UNIVERSITÀ DEGLI STUDI DI TRENTO

Facoltà di Giurisprudenza

Tesi di laurea

IMMIGRANTS' RIGHT TO FAMILY UNITY

A COMPARISON BETWEEN ITALIAN AND NETHERLANDS REGULATION

Relatore:

Prof. Roberto Toniatti

Laureanda:

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Anno Accademico 1998-99

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via O. Rovereti, 4/Bonardi
38100 TRENTO
lolivett@yahoo.com

ITALIAN IMMIGRATION LAW – FAMILY UNITY - NETHERLANDS IMMIGRATION LAW
EUROPEAN CONVENTION ON HUMAN RIGHTS – EUROPEAN UNION POLICIES

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Ai miei genitori

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Trento, March 2000 Lara Olivetti

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INTRODUCTORY

Framework

For some years now, entry and residence for the purposes of family reunification have been the chief form of legal immigration and prove a necessary way of making a success of the integration of residing foreign nationals. The presence of family members makes for grater stability and deepens the roots of immigrants, since they are enabled to lead a normal family life. The right to family reunification thus represents the essential instrument for immigrants to enjoy the right to family life.

Although there has been considerable support for the view that aliens can only expect equality of treatment under the local law, it must be observed that certain sources of inequality are internationally regarded as admissible. States show to unevenly adhere to the idea that aliens submit to local conditions with the benefits and burdens thereof and that recognizing a special *status* would be contrary to the principles of territorial jurisdiction and equal treatment. These considerations seem to lie at the basis of the distinction between the legal position of immigrants and citizens, between European Union/European Economic Area (EEA) nationals and third-country nationals or between short-term and long-term residing aliens. Accordingly, national law usually limits access to the right to family life of immigrants by drawing a discipline apart for immigrants from that applying to citizens, e.g. by not recognizing the right of family life to immigrants' relationships not based on marriage, or in case of homosexual relationships, or by distinguishing whether the alien to be allowed entry is a parent of a foreign or a citizen child.

Like in many other immigration countries, immigrants in Italy form a stable part of the society. Yet, the question of the conditions under which immigrants could be granted the right to enjoy family unity in Italy and the legal position of family members once reunited, remained unanswered for comparatively long time, being it only partly

regulated by first enacted Act no. 943/1986. The demand for a comprehensive regulation of the legal position of foreigners residing in Italy and the call for adopting measures in order to achieve integration of all groups in the society, first led to the enactment of 1990 Aliens Act and, later, to 1998 Aliens Act. In an broader perspective, the law in matter of the right to family life partly falls outside the scope of national legislation, being laid down by international instruments. Those norms recognize the family as the natural and fundamental unit of society, entitled to the fullest possible protection by society and the State (1966 International Covenant on Civil and Political Rights and on Economic and Social Rights, 1950 European Convention for the Protection of Human rights and Fundamental Freedoms). Although the Italian Constitution does not explicitly provide the primacy of international Treaty law on national statutes, the Constitutional Court affirmed this principle – in an *obiter dictum* - in 1993 and 1998 Aliens Act reiterates the ultimate respect of international treaties.

The object of the present work

Our present efforts concentrate in evaluating the achievements of Italian regulation governing immigrants' right to family unity and the legal position of family members. The principle of equal treatment between immigrants and citizens, or rather, between European Union/European Economic Area nationals and third-country immigrants, will serve as a fundamental parameter for evaluation. By so doing, we will examine the conditions for accessing the right to family unity, what relationships are considered relevant within the scope of family reunification and the legal position of immigrants' family members. Our analysis will take a comparative perspective and will focus on The Netherlands immigration law. Sources of international law and Community law will also be taken in account as necessary formants of the system of immigration law.

The Netherlands law system has been chosen as comparative term for two main reasons. Formerly, for the incisive influence of international treaty law on the regulation of immigrants' right to family unity, determining significant developments in both

regulation and case law. Latterly, the Netherlands experience attracted our attention for the inspiring debate and regulation developments concerning the right to family unity and the related question of the legal position of family members.

Our discourse will follow an "horizontal" pattern, by confronting the different legal provisions of the Italian and Netherlands system with respect to single key-issues. The comparison will allow us to identify specific features, debatable questions and prospective unfolding of the recently evolved Italian regulation of the right to family reunification.

After an introduction to the basic principles of the Netherlands and Italian immigration law and regulation of the right to family unity (Part I), we will focus our attention on the question of the access to the procedure of family reunification (Part II). In particular, we will compare the conditions of the availability of legal information and the certainty of the law, as well as the standards set by regulation with regard to the accomplishment of the requirements under which applicants may be granted reunification with family members. This will involve an analysis of regulation in point of the requirements of "suitable housing" and "sufficient/adequate income". Moreover, the legal position of the applicant will be analyzed in order to evaluate if higher requirements are set to immigrants with respect to nationals in order to be granted to right to family unity with foreign family members. Furthermore, we will analyze the concept of family under Italian and Netherlands (immigration) law so that to evaluate if the law puts additional setbacks to the right of family unity of foreigners. The implementation of the Italian and Netherlands common principle of dependence applying to the legal position of family members, will be object of further comparison.

Part III will deal with the enforcement and influx of international law in matter of immigrants' family unity within the Italian and Netherlands domestic legal systems. After illustrating the main principles of customary law relating to the right to family unity for immigrants, we will detect if and how these norms have an impact on the legal systems considered in matter of the access to the right to family unity and of the dependent *status* of family members. Particular attention will be devoted to Article 8 of

the European Convention on Human Rights due to its relevance in the development of a national concept of family unity applying to immigrants.

At last, Part IV offers a brief survey of the achievements in matter of the regulation of the right to family unity at an European Union level, including the main steps taken in matter of the condition of non-EU family members of non-EU residents, as well as of EU nationals as migrants within European Union Members States. The introduction of 1999 European Commission Proposal for a Council Directive on the Right to Family Reunification offers us the opportunity of evaluating prospective developments of Community law and the possible effects of the harmonization of national immigration law in matter of the right to reunification and the legal position of family members.

The scope of our analysis will be limited to the right to family unity involving non-European Union nationals, as well as non-European Economic Area nationals, considering the comparable regulation concerning the status of the citizens of EU and EEA Member States in the territory of the State Parties. Conversely, we will not deal with the right to family unity of refugees and asylum seekers or asylum *status* bearers for the wholly different character of the discipline that regulates this area of the law.

In this manuscript we will use the term *Netherlands*, by which we mean *pertaining to The Netherlands*. Keeping in mind the valuable teachings of professor Gerard-René de Groot, we will avoid using the common term *Dutch*, since this word expresses a different phenomenon. Dutch, in the Middle Ages, meant all that was contained between Friesland and Austria, the Slavic border in Germany and the Alps. Since this unity ceased to exist three centuries ago, Dutch as a term for Netherlander expresses an anachronism. Nowadays, *Duitsch* (more recently, *Duits*), in The Netherlands, means German. By accepting these suggestions and following the evolution of the Netherlands language, after which *nederlands* stands for *pertaining to The Netherlands*, we will adopt the adjective *Netherlands*.[1]

[1] **Groot, G.-R. de**, lectures given at University of Maastricht, Faculty of Law, January 1996. **Huizinga, J.,** 1924,"Lectures on Holland – delivered in the University of Leyden during the first Netherlands week

Likewise, we will avoid using the term *Holland* when referring to The Netherlands. Although we cannot forget that, after the fall of Antwerp in 1585, Amsterdam and Holland rapidly rose to the center of trade on the European Continent and eradiated over the whole area of the Free Republic of the United Netherlands, we are still quite aware that Holland still means only two provinces of the nowadays Kingdom of The Netherlands.

We shall not dwell any longer on the present introductory considerations and come to a due description of the basic tenets of Italian and Netherlands immigration law.

for American students, July 7-12, 1924", Leyden, A. W. Sijthoff's Publishing, p. 16: "Dutch as a term for the Hollander or Netherlander, is in a way an anachronism. (…) Moreover it has got an unfavorable tinge which is hateful to us. It would not be a loss, if Americans and Great Britons could be brought to substitute Hollander or Netherlander for Dutchman, and even to adopt the adjectives Hollandish or Netherlandish instead of Dutch. It would help to avoid confusion and to make old misunderstandings and disparagement to be forgotten. If the vague and antiquated word Dutch got out of use, it would mean that

the English speaking nations were beginning to see us such as we are today and such we ourselves wish to be known, no longer in the caricature of an old fisherman smoking a pipe."

Part I

BASIC TENETS OF IMMIGRATION AND OF FAMILY REUNIFICATION LAW

I:1 BASIC TENETS OF IMMIGRATION LAW: THE NETHERLANDS.[2]

The Constitution Kingdom of The Netherlands contains fundamental norms ruling the legal *status* of foreigners.[3] There are set the general principles of equality and non-discrimination after which "all persons in the Netherlands shall be treated equally in equal circumstances and discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted" (Article 1). Furtherly, the Constitution explicitly sets forth a reserve to acts of law with regard to the regulation of the condition of foreigners: "The admission and expulsion of aliens shall be regulated by Act of Parliament" (Article 2, section 2).

[2] Basic information is taken from **Kuijer, A., Steenbergen J.D.M.**, 1996, Nederlands Vreemdelingenrecht, Utrecht, Nederlands Centrum Buitenlanders;

[3] The Constitution of the Kingdom of the Netherlands nowadays in force, amended by Kingdom Act of 10 July 1995, entered into force per 1 January 1996. English version from the Ministry of Foreign Affairs internet site at *http://minbuza.nl/English*

Only Netherlands nationals are eligible for appointment to public service (Article 3), have the right to elect the members of the general representative bodies and to stand for election as a member of those (Article 4). On the other hand, The right to elect members of a municipal council and the right to be a member of a municipal council is granted by Act of Parliament to residents who are not Netherlands nationals (Article 130). Moreover, the duty to defend the territory and independence of the country may be extended to residents of the Netherlands who are not Netherlands nationals (Article 97).

Binding principles are laid down in 1967 Aliens Act (*Vreemdelingenwet*). [4] The most part of regulation is instead contained in government acts, such as the Aliens Circular (*Vreemedelingencirculaire*) the Aliens Ordinance (*Vreemdelingenbesluit*) and the Aliens Decree (*Voorschrift Vreemdelingen*).[5]

Entry clearance is granted to foreigners, provided that they dispose of a valid travel document, a visa, sufficient means of support and represent no danger to public order (Article 6 and 8, Aliens Act). According to 1985 Schengen Agreement and 1990 Schengen Convention, The Netherlands and the other four Founder Parties (Germany, France, Belgium and Lxembourg) abolished controls at their mutual borders and instituted uniform conditions of entry for a short term stay (up to ninety days). The application of these treaties up from December 1994 brought in a uniform entry policy for short-term stay and a common identification of Third States from which entry is subject to entry visa. As a rule, all countries which are not Members of the European Union or are not Parties of 1991 Agreement on the European Economic Area (EEA) are to be numbered among the states for which entry visa is required. The exempted minority is to be regarded as an exception made on the basis of specific Conventions.[6]

[4] 1967 Aliens Act underwent considerable modifications in 1993, 1997 and 1998. See State Bulletin (*Staatsblad*) 1993, no. 707, 1997, no. 580 and 1998, no. 203 and 204.
[5] Aliens' Circular, 1 January, 1994 in *Staatscourant*, 1994, 252; Aliens Ordinance, 7 January 1994, in *Staatscourant*, 1994, 8; Aliens Decree, 8 January 1994, in *Staatscourant*, 1994, 4.
[6] The admission of a person who does not meet the uniform conditions set forth is limited to the single admitting state.

Since 1994, the competence of issuing visa is conferred to the Ministry of Foreign Affairs.[7]

Any foreigner granted entry clearance on the basis of a *Schengen entry visa* is allowed residence within the territory of the host state for a maximum of three months, the so-called *free term* (Article 8 Aliens Act). A foreigner who intends to stay longer must apply abroad for provisional residence visa (*machtiging tot voorlopig verblijf*) and, once arrived in The Netherlands, apply for a residence permit (*vergunning tot verblijf*, Article 9, 11, 12, Aliens Act). The Aliens Circular sets the criteria under which residence permits are issued. Residence permits are granted pursuant to international obligations, or essential interests of The Netherlands, or other reasons such as family reunification, study or on humanitarian grounds in cases of severe hardship. A residence permit is in principle valid for one year.[8]

After five years of lawful residence in The Netherlands, foreigners are entitled to apply for a permanent residence permit (*vergunning tot vestiging*, Article 10, Section 1, 13 and 14, Aliens Act). The entitlement to a permanent permit does not depend on a timely application. The local aliens police have a duty to inform an alien of his/her right to this permit and how to obtain it once it results form the aliens police records that the residence requirement has been met.[9] This permit entitles to indefinite stay and cannot be withdrawn unless serious infringements of national security or public order are committed. No renewal is required.

The only case in which a residence permit can be issued on a permanent basis from the start (first entry to the country) is that of admission as bearer of refugee *status*. Still, it often happens that applicants are not granted refugee *status*, rather temporary protection (so-called *C-status*) or a conditional residence permit.[10]

[7] 1813 Sovereign ordinance (*Souverein besluit*).
[8] Article 9, Aliens Act.
[9] Aliens Circular, Chapter A4, under 7.6.1.
[10] Aliens Circular, Chapter B7.

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The competence following the Aliens Act is conferred to the Ministry of Justice. The Minister of Justice (in practice, the State Secretary), in consultation with the Cabinet, defines the implementation of the rule and instructs the executive administration bodies. The minister transferred many of his competencies in solving particular cases to the head of the police (*Korpschef*). Police officials in the various local sites of the Aliens Police Department of the Ministry of Justice are entrusted taking decisions in these cases.

As far as case-law is concerned, a distinction must be drawn between the courts hearing urgent applications - the civil courts, including the Court of Cassation at last instance - and the court conducting a full examination of the merits of the case, namely the Litigation Division of the Council of State.

Legal remedies may in principle be taken against orders and factual treatments involving limitation to individual right of circulation in the country, performed on the basis of the Aliens Act: *objection* or *administrative review with the Minister of Justice* and *judicial appeal to the District Court* (Article 29 and 30, Aliens Act). A temporary provision can be applied for at the President of the local District Court. In some cases, appeals can be lodged only at the Aliens Court of The Hague (so-called *Vreemdelingenkamer*, and its four local sessions of Amsterdam, Haarlem, 's-Hertogenbosch and Zwolle, Article 33a, Aliens Act). Against the decisions of the Court of The Hague and the decisions taken in review procedures with the Minister of Justice, the Aliens Act provides that appeal can be lodged to the Council of State, Administrative Law Division (Article 33a, Aliens Act).

I:2 ITALY.

Italian law marks as well a separation between the legal *status* of foreigners and that of citizens. The Constitution, *in primis,* lays down that "The legal *status* of foreigners is regulated by law in conformity with international rules and treaties" (Article 10, section 2).[11]

By putting forward this norm, the Constitution expresses the fundamental principle that only an act approved by the Parliament shall rule the condition of foreigners in the country (so-called *legal reserve*). This reserve sets out an explicit limit to the discretional power of administrative authorities: we should thus regard as a violation of the Constitution any regulation left to the only discretional power of executive bodies or any act of law conferring unbounded discretional power to administrative bodies over any constitutionally protected legal position of foreigners.

The Constitution recognizes to all individuals, both foreigners and citizens, the inviolability of personal liberty, personal domicile, the liberty and secrecy of correspondence and of every form of communication, freedom of religion, freedom to express one's thoughts by all means of communication, along with the further set of rights regarded as fundamental in the Charter. The jurisprudence of the Constitutional Court, the supreme judge of the constitutional legitimacy of all acts of law, has added a more certain character to the condition of aliens in the country, by specifying the extent to which the above-mentioned principles apply. The Constitutional Court action undisputedly gave an essential contribution in order to recognize family reunification as a fundamental right of the person, with particular reference to the preeminent interest of the child.[12]

[11] 1948 Constitution of the Italian Republic, at *http://www.giurcost.org/fonti/cost_ingl.html*

[12] Constitutional Court, judgement no. 28, January 19th, 1995, in *Giurisprudenza Costituzionale*, 1995, p. 271. The right to family reunification, by statute law recognized to the only "foreign workers" (Article 4, 1986 Aliens Act no. 943), has been declared applicable to immigrated housewives (contrast with Article 35 of the Constitution, protecting labor in all forms). In later decision of 17-26 June, 1997, no. 203, in *Gli Stranieri*, 1997/2, p.154, the Court affirmed the contrast of Article 4, 1986 Aliens Act no. 943 with Article 30 and 31 of the Constitution and in this way recognizing the right to family reunification to *de facto* families in favor of the superior interest of minor children.

Aliens are permitted entry to the country if dispose of a valid travel document (generally: a passport) and an entry visa. Since April 1998, 1985 Schengen Agreement and 1990 Schengen Convention started to fully apply in Italy so that the uniform entry regulation for short stay mentioned in the previous paragraph are to be recalled.[13] Accordingly, entry may only be granted to foreigners who

- dispose of sufficient financial means to pay their expenses during the period they intend to spend in Italy,
- obtain a visa, when provided,
- have not been reported as persons not to be permitted entry (e.g. because previously expelled),
- are not considered a danger to the security of the state and public order.[14]

The government carefully illustrated the mentioned criteria in specific circulars, but never clarified which amount of money has to be regarded as *sufficient financial means* and in which form these resources can convincingly be proved.[15]

Following Schengen entry policy, foreigners admitted to the country for a short-term visit cannot be granted any extension of their stay. Aliens who wish to stay for a longer period must apply abroad for an entry visa according to one of the entry reasons identified by the Ministry of Foreign Affairs and, once in Italy, shall apply for a residence permit to be issued for the corresponding reason (Article 4 and 5 Italian Aliens Act). 1998 Italian Aliens Act provides for the fundamental rules governing the issue, refusal, duration, revocation and renewal of resident permits in general and specifically, according to the reason for which a residence permit can be issued as set by the Aliens Act. Residence permits are granted only under the law-set reasons, such as:

[13] The Convention was signed by Italy in December 1990, ratified by September 1993.
[14] Article 1, 1998, Government Decree n. 286, July 25th, 1998, "Coordinated text of the discipline of immigration and of the condition of the foreigner", in *Gazzetta Ufficiale* no. 191, August 8th, 1998, attachment n. 139/L, hereinafter: *Aliens Act*;
[15] Ministry of Foreign Affairs circular, September 17th, 1997, no. 8, not published. A summary is contained in a document edited by the Ministry of Foreign Affairs, entitled "The system of visa and entry regulation to Italy and the Schengen Area", available to the public and periodically updated on the Ministry's internet site: *http://www.esteri.it*

labor, both dependent as well as self-employment, search for labor, family reunification, health care treatment, humanitarian protection.

Similarly to what provided by the Netherlands immigration rules, 1998 Aliens Act introduced the rule of permanent residence permits (*carta di soggiorno*, Article 9), to which foreigners are entitled to apply after five years of lawful residence in the country. This permit entitles to indeterminate stay (though the bearer has to apply for renewal every fifth year) and cannot be withdrawn unless the bearer commits serious infringements of the criminal law. However, the introduction of permanent residence permits seems not to change the fundamentally permanent character of residence permits, since renewal is, in principle, unlimitedly allowed. Consequently, the law sets the duty of periodical application for renewal as a form of periodical check that the condition required for the particular residence permit are still met.

The competence following the Aliens Act is conferred to the Minister of Internal Affairs. Immigration officers are embodied in the Local Aliens Police Departments of the Ministry of Internal Affairs (*Questure*), which are entitled to treat single proceedures with regard to the residence and expulsion of foreigners. The Aliens Act identifies the President of the Council of Ministers as the promoter of the implementing regulation of the principles set in the law (Article 3).

Appeal to the Regional Administrative Tribunal is the general legal remedy affording protection against the decisions of authorities concerning immigration law proceedings (Article 6, section 10 of the Aliens Act), as in any case of decisions taken by the Italian public administration. Objections against refusal to the issue of a visa can be raised from abroad by appealing to Regional Administrative Court of Lazio in Rome. The law sets special remedies against expulsion decrees, detention orders and family unity affecting decisions, so as to promptly settle situations in which public authorities inhibit foreigners' fundamental freedoms (Articles 13 and 14, Aliens Act).

I:3 BASIC TENETS OF FAMILY REUNIFICATION LAW: THE NETHERLANDS.

Following Netherlands regulation, we may define *family reunification* as a provision that entitles a Netherlands national or foreign national residing in The Netherlands to be joined by his/her foreign spouse, whom the applicant married *before* immigrating to The Netherlands.[16]

The same regulation recognizes the right to *family formation*. Family formation is a provision that enables a Netherlands national or foreign national living in The Netherlands to be joined by the spouse they married *after* they immigrated to The Netherlands. By affirming equal opportunities to unmarried couples, both hetero- and homosexual, the same provision applies to stable relationships not based on marriage. Both provisions refer to the children factually belonging to the concerned household. [17]

Therefore, the Aliens' Circular provides that the right to family life may concern the following family members:

- the spouse, as the person married to the applicant, according to the law to which the family is submitted;[18]
- minor children born within the wedlock and factually belonging to the family;[19]
- minor children born out of wedlock and factually belonging to the family;[20]
- other family members who are morally and financially dependent on the applicant, as may be parents, disabled grown-up children, etc…

[16] Chapter B1, under 1, Aliens Circular.
[17] Chapter B1, under 3, Aliens' Circular.
[18] The Netherlands law forbids polygamic marriage. Family reunification or formation may only apply to only one spouse.
[19] Minor age is meant up to the age of eighteen. Married children, although of minor age, are not considered as part of their original family. Following the Aliens' Circular, the family relationship may be considered broken if it results that children factually belong to a different household, e.g. if entrusted to another family and the parents no longer exercise their authority or provide for the children's maintenance.
[20] The Aliens' Circular identifies the specific categories of "children by a previous marriage", "children by a polygamic marriage", "foster-children".

- not married (permanent) partners, being it the case of a heterosexual relationship, as well as homosexual.

