable right of man as an individual or in the social nucleus in which his personality is developed, places precisely the human person at the apex of the constitutional values.

In conclusion, not recurring the basic peculiarity of the phenomenon “family” as stated in the Constitution and also interpreted generally by people as “according to nature”, presently the recourse that people involved in such sentimental developments have is to turn to deeds of agreement of common rights for the protection of one’s own interests. However, most likely the aforesaid developments may not find some relevance exactly of family type in the constitutional context, with the possibility that future law will include an analogous protection to that foreseen for the legitimate family or to one that could be anticipated for the de facto family or cohabitation like marriage encompassing the same terms and limitations dictated by the preferential consideration expressed
by the Constituent for the family community founded on marriage from section 29 of the Constitution, 1st sub-section.

The European Parliament’s resolutions and its several requests to the member States to eliminate the legal discriminations and the inequality of treating homosexual couples compared to heterosexual couples and the family, allowing them also access to marriage, to adoption and custody of minors, arose great perplexity.

Also, beyond all valuations on the non-binding worth of these resolutions for the States of the Union, the granting of the community invitations and recommendations by the Italian legislator, on the current state and in general terms, seems to us decidedly precluded.

It would not be possible if indeed one takes heed to the interpretation of the phenomenon of family as given by the Constituent, as it emerges in the constitutional Chart from the combined provisions of the sections 29, 30 and 31 of which we have already alluded. That’s because an eventual conformity and harmonization of the subject area of family unions with the legal systems of the most advanced member States in the subject, who are manifestations of experiences and customs diverse form ours and also, wouldn’t be possible since it could evolve into an insuperable conflict with the public constitutional order, that is with those fundamental principles and values of family as declared in the Italian Constitution.

However, it is a fact that the European Parliament, certainly moved by appreciable motives in the resolutions of February the 8th 1994 on the equal rights for homosexuals and of March the 16th 2000 on the injunction of disparity of treatment of homosexual couples in the Community, has taken in consideration predominantly the socio-cultural and legal evolution of some legal systems of the member States in respect to the models of family not properly traditional as in concepts pertaining to marriage and family which instead turn out to be asserted in the historical, legal and social Italian context.

The reference, however, is toward those States north-European where because of the diversity of culture, religion and moral ideas, customs much more diverse than ours are practiced and the relationships of couples are much more liberal, so that by allowing the proliferation of ways of cohabitation, particularly to that of heterosexual and homosexual unions, have led the national legislators to issue provisions intended to enforce the various aspects of such relationships.

Specifically in Denmark the phenomenon of homosexual couples has been the subject of attention by the legislator who, inspired by the principle of non-discrimination between these unions and other forms of family type of cohabitation as marriage, introduced in 1989 for the first time in the world the so called homosexual marriage allowing the registration of the relationship of people of the same sex.

So the Act #372 of 1989 on Registered Partnership, assuring to the homosexual couples the same opportunity accorded to heterosexuals of giving life either to a liberal union or to a formalized one, ordains that to register the homosexual relationship and obtain the benefits, they must satisfy some requirements such as at least one member must have a Danish citizenship and
to declare their cohabitation, thus enjoying the same effects of marriage with the
exception of a few dispositions.

Therefore, the same norms generally applicable to spouses, to the
patrimonial law of the family, to descendants, to separation, to divorce, to fiscal
benefits, to sanitary social assistance etc., are also applicable to the registered
relationships. But at the same time it is decreed that the legal dispositions
founded on the sex diversity of the spouses cannot be extended to other
relationships. It is, instead, permitted that the parties of a registered partnership
could request the joined adoption or custody of the minors or also the exclusive
custody of the same, and also it is possible that the partner of a registered
homosexual couple could adopt the child of the other partner.

The model for homosexual union based on the registration deed was
successfully accepted in Norway in 1993 and in Sweden in 1994. But the Finnish
system has not yet reached the point for the enactment of a specific statute
directed to enforce the legal relationships existing between same sex partners.

At any rate, in the systems of the north-European States, the true
equalization of the homosexual unions to the marriage institution is found only in
the law of Holland, where recently two very important legal provisions were
approved that allow the gay couples to marry and to adopt minors unless they
are foreign and side with the registration of the union. One cannot ignore that as
we speak, the very Catholic and traditional Spain is in the midst of approving in
Parliament the norm that will allow homosexuals to obtain a marriage, which in
Spain has always been considered a privilege limited to heterosexual couples.