The right to family reunification is in principle granted to regularly staying foreigners who dispose, on a long-term basis, of the financial means necessary for maintaining their family members. Further requirements regard the respect of public order and suitable housing. As a principle, applicants must dispose, for at least one full year up from the date of their application, of a minimum income corresponding to the family subsistence level, as periodically updated by State welfare authorities. Financial means may derive from work as employment, self-employment, or other assets. Exceptions to the rule are foreseen for applicants who are Netherlands citizens, refugees, asylum-*status* bearers, bearers of a permanent residence permit. These exceptions relate to unemployed people, or applicants of very young age (18 to 23), one-parent families with children under the age of six, fully disabled foreigners or older people living on their pension and welfare supplementary benefit.[21]

As for the respect of public order, general norms are provided for in Article 10, section 2 and Article 8 of the Aliens' Act, after which restrictions may limit the foreigner's right of abode for the sake of public peace, of public order or national safety. Following the provisions of the Aliens' Circular, danger to public order entails danger to public decency, national health and international relations.[22] Experts observe that the legislator's vague phrasing reveals the intention to mainly entrust the task of securing public order and safety to administrative authorities.[23] Few exceptions are then set in favor of the right to family life of Netherlands citizens, refugees and asylum *status* bearers.[24]

[21] Chapter B1, under 1.2 and 1.2, Aliens Circular.
[22] Chapter A4, under 4.3.1 of the Aliens Circular.
[23] **Kuijer, A., Steenbergen J.D.M**., supra, n. 2, p. 204.
[24] Entry clearance may be denied to the foreigner family member of these categories of applicants only in case of a) an irrevocable sentence to long-term imprisonment; or b) an irrevocable measure depriving the foreigners' liberty on the ground of a serious offence; c) multiple sentences to imprisonment or d) multiple measures depriving the foreigners' liberty on the ground of an offence; e) danger to national safety (Aliens' Circular, Article B1, sections 1.2.5/3.2.5/5.2.3/7.2.3).

As laid down by the Aliens Circular, suitable housing represents another imperative condition, in order to comply with the respect of public order, safety and health. Housing is considered suitable if the competent municipality authorities recognize that it corresponds to the housing standards of Netherlands nationals living in comparable conditions.[25] In practice, municipality's authorities perform control on the conformity to building regulation upon the applicant's request; the proportion between the dimension of the house, the number of the rooms and the number of the concerned family members are object of detection. An introductory description of the conditions set by Italian immigration law to access the right to family unity will follow.

I:4 ITALY.

Italian immigration law recognizes the right to family reunification to non-EU nationals with their family members (Article 28, 1998 Aliens Act). The provision only applies to families based on marriage according to the law to which they are submitted. Following to the primary rank recognized by the Italian legal order to marriage, immigration law does not contain provisions regarding reunification with unmarried partners.

We may observe that no distinction is drawn between reunification with family who already existed before the applicant first immigrated to Italy and family formed at a later time. The main distinction falls instead between married and unmarried couples. Likewise, the law does not take into consideration the right to family unity of homosexual couples.

This said, entry clearance on the basis of family reunification can be granted to the following family members (Article 29, Aliens Act):

a) spouse;

[25] Chapter B1, under 1.2.4, Aliens Circular.

b)) minor children (up to the age of eighteen), born either from the present or from pre-existing relationships of the two considered spouses, adopted and foster children;
c) parents, if morally and financially dependent on the applicant;
d) other close relatives, if disabled and morally and financially dependent.

Family members must comply with entry regulation. Therefore, expelled family members will not be granted entry clearance (during the previous five years) until a special authorization will be granted by the Ministry of Internal Affairs.[26] Family members have to apply for a visa to enter the country. A visa will be issued on the basis of the authorization, which the established foreigner may receive if all requirements are met.

The law provides that the person who wishes to be joined by his/her family members must comply with the requirements of adequate housing and sufficient financial means (Article 29, section 3, Aliens Act). A specific authorization for family reunification (*nulla osta*) must be requested by applying at the local departments of the Ministry of Internal Affair. Accomplishment with the requirement of adequate housing entails the correspondence to the standards set by regional acts of law concerning residential public building. Similarly to what Netherlands regulation states in the matter, municipality's authorities perform control on the conformity to residential public building regulation upon the applicant's request. Moreover, the applicant must prove to dispose of financial means amounting to at least the general welfare benefit on a yearly basis.[27]

[26] Article 13, section 13, 1998 Aliens Act. This rule represents in practice a serious obstacle, given the fact that the practice shows that the Ministry comes to a decision only after an average period of 24 months up from the application.
[27] The considered income must correspond to the mentioned amount if reunification concerns one family member; to the double amount for reunification with up to three family members, the triple for four people or more.

1998 Aliens Act introduced alternative procedures.[28] Family members may be granted entry clearance if followed by the relative they intend to live with in Italy if the concerned foreigner is bearer of a permanent residence permit or a labor residence permit which is valid for at least one more year (so-called "*ricongiungimento al seguito*", Article 29, section 4, Aliens Act). Moreover, the law admits entry to the parent of a minor child lawfully established in Italy. The parent will have to prove the subsistence of the above-mentioned requirements within one year to be granted a residence permit for further stay (Article 29, section 6, Aliens Act).

Once family members have entered the country, they must apply for a family residence permit (art 30, Aliens Act). Bearers of this *status* are entitled to access employment and self-employment, study courses, health and welfare facilities. A family residence permit strictly depends on the effectiveness and duration of the permit of already established relative. As a consequence, they will lose their residence permit if the bearer of the main residence permit loses his one. By the way, a family residence permit may be replaced with an independent permit (e.g. labor- or study residence permit) if legal separation intervenes, or in any case of marriage dissolution, and when children reach the age of eighteen.

Against unfavorable decisions of administrative authorities affecting the right to family unity, an urgent appeal may be raised to the local civil court (Article 30, section 6, Aliens Act). Until 1998, the general rule of judicial review used to apply to family reunification procedures, as of to all administrative proceedings. This remedy though used to (and for other immigration law procedures still does) represent a serious obstacle in the way to justiciability of unfavorable administrative decrees and depicts the main reason why we hardly can find case-law in matter of the right to family unity in Italy.

Comparative considerations will follow on single issues deriving from the above described principles, namely the access to the right to family unity, as to the availability

[28] Since implementation of alternative procedure was postponed until the issue of the implementing ruling which was published on November 3rd, 1999, application is still very limited.

of information, the set requirements for family reunification, the family members who are eligible for reunification and the legal position of family members as bearers of a residence permit for family reasons.

Part II

COMPARATIVE ANALYSIS OF SINGLE ISSUES

II:1 ACCESS TO THE RIGHT TO FAMILY UNITY.

II:1. 1. Access to legal information: constitutional fundaments and their effectiveness.

The knowledge of the law stands as a fundamental condition for accessing any right. The access to the various legal procedures concerning the right to family unity involves the availability of legal information. The law is accessible if it may be known with a reasonable effort. Regulation should thus be of clear language, readily stable, published, broadcasted, translated and explained. Although a fundamental principle of legality is explicitly provided in both the Italian and Netherlands system,[29] Ministry instructions (in the form of circulars) prove determining in administrative bodies decisions concerning foreigners. Indeed, these decisions often make reference to Ministry circulars in their reasons. Unlike national statutes, circulars may be, in

[29] Article 2 of the Constitution of The Kingdom of the Netherlands; Article 10, section 2 of the Constitution of the Italian Republic.

practice, not published and therefore aliens are submitted to a regulation which is quite difficult to reach and know in advance.

As already pointed out in our description of the basic tenets of Italian immigration law (§ I:2), the Constitution of the Italian Republic expresses at Article 10, section 2, the fundamental principle after which the legal *status* of Aliens must be regulated by acts of law. As a result, the Constitution sets a limit to the discretional power of the executive branch in matter of the regulation of the condition of Aliens. The Constitution lays down a further condition: regulation contained in acts of law has to be "in conformity with international rules and treaties". Constitution-makers thus conferred the powers to dictate immigration regulation to the Parliament and required that legislative power must pay heed to international customary and treaty law. Moreover, Articles 76 and 77 (1) of the Constitution specify the limits of Government powers in matter of legislation, by providing that "[t]he exercise of legislative functions may not be delegated by the Government, save by the laying down of principles and criteria and only for a limited period of time and for definite objects" (Article 76). Furthermore, under Article 77, section 1, "[t]he Government may not, unless properly delegated by the Chambers, issue decrees having the value of ordinary laws".

By way of contrast, reality shows that these constitutional norms have been violated in relationship with many aspects of the discipline of Aliens' legal *status*, where large parts are regulated by delegated legislation and administrative circulars. At the same time, administrative practice concerning immigration procedures still hold the character of broad discretion. As for the large use of circulars, it must be remembered that these acts have the nature of Public Administration instructions directed to lower offices, and not to citizens. Circulars are not the result of the confrontation of different subjects, neither is it published on any official bulletin, nor can be impugned before the Constitutional Court in case of a violation of the Constitution.[30] Yet, the practice shows that the decisions of local departments of authority in charge for immigration procedures, the State Police (depending from the Ministry of Internal Affairs), hardly

[30] **Bonetti, P**., 1993, La condizione giuridica del cittadino extracomunitario, Rimini, Maggioli Editore, p. 24. The author defines this phenomenon as "legislation by circulars".

ever depart from these directives, given the strict hierarchical structure of this section of the State administration.

Although the law provides that all administrative acts like "directives, programs, instructions, circulars and any other act concerning the organization, the functions, the goals and Public Administration procedures, as well as the acts defining the interpretation and the implementation of law norms" have to be duly published, official means of publication still lack.[31] Moreover, circulars in matter of immigration procedures are still difficult to reach and sometimes are even officially "reserved", thus not available to the public. As jurist Paolo Bonetti had to observe in 1993, it has happened that

> …[F]oreigners living in Italy have not to do with the implementation of acts of law, rather with internal instructions of the Ministry of Internal Affairs, often broadcasted with telegrams or fax messages, which provided for a woolly and disordered accumulation. On the other hand, the extremely vague content of many norms set up in recent immigration law acts and the pitfalls therein contributed to increase the situations where officials constantly and abnormally made reference to hundreds of ministry circulars, which in some cases proved to dispose quite beyond the same acts of law (many new types of entry visa and residence permits were actually "invented" and regulated by circulars of the Ministries of Internal Affairs and of Foreign Affairs).[32]

Nowadays some things have changed. A long debate on the need for a comprehensive and precise regulation led to the issue of a new immigration law act (Act no. 40, 6 March, 1998) including several detailed and appearently directly effective rules. However, the same act contains also a broad delegation command towards the Government, in order to enact, in the following two years, "corrective provisions that prove necessary in order to fully execute the principles set up by the present act of law or to the purpose of securing a better implementation", as well as harmonization with

31 Administrative Procedures Act, no. 241/1990, Article 26, section 1, in *Gazzetta Ufficiale*, no. 192, 18 August, 1998.
32 See **Bonetti, P.**, supra, note no. 30, p. 26.

other norms regulating the legal condition of foreigners. Since the statute does not define the principles to be complied with, this provision results in a blank delegation to the Government, as experts did not fail to notice.[33] Indeed the law does not describe the principles to be executed, nor these are clearly to be found in the language of the statute in point. We may instead notice that Act no. 40/1998 contains rules, i.e. clauses connecting precise legal consequences to a specific fact, rather than general principles, expressing the values at the basis of regulation. The woolly language of the delegation command of Article 47 results thus in conferring extremely broad powers to the Government, ranging from the competence to identify the alleged principles of the delegating law, to unlimitedly judge the full accomplishment of those principles, and, eventually, the power to establish if, when and how to correct every norm contained in Act no. 40 /1998. We may thus conclude that the above recalled constitutional norms have been breached.[34]

As a consequence of delegation, nowadays regulation that forms the cornerstone of the legal position of aliens in Italy is to be found in Government decree of 25 July, 1998, no. 286 (to which we here refer as "Aliens Act"). Relevant modifications are contained in subsequent Government decrees of 19 October 1998, no. 380 and 13 April, 1999, no. 113.[35]

These acts contain readily detailed norms providing for important landmarks in administrative practice. On the other hand, other setbacks still remain: the main two resulting from the following. First, most new regulation did not find any implementation until one and a half-year later. Indeed, 1998 immigration law act provided that implementation of many provisions had to be secured by a further regulation to be issued by October 1998. This was instead enacted almost one year later

[33] **Bonetti, P**., 1999, "Anomalie costituzionali delle deleghe legislative e dei decreti legislativi previsti dalla legge sull'immigrazione straniera", 2nd Part, in *Diritto, Immigrazione e cittadinanza*, 1999/3, p. 53.
[34] See **Bonetti, P.**, supra, note no. 33, p. 57.
[35] Government Decree no. 380, 19 October 1998, "Corrective provisions to the coordinated text of the discipline of immigration and of the condition of the foreigner, after Article 47, section 2, of Law Act no. 40/1998", in *Gazzetta Ufficiale*, no. 257, 3 November 1998. Government Decree no. 113, 13 April 1999, "Corrective provisions to the coordinated text of the discipline of immigration and of the condition of the foreigner, after Article 47, section 2, of Law Act no. 40/1998", in *Gazzetta Ufficiale*, no. 97, 27 April 1999.

and was published in November 1999. Second, ministry circulars concerning immigration result to have decreased in number, but they remain officially unpublished. Official means of publication still lack, circulars are still often transmitted by fax or telegraph dispatches within the administration organization and cannot be disclosed to operators working outside those offices. Since private paper collections still do not offer a prompt publication of circulars (three-four times a year), all non-ministry agencies working for immigrants support and information, including lawyers, find it hard to give complete and up to date information.

As previously introduced, the Constitution of the Kingdom of The Netherlands contains a reserve to acts of law with regard to the regulation of the condition of foreigners at Article 2, section 2: "The admission and expulsion of Aliens shall be regulated by Act of Parliament". Accordingly, the legal basis of Netherlands entry policy is to be found in the general provisions of 1967 Aliens Act (lately revised in 1998). On the other hand, the most part of regulation is contained in government acts, such as the fundamental Aliens Circular (*Vreemedelingencirculaire*, providing in matter of entry clearance), frequently amended by Interim Notices (*Tussentijdse Berichten Vreemdelingencirculaire).* As to the value recognized to circulars within the Netherlands legal order, the Supreme Court stated in 1990 that circulars, in those sufficiently concrete and clear parts, have to be regarded as law in the sense of Article 99 of 1985 Judicial Organizations Act, as for its content and scope.[36] This article provides indeed that the Supreme Court shall annul acts, judgements, sentences and dispositions on the ground of the violation of the law. As a consequence, the Supreme Court may depart from the norms contained in the Aliens Circular as well as its violation may lead to the annulment of the concerned act. Circulars are not regarded as national statutes, rather as "pseudo-legislation". Foreigners may make reference to circular rules, though administrative authorities are allowed not to apply those norms in exceptional cases. [37]

[36] Supreme Court, judgement of 29 June, 1990, in **Kuijer, A., Steenbergen J.D.M.**, supra, note no. 2.
[37] **Kuijer, A., Steenbergen J.D.M.**, *supra*, note n 2; **Boeles, P.**, 1992, "Inleiding in het internationaal, Europees en nationaal migratierecht", Utrecht, Nederlands Centrum Buitenlanders, p. 91.

It is important to our purposes to underline that the Aliens Circular has been officially published, as circulars in The Netherlands are usually published in the official journal (*Staatscourant*). Things used to be different before 1982, when such implementation rules were not officially available to the public. In 1982 the Parliamentary debate put forward the idea of a new, more detailed Aliens Act containing a comprehensive, available to the public regulation, instead of general principles leaving a broad margin of administrative discretion.[38] On the other side, the issue of the (officially published) Aliens Circular – as well as of its subsequent amendments - resulted in enhancing stability in regulation and brought the call for the introduction of a new law to decrease.

More recently, the same claims have been raised again after the considerable evolutions of immigration regulation (especially affecting family unity) that circulars put forth in 1993 and 1994. A few authors described Aliens legal position as a "lawless" one, that could undergo modifications according to day by day discretional considerations contained in ministry circulars. In subsequent parliamentary discussions it was underlined that the Aliens Act is the primary law source as to the introduction of the types of residence permits and as to setting up the conditions under which residence permits are issued. [39]

We may thus conclude that in both the considered legal systems ministry instructions form a significant part of the Aliens condition regulation, and of family reunification. This state of things has caused concern in national debates and brought to the official publication of circulars in a special bulletin, in The Netherlands.
The official publication of circulars in Italy would lead to a more transparent administration of immigration procedures and to the spreading of legal information to all Aliens in Italy. On the other hand, the Netherlands experience also shows the limits of legislation by circularsThe frequent issue of law "adjustments" by circulars negatively affects the certainty of law and the stability of a community based of the rule of law.

[38] *Buikema and others* Parliamentary Resolution, Parliamentary proceedings of the Second Chamber, TK 1981-1982, 17, 100-IV, no. 44.

II:1. 2 Required conditions within the scope of family unity.

The implementation of law rules protecting the right to family unity, as previously introduced (§ I:3 and § I:4), reveals that the actual threshold to that right is considerably high. Indeed, the requirements set for granting the right to family reunification and the documentation the applicant must hand in, in order to prove the accomplishment thereof, may result in significantly restrict access to this provision. We shall consider, in particular, the requirements of "adequate housing" and "sufficient income".

Suitable Housing.

We shall now detect the different solutions provided for by the Italian and the Netherlands regulations on housing requirement. Under the Netherlands rule, housing is considered *suitable* "if the competent municipal authorities certify that it is sufficient for Netherlands nationals in comparable conditions" (Chapter B1, under 1.2.4 – married spouse, under 3.2.4 – partners, Aliens Circular). 1986 Circular of the State Secretary of Public Housing, Environmental Planning and Protection also finds application. The principle is expressed therein, after which "[a]s to the housing evaluation in matter of entry regulation within the scope of family reunification, no other norms shall be employed than those applicable to citizens".[40] Moreover, the State Secretary marks a distinction between the standard applying to housing requirement within the scope of family reunification (formation) and that relating to other immigration law purposes. In matter of family reunification (formation), reference has to be made to municipal building regulations mainly concerning public health and safety standards, rather than to

[39] **Kuijer, A., Steenbergen J.D.M.**, supra, note n. 2, p. 84.
[40] "Circular concerning suitable housing according to the Foreign Workers Act and relating to family reunification", State Secretary of Public Housing, Environmental Planning and Protection, 28 August, 1986, no. MG 86-23, in *Vreemdelingencirculaire*, Ministry of Justice - Immigration and Naturalisation Service, 1999 updated ed., Sdu Publishing, Part C, under C11.

the higher standards set in residential regulations. These shall instead apply to labor residence permits procedures.[41]

The principle applying in the Netherlands, aims at granting equal standards to both immigrants and citizens, is also to be found in 1998 Italian "Government Program concerning Immigration Policy", setting up the goals of a newly introduced integration policy. The program endeavours "to guarantee equal access opportunities and to protect differences".

> The basic idea inspiring Italian integration policy, nowadays shared by most European countries, mainly consists in enabling foreigners to "normally" live, i.e. to fill in the gap of knowledge following from the specific condition of being alien (knowledge of the language, access to education, to health care services, to professional training, access to public housing, etc…) disfavoring them in front of Italian citizens living in comparable social and economic conditions.[42]

The following analysis is aimed at evaluating the achievements of Italian regulation in point of housing requirement with reference to the issue of equal treatment.

As for regulation in matter of suitable housing standard, we may recall that 1998 Italian Aliens Act brought in fairly precise rules. Italian lawmakers set up a standard by resorting to the norms of regional acts of law concerning the access to residential public building.[43] As a consequence, the criterion applied depends on factors which do not refer to safety requirements (so-called *abitabilità*), or to the actual housing conditions of other (autochthonous) residents in the considered areas. The parameter consists instead in the housing condition of the applicants to public housing which, according to regional legislation concerning the access to public housing, does not justify the allocation of apartments of residential public building. An example shall explain. The Residential Public Building Act of the Region of Lombardy provides that only individuals in

[41] See, *supra*, previous note.
[42] President of the Republic decree, 5 August, 1998, in *Gazzetta Ufficiale*, 15 September 1998, no. 215, Attachment no. 158.
[43] Article 29, section 3, under a), Aliens Act.

identified conditions are eligible for the allotment of public housing. Applicants are eligible if do not dispose of a house of a minimum total surface of 54 square meters for one to two inhabitants, 72 for up to 4 people, 90 for 5 to 6 people, and so on.[44] By explicit reference of Article 29, section 3, under a), this is the standard applied in Lombardy to family reunification procedures. We may argue that its application may cause inequality between applicants to family reunification and other families resident in the same area, by not directly referring to the average housing condition of people residing in Lombardy or to the minimum health and safety standard, rather to housing condition that does not entitle to access residential public housing. Moreover, from the data elaborated by the Italian National Institute for Statistics, after 1991 census of population and habitations, we can observe that resident families dispose, as an average, of houses of limited extent: more than 68% of families in Lombardy (normally composed 3 members) live in apartments of one to four rooms.[45]

Besides, the mentioned standard does not seem proportioned for the scope of family reunification. Since apartments of this extents are not easy to be found and that the market commends a high price for their rent (amounting to the average salary of a workman), the access to the procedure of family reunification results negatively affected and may cause discrimination between Italian and EU (EEA) resident families and non-EU (EEA) resident foreigners disposing of a house of a lower extent. Many foreign families account for a considerable number of children and, as a consequence of the introduction of the said standard, have to renounce family reunification, even though they complied with all other requirements, or to opt for a partial reunification, by

[44] Articles 1 and 2, Lombardy Regional Residential Public Building Act, 5 December, 1983, no. 91 in *Leggi Regionali d'Italia*, De Agostini Giuridica, 1999 cd-rom. Similar standards are laid down in Autonomous Province of Trento Residential Public Building Act, February, 1992, no. 91, Article 5 (coordinated text with implementing regulations provided for by the Residential Public Building Service - Autonomous Province of Trento, 1999); Article 3, Emilia-Romagna Regional Residential Public Building Act, 14 March, 1984, no. 12; Article 6 and 13 of Toscana Regional Residential Public Building Act, 20 December, 1996, no. 96, Campania Regional Residential Public Building Act, 2 July 1997, no. 18. A significantly lower standard is instead set in Lazio Regional Residential Public Building Act, 26 June, 1987, no. 33, article 3, section 6, under a): "adequate housing: a habitation, the net surface of which amount to not less than 45 square meters and the rooms of which, as calculated by dividing the net surface to 14 square meters, is equal or superior in number to that of the concerned family members", all law acts in *Leggi Regionali d'Italia*, De Agostini Giuridica, 1999 cd-rom.

[45] "Popolazione ed abitazioni", 1991, 13th General census of population and habitations, ISTAT, tables 5.16, 5.19, 5.22.

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recalling only part of their family members. The provision after which, in case of reunification with only one child under the age of fourteen, the evidence of adequate housing may be replaced by the written consent of the house owner, does not prove helpful in the case of families with more children than one.[46] We may thus conclude that family reunification norms on adequate housing may paradoxically bring to a further family *separation*.

Authorities in a few Italian regions seem to consider the negative effects of the introduction of such housing standards and agreed in modifying it for the specific purpose of family reunification. In the Region of Veneto, for example, the municipal authorities of Verona and the local Aliens Police Department make reference to the regional law-set standard (60 square meters for two inhabitants, 70 for three, 85 for four, 95 for five people and 110 for more, under Article 9, section 3 of 1996 Regional Residential Public Building Act) as a maximum term, rather than a minimum.[47] We may then recall the agreement reached by the same authorities in the Municipality of Turin, Region of Piemonte, where the Regional Residential Public Building Act does not express a standard as to the housing extent.[48] Authorities set the minimum extent of the concerned house at 9 square meters for every person, except the facilities (such like kitchen and bathroom).[49]

November 1999 implementing regulation may give way to a more favorable policy, by adding that the applicant for family reunification may meet the requirement in point by obtaining a pass certificate from local public health authorities, according to the standard of hygiene and health care security, rather than to the house extent.[50] Following late December 1999 circular of the Ministry of Internal Affairs confirms that

[46] Article 29, section 3, under a), last sentence, Aliens Act.
[47] Veneto Regional Residential Public Building Act, 2 April, 1996, no. 10 in *Leggi Regionali d'Italia*, De Agostini Giuridica, 1999 cd-rom. More information provided for by Verona Municipality Demographic Service, January 2000.
[48] Article 2, Piemonte Regional Residential Public Building Act, 28 March, 1995, no. 46 in *Leggi Regionali d'Italia*, De Agostini Giuridica, 1999 cd-rom.
[49] Municipality Aliens Office of Turin, January 2000.
[50] Article 6, section 1, under c), Implementing Regulation, President of the Republic decree of 31 August 1999, no. 394 in *Gazzetta Ufficiale*, 3 November 1999, no. 258, attachment no. 190/L.

the two certificates may be alternatively produced.[51] As a consequence, the *onus* of producing evidence of adequate housing seems to be significantly reduced. On the one hand, we may observe that access to family reunification may be undoubtedly favored by regarding housing as adequate according to hygienic and safety standards, no matter of their extent. On the other, we cannot help noticing that the standard once set by the Parliament at Article 27, section 3, under a) of law act no. 40/1998 (then contained at Article 29, Government decree no. 286/1998) has been done away, in practice, by its implementing regulation, introducing a completely different rule. In fact, the purposes of the two standards are different. The first, recalling Regional Residential Public Building acts, is meant for evaluating the proportion between the dimension of the house, the number of the rooms and the number of the concerned family members, while the second concerns the hygienic and health conditions of the concerned habitation. It is on the basis of these considerations that the attitude of Local Aliens Police Departments took different stands, by requiring that both certificates shall be produced, or alternatively accepting one out of the two.[52] More considerations on income requirement will follow.

Sufficient/adequate income.

We have already introduced the common principle in Italian and Netherlands immigration law, after which the right to family reunification shall be granted to foreigners who dispose of sufficient financial means to maintain their family members. The Italian norm in point requires durable income, calculated on a one-year basis, amounting to, at least, the general welfare benefit on a yearly basis.[53] If one or more family members already take part to the applicant's household, their income may also

[51] Article 6, section 1, under c), Implementing Regulation; Ministry of Internal Affairs, circular no. 300/C/227729/12/207/1^ Div. of 23 December 1999.
[52] Information collected form the Local Aliens Police Department of Trento, Udine, Trieste (requiring both types of certificates); Local Aliens Police Department of Bologna, Rome (alternatively requiring one of the two certificates).
[53] Article 29, section 3, under b), 1998 Aliens Act; Article 6, section 1, under b) of the Implementing Regulation, *supra*, note no. 50, repeats the same norm.

be considered for the purpose of family reunification.[54] The Netherlands regulation provides that the applicant must prove to dispose of a durable income for at least one full year up from the date of their application, (at least) in a corresponding amount to the family minimum subsistence level, as periodically updated by State welfare authorities, set up according to the age of the concerned person.[55]

Short-term employees are not eligible for family reunification under Italian law. Since Article 29, section 3, under b) of the Aliens Act does not precisely indicate what evidence has to be produced in order to prove sufficient income, Aliens Police authorities are implicitly recognized a discretional power as to the documentation required. The practice shows that Aliens Police offices require the applicant, if dependent worker, to dispose of a labor contract for at least one more year or, in some cases, an open-ended one.[56]

If we consider that the labor market has evolved into a system of new forms of labor contracts of limited duration, temporary work provided by specialized agencies and a reduced guarantee for long-term employment, we may argue that the income-standard as above described does not meet with this trend. We may consider the different solution set up in Netherlands regulation. It is relevant to this purpose to give an account of the recent developments, after 1994 issue of the Netherlands Aliens Circular. Later circulars brought in considerable modifications to the original text. Nowadays, Chapter B1, under 1.2.3.3 and 3.2.3.3, gives access to family reunification (formation) for temporarily employed applicants:

> In relationship with the market evolution towards flexibility, employers increasingly apply short-term labor contracts. As a consequence, it is more difficult for applicants to produce labor contracts of a minimum duration of one year. In this regulation we seek contact with these development. On the other

[54] Article 29, section 3, under b), last sentence.
[55] Aliens Circular, Chapter A4, under 4.2 and B1, under 1.2.3/3.2.3/5.2.1/7.2.1; the standard is set at 2129,16 Netherlands Guilders (to be reduced to 70% for excepted categories of applicants) by the State Secretary for Justice Interim Notice concerning the Aliens Circular 1999/15 in *Vreemdelingencirculaire*, loc. cit., note no. 40.

hand, our major concern still lies in proving the existence of durable financial means. In case the concerned person does not dispose of a labor contract of the minimum duration of one year, the existence of durable financial means for the future will be evaluated on the basis of his/her past labor experiences. The concerned person must then comply with the following rule:

income earned on the basis of a labor contract of a shorter duration than one year (temporary work from specialized hiring agencies included) may be regarded as durable income, as a departure to the basic rule, in case, at the moment of application:

- the concerned person uninterruptedly worked during the previous three years (whether on the basis of short-term contracts or not) and, during the whole period, could earn work income amounting to the applicable subsistence level, as identified by the General Social Security Act; and
- labor income will be enjoyed for, at least, further six months.

Short unemployment periods, during which the concerned person enjoyed payment according to the Unemployment Act, shall count, within the three years period, as labor income. During this three years-period, short unemployment periods shall not amount, in total, to more than 26 weeks. The *ratio* of this provision lies in that short-term unemployment due to the switch from one job to another, may not in any case negatively considered to the detriment of the applicant.

Further provisions enable State officials to adapt the principle of sufficient and durable financial means to the average economic conditions of applicants older than 57,5 years of age, disabled, long-term unemployed and applicants between 18 and 23 years of age. As to this last category of applicants, we shall briefly describe this provision and the recent developments of national case law.

The Aliens Circular lays down a specific exception in favor of young applicants to family reunification (though not extended to family formation, i.e. to *de facto* families)

[56] Information taken from the Aliens Police Offices of Trento, Rome, Brescia and Milan, last updated January 2000.

aged between 18 and 23. Income shall be regarded as sufficient if deriving from a work contract of at least 32 hours per week. Moreover, family reunification may be granted to applicants working for less than 32 hours/week if their income still amounts to 70% of the applicable subsistence level as identified by the General Social Security Act.[57]

As for the income standard to apply in case of very young couples in The Netherlands, the principle prevailed after which authorities cannot expect from very young applicants, whose education and knowledge of the Netherlands language is still low, to earn more than the average minimum income relating to the age of eighteen. The Aliens Court, Haarlem session, held in 1997 that, in the case of a young couple, where one member is younger than 21, a lower income standard shall apply.[58] Despite the contrary attitude of the State Secretary of Justice expressed in a subsequent circular, the same Court, Amsterdam session, confirmed this view.[59] To this regard, The Council of Public Administration, advisory body to the Government, pointed out that a high standard as to the evaluation of adequate income in the scope of family reunification of young applicants, especially if women, negatively affects their integration in the community, their participation to the education system and, as a consequence, may confine them to the lower level of the labor market.[60] More considerations will follow, in matter of the legal position of the applicant as a variable with respect to the applying regulation.

II:1.3 Legal position of applicants.

The legal position of the person applying for family reunification (formation) proves a relevant factor as to identifying the applicable regulation. The legal protection

[57] Chapter B1, under 1.2.3.5.a, Aliens Circular.
[58] The Hague Court, Haarlem session, 23 June 1997, AWB 97/33495, in **Lange, T. de**, 1998, "Kroniek van het Vreemdelingenrecht", in *Nemesis – Tijdschrift over Vrouwen en Recht*, 1998/3, p. 71.
[59] Interim Notice concerning the Aliens Circular 1997/11 (TBV, *Tussentijdse Berichten Vreemdelingencirculaire*), State Secretary of Justice Circular, 11 November 1997, in *Vreemdelingencirculaire*, Ministry of Justice - Immigration and Naturalisation Service, 1999 updated ed., Sdu Publishing; The Hague District Court, Amsterdam session, 18 December 1997, AWB 97/6506 in **Lange, T. de**, *supra*, note no. 58, p. 71, ff.
[60] Council for the Public Administration report, Retoriek en realiteit van het integratiebeleid, March 1999.

recognized to the right to family unity finds a different discipline according to the nationality of the applicant and the type of residence permit of the foreign national, contributing to further stress a dividing line between the *status* of Italian/EU/EEA Member States nationals and that of other residents within the same country. We will endeavor to evaluate the different solutions set up by the legislation of Italy and the Netherlands.

From the language of Article 28 and 29 of the Italian Aliens Act we may discern that the procedure of family reunification only applies to foreigner nationals, by only mentioning "the alien" as the applicant to the procedure.[61] The right to family reunion of Italian-EU nationals with (non-EU) foreign family members is more specifically regulated by a different provision (Article 28, section 2 resorts to 1965 EU Member States Nationals Circulation Act), after which a right of abode is recognized to the spouse and children, parents, grandparents and descendants of the concerned Italian (EU) citizen, as well as to the parents, grandparents and descendants of his/her spouse (whether financially dependent or not).[62] Moreover, the law forbids the expulsion of minor age foreigners, as well as foreigners living with Italian relatives until the fourth degree. The Ministry of Internal Affairs recommended that they shall be granted a residence permit for family reasons.[63]

As we already observed, these norms only apply to Italian and EU nationals, as the result of a lawmakers' precise choice. The different stand taken by the lower judge of Perugia, after which the same rule shall apply to all aliens, irrespective of their legal

[61] Article 29, section 1 generally refers to foreigners, among which we shall also number EU nationals, as foreign nationals bearers of a "permanent residence permit or a residence permit of more than one-year duration for the reasons of employment, independent labor, asylum or religious grounds" (Article 28, section 1 of the Aliens Act).
[62] Article 1 and 5-*bis*, EU Member States Nationals Circulation Act, President of the Republic decree, 30 December 1965, no. 1656, as subsequently amended by law act no. 177, 4 April 1977, and President of the Council of Ministers decree, 2 August 1999, no. 358 in *Le Leggi Vigenti*, V. De Martino ed., Edizioni De Agostini.
[63] Article 19, section 2, under a) and c) of 1998 Aliens Act and Ministry of internal Affairs circular, 20 March, 1998, no. 559 and Article 1 of previously quoted President of the Republic decree no. 1656/1965. The judge recognized the full applicability of above described Articles 28, Section 2 and 19, section 2, under c) to the appellant, older than 18 years of age with her lawfully residing parents and brothers.

position in the State, does not lie on precedents.[64] The judge held that the said exceptions to expulsion, namely concerning minor age persons and the family, are laid down according to the constitutional principles protecting children and the family. Thus, following Article 2 of the Aliens Act, the exception to expulsion would find application to all aliens, however present at the boundary or within the State territory. According to the judge, The principle after Article 2 of the Constitution ("The Republic recognizes and guarantees the inviolable rights of man") "finds particular consideration in subsequent Articles 29 and 31, recognizing the rights of the family and guaranteeing family unity, as well as favoring the formation of families; a principle applying to the foreigner since, for what regards fundamental human rights, the citizen and the alien enjoy equal treatment".

We shall now add to what we already introduced in the above brief description of family reunification (formation) in The Netherlands and in Italy (§ I:3 and § I:4), respectively, that the Netherlands Aliens Circular sets up exceptions to the regular discipline in matter of the requirements of financial means, housing and public order reasons. Unlike for aliens holding an ordinary residence permit (only valid for one year), family reunification (formation) may be granted to young Netherlands nationals (between 18 and 23 years of age) receiving income in the frame of youth work contracts or a minimum income as laid down in the General National Assistance Act. Unemployed applicants to family reunification can meet the income requirement if they receive social benefits amounting to the above-mentioned minimum income for one further year. More provisions distinguish reference to income requirement depending on age or type of social benefits obtained and in case of unemployed people aged 57.5 and older, single parents with children, permanently unable to work applicants, bearers of refugee *status*, etc…

Though we may notice that all exceptions regarding Netherlands nationals do also regard non-EU Aliens as bearers of permanent residence permits. This element highlights the effort of law-makers to face immigration in the respect of equal

[64] Perugia District Court, 26-30 October, 1998, no. 51085 and 51094 (Sekkal), in *Gli Stranieri*, 1999/1, p. 35.

opportunities and non-discrimination with regard to all people permanently resident in the country, whether Netherlands nationals or not. This seems to be the direction that the Italian legislator is following, as well, if we consider the introduction in 1998 Aliens Act of the provision of a permanent residence permit, which may be granted to foreigners after five years of lawful residence and to their family members. Although the implementation of this new *status* has been postponed until year 2000 (following the issue of the necessary ministry implementing circular to local Aliens Police Departments), we may infer from the language of Article 9, section 1 of 1998 Aliens Act that this provision will benefit the condition of family members. In fact, a permanent residence permit may be issued not only to the foreign national meeting the requirements set in the same paragraph, but also to the spouse and minor age children. Significantly, the law puts permanently residents on a par with citizens, by ensuring the issue of a permanent residence permit to the newly entered family members of both Italian (EU) nationals and of bearers of a permanent residence permit (Article 30, section 4 1998 Italian Aliens Act).

Family reunification may be granted, according to Italian law, to the bearers of a permanent residence permit or a residence permit of more than one-year duration for the reasons of employment, independent labor, asylum or religious grounds (Article 28, section 1, Aliens Act).[65] Moreover, entry clearance for purposes of family reunification may be granted to the parent of a legally resident (foreign national) child, provided that the applicant may prove accomplishment with the above mentioned requirements within the subsequent year.[66] Family reunification shall not be granted to the bearers of a residence permit for family reasons, and the bearers of short-term residence permits,

[65] From the Aliens Act parliamentary proceedings we learn that the term *asylum* extensively refers to both aliens recognized the status of refugee following 1951 Geneva Convention on the Status of Refugees and those recognized the right of asylum according to Article 10, section 3 of the Italian Constitution ("A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic, under conditions laid down by law"). See Parliamentary proceedings no. 373/2, XIII Legislature, March 1998, IV Part- Chamber of Deputies, p. 1222 (text of amendments 26.13 and 26.13), p. 1150 (discussion and voting).

[66] Article 29, section 6, 1998 Aliens Act.

such as for reasons of seasonal employment, health care treatments, tourism, etc…[67] Quite similarly, the bearers of short-term residence permits do not number among the individuals eligible for family reunification or formation under Netherlands regulation. In practice, the right is guaranteed only to the bearers of a residence permit (in principle valid for one year, Article 9, Netherlands Aliens Act) or of a permanent residence permit (following Article 10). Provisional residence permit (Article 9a) fall outside of the scope of family unity provisions.

Further considerations on the individuals eligible for family reunification entails the investigation of what relationship, under national immigration law in matter of family unity, is regarded as *family*.

II:2 THE CONCEPT OF FAMILY UNDER NATIONAL REGULATION.

The basic idea of family within the Italian legal system is expressed by the constitutional precept: "The State recognizes the family as a natural association founded on marriage" (Article 29 of the Italian Constitution). Among the various forms in which relationships between individuals take shape, heterosexual relationships based on marriage are recognized preeminence in the Italian legal system. The alleged discrimination of families not based on marriage (d*e facto*) has been judged as ungrounded by the Constitutional Court, since the difference in treatment corresponds to a different actual situation as for the settlement of legal obligation between the spouses, which would not be attached to the *status* of *more uxorio* cohabitation.[68] Nonetheless, *de facto* relationships are regarded as relevant under Italian law.[69] The Constitution itself provides that the Republic recognizes and guarantees the inviolable rights of man both as an individual and as a member of the social groups in which his/her personality

[67] We may remember here that the right to family reunification is granted to the reunited spouse with his/her parents and children born out of wedlock as a result of Constitutional Court judgement, 19 January, 1995, no. 28 (De Castro), in *Giurisprudenza Costituzionale*, 1995, p. 271, later dealt with.
[68] Constitutional Court, judgements of 26 May, 1989, no. 310, in *Giurisprudenza Costituzionale*, 1989, I, p. 1400; 22 June 1989, no. 352, in *Giurisprudenza Costituzionale*, 1989, I, p. 1629.

finds expression (Article 2). Individuals' freedom to form and live in any social group, whether legally foreseen or not, is recognized and guaranteed by the Constitution. Cohabitation *ad modum coniugii* may well be numbered among those relationships as generally provided by Article 2.[70] Moreover, Article 36, Section 1 of the Constitution, providing that "[a]n employed person is entitled to wages in proportion to the quantity and quality of his work, and in any case sufficient to provide him/her and his/her family with a free and dignified existence", also applies to families not based on marriage. If not so, the different treatment of legitimate and *de facto* families would be regarded as a violation of the fundamental right to a free and dignified existence.[71] The same applies to Article 37, Section 1, recognizing the right of women to work conditions making "it possible for them to fulfill their essential family duties and provide for the adequate protection of mothers and children".[72] Other provisions in the various sectors of Italian legal system provide for a more definite *status* of *de facto* families. 1989 Residence Registry regulation, although to the only purposes of residents' registration, privileges a substantial meaning of family, as "a group of people connected by marriage ties, consanguinity, relationship by marriage, adoption, guardianship or other affective ties, living in cohabitation and taking abode in the same municipal area".[73] Moreover, Italian courts recognize the principle of the relevance of non-marital relationships to the purposes of determining the amount of alimonies in divorces.[74] Furthermore, national courts nowadays generally accept the view that a natural obligation of mutual support ties not married partners in the same way as married couples.[75] We may thus conclude that Italian regulation, by confirming a *favor matrimonii*, follows in the direction of

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[69] **Busnelli, D., Santilli, M.**, 1993, "La famiglia di fatto", in Commentario al diritto italiano di famiglia, Cian, G., Oppo, G., Trabucchi, A., ed., Padova, Cedam; **D'Angeli, F**., 1995, La tutela delle convivenze senza matrimonio, Torino, G. Giappichelli Editrice;

[70] **D'Angeli, F**., *supra*, previous note, p. 33, setting the limits to this right in criminal law, providing the crime of incestuous *more uxorio* cohabitation (Article 564, Criminal Code).

[71] **Rescigno, P.**, 1992, Manuale di diritto privato italiano, Napoli, Jovene, p. 356.

[72] **D'Angeli, F**., *supra*, note no. 69, p. 42; **Prosperi, F.**, 1980, La famiglia "non fondata sul matrimonio", Camerino-Napoli, Edizioni Scientifiche Italiane, p. 57, ff.

[73] Article 4, President of the Republic decree, no. 233, 30 May, 1989, in *Gazzetta Ufficiale*, 8 June, 1989, no. 132.

[74] **D'Angeli, F**., 1989, La famiglia di fatto, Milano, Giuffré, p. 320, ff. offering an overview on case-law developments.

[75] Case-law analyzed in **D'Angeli, F**., *supra*, note no. 69, p. 93, including more observations in matter of succession in the partners' position within house renting contracts, insurance law, tax law and access to public housing.

separating the legal position of *de facto* families from families based on marriage, rather than to their assimilation.

Regulation referring to *de facto* families only applies to heterosexual relationships.[76] The legal position of homosexual couples holds its basis Article 2 of the Constitution, above mentioned, recognizing the right of the individual in all social groups in which his/her personality finds expression. The Constitutional Court confirmed this view and held that the right to sexual freedom stands as a right to be numbered among the constitutionally protected positions and regarded as an inviolable human right under Article 2.[77] As a consequence, any action of State authorities directed to forbid or punish the free constitution of such relationships may cause violation of Article 2. We may notice that, unlike for *de facto* families, homosexual relationships are not regarded as families, rather an expression of individuals personality and of sexual freedom. Thus, regulation on family ties and childcare does not find application. Indeed the phenomenon of homosexual cohabitation, although increasing in the Italian society, still raises highly controversial issues, especially concerning the possible parental role of partners.

The fact of cohabitation between individuals of the same sex acquires relevance as of the registration of residence within the purview of the notion of family in 1989 Residence Registry regulation (previously mentioned), the broad formulation of which encompasses "a group of people connected by (…) affective ties, living in cohabitation". Furthermore, a few regional acts open the way to the relevance of homosexual relationships with reference to the access to Residential Public Buildings. Among the subjects composing the families entitled to apply for the allotment of public housing, these provisions include, within the notion of family, "other persons not bound by consanguinity or relative-by-marriage ties, provided that the concerned relationship

[76] Although not explicitly foreseen, many provisions on the family in both statutes and the Constitution imply a heterosexual relationship by making explicit reference to procreation. See **D'Angeli, F**., *supra*, note no. 69, p. 178.
[77] Constitutional Court, judgement of 18 December 1987, no. 561, in *Foro Italiano*, 1989, I, 2113, ff. The exercise of this right does not find limits in the legal system, except in case of its display in public (Article 529 of the Criminal Code).

has a stable character and aims to mutual moral and material support".[78] Moreover, the idea of the existence of an obligation to mutual moral and social support with homosexual relationships, similarly to what affirmed in the case of *de facto* families, has been advanced by national courts.[79] From the necessary explanation of the legal position of relationships not based on marriage, the following considerations derive, regarding the right to family unity under Italian immigration law.

Although *de facto* families bear a specific *status* under Italian law, Article 29 of the Aliens Act recognizes the right to family unity to the only families based on marriage, by providing that reunification applies only to aliens with their "not legally divorced spouse". The same seems to apply to the foreign unmarried partners of Italian or EU-Member States nationals.[80] On the other hand, the right to reunification with a not married partner finds indirect accomplishment as a consequence of the recognition of the right of lawfully resident minor children to be joined by their natural parent (Article 29, section 6 of the Aliens Act).[81] Moreover, the relationship of *de facto* families seems to acquire relevance, if we consider a few recent decisions of first instance District Courts. In Rome District judgement of 21 October 1998, concerning the expulsion of a stateless woman of Rumanian origin, living with her partner and descendants, the judge held that the cohabitation with her legally staying partner, adult

[78] Article 3, section 2, Emilia-Romagna Regional Residential Public Building Act; Article 3, section 4, Lazio Regional Residential Public Building Act; Article 2, section 3 of Campania Regional Residential Public Building; Article 2, section 4, Lombardy Regional Residential Public Building Act; Article 2, section 4, Veneto Regional Residential Public Building Act; Article 3, Piemonte Regional Residential Public Building Act, *supra*, previous note no. 44. Article 34, section 4, Liguria Regional Residential Public Building Act, 28 February, 1983, no. 6; all in *Leggi Regionali d'Italia*, De Agostini Giuridica, 1999 cd-rom.