The reference is the Act #26672 regarding the same sex marriage and the
Act #26673 pertaining to adoption, both gone in effect January the 1st 2001.
These provisions place Holland, in northern Europe, at the vanguard by being the
first State to decree the process of integrating homosexuals in the social chain,
since the others, as we have seen, stopped at the adoption of the decree of
"registered unions".

In particular, with the legal dispositions pertaining the gay union, the same
sex marriage is placed on the same level as the heterosexual one, substantially
in every respect: conclusion of marriage, capacity of the people concerned,
invalidity and effects.

A mechanism more articulated in the protection of gay couples was
predisposed by the Belgian legislation which, with the intention of equalizing the
protection of the homosexual couples to that already accorded to the
heterosexual couples, introduced in the system in 1998 the institution of the so
called "legal cohabitation" which is the result of simply living together and of the
formal declaration of the partners to want to cohabitate. This declaration is
registered at the City Hall and it will provide a series of effects on the level of
patrimonial relationships that are established by the cohabitants.

The French legislation has undertaken a different way which predisposes
the document of agreement, exercised either by the homosexual couples or by
the heterosexual couples. In the civil code in 1999 is interpolated the form of the
"Civil Pact of Solidarity" (PACS) which is a contract signed by two same sex
people or of different sex. Whatever the nature of their bond, they organize their
common life from which derive consequences either of patrimonial character or of social assistance.

While in the region of Catalonia, the most progressive in Spain, and in the German legal system respectively in 1998 and 2001 the recognition of the legal reality of the homosexual union remains subordinate to the entry in the city hall registry and, therefore, to the adoption of a registered public act that has a constitutional nature of the new family situation, in the English and Italian systems in the case of legal acknowledgement of homosexual unions, there isn’t any rule.

This legislative void, or the fact that a law had not been established, made it possible for the cohabitating couples to reach for a deed of common right such as contracts, agreements and covenants to regulate the various aspects of cohabitation relationships. These deeds are very flexible since, leaving out of consideration on the sex diversity within the union, they can be utilized indiscriminately even by homosexual couples, thus opening the way to a private autonomy in a sector debarred from marriage. The mostly expended clauses of these agreements, which in the English system normally are designated as “cohabitation contracts”, refer to relationships of economic nature arising from the cohabitation as the definition of the conditions with which the partners must provide to the reciprocal support and to common expenses of the household, the system choice of separation or community of property acquired by the couple while living together and the eventual rights at the dissolution of the relationship, the determination of the goods that will go to the surviving partner at the other’s death etc.

The synthetic picture so delineated allows to gather the general lines of tendency that are presented in the European context for the solution of the homosexual union problems, felt and lived by the couples in question as a heavy social discrimination and consequently legal discrimination.

It is undoubtedly, in the initial stage, the tentative of the various European legislators, through several mechanisms, to unify and to extend the foreknown protection for the cohabitations like married to the same sex cohabitations, approaching them as closely to the rule of the spousal relationship. This concerns in particular the patrimonial aspects of the relationship, thus extending from the matrimonial institute a second model of union that in an inappropriate manner could be defined as “light marriage”. In other systems, instead, emerges the tendency to solve the problem with the utilization of a deed of agreement, either as legally foreseen in the French PACS or as when the same pact is described as a deed of common right.

Which solution will prevail, in the absence at the moment of a community intervention to harmonize the various national legislations and, therefore, of one or the other model of same sex unions, where legally not already foreseen the same sex marriage as in Holland, will depend on the individual contests where the various legislators are called to act. It will also depend either on the presence of a vast social maturity in accepting and comprehending the homosexuality phenomenon or on the presence of entreaties more or less
articulated by the same gay couples to obtain a full equality of their union to that of marriage.

It appears, though, and this reflects above all the Italian system, that the best road to take is that of prominence on the normal level of legal pacts of cohabitation, in as much as the auto-ruling of the relationship represents and reflects the maximum expression of freedom relinquishing exclusively to the parties involved the choice to model their own relationship according to their own needs and their personal values, without incurring appreciation or devaluation which could be verified where an *ad hoc* rule could be called upon to operate within a framework guiding these complex unions.