[79] Florence Tribunal, 11 August, 1986, in **D'Angeli, F**., *supra*, note no. 69, p. 182.

[80] Article 1 and 5*bis* of President of the Republic decree no. 1656/1965, supra, note no. 62, provides the right of abode to the only *spouse.*

[81] Article 29, section 6, Aliens Act: "(…) [E]ntry shall be permitted to the natural parent of a lawfully resident minor child if the concerned parent will prove, within one year up from entry to Italy, the accomplishment of housing and income requirement as set in section 3". This provision apparently finds its origin in Constitutional Court judgement of 17-26 June, 1997, no. 203, in *Gli Stranieri*, 1997/2, p.154, declaring the "unconstitutionality of Article 4, act no. 943/1986 as for the part in which it does not provide the right to residence to the non EU foreign parent of his/her minor child, lawfully resident in Italy with the other parent, unmarried partner of the applicant".

son and grandchildren stands as a further reason to recognize applicant the right of abode, i.e. in order to preserve the existing family ties.[82]

Although we do not have notice of Italian courts' judgements on aliens' right to family unity involving homosexual relationships, we may argue that the (limited) relevance of such relationships under Italian law, as previously introduced, may affect aliens, as well, since the fundamental right to sexual freedom shall be recognized to anyone.[83] Instead, no such limitations are set by the law to the applicability of the extended concept of family under Residence Registry regulation or Regional Residential Public Buildings Acts providing access to public housing. Quite on the contrary, Article 40, section 6 of the Aliens' Act provides that lawfully staying aliens "have the right to access, on a par with Italian nationals, to habitations of Residential Public Building" and other forms of support for renting or buying a house. Moreover, the necessary novelties introduced to 1989 Residence Registry regulation for the registration of immigrants, do not touch upon the notion of family of Article 4.[84]

The concept of family under Netherlands family reunification law underwent considerable changes as a consequence of the jurisprudence of the European Court of Human Rights (set up by 1950 Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms). During the last fifteen years, the Netherlands Courts abandoned the restrictive idea of a family unit composed of the only spouse and minor age children and endorsed the view after which the relationship between parents and adult children, grandparents and grandchildren, brothers and sisters, uncles/aunts and nephews/nieces entail relevant family ties, provided that a factual relationship exists, e.g. psychological or material dependence. Moreover, cohabitation in a parental relationship is no longer seen as a necessary requirement for being granted the right to prolonged stay.[85]

[82] Rome District Court, III Civil Law Division, 21 October, 1998, no. 34781 (Bunescu), in *Gli Stranieri*, 1999/1, p. 33.
[83] As stated by the Constitutional Court, supra, note no.77.
[84] Article 15, Implementing Regulation.
[85] See, *infra*, § III.5.2.

Not married partners come into consideration with the Netherlands regulation on family unity. The law provides that both married and unmarried partners have reached the age of eighteen.[86] In principle, it is not relevant whether it is a matter of a heterosexual or homosexual relationship. Netherlands regulation goes further to this regard than the Strasbourg Court does. Indeed, the Commission and the European Court of Human Rights affirmed that authorities' action persecuting homosexual relationships represents a violation of private life, but never recognized these relationships as family life.[87] Although Netherlands law does not recognize homosexuals the right to marry, homosexual relationships fall within the concept of family. Following the recently introduced provision of relationship registration (Netherlands Civil Code, Book 1, title 1A, per 1 January 1998), *more uxorio* cohabitation acquires the rank of *quasi*-marriage. Relationships registration, open to both heterosexual and homosexual couples, is meant as an alternative to marriage and affects the civil state of individuals.[88]

The Aliens Circular provides differences in the treatment of the right to family unity between families based on marriage and other relationships. Not married partners still result disfavored as for the accomplishment of the income requirement, since the lower standard set for married couples does not find application.[89] If we consider that the law does not allow homosexual partners to marry under civil law, we may argue that these applicants result especially disfavored, as national case law confirms.[90] The reason at the basis of the application of a different standard would be that the law sets no maintenance obligation in the case of unmarried couples. The Chamber for the Uniformity of Legal Interpretation, The Hague Court, declared that the difference in

[86] Chapter B1, under 1.1.2.1 (spouses), 3.1.2.1 (partners), Aliens Circular.
[87] We here make reference to ECHR judgements of 22 October 1981 (Dudgeon v. United Kingdom); 26 October 1988 (Norris v. Ireland); 22 April 1993 (Modinos v. Cyprus); 27 September 1999 (Lustig-Prean and Beckett v. United Kingdom), in *http://www.dhcour.coe.fr/hudoc*
[88] Unlike for marriage, registration only displays its effects between the partners. Moreover, the provisions stating rights and duties are set by the parties themselves at the moment of the registration. The effects of marriage and the distribution of right and duties are set by the law and cannot be disposed by the parties. Registered relationships ties may be dissolved by mutual consent without any judicial declaration, in **Hiemstra, A.**, 1997, "Kroniek van personen- en familierecht" in *Nemesis – Tijdschrift over Vrouwen en Recht*, 1997/6, p. 186, ff.
[89] Chapter B1, 3.2.3, Aliens Circular. See, supra, § II.1.2 Sufficient/adequate income.
[90] Litigation Division of the Council of State, 22, August 1989 in *Rechtsspraak Vreemdelingenrecht*, 1989/23; 19 July 1990, in *Rechtsspraak Vreemdelingenrecht*, 1990/20; more recently: The Hague Court, Amsterdam session, 23 October 1997, in Jurisprudentie Vreemdelingenrecht, 1997, p. 105.

treatment performed by immigration law in point of family unity between families based on marriage and *de facto* ones is justified.

> Although we have to recognize that there is an indisputable trend in our society towards considering marital and *de facto* forms of cohabitation on an equal footing, it is the opinion of the Court that the law has not underwent such developments, as yet, in order to put not marital stable cohabitation on a par with marriage and to consider any difference in legal provisions as a violation of the principle of equal treatment.[91]

The State Secretary of Justice partly modified the norms in point by extending a few exceptions to income requirement rules to homosexual couples:

> Exemption from income requirement may apply to Netherlands citizens, foreign nationals bearing a residence permit as refugees or for asylum, as well as the bearers of a permanent residence permit, provided that an obstacle is laid down by the law as to contracting marriage for the reason that their partner belong to the same sex and are
>
> - steadily unemployed or
> - are 57,5 years of age or older.[92]

This provision has been criticized for still violating the fundamental principle of non discrimination set by Article 1 of the Constitution, since: a) the language of the text leaves a broad margin of appreciation to Aliens Police Officials as to the application of this exemption; b) other possibilities of exemption to income requirement do not apply to homosexual relationships, although provided in favor of married couples, such as in case of single parents caring for younger children than five years of age.[93]

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[91] The Hague Court - Chamber for the Uniformity of Law Interpretation (Rechtseenheidkamer), 23 October, 1997, AWB 97/7899 VRWET in *Jurispudentie Vreemdelingenrecht*, 1997/24, p. 105.

[92] Interim Notice concerning the Aliens Circular 1998/24 (TBV), State Secretary of Justice Circular, 30 September 1998, in *Vreemdelingencirculaire*, Ministry of Justice - Immigration and Naturalisation Service, 1999 updated ed., Sdu Publishing.

[93] **Goudsmit, S., Lange, T. de**, 1999, "Kroniek vreemdelingenrecht", in *Nemesis – Tijdschrift over Vrouwen en Recht*, 1999/6, p. 164

Furthermore, registration of *de facto* relationships is not open to aliens' partners before family reunification procedure is fulfilled and the joining partner has obtained a residence permit.[94] This norm stands as a necessary condition for preventing that registration shall be performed with the only purpose of obtaining a residence permit.[95] On the other hand, applicants to family formation are required to produce evidence of their real intention by undersigning a Relationship Statement (*Relatieverklaring*). In case authorities will ascertain that applicants have not declared the truth, they will be prosecuted for committing forgery.[96] We may notice that, although aliens are required to sign a declaration of the "authentic reasons" of their marriage, the State Secretary still is of the opinion that Relationships Registration shall not apply to reunifying couples, as a measure for preventing "registrations of convenience".[97]

Under the Aliens Circular, only exclusive relationships of unmarried partners are regarded as relevant within the scope of *de facto* families.[98] Relevant relationships, either homosexual or heterosexual, must be stable ones. Cohabitation, as an evidence of stability, is explicitly required by the Aliens Circular. In practice, a notarial cohabitation contract must be signed and the partners must register at the same address. [99] The following considers the dependent legal position of family members from the *status* of the holder of the main residence permit and the effects of regulation on acquiring an independent permit.

[94] "Since registration may only take place on basis of a residence permit in The Netherlands, the regulation on entry requirements within the scope of family formation shall not be affected by the norms on relationship registration. No special entry procedure is called into being as for foreign nationals to register in The Netherlands. Unmarried individuals willing to start cohabitation in The Netherlands shall comply with the requirements set by the Aliens Circular, Chapter B1, under 3. No anticipation shall be admitted of a future registration of cohabitation in The Netherlands", Interim Notice concerning the Aliens Circular 1998/24, *supra*, note no. 92.
[95] Kortmann Commission advisory opinion to the State Secretary of Justice, 14 May, 1997, Parliamentary Proceedings of the First Chamber, EK 1996/1997, 23 761, no. 157d; Interim Notice concerning the Aliens Circular 1998/24 (TBV), supra, note no. 92.
[96] Chapter B1, under 3.1.2.1, Aliens Circular.
[97] Cfr. Chapter B1, under 3, supra, note no. 94.
[98] Chapter B1, under 3.2.2, Aliens Circular.
[99] Chapter B1, under 3.2.1, Aliens Circular, expressly requiring that the partners shall start cohabitation immediately after the recalled partner has entered the country.

II:3 THE DEPENDENT LEGAL POSITION OF FAMILY MEMBERS.

The reason at the basis of the right of residence of many foreign nationals lies in their relationship with a citizen or an established foreigner living in the considered country. In these cases, the renewal of that residence permit will depend on the continuation of the concerned relationship. In principle, if the spouse or partner, as the holder of the main residence permit, dies or loses his/her right of abode, if the relationships collapses or the required cohabitation in any case stops, the family member will no longer be entitled to stay. Thereafter, family members' residence permits are also called *dependent residence permits*. Examples thereof, to be found in both Italian and the Netherlands immigration law, are residence permits issued within the scope of family reunification (formation) and thus regard aliens' family members. We will offer a few considerations on the implementation of the principle of dependence in the Italian and Netherlands law. We will start dealing with the latter, since its comprehensive regulation and far reaching debate will offer us the means to better evaluate the developments and effects of Italian regulation.

The Netherlands.

Until 1994, spouses, partners and children under 18 years who were admitted for family reunification with a Netherlands national or an alien holding a permanent residence permit, were automatically granted a statutory right to permanently remain in the country, after they had lawfully resided for one year. The rule changed by January 1994 and family members admitted afterwards no longer receive that secure *status*. Family members are instead required to apply for renewing their temporary residence permit each year, until they are entitled to a permanent resident permit under the general rule (i.e. after five years of residence).[100]

The factual ending of the relationship brings, in most cases, to the loss of the right to residence in the country. In case the concerned foreign national wants to continue

his/her stay in the country, a permanent residence permit must be requested to the competent authorities. By processing the applicant's request, the concerned administration will not apply the same norms as to the first entry, since the factual situation to be handled is different. Indeed, the foreigner indeed has lived in the country for considerable time and has developed ties with the local community. As a consequence, a different regulation has developed finding application in case of the prosecution of stay of spouses, partners, children after the ending of their relationship with the holder of the main residence permit. This regulation finds its basis on the principle of the respect of humanitarian grounds in cases of severe hardship or international obligations.[101]

After marriage/relationship has factually or legally ended, an independent residence permit may be granted in case

- the marriage has had a minimum duration of three years, and
- the concerned foreigner has lawfully resided in The Netherlands for at least one year.[102]

A different rule applies in case of relationships, which are not based on marriage. Foreigners admitted on the basis of a *de facto* relationship with a Netherlands national or established alien, may be granted an independent residence permit

- if the relationship has ended after a minimum time of three years up from the moment they were admitted entry for family formation, and
- the applicant has lawfully resided in the country for at least three years.[103]

We may observe that a stricter requirement is laid down in this case, since not married partners – in particular homosexual partners, for which marriage is not allowed by the law - have to reside for three years in the country, instead of one as for spouses, in order to be granted an independent residence permit. The Council of State has confirmed that the difference in treatment between married and *de facto* families does

[100] Chapter B1, under 2 (families based on marriage), under 4 (*de facto* families), *supra*, § I.1.
[101] **Kuijers A., Steenbergen, J.D.M**., Nederlands vreemdelingenrecht, *supra*, note no., p. 166;
[102] Chapter B1, under 2.3, Aliens Circular.
[103] Chapter B1, under 4.3, Aliens Circular.

not clash with the constitutional principle of non-discrimination (Article 1) since the different provision is founded on the objective fact that no law-set obligation applies to *de facto* relationships.[104] The provision in point has been highly criticized, with particular regard to the consideration that, under Netherlands law, marriage obligation to mutual support nonetheless ceases to exist after divorce. Though the national debate that originated has not led to the demanded amendment, as yet.[105]

We shall add that, in principle, an independent residence permit may be only granted if the applicant disposes of sufficient work income on a durable basis (i.e. for one more year up from the application), at least corresponding to the minimum subsistence level for individuals, as periodically updated by the Ministry of Social Affairs and Labor.[106] If this requirement is not met, recent amendments to the Aliens Circular introduced the opportunity to grant a residence permit for one year, during which the concerned person may achieve the work income required.[107] At the end of the so-called "search-year", if the applicant has not accomplished the said requirement, the only possibility to obtain a residence permit will still depend on the co-operation of the spouse or partner. If the partner/spouse disposes of a work income at least corresponding to the minimum subsistence level for families, as set by welfare authorities, the dependent residence permit will be renewed.[108] If the spouse or partner does not dispose of sufficient income or enjoys welfare benefits, a permanent residence permit may only be granted after ten years of residence.[109] As a consequence, the dependence period may last ten years.

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[104] Council of State, Litigation Division, 22 August 1989, in *Rechtsspraak Vreemdelingenrecht*, 1989, 23.
[105] **Blokland, E. van**, "Onverantwoordt (vreemdelingen)beleid: Evaluatie gezinshereniging getoetst", in *Nemesis – Tijdschrift over Vrouwen en Recht*, 1995/5, p. 109; **Kuijers A., Steenbergen, J.D.M**., Nederlands vreemdelingenrecht, supra, note no., p. 166.
[106] As per 1 July, 1999, the standard was set at 1064,58 Netherlands Guilders per month by the Ministry for Social Affairs and Labor, in State Secretary for Justice Interim Notice concerning the Aliens Circular 1999/15, in *Vreemdelingencirculaire*, loc. cit., note no. 40. The provision on temporary labor-income, following 1.2.3.3 applying in matter of entry clearance within family reunification (formation), also applies in the case in point, after Interim Notice concerning the Aliens Circular 1997/5, in *Vreemdelingencirculaire*, *loc. cit*., note no. 40.
[107] Chapter B1, under 2.3.1, Aliens Circular.
[108] As for the applying income standard, see, *supra*, note no. 55.
[109] Article 13, Aliens Act *juncto* Chapter A4, under 7, Aliens Circular.

If the mentioned conditions with regard to the duration of marriage/relationship are not met, the applicant is not recognized a right to prolonged stay.[110] Exceptions may be made with respect to the circumstances of the particular case, namely to possible "consequences of severe hardship, directly deriving from the ending of the concerned relationship".[111] The application of this principle has been quite restrictive, especially in less recent times. The Council of State recognized that return to the country of origin as a divorced person may be particularly difficult for women, as a consequence of the hostile legislation and social punishment in the concerned state. On the other hand, the exception to the rule did not find application in these cases, since "the circumstances of the appellant do not differ from those of other women living in Morocco and experiencing divorce".[112] Furthermore, reality showed soon that marriage or relationships dissolution and the following loss of the residence permit particularly affected women who escaped from their husbands/partners before the three-years-term, as a consequence of having suffered battery. The strict application of the "dependence principle" brought national courts to deny the right to a residence permit in most cases, since the appellant (and her children) "had not yet developed sufficient ties with the Netherlands community, so as to justify her right to an independent residence permit".[113]

The results of researches on the disruptive effects of the dependent *status* of family members within family relationships and the action of organizations for the support of immigrant women gave rise to an animated debate.[114] Moreover, the

[110] Chapter B1, under 2.2 (marriage duration shorter than three years) and under 3.2 (relationship duration shorter than three years).
[111] Chapter B1, under 2.4, Aliens Circular.
[112] Council of State, Litigation Division, 9 November 1986, in *Rechtsspraak Vreemdelingenrecht*, 1986, 26; Council of State, Litigation Division, 11 November 1990, in *Rechtsspraak Vreemdelingenrecht*, 1990, 32.
[113] See, e.g., Council of State, Litigation Division, 8 September 1987, in *Migrantenrecht*, 1988, 1; Council of State, Litigation Division, 3 February, 1989, in *Rechtsspraak Vreemdelingenrecht*, 1989, 4; 24 August 1989, in *Rechtsspraak Vreemdelingenrecht*, 1989, 13; 23 January 1990, in *Rechtsspraak Vreemdelingenrecht*, 1990, 2; 7 May 1990, in *Rechtsspraak Vreemdelingenrecht*, 1990, 9, in the case of a Polish woman who escaped the household with her children and started living in a women's refuge center as a consequence of serious maltreatment by her mentally disturbed husband.
[114] Research Reports: 1988, Recht om te blijven, recht om te leven, Komitee Zelfstandig Verblijfsrecht Migrantevrouwen; **Blokland, E. van, Vries, M. de**, 1992, De afhankelijke verblijfstitel van migrantenvrouwen, Nijmegen Wetenschapswinkel; 1994, De gevolgen van het vreemdelingenbeleid inzake gezinshereniging/gezinsvorming voor nederlandse vrouwen met een niet-nederlandse partner,

European Court of Human Rights case law undisputedly influenced the decisions of national courts.[115] The more extensive concept of "family life" was accepted and brought to the recognition of the right of abode in favor of divorced foreign nationals with their children of minor age even if the conditions set by national law were not satisfied.[116] We shall then recall the significant introduction in the Aliens Circular of criteria for evaluating the cases in which an independent residence permit may be granted for humanitarian reasons. These directions will allow reaching a more consistent attitude of the competent administrative authorities through the country. Accordingly, Chapter B1, under 2.4 (married women), 4.4 (partners) of the Aliens Circular stipulates:

> In the case of separated women, a balance between interests shall be achieved, whereon a *combination* of the following factors will weigh:
>
> - the position of single women in the country of origin;
> - the social position of the concerned woman in the country of origin;
> - the question whether in the country of origin and according to the standards of that state, reception may be plausibly expected;
> - the caring function of the concerned applicant with respect to children who were born and/or bred in The Netherlands;
> - evidence of (sexual) violence within marriage, which has led to the marriage dissolution (these circumstances may be proved on the basis of trials-reports, medical reports, statements of women's refuge centers (…).

Chapter B1, under 2.4.1 (4.4.1) goes further, by assuring that the residence permit of women escaping from violent husbands/partners and living in women's refuge

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Lawine Fundation; **Jansen, S.**, 1995, "Nieuwe verslechteringen rechtspositie vreemdelingen", Politiek Forum over discrepantie tussen vreemdelingenwet, emancipatie- en minderhedenbelied. Further literature, among others: **Walsum, S. van**, 1992, "Geen emancipatie maar afhankelijkheid: de rechtspositie van de buitenlandse vrouw in Nederland", *Ars Aequi*, 1992/41, p. 197, ff**; Brink, A. van den, Jüngen, J.**, 1995, "Thuisgeweld tegen vrouwen, het Meldpunt vrouwenopvang Amsterdam, 1991-1994", in *Tijdschrift voor Criminologie*, 1995/4, p. 41, ff; **'t Hoen, E., Jansen S.**, 1997, In de hoek waar de klappen vallen, Amsterdam University Emancipation Commission Publishing.

[115] See, *infra*, Part II, § 5.2.

[116] With reference the so-called "Berrehab situatie", *infra*, § III.5.2; see Council of State, Litigation Division, 18 September 1990, in *Rechtsspraak Vreemdelingenrecht*, 1989, 24; Zwolle District Court, 14 May 1990, *Kort Geding - Rechtsspraak van de week*, 1990/27.

centers shall not be withdrawn, on the basis of the (provisional) interruption of their marriage/relationship.
Considerations with regard to the implementation of the principle of dependence of family members' residence permits in the Italian regulation will follow.

Italy.

The Italian legislator first expressed the principle of the dependence of the *status* of immigrants' family members in 1986, when, for the first time, an Immigration law act was enacted especially regarding the right of abode of non-EU foreign workers. Article 4 of 1986 Immigration Act no. 943 laid down, indeed, that "the residence permit granted to aliens' family members has the same duration as that of the holder of the main permit".[117] No other norms provided for the possible consequences on the legal position of family members of facts affecting the main right of the spouse, holder of the main residence permit. The only exception was set in section 7 of the same article which, similarly to what stated by the previously described norms of the Netherlands Aliens Circular, affirmed that the foreign spouse of an Italian citizen may be granted an independent residence permit after three years of marriage and residence in the country.

The lack of a legislative provision left a broad margin to the discretional power of the competent administrative authorities. In case of divorce, death of the spouse, or loss of his/her right of abode, family members actually risked to loose their right to residence, thus to face illegality and expulsion. We may argue that the restrictive conditions to access legal remedies against authority's decrees affecting the condition of immigrants are the main cause of the limited case-law to be found on the legal position of immigrants' family members.[118]

117 Law act no. 943, 30 December 1986, "Norms in matter of employment and treatment of non-EC immigrant workers and in matter of tackling illegal immigration", in Gazzetta Ufficiale no. 8, 12 January 1986.
118 Although 1998 Aliens Act (Article 30, section 6) has exceptionally introduced a more viable legal remedy for the only authority's decisions affecting family members, the main legal remedy against authority's decrees revoking or denying other types of residence permit (or visa) still remains judicial review, by means of an appeal to the Regional Administrative Tribunal. The access to this legal remedy

Anyway, we may observe that Administrative Tribunals, by recognizing legally separated (but not yet divorced) spouses the right to prolonged stay, confirmed that the appellant shall be granted the right of abode for family reasons until the definitive end of marriage. The mere fact of submitting a separation application to the judge has not been regarded as a sufficient ground for revoking a dependent residence permit by the Administrative Tribunal of Lazio in 1993. The court held that "if we were to accept the adverse opinion, we would confer the holder of the main residence permit a public power, i.e. the power to grant or revoke a residence permit to the foreign spouse". Moreover, the Court affirmed that only a formal act of marriage dissolution shall bear the consequence of revoking a residence permit.[119] By the same token, the Administrative Court of the Region Val D'Aosta stated in 1994 that a separated wife still had the right to reside on the ground of a residence permit for family reasons. Although legal separation actually preludes to divorce and the dissolution of marriage, it has the mere effect to release marriage ties. "The withdrawal and expulsion of the concerned spouse conflicts with the *ratio* of separation provision under Italian family law, since marriage ties still exist and the common life of spouses could be re-established".[120]

1998 Aliens Act repeated the principle of dependence of family members from the legal position of the holder of the main residence permit and added more norms regulating the *status* of the bearers of such permits. Italian law makers seem not to share the view expressed by Administrative courts and put on a par the provision of legal

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still remains the most expensive among first instance remedies, amounting to about 800,000 Italian Lire as of the initial net registry dues for lodging an appeal. Expenses raise to 2-3 million Italian Lire, as an average, if we include the lawyer' fee. Moreover, the duration of the trial, although it averages the regular Italian duration of trials, still reaches two years of time or more. The access to free legal aid is still very limited, since the law requires the cooperation of the diplomatic or consular representatives of the appellant's country of origin, which in most cases is extremely difficult to obtain. Many consular offices refuse cooperation with their citizens if lacking of a valid residence permit or are involved in criminal law trials. Information collected at Trento Administrative Tribunal of the Autonomous Province clerk office, November 1999.

[119] Administrative Tribunal of Lazio, I Div. 3 May, 1993, no. 653 (Salimsakova), in *Gli Stranieri*, 1994/1, p. 45.

[120] Administrative Tribunal of Valle D'Aosta, 4 October, 1994, no. 33 (El Idrissi) in *Gli Stranieri*, 1995/1, p. 164. The same view was expressed in Administrative Tribunal of Sicily, 2 December, 1996 (Dhurata), no. 1841, in *Gli Stranieri*, 1997/2, p. 161.

separation and divorce, in order to recognize the right to an independent residence permit. Similarly to what Article 4, 1986 Immigration Act provided, Article 30, section 3, states that "Residence permits issued for family reasons have the same duration of that of the alien to which family reunification has been granted following Article 29, and shall be renewed together with the main one". 1998 law-makers seem not to neglect the question of the dependent position of family members by stating that, in case of legal separation or marriage dissolution, the concerned residence permit may be converted into a residence permit for employment, independent labor or study (Article 30, section 5).[121] On the other hand, any other consequence of the events that may affect the dependent situation of spouses is left to the decisions of the authorities of Local Aliens Police Departments.

November 1999 published Implementing Regulation lays down directions to the competent local authorities that may positively affect the condition of spouses by recognizing the right to obtain an independent residence permit at the act of renewing the old one. On one hand, Article 14 of the Regulation reproduces and explains 1998 Aliens Act provision, under which the aliens admitted to the country for family reasons are allowed to access the labor market on a par with other workers. On the other, it states that the competent authority, "at the moment of renewal, shall issue a residence permit according to the factually performed activity". We may then observe that the provision in point is not clearly expressed, since a) it deals, at the same time, with the conversion of more types of residence permit at the same time, to which apply a very different regime; b) if the possibility of obtaining an independent residence permit were to be introduced, the consequence would follow that the conversion of a residence permit for family reasons would not be only allowed in case of marriage dissolution, as Article 30 of the Aliens Act provides, but in any case that the bearer of such a permit performs the activity of labor or study *at the moment of the renewal*. We may then argue that, if the duration of a dependent residence permit is to be calculated on that of the spouse, the period of dependence from the position and the choices of the holder of the main residence permit would have a longer duration in case the spouse holds a longer

[121] Article 30, 1998 does not repeat Article 4, section 1, 1986 Immigration Act, after which reunified family members could be granted a labor authorization only after one year of residence in the country,

residence permit (set at a maximum of four years, granted to foreigners who, after having resided for two years, dispose of an open-ended labor contract). These spouses would be then disfavored in comparison with the spouses of the holders of residence permits of shorter duration.

December 1999 Circular, concerning the Implementing Regulation in point, confirms the same provision by merely repeating its text. We may wonder if the different tenet of the implementing norms than that of the law provision stands as a better means of accomplishment or, instead falls at odds with that. Parliamentary proceedings do not help, since the norm at Article 30, section 5, here considered, already contained in the law draft advanced by the government, has been advanced and supported in the more general context of the whole law draft and the specific question of the consequences for the bearers of dependent residence permits does not result from the discussion.[122] Moreover, 1999 Implementing Regulation and the following circular are acts of the executive bodies, so that public confrontation and discussion did not take place for its enactment.

If we consider Article 14 of the Implementing Regulation as a means of completion of the legal provisions regulating the *status* of the bearer of residence permit for family reasons, namely Article 30 of the Aliens Act, we could then come to the conclusion that the two norms do not regulate the same situation (i.e. the only case of conversion of a dependent residence permit to an independent). To explain: Article 14 applies in those cases a family member performs labor (or study). When the date of his/her dependent permit will expire, the new residence permit will be issued with respect to the activity actually performed (i.e. an independent residence permit for the reason of labor or study). Article 30 instead provides for the cases in which the spouse does not work (or is not enrolled in a school/university).[123] If the effects of marriage

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rather states their right to a labor authorization (Article 30, section 2).

[122] Parliamentary proceedings no. 373/2, XIII Legislature, March 1998, IV Part - Chamber of Deputies, Part VIII – Senate.

[123] We may observe that the rule applies to all bears of residence permits, including the cohabiting foreign relatives of Italian EU-Member States citizens. As a consequence, the norm in point would have the effect to release these foreign nationals from dependence, which, on the other hand, stood as the very reason of their entry (Article 28, Aliens Act, supra, note no. 62).

lapse as a consequence of legal separation, divorce or death, the spouse may nonetheless be recognized a right of abode. Article 30, section 5 would stand as a further protection of the *status* of family members who (are not bearers of a permanent residence permit and) do not perform work outside the family in case they loose the main reason for which their residence permit was originally issued, i.e. when cohabitation stops after legal separation or marriage dissolution.

We will privilege this interpretation of the norms in point, rather the previously described. Still, we have to observe that an explicit expression of the favorable attitude of the legislator should find a more appropriate site within the text of the Aliens Act, rather than in its Implementing Regulation and in the subsequent circular. As a consequence, Local Aliens Police Departments through the country take different stands by adhering to the former interpretation and denying the conversion of dependent residence permit unless in case of marriage dissolution, or, on the contrary, granting the conversion to an independent residence permit, according to the activity performed by the applicant.[124]

Cohabitation seems to be set as a necessary condition for granting family members a right of residence. On the one hand, Article 29, section 2 of the Aliens Act affirms that adequate housing is a prerequisite for family reunification, so that the joining family member and the concerned applicant will live in that habitation. On the other, Article 5, section 5, stipulates that "the residence permit, or the renewal thereof, shall be refused and, if the permit has already been issued, shall be revoked, when the required conditions for entry and stay in the State territory lack or later lapse (…)". We may argue that, if cohabitation is a prerequisite for family reunification, a residence permit issued for family reasons may be withdrawn in any case cohabitation stops. Similarly to what considered with respect to Netherlands regulation, serious consequences may derive to spouses victims of maltreatment within the household. Indeed, if cohabitation is to be regarded as a prerequisite after Article 5, section 5, the

[124] For the former attitude, we shall mention, e.g. Trento, Udine, Trieste, Bolzano and Bari Aliens Police Departments; for the latter: Roma, Bologna, Milano, Napoli Aliens Police Departments (which used to apply the more favorable rule also before the enactment of 1999 Implementation regulation). Information provided for the mentioned Local Aliens Police Departments as of December 1999 and January 2000.

absence of an *ad hoc* corrective to the application of the principle of dependent status of family members would cause the loss of the right to residence for spouses escaping from violence. The absence of an explicit norm in order to prevent the disruptive effects of revocation, in case cohabitation fails, leaves the solution to the discretional power of Local Aliens Police Offices.

We will privilege the described point of view, although we are aware that a different interpretation may be advanced, as follows. A principle of non-revocation of spouses' residence permits in case of factual separation was indeed affirmed by Administrative Courts in the early 90's, with regard to Article 4, Law Act no. 943/1986. Moreover, no obligation to cohabitation is generally laid down by the Italian civil code for spouses. Thus, cohabitation would not be a necessary condition for spouses' right of residence until marriage ties officially cease to exist. Yet, we are quite aware that the recalled case law is based on regulation which is no longer in force and thus cannot provide for an effective corrective to the consequences of the dependence principle. Furthermore, the general principle, under which the cohabitation of spouses is not needed, seems to find an exception in 1998 Aliens' Act, especially regulating immigrants' right to family members (in point, Article 29, section 2). Again, we support the view after which an explicit norm should introduce an exception to revocation for factually separated immigrants' family members. This would enable immigrants to access an effective means of protection, to be easily recalled before the competent authorities.

Part III

THE INFLUX OF INTERNATIONAL LAW

The principles set by international law norms relating to the protection of the right to family unity and, in general, of the rights recognized to migrant workers and their families will be briefly introduced. We will describe if and how those norms access the domestic legal systems of Italy and The Netherlands. Afterwards, our attention will be devoted to the influence of international law on the practice of national courts and in general on the development of immigration law in Italy and in The Netherlands.

III:1 PRINCIPLES OF INTERNATIONAL CUSTOMARY LAW RELATING TO THE RIGHT TO FAMILY UNITY.

Although there has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he/she submits to local conditions with benefits and burdens and because recognizing a special *status* would be contrary to the principles of territorial jurisdiction and equality (so-called *standard of national treatment*), it must be observed that it is agreed on all hands that certain sources of inequality are admissible.[125]

Due to the effect of generally recognized norms of international law, after which there is no obligation to admit foreigners to the state territory, rather a discretional power to admit or expel them, the admission, expulsion and liability of aliens represent a matter of domestic jurisdiction. Internal economic policies and aspects of foreign policy may result in further restrictions to the economic activities of aliens, such as accessing to the national labor market. On the other hand, the power of expulsion must be exercised in good faith and in respect of human rights standards. These must represent guide principles and a limit while interpreting the concept of *ordre public*, at the basis of the exercise of state powers. In certain conditions expulsion may constitute genocide or may infringe the principle of non-discrimination, which is part of customary law.[126]

Measures like denial of entry clearance or expulsion of the concerned foreigner may affect the right to family unity as they may entail forced separation of family members. Violation of family unity may be considered an inhuman treatment, as a violation of generally recognized principles of human rights, according to the International Court of Justice.[127] Moreover, the requirements and limits under which family reunification may be granted by state authorities may be so strict to cause an unjustified discrimination of the right to family unity of aliens if compared to that enjoyed by national families. During the last fifty years the idea of the free exercise of state powers (*selon son bon plaisir*) towards aliens has thus given way to the relevant

[125] **Browlie, I.**, 1990, "Principles of Public International Law", Oxford, Clarendon Press, p. 523.
[126] See **Browlie, I.**, *supra*, note no. 125, p. 521, ff.
[127] International Court of Justice, June, 27th, 1986, (Nicaragua II), I.C.J. Reports 1986, par. 217-220, in **Boeles, P.**, 1992, "Inleiding in het internationaal, Europees en nationaal migratierecht", Utrecht, Nederlands Centrum Buitenlanders, p. 19.

interest of aliens to settle in the state territory they choose. States may obstacle this interest, but their decision must be taken in accordance with the law and must be based on justified reasons, as well as they must guarantee judicial safeguards to the concerned alien.[128]

Many states have supported the idea of an *international minimum standard* ("a moral standard for civilized states" including the respect of "fundamental human rights"), as opposed to the principle of national treatment. Yet, we cannot regard the affirmation of this principle as undisputed and sufficiently precise to form a generally recognized norm of international law.[129]

A host state is clearly responsible if its authorities injury the alien visitor or resident in the state territory, for example in the form of brutality by police officials. Still, for the question of the respect of family unity, it is much more usual to find cases where the alien is harmed by acts or omissions, which are on their face merely a normal exercise of the competence administrative bodies and government of the host state. Procedures and safeguards relating to the right of family unity may be (and actually result) affected by forms of administrative malfunction and the difficulty to access judicial protection. These situations include the malfunction of judicial organs dealing with acts which constitute breaches of the local law affecting the interest of the alien, so-called *deni de justice*, which we may describe as "unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement".[130] Moreover, we may regard as injuries to aliens individuals acts like general legislative restrictions, not directed at aliens as such, affecting e.g. the ownership or enjoyment of foreign-owned assets.[131] On the same footing may account other facts, like considerable delays in implementing national law affecting immigrants through the various areas of the country, as well as the setting up of regulation relating

[128] **D'Orazio, G.**, 1992, Lo straniero nella costituzione italiana: asilo - condizione giuridica – estradizione, Padova, Cedam, p. 145.
[129] See **Browlie, I.**, *supra*, note no. 126, p. 525; **D'Orazio, G.,** *supra*, note no. 128, p. 137.
[130] 1929 Harvard Research Draft in **Browlie, I.**, *supra*, note no. 126, p. 529.
[131] See **Browlie, I.**, *supra*, note no. 126, p. 523.

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to aliens condition by way of unpublished administrative instructions, which apparently results in denying access to basic information.

Other relevant principles contained in generally recognized norms of international law concern the obligation of states to respect the aliens assets and positions outstanding from the individual's capacity to contract, including testamentary capacity, marriages and divorces.[132] The issue of the effect recognized by domestic legal systems to international customary law must now be considered.

III:2 BASIC PRINCIPLES GOVERNING THE RELATIONSHIP BETWEEN INTERNATIONAL CUSTOMARY LAW AND DOMESTIC LAW.

III:2.1 The Italian legal system: constitutional principles.

The basic tenets of the rank recognized to international law are to be found in the fundamental law, i.e. the Constitution of the Italian Republic entered into effect in 1948 and subsequently partly modified, according to the particular process set by Article 138, confirming the rigid character of the Charter.

We may number the Italian Constitution among those upholding international custom and, on the other hand, generally lacking provisions that would specifically regard the implementation of international treaties. Quite on the opposite side, the Netherlands Constitution disregards reference to customary law while adopting forward-looking and strongly internationally oriented provisions on international treaties. We shall endeavor to explain the reasons of such departing attitude.

We may observe that the Italian Constitution (1948) upgrades the role of customary international law by reading the text of article 10, sections 1 and 2:

[132] See **D'Orazio, G.,** *supra*, note no. 128, p. 157.

(1) “Italy's legal system conforms to the generally recognized principles of international law”.
(2) “The legal *status* of foreigners is regulated by law in conformity with international rules and treaties”.

The proclaimed deference of the newly reconstituted Italian State to the general standards of behavior agreed upon by the majority of member states of the international community apparently finds its origin in the intent of the founding fathers to extend the introduction of democracy to Italy’s international conduct. Moreover, democratic and catholic-pluralistic strains in the Constituent Assembly contributed to a wider opening to the international community. On the other hand, the opposite view of other constitution-makers led to qualify the Italian acceptance of international law as much as possible, so much so that any reference to treaties was ruled out and in addition the acceptance of general international law was qualified by taking up the Weimar Constitution’s terminology, which spoke of “generally recognized” rules of international law.[133]

Let us now focus on the wording of Article 10, section 1: it states that the Italian legal order shall conform to international law. Thus, the whole Italian legal system must comply with general international law, by explicit command of the Constitution. Three main consequences follow. First, the Italian legal system has to adjust itself continuously to general international rules, since the reference of Article 10, section 1 was not made only to the law existing at the time when the Constitution was passed, but also to the evolving rules of international law. As soon as a customary rule of international law comes into existence, a corresponding rule evolves in the Italian legal system. Conversely, as soon as a general rule is terminated or changes in content, the corresponding rule of international law comes to an end or acquires a new scope and import. It is for each court to detect whether a rule of customary international law is applicable in the case at issue, and what its content is. In Italy the power to pronounce on international law is not conferred to one special body, although the Constitutional

[133] **Cassese, A.**, 1985, “Modern Constitutions and International Law” *Recueil des cours de L’ Académie de droit international de la Haye*, 1985, III, p. 370, ff.

Court has the final say on the matter. A second consequence entails that the Parliament has a duty to refrain from passing legislation contrary to general international law. By the same token, the Constitutional Court is ordered to quash any statute contrary to an international custom. Thirdly, Article 10, section 1, issues a command to the State officials and agencies responsible for the conduct of foreign policy: they are all duty-bound to refrain from entering intro agreements derogating from those general rules of international law which fall into the category of *jus cogens*. We shall remember to this purpose 1980 Vienna Convention on the Law of Treaties under which treaty rules contrasting with peremptory norms of general international law would be null and void at the international level (articles 53, 64, 71).[134]

According to the wording of article 10 of the Constitution, the order of law sources within the Italian legal system may be described as follows:

- the Constitution, standing as the fundamental norm, leading the different legal formants to a unity;
- the generally recognized principles of international law;
- international treaty law, as ratified by act of law;
- National acts of law.

Although it has passed judgements on many Italian statutes allegedly conflicting with customary rules of International law, the Constitutional Court has always concluded that the asserted international rule did not in fact exist, or that the challenged Italian statute did not run counter to it. Moreover, the Court never took the view that a customary rule could only be applied by Italian Courts and other State bodies if it had been previously accepted by Italy on the international level. The Court implicitly held the view that consent or acquiescence by a large majority of states, regardless of whether Italy belongs to such majority, is sufficient for a rule to be considered applicable in the international community, hence binding on Italian domestic authorities. The Court has not specified whether, in its view, the unconstitutionality follows from the constitutional *status* of the rule of international law or from its

[134] See **Cassese, A.**, *supra*, note no. 133, p. 372; **Cassese, A., 1975,** *Commentario della Costituzione*, (Branca, G., dir.), sub art. 10, Bologna, p. 479, ff.

infringing upon the command of Article 10, section 1. Whatever the formal justification, any statute disregarding international law must fall under the axe of the highest judicial body. [135] On the question of the possible contrast of an international customary rule with constitutional norms, the Court clearly stated that "no adjustment of domestic law may ever allow the violation of the fundamental principles of our constitutional order".[136]

III:2.2 Constitutional neglect of international customary law: the Netherlands Constitution.

Many states do not have constitutional rules proclaiming their compliance with international custom. Among them, a group of Western countries like The Netherlands (but also France, Spain and Sweden) which, although they have lately changed their constitutions, do not make provision for general international law. In modifying their constitutional charter, as a result of fundamental political and social transformations, The Netherlands neglected the reference to international customary rules, which, on the face of it, would seem to be motivated by the resurrection of a sort of nationalist outlook. Conversely, the same Parliament has adopted momentous provisions in the field of international affairs by issuing forward-looking and strongly internationally oriented provisions on international treaties, as we shall see later on.

We may wonder what are the reasons for this departing attitude towards different sources of international law. We may recall the explanation suggested by authoritative jurist Antonio Cassese, after which:

> …[T]he main reason for this in Western countries lies in the changes that international customary law is currently undergoing. It is well known that a few basic rules of the international community are under strong attack by a conspicuous segment of its members; their general binding force is therefore in a sort of *limbo*: some states claim that they are still applicable to the whole international

[135] See **Cassese, A.**, *supra*, note no. 133, p. 373.
[136] Constitutional Court, no. 48/1979 in **D'Orazio, G.,** *supra*, note no. 128, p. 139.

community while others flatly reject their applicability and rely upon other international standards.[137]

Forced with new trends in international law making, many western states would feel on the defensive and almost instinctively react to international pronouncements with extreme caution. Therefore, they prefer to avoid giving automatic and immediate binding value to international rules in their municipal law and much less do they wish to upgrade international customary law so as to give it priority over ordinary legislation.

III:3 INTERNATIONAL TREATY LAW RELEVANT TO THE ISSUE OF THE RIGHT TO FAMILY UNITY.

As already considered with regard to international customary law, the exercise of states power concerning the denial of entry clearance, further residence or expulsion of aliens may affect in the right to family unity. Various international treaties contain provisions relating to the right to family unity, such as 1950 Council of Europe Convention for the Protection of Human rights and Fundamental Freedoms (Articles 8 and 12), 1966 United Nations International Covenant on Civil and Political Rights (Articles 17 and 23), 1990 International Convention on the protection of the Rights of All Migrant Workers and Members of their Families (Articles 4, 14, 17, section 6), 1959 United Nations Convention for the Protection of the Rights of the Child (Articles 7, section 1, 9, 10, 16, 18, 19, 20, 21, 22).

Among all of the existent provisions, we shall focus on the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in particular, on article 8, because relevant case law on other sources still lacks and for its contribution in the development of a human rights culture in the immigration law of the legal systems that we are taking under consideration.

[137] See **Cassese, A.**, *supra*, note no. 133, p. 383.

On the other hand, we shall not forget mention of the significant role of 1961 European Social Charter. As the counterpart of the European Convention on Human Rights, which secures civil and political rights, 1961 European Social Charter lays down standards governing the main human rights in working life as well as in social protection. In particular, articles 18 and 19 require of the Contracting Parties certain minimum safeguards for migrant workers and their families. In our view, the mechanism set up for performing control on the implementation by the States Parties bids well for a new way of influencing domestic legal systems by opening to international law principles an access to national law-making. Article 1 through 17, while not specifically referring to them, also apply to nationals of Contracting Parties as lawfully resident aliens within the territory of the Contracting Party concerned. This implies that foreigners shall enjoy the rights guaranteed by the aforementioned provisions on an equal footing with nationals. Thus dual protection - both at a national as well as at an international level - may apply in some instances, as certain matters covered by article 19 have parallels in articles 1 through 17. The issues addressed by the Committee of Independent Experts monitoring the application of the Charter must be recalled, with particular regard to the question of determining which family members are eligible to be admitted for purposes of family reunion and assessing the various conditions and restrictions which contracting parties attach to it.[138]

Further mention is to be made of 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women for its relevance in banning discrimination of women in immigration law norms affecting the family. Namely, national immigration law on family reunification is based on the principle after which the established foreign national is personally and financially responsible for the joining family members, who will be granted a *dependent* residence permit. Since most joining family members result to be women and most victims of family harassment are female, this regulation results discriminating against women (mostly) as wives of established immigrants bearing the main (independent) residence permit. This situation openly conflicts with the convention in point. Article 3, indeed, requires States Parties to take

[138] Boucaud, P., 1996, Migrant workers and their families protection within the European Social Charter, Human rights Social Charter monographs – no. 4, Strasbourg, Council of Europe ed.

all appropriate measures, in all fields, including legislation, to ensure the full development and advancement of women.[139] The restrictive national legislation, deeming spouses to a dependent condition from their partner, leads to exacerbate power relations in families and results in limiting the participation of women to political, social, economical and cultural life.[140] The influence of international treaty law on the Italian and Netherlands legal systems will be further described, but before we will offer a survey of the main principles governing the enforcement of international treaties in domestic systems considered.

III:4 RELATIONSHIP BETWEEN INTERNATIONAL TREATY LAW AND DOMESTIC LAW.

A survey of the constitutions of the concerned legal orders will allow us to observe that they seem to stand at opposite poles as for the accomplishment of obligations once taken up by entering into international treaties. We shall endeavor to detect the reasons therefore and the effects of such provisions.

III.4.1 The Italian Constitution.

The Italian Constitution may be numbered among those ignoring the question of implementation of international treaties.[141] Although the Italian Republic has entered into many international agreements which are certainly based on its own will, the lack of constitutional provisions on the compliance of the resulting obligations brings to light the wish to reserve to the State the right to disregard treaties in exceptional circumstances. From the constitution-making debate it results apparent that the framers

[139] Text of article 3: "States Parties shall take, in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".
[140] **Walsum, van, S.**, 1996, VN-Vrouwenverdrag en het Nederlands vreemdelingenrecht, Amsterdam, Clara Wichmann Instituut.
[141] See **Cassese, A.**, *supra*, note no. 133, p. 395, who includes also most socialist countries, Third World countries, the United Kingdom, Switzerland, Belgium (at least until 1963) and Canada.

wished the domestic authorities to preserve some freedom of action in case the observance of international agreements should run counter to national interests.[142]

Another reason lies in the very mechanism ruling the process of the formation of international obligations. Instead, Italian treaty-making power is distributed between the executive and the legislature to the effect that the latter must participate in the conclusion of treaties any time they touch upon matters falling within the purview of law making. When the legislature intervenes, the treaty is usually implemented as a result of a legislative act which orders all the persons and State agencies concerned to apply the treaty into municipal law. It follows that, at least in these cases, the treaty comes to enjoy the *status* of ordinary legislation in municipal law; it consequently possesses a rank that allows it to take effect in the whole national legal order and with respect to all persons and State officials concerned. As a result, the principle *lex posterior derogat priori* finds application.

According to the opinion advanced by distinguished jurist Quadri, treaties which have been regularly concluded are to be applied by State authorities because of a norm implied in the above mentioned Article 10, section 1, of the Constitution. ("The Italian legal system conforms to generally recognized rule of international law"). Quite on the opposite, the Constitutional Court constantly supported the view that treaties are not included among the norms implemented in Italy under the said paragraph.[143] The Constitutional Court has not departed from that interpretation, although the possibility of a different conclusion with regard to special types of treaties, such as the EEC-EU treaties and the European Convention for the Protection on Human Rights, could be inferred from the wording of two later decisions.[144]

The question of what rank has to be recognized to the said Convention remained for long time unanswered. The Court limited its decision to the statement after which

[142] See **Cassese, A.**, *supra*, note no. 133, p. 396.
[143] Up from judgement no. 32/1960, in **Cassese, A.,** 1975, Commentario della Costituzione, (Branca, G., dir.), sub art. 10, Bologna, p. 461; **Conforti, B**., 1997, Diritto Internazionale, Napoli, Editoriale Scientifica, p. 312.
[144] Judgements no. 144/1970 and no. 232/1975 as observed by **Gaia G.,** in **Jacobs, F.G., Roberts S., (ed.)**, 1987, The effect of Treaties in Domestic Law, London, Sweet & Maxwell, p. 87, ff.

"these conventions have to be regarded as a source of obligations and responsibilities for the States Parties, but they cannot become effective without a specific legislative act being adopted for that purpose" (Judgement no. 69/1976).[145]

Moving from the affirmation that Article 10, section 1 does not encompass norms of international treaty law, the Court consistently drew the conclusion that international treaties are to be recognized the same rank as national statutes in the Italian system of law sources. Accordingly, a subsequent national statute abiding from a ratified and executive international treaty would not conflict with the constitution (judgement no. 323/1989).[146]

A promising turn in the Constitutional Court's attitude may be discerned in judgement no. 10 of 12 January 1993. The Court found that two provisions included in the European Convention on Human Rights and in the Covenant on Civil and Political Rights (both implemented in Italy by acts of law), were not abrogated by a subsequent provision of the 1988 Italian code of criminal procedure, with which they were not in conformity. The Court thus disregarded the ordinary criterion (i.e. the succession of laws in time: a provision having the force of law implicitly abrogates any previous provisions having the same force and conflicting with it), stating that human rights treaty provisions are "rules arising from a source to be connected to an atypical competence and, as such, they cannot be abrogated or modified by provisions having the force of ordinary law". The asserted preeminence of international treaty law does not seem to lie on a principle of hierarchy between law sources, rather on a criterion of *competence*. As a consequence, regulation introduced with international conventions would not be abolished or modified by subsequent domestic law. Instead, its object pertains to an area of competence deducted from the application of domestic law.[147] This new attitude seems to take after the idea applying in matter of the relationship between domestic and European Community rules. Indeed, since 1984, the Constitutional Court applied the principle that EC law norms must be considered by

[145] **D'Orazio, G.,** *supra*, note no. 128, p. 177.
[146] **D'Orazio, G.,** *supra*, note no. 128, p. 178, **Conforti, B**.,. *supra*, note no. 143, p. 313.
[147] **Cannizzaro, E.**, 1993, "Gerarchia e competenza nei rapporti fra trattati e norme interne", in *Rivista di Diritto Internazionale*, 1993/2, p. 351, ff.

themselves: there is no longer a question of receiving and transforming provisions pertaining to different legal systems into Italian law. This has led to the conclusion, today accepted by Italian courts, that European Community provisions have priority over domestic provisions.[148]

The Court identified another cornerstone of the principles governing the relationship between international treaty law and domestic law by affirming that the State shall not exercise its treaty-making powers in violation of the fundamental rights as recognized by the Constitution (judgement no. 280/1985). Thus no treaty may override constitutional norms. [149]

III.4.2 The Netherlands Constitution.

The Constitution of the Kingdom of the Netherlands (originally put into effect in 1953), in its subsequent versions as amended in 1956 and 1983, bids well for a representative example (as well as rare: the only other example would be that of 1975 Constitution of the Republic of Surinam) of openness to international treaty law.[150] 1953 Constitution, revised in 1956, laid down the principle after which treaties amending the constitution can only be concluded after obtaining the approval required for constitutional amendments (article 63).[151]

From the debates of constitution-makers and legal literature we can draw the interpretation that this provision only applies in cases where some doubt arises as to the "intrinsic" constitutionality of a treaty before it is concluded. If no doubt arises and at any rate the procedure under article 63 is not followed, and it then appears that the treaty actually includes provisions running counter to the constitution, the treaty ultimately may override the constitution, according to article 60 provision.[152] This norm provides that "Statutes in force within the Kingdom shall not apply if this application

[148] See **Scovazzi, T.**, *supra*, note n.183, p. 69.
[149] **D'Orazio, G.,** *supra*, note no. 128, p. 176.
[150] See **Cassese, A.**, *supra*, note no. 133, p. 409.
[151] It has to be noticed that 1995 amendments to the Netherlands Constitution does not touch upon the norms under examination in the present chapter.
[152] See **Cassese, A.**, *supra*, note no. 133, p. 410.

would be incompatible with provisions of agreements which are binding upon anyone and which have been entered before or after the enactment of such legislation".[153]

1983 Constitution contains an actually corresponding rule with art. 63 at article 91:

(1) The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament. The cases in which approval is not required shall be specified by Act of Parliament.

(2) The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.

(3) Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament only if at least two-thirds of the votes cast are in favor.

National law thus rules the internal effect of international treaties. Up from the early 1900s, the idea prevailed in parliamentary discussions that international treaties have to be regarded as binding to all state bodies and citizens, without needing any further domestic provision to put them into effect. The Supreme Court confirmed this view in 1919 (*Aachen Border Treaty* judgement, Supreme Court, March 3rd, 1919). Later debates within the Parliament put forward different opinions on the matter, among which the idea to limit the scope of this principle to the only treaties which are "binding to all persons", i.e. directly lay down rights and duties to individuals and legal persons".[154]

This led to the wording of art. 66 of 1953 Constitution, still hold in art. 93 of the present text, where this restriction finds expression: "Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents, shall become binding after they have been published". By detecting

[153] **Kortmann, C. A. J. M.,** 1983, De Grondwetsherziening 1983, Deventer, Kluwer, p. 256; **Burkens, M.C.B.**, 1982 "The complete revision of the Dutch Constitution", *Netherlands International Law Review*, 1982, p. 323.

[154] **Akkermans, P.W.C., Koekkoek, A.K., ed.**, 1992, De Grondwet: een artikelsgewijs commentaar, Zwolle, W.E.J. Tjeenk Willink, p. 863, ff.

the proceedings of parliamentary activity reforming in more occasions the Constitution up to nowadays, experts undisputedly affirmed that

> It is certainly in the opinion of the legislator that no transformation is required in any form for international norms to enter into force within the national legal system, neither for written, nor for unwritten international law norms. The Netherlands accept by virtue of an unwritten rule of national law and/or by virtue of jurisprudence the adoption system for the whole international law.[155]

As a consequence, the wording "binding on all persons" must be understood as "universally binding norms". Furtherly, Article 93 states a duty for the government to publish international law rules as to assure that they promptly enter into force within the Kingdom. The citizens cannot be bound to obligations deriving from international law norms before these norms are duly published.

We may affirm that the Netherlands system takes in international treaties without any formal recognition act and that this way treaties directly exert their effect within the national system. This phenomenon has been called *adoption*. Quite on the opposite side stand those systems, like the Italian one, where an international treaty has to be converted into an act of municipal law before being recognized any internal effect. This mechanism has been called *transformation*. [156]

While article 91 actually corresponds to the previous Article 63, a novelty can be discerned in the rule governing the relationship between international treaties and national legislation. Article 94 stipulates as follows:

[155] **Akkermans, P.W.C., Koekkoek, A.K., ed.**, *supra*, note no. 154, p. 866.
[156] We agree with **Akkermans, P.W.C., Koekkoek, A.K., ed.**, *supra*, note no. 154, under article 91, where the terms "transformation/adoption" are preferred to those of "monistic/dualistic systems" because the former would better describe the fact that both systems actually recognize the different nature of the two law sources considered, i.e. national and international law. Thus it would not be precise to use the term "monistic" for a system that indeed distinguishes the nature of effective international treaties (as put into effect by the introduction of a specific act of national law) and national statutes.

> Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

The said provision thus affirms the primacy of international treaties on national statutes. By considering the wording of Article 94, two main questions arise. The first one concerns the identity of the body entitled to perform control on the applicability of national statutes that may run counter international treaty norms. The Supreme Court answered this question as early as 1959 by explaining that it is a duty falling into the competence of the Parliament to perform adjustment of national statutes in case of incompatibility with international treaties. In other words, Netherlands courts are not entitled to question the validity of treaties. The Supreme Court added that the judge is instead entitled to perform a limited control, i.e. "concerning the possible contrast between national law and the self-executing provisions of treaties" (*Nyugat case*, Supreme Court, March 6th, 1959). The judge has a duty not to apply national law if running counter to the recalled norm of international law.

The second question regards the meaning of the expression "binding on all persons", which identifies the scope of the judicial control. We may wonder if this phrase stands for "self-executing", as the aforementioned judgement would suggest. Though most authors observe that the two expressions have different meanings. By saying "self-executing", we would indicate that an international norm is directly binding and that no further rules must be laid down to put it into effect within the national legal system, no matter to which bodies the considered norm is directed. With the expression "binding on all persons", we mean "directed to both private and legal persons". Thus, the conclusion may be reasonably advanced that Article 94 limits the competence of the judge to the cases in which it is a matter of international treaty norm that both is "binding to all persons" and is self-executing.[157] A clear and last answer to the question if an international treaty is "binding to all persons" in the sense of article 94 is still hard

[157] **Erades**, **L.,** 1963, "Poging tot verwarring van de 'self-executing' knoop", *Nederlands Juristenblad*, 1963, p. 845; **Kortmann, C.A.J.M.,** 1988, "De rechter en de wet", in *Regelmaat*, p. 133; **Sondaal, H.H.M.**, De Nederlandse verdragspraktijk, The Hague, M. N. Pub., **Tammes, A.J.P.,** "Een ieder

to find. On the other hand the Supreme Court stated in 1986 that it is the judge who decides in the actual case as well as the judge will decide if it is more appropriate to perform control *in abstracto* or *in concreto.*[158]

Although the language of the text appears to proclaim the primacy of international legislation with respect to statutory rules, while the constitution would remain ineffective, authoritative Netherlands jurists argue that the 1983 Constitution does not depart from the previous text as far as the relations between international treaties and the Constitution are concerned. Accordingly, treaty provisions – if self-executing and "binding to all persons" - would take precedence both over statutory law and the Constitution.[159]

The position of resolutions by international institutions within the national legal system may vary according to the specific source considered. The Supreme Court stated in 1989 that the sentences of the European Court of Human Rights, since they contain interpretations of the European Convention of Human Rights, have to be regarded as a part of the "all persons binding" treaty they refer to (Hoge Raad, November 10th, 1989). By the same token, full legal force is acknowledged to the resolutions of the United Nations Security Council ex art. 25 of the United Nations' Charter, the resolutions of the Organization for economic Cooperation and Development and the resolutions (The resolutions of the institutions of the European Union are recognized internal effect following art. 92 of the Constitution, which provides that "Legislative, executive, and judicial powers may be conferred on international institutions by or pursuant to a treaty").[160]

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verbindende' verdragsbepalingen", *Nederlands Juristenblad*, 1962, p. 71 and 89; in **Akkermans, P.W.C., Koekkoek, A.K., ed.**, *supra*, note no. 154, p. 878.

[158] The analysis of the different conclusion, to which leads judicial control following article 94 in matter of EEC-EU, law falls outside the scope of our dissertation.

[159] See **Cassese, A.**, *supra*, note no. 133, p. 411.

[160] **Alkema, E.A**., 1985, Toepassing van de Europese Conventie voor de rechten van de mens – Preadvies voor de Vereniging voor de Vergelijkende Studie van het Recht van België en Nederland, Zwolle, W.E.J. Tjeenk Willink, p. 30; **Akkermans, P.W.C., Koekkoek, A.K., ed.**, *supra*, note no. 154, p. 871.

The present observations will allow us to better understand to which extent domestic legal system allow international law to exert their influence on national regulation affecting the right to family unity, with particular regard to Article 8 of the European Convention on Human Rights.

III:5 THE INFLUENCE OF ARTICLE 8 OF 1950 COUNCIL OF EUROPE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ON DOMESTIC LAW.

III:5.1 Relevant provisions of the Convention: scope of Article 8.

The protection of the family figures at more than one place in the Convention. Article 12 guarantees the right to marry and found a family, while Article 8 affirms that everyone has the right to respect for his (her) family life and that interference with an existing family unit is permitted only under a few determined circumstances. Article 2 of the First Protocol deals with the right of parents to ensure children's education in conformity with their own religious and philosophical convictions. We shall focus our attention on Article 8 provision because of its influence on national case law here considered and for its high potential in the development of an international protection of the family.

The right to respect for family life, as guaranteed by article 8, has as its principal element the protection of the integrity of the family. We may wonder what, under the Convention, constitutes a family and under what conditions interference is authorized. Generally, the Commission and the Court have considered the family to include more than husband, wife and children. The Court, in particular, held that "The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life".[161] Relationships between brothers and sisters, taken together

[161] European Court of Human Rights, B. v. United Kingdom, 8 July, 1987, in **Jacobs, F. G., White, R.C.A.**, 1997, The European Convention on Human Rights, 2nd ed., Oxford, Clarendon Press;

with those between parents and children, are also covered.[162] The relationship with children born out *de facto* marriages also fall within the scope of Article 8, since they form part of the family unit from the moment of their birth and by the very fact of it. Family ties exist even where the parents are not living together at the time of the child's birth.[163] In some circumstances, relations with grandparents may be protected under Article 8.[164] More remote relationships are generally not close enough to constitute family relationships protected by the said norm. Engagement does not in itself constitute family life, but the relationship between a prisoner and his fiancée falls within private life, as meant by Article 8, section 1. The same is true for homosexual couples.

Action by state authorities, such as expelling a person from a country, refusing to admit someone or denying a permit for prolonging their stay, may result in a separation of family members. State action in itself cannot be regarded as a breach of the Convention as it does not guarantee any right to reside in a particular country. Though the Commission and the Committee of Ministers stated that the question might arise, whether, for instance, a refusal of admission to the country does not infringe some other right which is guaranteed. Thus, while the right to reside in a particular country is not, as such, guaranteed by the Convention, the Commission has frequently examined complaints of expulsion or of refusal of admission in relation to Article 8, where such a measure might disrupt the family unit.[165] There have been, for example, many cases where the applicant complains of being separated from his wife as a result of his expulsion from the country where they lived together, or as a result of his not being allowed entry or permanent admission to the country in which she lives. In such cases, the Commission has first examined whether there existed an effective family life between the members of the family concerned. This normally requires the existence of

[162] European Court of Human Rights, Moustaquim v. Belgium, 18 Feb., 1991, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161.
[163] European Court of Human Rights, Berrehab v. The Netherlands, 21 June, 1988, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161.
[164] European Court of Human Rights, Kroon and others v. The Netherlands, 27 Oct., 1994, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161.
[165] East African Asians v. United Kingdom, Decisions of the Commission, 10 &18 Oct. 1970; Committee of ministers resolutions DH (77)2, DH (94)30, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161.

two elements: a close relationship and one between persons who have been living together at the time of, or shortly before, the alleged interference.[166]

The relationship between an uncle and a niece or a nephew is not sufficiently close, at least in the case where they are not and have not been living in the same household.[167] The only cases, which have been regarded as constituting a close relationship for this purpose, are the relationship of husband and wife, and of parent and child where there is some situation of dependence.[168]

Along with the necessary existence of the two elements named above (closeness of the relationship and cohabitation at the time of the alleged interference), the Commission would next enquire whether the family unit could not be preserved by establishing the family's residence in the country to which the concerned member is to be expelled, or from which he/she seeks admission. In that case, the host State would not interfere with the right to respect for family life. Such a limitation in the notion of interference is necessary, for otherwise there would be an effective prohibition on expulsion, and of refusal of admission, whenever family life was established.

The conclusion seems to be that the Convention does not guarantee the right to family life in a particular country, but only an effective family life as such, no matter where. This principle, however, appears to be modified in the case of relationships between parents and their children, if the former are not admitted to the country where the latter have their residence. It would seem to follow that, while the admission of a person to permanent residence may not imply any obligation to admit the spouse (present or future), it may imply an obligation to admit any dependent children. Where a marriage ends, immigration issues can arise. In the *Berrehab case*, a Moroccan national became divorced from his Netherlands wife; the couple had a daughter who was born after the couple had ceased living together, though Mr. Berrehab saw her regularly over

[166] See **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161, p. 180.
[167] App. 3110/67, X. v. Federal Republic of Germany, 19 July, 1968, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161, p. 181.
[168] Apps. 2991/66 and 2992/66, Alam, Khan and Singh v. United Kingdom, 15 July, 1967, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161, p. 181.

a number of years. Following divorce, he was then refused a residence permit and complained that this violated his family life under Article 8. The Court held that Article 8 was applicable and rejected an argument that Berrehab could travel from Morocco to The Netherlands to see his daughter. The Netherlands authorities relied on the exception in paragraph 2, in the interest of public order. The Court concluded that the exclusion of Berrehab in these circumstances was excessive in protecting public order and therefore constituted a violation of Article 8.[169]

The interest of preserving family life may also be relevant when decisions to deport someone arise. In the *Moustaquim case* the applicant, a Moroccan citizen who had lived in Belgium since the age of two, was successful in arguing that deportation would interfere with his family life by depriving him of contact with his parents and brothers and sisters.[170] The following observations reveal the impact of these principles on national courts' decisions.

III:5.2 The influence of article 8 on The Netherlands case law.

Article 8 eventuated to significantly influence the practice of Netherlands courts. In less recent judgements already used to encompass both control regarding violation of national law and of Article 8 of the European Convention on Human Rights. Over time this provision assumed in an independent role in Netherlands case law so that nowadays check is performed on the basis of a scheme developed by the European Court of Human Rights (*Abdulaziz, Cabales and Balkandali* v. United Kingdom, ECHR, 28 May, 1985). This development has also influenced national regulation (Aliens Circular, art. B1/11). We could sketch it out as follows:

- the judge should first of all determine if it is matter of family life as meant by art. 8 of the Convention. If not, no further art. 8 ECHR-check will take place;

[169] European Court of Human Rights, Berrehab v. The Netherlands, 21 June, 1988, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161, p. 185.
[170] European Court of Human Rights, Moustaquim v. Belgium, 18 Feb, 1991, in **Jacobs, F. G., White, R.C.A.**, *supra*, note n. 161, p. 185.

- if it is a matter of family life, the question follows if there was interference from any public authority after art. 8, section 2;
- if it is a matter of interference, the judge will consider if this interference may be justified on the basis of the conditions set in art. 8, section 2. If so, appeal will be rejected;
- if it is not a matter of interference, the judge may still consider that a positive obligation for state authorities may still derive from the circumstances of the particular case and entry clearance or further stay must be granted.[171]

Since 1985, this scheme has evolved under the action of the Netherlands jurisprudence. We shall attempt to describe the recent developments of immigration policy and case law, with particular attention to the question of a possible positive obligation deriving from Article 8 and the definition of the circumstances that may justify interference.

The European Court of Human Rights' interpretation of the concept of "family life" and of the expression "to factually belong to the family unit" has significantly influenced the decisions of national courts, faced with a quite different concept of family unit, according to national statutes. Indeed, according to Netherlands family reunification policy, only an exiguous number of family members belong to a family unit: the spouses or partners and the children. By performing check under Article 8 of the Convention, the Netherlands courts applied a broader concept of family as developed by the Strasbourg Court. We shall take an example. Unlike in the Convention, cohabitation is a strictly required condition to qualify the existence of factual family ties under Netherlands regulation, in order to grant a permit for prolonged stay. Though Netherlands Council of State affirmed that the fact that the partners or spouses chose to lead a "loose relationship", thus not including cohabitation, does not *per se* mean that factual family ties have ceased to exist.[172]

[171] **Vrouenraets, M.J.A.**, 1998, Artikel 8 EVRM: de stand van zaken, *Migrantenrecht*, 1998/1, Utrecht, Forum – Instituut voor Multiculturele Ontwikkeling, p. 3.

[172] In the case Gyabaah, The Litigation Division of the Council of State (5 Oct. 1993) affirmed in the context of an homosexual relationship that a "loose relationship", which does not include cohabitation, still is a sufficient tie for the existence of family life. The same argument may be considered in the cases of an heterosexual relationship and of a family based on marriage. See **Dijk, van, P.**, 1994, "Toelating en

A child born out of wedlock still belongs to the family, and respectively to both natural parents. Cohabitation is not required in this case, as well. Divorce between parents does not change the child's family ties with both parents, but parent and child should maintain frequent contacts. From the Berrehab judgement the Netherlands Council of State acquired that frequency can be not too intense.[173] Following judgments stated that family ties do exist, although no maintenance allowance is paid. On the other hand, the respect of maintenance order cannot be regarded as a sufficient element to ground family ties, since the factual relationship bears a decisive importance.[174]

As a consequence of the Strasbourg Court's extensive notion of family ties, not limited to the original Netherlands law-set "spouses and minor age children-unit", the Netherlands judges recognized the existence of family ties between parents and adult children, grandparents and grandchildren, brothers and sisters, uncles/aunts and nephews/nieces, provided that a factual relationship exists, e.g. psychological or material dependence.[175]

The concept of factual relationship stands as a parameter in the question of evaluating what state action has to be regarded as interference. Since 1991 the Litigation Division of the Council of State (confirmed in 1995 by the Chamber for the Uniform Interpretation of the Law) has taken the view that it is not a matter of interference but in the case where authorities withdraw a residence permit to family members already settled in the country. That means in practice that there can be interference in the only cases of refusal of prolonged stay and not in matter of first entry of family members. This attitude corresponds to the stand taken by the European Court of Human Rights as

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verblijf van vreemdelingen in Nederland; de eerbiediging van het familie- en gezinsleven op grond van artikel 8 EVRM", *Nederlands Juristen Comité voor de Mensenrechten Bulletin*, 19 – 1 (1994), Leiden, p. 12.

[173] Litigation Division of the Council of State, 23 March, 1992 (Hamach) in **Dijk, van, P.**, *supra*, note n. 172, p. 13

[174] Litigation Division of the Council of State, 18 June, 1991 (de F. Brito) and 28 Feb. 1991 (Boumaaza) in **Dijk, van, P.**, *supra*, note n. 172, p. 13.

[175] Litigation Division of the Council of State, 8 April, 1991 (Kaya), 14 Feb 1989 (Ramautar), 11 June 1992 (Bachri), 18 June 1993 (Kandemir), 18 June, 1991 (Ho-Sam-Sooi and Wilson), 13 July 1989 (Zidi), etc…in **Dijk, van, P.**, *supra*, note n. 172, p. 16.

early as 1985.[176] The practice shows that in principle, before granting entry clearance to family members (provisional residence visa), authorities evaluate if the conditions for a residence permit are met by the applicant.

Article 8, section 2 states that interference of state authorities may be justified under certain circumstances. State action must be prescribed by or in accordance with the law (so-called "rule of law test") and has to result "necessary in a democratic society, in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others". While European Court case law still does not give a clear interpretation of the said norm, in Netherlands jurisprudence the value of the economic well-being of the country acquired higher importance among the justifying reasons. In particular, a balance shall be reached between the public (economic) interest and the individual interest of the concerned alien. Relevant factors to this purpose are the frequency of contacts between family members, the age of the child, the financial situation of the parents and the distance between The Netherlands and the country of origin.

From the European Court judgement on the Berrehab case, the attitude derived in Netherlands courts after which interference is not justified in the case of the refusal of residence permit for prolonged stay to a parent who has intense contact with his/her (legally residing) child, provided the relationship has come into being during the legal stay of the applicant. This has been called the "Berrehab situation".[177]

The definition of the protection of public order as a reason for justifying interference does not take a precise shape, and the evaluating factors identified by the Strasbourg court range from the existence of ties with the country of origin to the seriousness of the offence and to possible mitigating circumstances.[178]

[176] European Court of Human Rights, Abdulaziz, Cabales and Balkandali v. United Kingdom, ECHR, 28 May, 1985, in **Vrouenraets, M.J.A.,** *supra*, n.171, p. 4.
[177] See **Vrouenraets, M.J.A.,** *supra*, n.171, p. 5.
[178] See **Vrouenraets, M.J.A.,** *supra*, n.171, p. 5.

Following the command contained in article 8, section 2, i.e. not to interfere with family life, the question arose whether a positive obligation would derive for states to take measures to better respect family life. Again, the idea of a positive action has been first introduced by the European Court in the *Abdulaziz case,* and then developed in the cases *Gül* and *Ahmut*. By assuming this concept, the Litigation Division of The Council of State gave origin to a constant jurisprudence after which in the cases where it is not a matter of interference (i.e. first entry), still authorities should evaluate the circumstances of the case ("reach a fair balance") that could nonetheless ground a positive obligation to grant entry and stay. [179] Experts argument that Netherlands case law has taken a restrictive attitude, over time, by identifying a whole set of circumstances in which no positive obligation arises. Taking after the European court judgement in the Gül case, Netherlands judges held that no positive obligation may derive to the State unless "objective obstacles" prevent to establish family life in the country of origin, or obstruct the concerned foreigner to receive there the health care treatment needed.[180] Moreover, the State Secretary affirmed that in cases where objective obstacles give rise to a positive obligation as to granting the right of abode, authorities should verify that applicant, *within a reasonable period*, comply with the requirements laid down for family reunification. By the same token, authorities should detect if, *within a reasonable period*, adverse conditions in the country of origin may have changed.[181] More recently, the Parliament stated that, by evaluating a family reunification application in presence of objective obstacles, authorities should decide on an individual basis and by considering humanitarian reasons.[182]

[179] European Court of Human Rights, Abdulaziz, Cabales and Balkandali v. United Kingdom, *loc. cit*., note n.179. To this regard, see **Steenbergen, J.D.M.,** 1997, note to judgement European Court of Human Rights, Ahmut v. The Netherlands, 28 November 1996, in *Nederlands Juristen Comité voor de Mensenrechten Bulletin*, 22 – 2 (1997), Leiden, p. 148 and **Boeles, P.**, 1996, note to judgement European Court of Human Rights, Gül v. Switzerland, 19 February 1994, in *Rechtsspraak Vreemdelingenrecht*, 1996/24.

[180] District Court Den Bosch, 1 may, 1996; Chamber for the Uniform Interpretation of the Law, 15 may 1996; District Court Haarlem, 29 Sept. 1996; in **Vrouenraets, M.J.A.,** *supra*, n.171, p. 7.

[181] 9 Sept. 1996 State Secretary letter to the Second Chamber, in **Vrouenraets, M.J.A.,** *supra*, n.171, p. 7.

The influence of Article 8 on Netherlands regulation.

November 1999 amendments to the Aliens Circular introduced chapter B1.11, containing the principles elaborated so far by national courts. The provisions lay down the three main questions that shall guide officials' in taking decisions in matter of the respect of family life:

a) Is it a matter of family life in the sense of Article 8 ECHR?
b) Does refusal to the right of residence to the concerned alien cause interference to the right to family life?
c) Is interference justified on the basis of Article 8, section 2?

Following the pattern previously described with respect to Netherlands case law, the provision in point ("it is not a matter of interference but in case authorities withdraw a residence permit to family members already settled in the country") affirms that "not granting a residence permit does not in principle cause interference". Exceptions may be made by carefully considering

1. the age of the concerned foreigner;
2. the situation of the country of origin;
3. his/her financial or moral dependence from the family members in The Netherlands and the Netherlands citizenship of family members.

Although the law reiterates the general prerequisite of cohabitation, officials are required to consider the particular circumstances of the case in order to grant a right to prolonged stay to the spouse/partner after the ending of the relationship. Particular attention shall be devoted to

- regular and frequent contact between the parent to whom the child is not entrusted and the same child;

[182] 26 June 1997 parliamentary resolution promoted by the deputies Rijpstra and Verhagen, Parliamentary proceedings of the Second Chamber (TK 1996-1997, 25386 and 19637, no. 8) in **Vrouenraets, M.J.A.,** *supra*, n.171, p. 7.

- the presence of an arrangement concerning parental access;
- the contribution to the upbringing and care of the child.

Chapter B1.11, under 2 identifies the guidelines for competent authorities to reach a fair balance between the public interest and the interest of the concerned individual, in order to ascertain, *in concreto*, if interference may be justified. The duration of the residence of the concerned person in the state territory, possible offences to public order or the dependence from the public funds are indicated as examples of important factors to be taken into account.

Specific provisions regard the cases in which the concerned foreigner is the parent of a Netherlands national child. In this case interference may only be justified if the concerned child still has not developed significant ties with the Netherlands State, and, in general, if the child is very young and still does not attend school.

In case the competent authorities regard the concerned situation as corresponding to that of family life under Article 8 of the European Convention, and interference is nonetheless considered justified, the aforementioned factors number 1-3 shall be still taken into account. This will enable the Alien Police to pay additional attention to the respect of possible humanitarian reasons of severe hardship.

III:5.3 The influence of article 8 on Italian case law.

If we keep in mind the considerations made above on the implementation of treaties in the Italian legal system, we may partly understand why Italian courts do not fully apply human rights treaties. Indeed the rank of statutory law of such treaties does not automatically permit their precedence over inconsistent legislation. Although, in principle, such precedence might be obtained by resorting to the criterion of "presumption of conformity" or that of the special (thus prevailing) character of

international treaties, in practice Italian courts are reluctant to supersede legislation in force.[183]

We may recall the words of jurist Scovazzi, describing the attitude shown by Italian courts:

> Diverse and concurring elements confirm the assumption that Italian courts prefer domestic legislation to international treaties. First, courts devise restrictive theories on the application of international treaties and tend to resort to the latter only when they are confirmed or supported by separate or domestic legislation. Secondly, when human rights treaties are applied, they are often interpreted incorrectly, according to domestic criteria of interpretation. Thirdly, the double protection for human rights – that is, protection provided both under international treaties and national legislation – sometimes results in the application of the latter to the detriment of the former. The overall picture is that (either explicitly or implicitly) domestic legislation is granted priority over international treaties.[184]

To the specific purpose of our survey, we may observe that judgements of the European Court of Human rights involving applications of non-EU nationals against Italy concerning Article 8 still lack. This absence may not be solely due to the recent character of the phenomenon of immigration to Italy, if compared to other European countries. We may instead argue that the route to international remedies remains blocked until full "exhaustion of domestic remedies" has occurred. To this regard, this route would be much longer for aliens raising their appeals against Italy, if we consider the awesome negative Italian record of decisions by the European Court (an the

[183] See **Francioni, F**., 1997, "Reflections on the Italian Experience", in **Conforti, B., Francioni, F.**, 1997, Enforcing International Human Rights in Domestic Courts, The Hague, Kluwer Law International, p. 29. In the same work, **Scovazzi, T.**, "The application by italian Courts of Human Rights Treaty Law", p. 59, quotes Constitutional Court decision No. 62 of 24 February 1992, where the Court stated bluntly that 1966 International Covenant on Civil and Political Rights "has not yet been ratified by a sufficient number of States in order to become effective as a multilateral treaty", disregarding the fact that the covenant has been in force on the international level since 23 March 1976 and entered into force for Italy by duly publication of Law no. 881 of 25 October 1977.

[184] See **Scovazzi, T.**, *supra*, note n.183, p. 60.

Commission) ascertaining a breach of Article 6 of the European Convention, as of the specific issue of the right to a fair trial "within a reasonable time".

Moving from these premises, we may consistently notice that Article 8 of the Convention is very rarely put forward by appellants and taken into consideration by Italian Courts. As a consequence, no specific attitude or trend has developed, as yet. On the other hand, there are more examples of recourse to the Constitutional Court on the ground of violation of Articles 29, 30 and 31 of the Constitution by immigration regulation, especially securing protection to the family.[185] The absence of the reference to international conventions in appeals for the protection of the right to family unity may find a (partial) explanation in the existence of traditionally recalled fundamental norms within the constitution which provide protection to the family. We may consider the following judgements as some of the rare examples of explicit reference to Article 8 of the European Convention.

The Criminal Court of Cassation judged an appeal as grounded, in the case of the expulsion ordered by a lower court on the ground of the protection of public safety.[186] By recalling the constant case law of the European Court, the Italian judge affirmed that expulsion (even if in case of a serious infringement of criminal law) caused violation of the right to respect of family life because such measure did not prove necessary in a democratic society in the sense of Article 8, section 2. The consequences of such provision did not prove proportioned to the disrupting effect of the separation of family members. With particular reference to the "necessary in a democratic society" requirement (not disputed by appellant), the Court recalled the European Court of

[185] 1948 Constitution, Article 29: Article 29 [*Marriage*] (1) The State recognizes the family as a natural association founded on marriage. (2) Marriage is based on the moral and legal equality of husband and wife, within the limits laid down by the laws for ensuring family unity. Article 30 [*Education*] (1) It is the duty and right of parents to support, instruct and educate their children, even those born out of wedlock. (2) The law states the way in which these duties shall be fulfilled should the parents prove incapable. (3) The law ensures full legal and social protection for children born out of wedlock consistent with the rights of the members of the legitimate family. (4) The law lays down rules and limitations for ascertaining paternity; Article 31 [*Family*] (1) The Republic facilitates, by means of economic and other provisions, the formation of the family and the fulfillment of the tasks connected therewith, with particular consideration for large families. (2) It safeguards maternity, infancy, and youth, promoting and encouraging institutions necessary for such purposes.

[186] Criminal Court of Cassation, 10 July, 1993, no. 2194 (Medrano), in "Gli Stranieri", 1994/1, p. 70.

Human Rights case law in point and held that interference must be based on a "pressing social need", relating to the particular circumstances of the case. Therefore, judges who ruled out the disputed order must *in concreto* ascertain if the concerned foreigner actually represents a danger to public order or national safety, since any form of presumption in this field has been banished both by the European Court of Human Rights case law and by national law.

More recently, We shall recall 5 October 1998 decision of Rome District Court (*Pretura*), in the case of an appeal against an expulsion decree issued by administrative authorities on the ground of the protection of public order.[187] The appellant, as the 24-years-old son of a Polish regularly established foreigner, objected that he had the right to join his mother as his only family member still existing. By evaluating the actual circumstances of the case, the judge decided that the interest of appellant – the right to enjoy family life with his mother, as his only family member – did prevail on the public interest, by also considering that there was no reason to regard the presence of appellant as a danger to public order. The judge thus ruled out that interference was not justified as not "necessary in a democratic society".

The reference to Article 8 of the European Convention (next to that to the Constitutional provisions protecting the family) contributed to the recognition of the right to preserve family unity and to the annulment of an expulsion decree in the case of an illegally staying woman, living in Italy with her partner, their (adult) son and grandchildren. The reference to the superior interest of the respect of family life had thus the effect to overcome the application of Article 29, providing the right to family reunification to the only married spouse.[188]

[187] Rome district Court, III Civil Law Division, 5 October 1998, no. 32727 (Skoczylas), in *Gli Stranieri*, 1998/3, p. 28.

[188] We shall add that , in the concerned case, the applicant had lost the original Rumanian nationality and, as a stateless person, missed the necessary condition of a passport in order to have a residence permit. As an illegally staying foreigner, the appellant was exceptionally recognized the right of abode as a stateless and member of a legally staying *de facto* family; Rome District Court, III Civil Law Division, 21 October, 1998, no. 34781 (Bunescu), in Gli Stranieri, 1999/1, p. 33.

Eventually, we may observe that reference to Article 8 of the European Convention is noticeably missing in the two fundamental judgements of the Constitutional Court in matter of immigrants' right to family unity. In both decisions the Court only hinted at "international treaty norms affirming the right to respect for family unity and of the minors' affective relationships".[189] More considerations will follow, with regard to the setbacks met at a State level in the way to the enforcement of treaty law.

III:6 OBSTACLES IN THE WAY OF STATE'S ENFORCEMENT OF TREATY LAW.

We will now consider a few reflections on the "reasons of the state" from the debate that has developed in The Netherlands, which could serve well in the perspective of a more internationally oriented era in Italy.

1991 Netherlands government note entitled "Insight on Legislation" is a survey on the pitfalls that frequently characterize national laws affecting human rights.[190] The analysis shows that national regulation results in putting obstacles on the way of citizens and organizations because of its uselessly complicated norms, untransparent wording and sometimes contrasting tenet with other higher rules. This all results in lack in feasibility and difficulty of enforcement.

The cause of these setbacks seems to be the following. We shall recall the complexity of law-making process: it involves many passages through different commissions and institutions, many different interests are concerned and must meet within the limits of lawfulness. This leads to the necessity of finding compromises between far apart positions as well as it requires a long time. Compromises can

[189] Constitutional Court, judgement no. 28, January 19th, 1995, in *Giurisprudenza Costituzionale*, 1995, p. 271; 17-26 June, 1997, no. 203, in *Gli Stranieri*, 1997/2, p.154, supra, Part II.
[190] Government note "Zicht op wetgeving", Parliament proceedings, Second Chamber, 1990-1991, (22008, no.1-2) in **Verhey, L.F.M.**, 1995, "Implementatie van het EVRM door de wetgever", in *45 Jaar EVRM, Speciaal nummer Nederlands Juristen Comité voor de Mensenrechten Bulletin*, 1995, Leiden, p. 103, ff.

negatively affect the consistency and effectiveness of the law (politic and governmental interests can prevail on the juridical ones) and it can happen that fundamental rights do not receive the protection that would be due according to international treaties. Inconsistency and juridical pitfalls may be due to unclear higher norms and unpredictability of judicial decisions, and so the limited knowledge in the treated matter by lawmakers. Further setback-factors are inconsistency in jurisprudence and decisions lacking in motivation. Different attitudes and suggestions concerning the same subject provide for confusion and the message comes unclear to the legislator.[191]

Though a relevant contribution to a more direct communication between international law and national lawmakers could come from international bodies set up by international treaties. We may notice to this regard that the control on the legitimacy of national law with the European Convention performed by the Strasbourg Court is very much concentrated on the analysis of the elements of the particular case. More abstract considerations concerning the contrast between the considered national norm and the principles of the European Convention could be useful for the national legislator and could prevent form repeating the same discussions in Parliament.[192]

Moreover, Article 57 of the European Convention on Human Rights, providing that every State Party should transmit a report of the implementation state of the Convention, results to be a dead letter. Indeed, States Parties very rarely reported on the national achievements with regard to the commands of the Convention. By contrast, the 1966 United Nations International Covenant on Civil and Political Rights lays down a more affective system, after which a special Committee performs controls and is very actively involved in collecting and elaborating states reports. Frequently reporting creates an intensive communication between the state and the surveillant body so that the state can update the debate in the parliament and anticipate law changings before possible sentences will be pronounced.[193] Action towards the enforcement of relevant treaty law as to the right to family unity should thus come from all involved agencies, also at an international level.

[191] **Verhey, L.F.M.**, *supra*, note n. 190, p. 108.
[192] **Verhey, L.F.M.**, *supra*, note n. 190, p. 110.

Our discourse will now briefly dwell on the existence of a European Union access in matter of immigrants' right to family unity.

[193] **Verhey, L.F.M.**, *supra*, note n. 190, p. 112.

Part IV

EUROPEAN UNION POLICIES

One of the amendments made by the Amsterdam Treaty on the European Union, which entered into force on May 1st, 1999, requires that an area of freedom, security and justice be established progressively. The Treaty establishing the European Community now accordingly provides for the adoption of measures relating to free movement of persons, in conjunction with flanking measures relating to border controls, asylum, immigration and the protection of the rights of third-country nationals. The immigration measures provided for by Article 63, sections 3 and 4, concern the conditions for entry and residence and the issuance by Member States of visa and long-term residence permits, illegal immigration and illegal residence. As a matter of completion, we shall recall the significant achievement of the European Community in matter of aliens' entry: the Member States stipulated on 15 June 1990 the Convention of Dublin to determine the state responsible for examining asylum applications as lodged in one of the Member States. Moreover, it has to be remembered that fifteen European States, among which the majority of the European Union Member States, already agreed in cooperating with regard to the abolishment of controls at their mutual frontiers, police cooperation and the institution of a uniform information system.

Before the Amsterdam Treaty came into force, Community law already contained provisions relating to family reunification of third-country nationals. The instruments governing free movement of Union citizens within the European Community apply to family members whether they are Community or third-country nationals. A Union citizen exercising the right to free movement may be accompanied or joined by his/her family. The terms for integration of the family in the host country stand as a necessary condition for the exercise of free movement in objective conditions of freedom and dignity. Apart from the situation of third-country nationals as family members of Union citizens exercising their right to free movement, Community law contains no binding rules on family reunification of third-country nationals, of refugees or of other categories of migrants. Likewise, no harmonized regulation apply to the entry and the legal position of third-country family members of Union nationals residing in their country of origin, since the mentioned provisions only apply to Union citizens exercising their right to free movement. This is the direct consequence of the absence of a community legal basis prior to the entry into force of the Amsterdam Treaty. On the other hand, the importance of family reunification had already been recognized in the European Union by Council activities before 1999.

Our survey will thus encompass the main steps taken in matter of the condition of non-EU family members of non-EU nationals and of Union nationals not exercising their right to free movement, as well as of EU nationals as migrants within European Union Members States.

IV. 1 ACHIEVEMENTS IN MATTER OF THE RIGHT TO FAMILY UNITY OF THIRD-COUNTRY NATIONALS.

The Ministers responsible for immigration recognized family reunification as a priority topic in the program of harmonization adopted by the European Council at Maastricht 1991. In 1993, the same Ministers adopted a Resolution on the

harmonization of national policies on family reunification.[194] This instrument of soft law sets out the principles which should govern the Member States' national policies (family members eligible for admission, conditions for entry and residence). It concerns the family reunification of third-country nationals residing in the territory of the member states on a basis offering the prospect of durable residence; it does not deal with the family reunification of Union citizens or third-country nationals who have obtained refugee *status*. The adopted non binding rules on family reunification, entry of students and access to the EU labor market for the employed and self-employed, as well as a Joint Action on visas for school parties. According to the principles agreed on, the definition of the family is restricted to dependent children while applications for family reunion must be made outside the receiving state. As a consequence, regularization outside the ordinary procedures is excluded.[195]

The Resolution took measures concerning family reunification: thus family formation or extended reunification fall outside the scope of the resolution. Although the agreed norms are not binding to Member States, states are morally and politically bound to take into account the content of resolutions in future legislation. Reunification allows entry of a third-country worker's spouse and of dependent children under the age set by each Member State for the attainment of majority. No other rules concern the entry of more family members. Member States may grant the right to family reunification after a determined period of residence of the concerned foreigner. Since the resolution does not mention the possibility of States to introduce a time limit after which foreign nationals cannot be recognized the right in point, national regulation setting up such limits would be contrary to the principles of the Resolution.

As to the question of converting dependent residence permits of family members into independent ones, the Resolution generally indicates that independent residence permits shall be issued "in a reasonable time". We may observe that discussion on the consequences of the dependent position of family members, namely women, did not play a significant role at Copenhagen Intergovernmental Conference. The Resolution

[194] Document SN 282/1/93 WGI 1497 REV 1.

also considers the issue of preventing the spread of marriages of convenience, by providing that Member States may adopt due controls. In cases of polygamic marriages of immigrants, the adopted measures lay down that family reunification may only regard one of the concerned wives and her children. If the children of another wife already reside in the receiving country, reunification with other children may be refused. More restrictive provisions set up at national level may conflict with the Resolution. We here make reference to the Netherlands law requiring that applicant to family reunification shall make a distinct choice from the beginning on which wife and children to recall and forbids that another wife and her children shall later join the concerned immigrant, in place of the first spouse.[196] Since the provisions contained in the described resolution are limited and many disputed questions still remain undiscussed, we shall conclude that it would be incorrect to speak of harmonization.

A first clear attempt to address the consequences for family members of the dependence *status* recognized by EU-Member States legislation was made by the European Parliament, by adopting 1987 Resolution on Women Discrimination in Immigration Law.[197] We may recall a few relevant passages:

> The European Parliament
>
> (…)
>
> 2. Calls on governments of the Member States forthwith to amend their laws governing the residence of immigrant women so that respect for family life is protected and interventions by the State in private relations between spouses is eliminated;
>
> (…)
>
> 14. Calls for non-EC nationals already resident as part of a family to be granted right of residence of the other members of their family, such as their spouse or either or both of their parents;
>
> (…)

[195] Joint Council for the Welfare of Immigrants, 1993, The Right to family life for Immigrants in Europe, London, JCWI Publishing, p. 26.
[196] Chapter B1, under 1.2.1 of the Aliens Circular.
[197] European Parliament, doc. A2-133/87, Official Journal C 305/79.

18. Calls for an immediate end to the practice of expelling migrant women if their husband returns to his country of origin or moves to another country, in case of separation or divorce, if their husbands or fathers fall sick, is imprisoned or dies, or if they are in receipt of welfare assistance; (…)

Moreover, the European Parliament considered question of battered migrant women, in particular:

22. Wishes to see foreign women enjoy the same protection from maltreatment and violence in the family as women who are EC nationals;

23. Demands that any immigrant women should be able to ask for divorce without immediately being threatened with expulsion;

24. Believes that women in such cases should be able to enjoy the same guarantees as nationals of the Member State in question.

Notwithstanding the broad consent received within the Parliament, implementation by Member States still proves scarce. We may take the example of Germany, where reunification is granted to immigrant workers with their spouse after eight years of residence and if the marriage existed for at least one year. This condition forces the couple to live apart for one year after marriage, a separation which, in German divorce legislation, is taken as an indicator of marital breakdown.[198] Britain's "Primary Purpose Rule" requires spouses to demonstrate that their marriage was not contracted for immigration purposes. The implementation of this rule has brought to bar applicants from the Indian subcontinent in 70% percent of cases in 1996.[199] Moreover, a hindrance to the accomplishment of income requirement may be represented by Member States legislation requiring that families seeking reunification be maintained by the applicant out of his/her own resources from employment or business, recourse to

[198] Polzer, C., 1995, Country Profile: Germany, in Confronting the Fortress, European Women Lobby ed., Women's Rights series, E2, Luxembourg, European Parliament.
[199] Joint Council for the Welfare of Immigrants, 1997, Immigrants, Nationality and Refugee Law Handbook: A User's Guide, London, JCWI Publishing, p. 17; SOPEMI, 1997, Trends in International Migration Annual Report 1996, Paris, OECD.

social benefits (See, e.g., the above described regulation of Italy and The Netherlands). High standards in evaluating the extent of adequate housing, while not taking as a reference the average housing conditions of citizen residents, may entail discrimination, as well as further barring from accessing the right to family unity.[200]

While restrictive policies have been pursued by national states and at an Intergovernmental level, the European Commission and Parliament have attempted to pursue a more positive role but their recommendations are not binding on individual states.[201] In parallel to the moves by the Council, the Commission's 1994 Communication on Immigration and White Paper on social policy envisaged several new measures to benefit permanently resident third-country nationals.[202] These included coverage for health care when travelling in the EU and the right to go abroad to obtain needed medical treatment in another Member State; a right to enter other EU States without visa as well as priority on job openings in other Member States, where no EU nationals or locals were available. The Commission also suggested that Member States extend rights of permanent residence to third-country residents and to their spouses and children, and supported full equal treatment in access to employment and social benefits.

In 1997 the Commission presented a proposal for a Convention on rules for the admission of third-country nationals to the Members States.[203] The aim was to provide input for the debate on immigration questions before the Amsterdam Treaty came into force with all the major institutional changes that followed it. In a preliminary declaration the Commission stated its intention of presenting a new draft directive after the entry into force of the new Treaty. The object here was to preserve the benefit of discussions on the substance of the text when producing a Community legal instrument.

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[200] See, *supra*, Part II, § 2.
[201] Joint Council for the Welfare of Immigrants, 1993, The Right to family life for Immigrants in Europe, London, JCWI Publishing.
[202] White Paper on European Social Policy, COM (94) 333, 27 July 1994, p. 28, ff. Further action of the Commission is to be found, e.g. in COM (95) 134, 12 April 1995, p. 12; Social Action Program, COM (95) 284, 26 June 1995 (health benefits).
[203] Official Journal, C 337, 7.11.1997, p. 9.

December 1998 Council and Commission Plan of Action on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice once again affirms the need of adopting, within two years of the entry into force of the Treaty, an instrument on the legal *status* of immigrants, and "rules on the conditions of entry and residence, standards of procedures for the issue by Member States of long-term visa and residence permits, including those for the purposes of family reunion" , to be prepared within five years. Moreover, it will be remembered that the Vienna European Council on 11 and 12 December 1998 urged the Council to continue work on, among other things, the rules applicable to third-country nationals.[204] We shall then recall the Cologne European Council meeting on 3-4 June 1999, where the Heads of State and Government decided that a Charter of Fundamental Rights of the European Union should be drawn up. This Charter should bring together the fundamental rights applying on a Union wide basis in order to raise their profile. Its scope should only be limited to the citizens of the union. Nevertheless, to date; no decision has been taken concerning the legal scope and the enforceable value of the Charter.

We shall here remember that specific rights of third-country nationals relating to the right of family unity and the position of family members may derive from the Community international agreements. The most substantive agreement, the European Economic Area (EEA), extends the European Union's access to Norway, Iceland and Liechtenstein.[205] Apart from the EEA, the most extensive EU agreements on migrant workers and social security are Decisions 1/1980 and 3/1980 concluded by the EEC-Turkey Association Council.[206] Rights are also awarded by other agreements, such as the Maghreb Cooperation Agreements (MCAs) with North African States; the Euro-Mediterranean Agreements (EMAs) with Tunisia Morocco and Israel; the Europe agreements with ten Eastern European States; the Partnership and Cooperation

[204] Presidency Conclusions, Vienna, 11 and 12 December 1998, point 85.
[205] Official Journal L 1/1, 1994; L 86/58 (Liechtenstein).
[206] See EEC-Turkey Association Agreement and Protocols and Other Basic Texts, 1992, Brussels, Council of the European Community; EEC- Turkey Association Agreement ("Ankara Agreement"), OJ C 113/2, 1973.

Agreements (PCAs) with former Soviet republics; the Lomé Convention.[207] Further detection of the Union agreements and derived specific rights for third-country national of certain nationalities falls outside of the scope of the present analysis.

Following the entry into force of Amsterdam Treaty and the insertion of a new Title IV in the treaty establishing the European Community relating to visa, asylum, immigration and other policies related to the free movement of persons, the Commission presented on 1st December 1999 a new "Proposal for a Council Directive on the Right to Family Reunification".[208] In the following paragraph we will briefly describe the measures to be introduced in point of the questions of

- the conditions set for accessing the right to family unity of third-country nationals and of Union nationals not exercising the right to free movement within the Union territory;
- the type of relationships recognized the right to reunification;
- the *status* recognized to family members.

1999 European Commission Proposal for a Council Directive on the Right to Family Reunification.

The European Council of Tampere (October 1999) reiterated the need to set up a more dynamic integration policy aimed at offering third-country nationals comparable rights and obligations to those enjoyed by Union citizens.[209] In December 1999 the Commission introduced a proposal by affirming the need of considering the provisions of existing Community law as regards the family reunification of Union citizens who exercise their right to free movement (see, further, § 2) as a basis for the recommended Council directive on family reunification of third-country nationals and Union citizens

[207] See MCAs with Algeria, Morocco and Tunisia, OJ L 263-264-265, 1978; EAs in OJ L 347-348, 1993; OJ L357-358-359-360, 1994;Lomé Conventions in OJ L 347/1, 1980; L 86/3, 1986; L 229/3, 1991.
[208] COM (1999) 638 final, at *http://europa.eu.int/eur-lex/en/com/dat/1999/en_599PC0638.html*
[209] October 15th and 16th 1999, Tampere (Finland), Presidency Conclusions, point 18.

residing in their country of origin. Accordingly, the declared aims of the Commission proposal are:

- to allow third-country nationals residing lawfully in the territory of the Member States to enjoy the right to family reunification, by looking forward to being treated in the same way as Union citizens;
- to recognize the respect for family life to all third-country nationals, irrespective of their reasons for opting to live in the territory of the Member States, the sole criterion being lawful residence;
- to harmonize the legislation of the Member States to a twofold purpose. First, to achieve equal treatment of third-country nationals to be eligible for broadly the same family reunification conditions, irrespective of the Member State in which they are admitted for residence purposes. Second, to overcome the existing different regulation applying to the family reunification of Union citizens with family members who are third-country nationals *in the case Union citizens do not migrate in another Union Member State*. Since they did not exercise their right to freedom of movement, the question of the right to family unity has been considered an internal situation falling under Member States competencies.

Since the Community does not have exclusive powers in matter of immigration policy, Community action must still take shape if and in so far as the objectives of the planned action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the planned action, be better achieved by the Community (Article 5 of the Treaty establishing the European Community). The Commission chose thus the legal instrument of the directive, in accordance with the principles of subsidiarity and proportionality. The prospective directive would set the guiding principles while leaving the member States free to choose the form and methods for the implementation of these principles in their legal systems and national context.

Despite the opening declaration, according to which the scope proposed directive shall not be confined to certain categories of third-country nationals ("the sole criterion is lawful residence"), the Commission soon limits the application to the only

third-country national holding a residence permit for a period of at least one year (Article 3, section 1, under a). Moreover, family reunification does not apply to the bearers of third-country nationals authorized to reside on the basis of temporary protection or applying for authorization to reside on that basis and awaiting a decision on their *status* (Article 3, section 2, under b) and shall only partly apply to immigrants residing in the Member State for the purpose of study (Article 5, section 5). Since these two mentioned restrictions are not set in Italian legislation, the introduction of the present measures would result in restricting access to the right to family unity under Italian law.

As to the family relationship regarded as relevant under the Commission's proposal, we may observe that preeminence is recognized to those relationships based on marriage, being other durable relationships only taken into consideration "if the legislation of the Member State concerned treats the situation of unmarried couples as corresponding to that of married couples" (Article 5, section 1, under a), including homosexual relationships (as explicitly recalled in the Commission's commentary to the provision in point).

In matter of the requirements set to access family reunification, the Commission proposal sets the fundamental principle after which "the conditions relating to accommodation, sickness insurance and resources (…) may not have the effect of discriminating between nationals of the Member State and third-country nationals" (Article 9, section 2). Accordingly, housing is regarded as adequate if it corresponds to "accommodation that would be regarded as normal for a comparable family living in the same region of the Member State concerned" (Article 9, section 1, under a). To explain: criteria as to size, hygiene and safety may not be stricter than for accommodation occupied by a comparable family (in terms of number of members and social *status*) living in the same region.[210] The minimum amount of resources required to be sure that the applicant will be able to satisfy his/her family's needs may not be higher than the level of resources below which the Member State concerned may grant social assistance. Where the Member State's social legislation makes no provision of this form

of assistance, resources shall be deemed sufficient if they are equal or higher than the level of the minimum social security pension paid by the Member State (Article 9, section 1, under c).

To this last regard, we may notice that the Commission opted for the application of standards granting equal treatment between the families of Union citizens and of immigrants from third-countries. In the prospective introduction of such a criterion by the European Council, the Italian regulation on the requirements set to family reunification, with special regard to "adequate housing", would come at odds with the Council directive, by providing the evaluation of suitable housing according to a different parameter than that of the housing conditions of other families living in the same area in comparable conditions.[211] The criterion taken up by the Commission seems instead to correspond to that applied in the Netherlands regulation (See, supra, § II.1.2).

The principle of dependence of the duration of residence permits on that of the holder of the main permit is at the basis of the legal *status* of third-country national family members. The discipline in point allows a sharp national regulation to develop. Indeed, the proposal provides that if the main residence permit is issued on a permanent basis, the Member States may limit the duration of the family members' first residence permit to one year. In its Commentary, the Commission explains that this norm would serve to prevent abuse and to check whether family life is still pursued when the renewal is applied for. The specific provisions and penalties set at Articles 14 to 17 for the case of circumventions of the rules and procedures in point seem not to be sufficient means of discipline for the Commission, which preferred to opt for preventing measures, as well.

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[210] Commission's Commentary, *supra*, note no. 208, p. 18.

[211] We here make reference to Article 29, section 3, under a) of the Italian Aliens Act: the parameter consists in the housing condition of the applicant to publis housing which, according to regional legislation concerning the access to public building, does not justify the allocation of apartments of residential public building. The alternative criterion introduced by the 1999 Implementing Regulation (Article 6, section 1, under c), i.e. the correspondance to hygienic, health and security standard as stated by a pass certificate by local public health authorities, would satisfy the principle of non-discrimination, being that parameter the same applyed to all residents.

The Commission adds at Article 13 that the family member concerned shall be entitled to an autonomous residence permit at the latest after four years and provided the family relationship still exists.[212] Thus the dependent *status* of family members may last four years. If the underlying relationship stops before that term, the residence permit may be revoked or renewal may be refused. The Commission seems to hold that family members have not developed sufficient ties with the concerned Member State before four years of residence within the scope of an existing family relationship in order to recognize them an independent right to residence. An exception is provided only in cases of widowhood, divorce, separation or death of relatives in the ascending line, when the person who have entered by virtue of family reunification have been resident for at least one year.

The Commission explains that this provision aims at protecting women who have suffered domestic violence and to prevent that they be penalized by withdrawal of their residence permit if they decide to leave home.[213] Though we cannot help noticing that no protection is guaranteed in case acts of maltreatment intervene during the first year of residence or in any case separation or divorce do not follow. Since the law of the country of origin of the concerned immigrants regulates the relationship between the spouses and because in many cases the law applying provides that divorce or legal separation can only be granted by the husband, no protection is granted to women who are not granted separation or divorce by their spouse, even if they have been victims of maltreatment. As a consequence, these provisions would certainly represent a significant restriction if applied within the Italian and the Netherlands systems (see § II.3). The following considerations will deal with the position of non-EU family members of EU-Member States citizens.

[212] It is important to note that the provision in pont only applies to the spouse (unmarried partner, when the concerned Member State legislation so allows) and children who have reached majority by explicit reference of Article 13, section 1). As for other family members, the Commission provides a possibility for members states to grant an autonomous status without setting further terms.
[213] Commission's Commentary, *supra*, note no. 208, p. 20.

IV. 2 RIGHTS OF FAMILY MEMBERS OF EU CITIZENS AS MIGRANTS WITHIN THE EUROPEAN UNION.

Many non-EU nationals, regardless of their nationality, have rights as family members of an EU-Member State citizen who is him/herself a migrant within the European Union. An EU national migrant's spouse and dependent children (or children under 21 years of age), along with dependent relatives in the descending or ascending line of the migrant or his/her spouse, may enter an EU State to live with the migrant.[214] The specified relatives may remain in the EU along with the migrant, and may remain in that Member State after death of the migrant, but may be expelled upon divorce (though not in case of mere separation).[215] Spouses and dependent children may work in the same Member State as the migrant.[216] The European Court of justice has extended the rule of non-discrimination in "social advantages" to migrant workers family members, but it is not clear whether family members apart from children are entitled to national treatment for educational grants.[217] Family members have derived rights to social security under the Regulation on Social Security for migrants, but no rights to social security on their own.[218] Presumably an EU migrant worker may enforce a right to entry for a "permanent partner" who is a third-country national, where his/her host Member

[214] Article 10, section 1, Regulation 1251/70, Official Journal L 142, 1970, p. 24; Article 1, section 1, Directive 73/148, OJ L 172, 1973, p. 14; Article 2, Directive 90/364 OJ L 180, 1990, p. 26; Article 2, Directive 90/365 OJ L 180, 1990, p. 28; Article 1, Directive 93/96, OJ L 317, 1993, p. 59.

[215] Article 3, Regulation 1251/70, loc. cit.; Article 3, Directive 75/34, OJ L 14, 1975, p. 10. On divorce and separation, see Case 267/83 (Diatta), [1985] European Court Reports, 567; Case C-370/90 (Surinder Singh), [1992] European Court Reports, I-4265.

[216] Article 11, Regulation 1612/68, Official Journal L 257, 1968, p. 2; Article 2, section 2, Directives 73/148, loc. cit.; 90/364, loc. cit.; 90/365, loc. cit.; Case 131/85 (Gul), [1985] *European Court Reports*, 1573.

[217] Article 7, section 2, Regulation 1612/68, loc. cit.; Cases 32/75 (Christini), [1975], European Court Reports, 1085; 94/84 (Deak), [1985] *European Court Reports*, 1873; C-243/91 (Taghavi), [1992] *European Court Reports*, I-4401. As for the right of migrant workers' children to educational grants, the provisions of Article 12, Regulation 1612/68 finds application; See in point, case C-7/94 (Gaal), [1995] *European Court Reports*, I-1031, as well as case C-3/90 (Bernini), [1992] *European Court Reports*, I-1071.

[218] See Regulation 1408/71, Official Journal L 149/1, 1971, as consolidated by Regulation 2001/83, Official Journal L 230/6, 1983; Cases 40/76 (Kermaschek), [1976] *European Court Reports*, 1669; 238/83, (Meade), [1984] *European Court Reports*, 2631.

State grants such rights to its own nationals.[219] However, no rights under the EU law are normally available unless the applicant has moved within the EU.[220]

The Commission has proposed an increase in the class of family members with rights to join a worker and the rights that workers' family members enjoy, especially regarding lifting visa requirements for family members, which still have not found reception in a regulation.[221] In any event, the existing restrictions on the class of family members who join a migrant and the rights that they may enjoy may now be suspect. In *Kraus*, the Court ruled that non-discriminatory national measures which hinder free movement of workers or freedom of establishment must be struck down unless they aim to protect a mandatory requirement, justified in the public interest, which cannot be accomplished by less restrictive provisions, and takes account of measures to protect such rights in the migrant's home Members State.[222]

EU-Member States citizens may well be deterred from exercising their rights of free movement if their family members are third-country nationals who cannot take up self-employment, or who cannot work in another Member State than that of residence, or who might not have their qualifications recognized. Therefore the Court might be willing to denounce such hindrances. It might remove all restrictions upon employment or self-employment of family members of any migrant EU citizen, whether in the host Member State or in any other Member State. All family members may be entitled to recognition of their qualifications or experience, whether or not they are EU nationals, or to a comparison of their qualifications or experience with national requirements, with reasons for rejection and judicial review.[223] Furthermore, the new analysis might grant all EU migrants the right to move all dependent family members with them, whatever their family relationship or *status* of the migrant under EU law is. Unless the Court

[219] Case 58/85 (Reed), [1986] *European Court Reports*, 1283.
[220] See, "reverse discrimination" case law beginning with Joined Cases 35 & 36/82 (Morson and Jhanjan), [1982] *European Court Reports*, 3723.
[221] See COM (95) 348, 12 July, 1995, affecting directives 68/360, in OJ L 257, 1968, p. 13 and 73/148, loc. cit.
[222] C-19/92, [1993] *European Court Reports*, I-1663.
[223] See Case C-340/89 (Vlassopoulou), [1991] *European Court Reports*, I-2357; C-375/92 (Commission v. Spain), [1994] *European Court Reports*, I-923; C-147/91 (Laderer), [1992] *European Court Reports*, I-4097; C-154/93 (Tawil-Albertini), [1994] *European Court Reports*, I-451.

sharply restricts the scope of the potential non-discriminatory hindrances it will scrutinize, as it has done for the free movements of goods, it is possible that the rights, which third country nationals may enjoy indirectly, could be substantially broader that at present.[224]

[224] Joined Cases C-267 & 268/91 (Keck and Mithouard), [1993] *European Court Reports*, I-6097.

CONCLUSIONS

The availability of legal information and its relative stability prove a primary condition to guarantee access to the right to family unity and the transparency of the action of public administration. The reiterated violation of the constitutional reserve of legislation both in the Italian and the Netherlands immigration law is the primary cause of the fundamentally weak discipline of the right to family unity and of the legal position of family members. The implementation of this reserve to legislation would guarantee individuals as to the due publication of norms and the risk of a changeable discipline by administrative acts.

Regulation by circulars concerns very practical matters, like the necessity to produce certificates of accomplishment to high or lower standards, or in what circumstances a dependent residence permit may be renewed. It is especially on these issues that we can test the effectiveness of a constitutionally protected right. From the Netherlands experience, we may learn that the publication of circulars proves of extreme importance for the necessary information of all residents in the country. Yet, it is from the Netherlands regulation that we shall take a clear example of violation of the Constitution clause reserving to legislation the discipline of the condition of foreign nationals. Indeed, the whole described regulation governing the right to family unity derives from the powers of the Government, by only finding its legislative basis in the only Article 11, section 5 of the Netherlands Aliens Act, after which “the issue or renewal of a residence permit, after which we here mean a provisional residence permit, may be refused on the ground of the public interest”.

The Italian recent experience seems to follow the same trend by allowing that subsequent Government decrees may deeply amend the original legislation. Further action within the Ministry’s organization, expressed in circulars to the lower offices,

make legal precepts take unforeseen paths, eventually resorting in new regulation. As a result of this, the discipline governing immigrants' right to family unity takes an unpredictable and changeable character. Eventually, the need of transparency, relative stability and availability of legal information would be satisfied by the respect of the Constitution and of national statutes by the very law-makers and the Government.

The application of different rules as to the access to the right of family unity for Italian (EU-EEA) nationals and for third-country nationals results in discrimination and separation among different national groups living within the same society. The comparison with the Netherlands regulation in point of the requirements set to access family reunification (formation) shows that the standards set by the Italian legislator as to the requirements of sufficient income and adequate housing result in discriminating immigrants' family members against the citizens. The standards set are not directly in relationship with the average housing conditions of other residents' families and the income requirement does not suit to the nowadays labor market evolution towards flexibility. As a consequence of the different standards applied in Italy to the considered requirement and with respect to the few agreements reached at a local level, an extremely heterogeneous map takes shape, where areas may be identified in which Aliens' right to family unity is comparatively more difficult to achieve than in others. This not only has a discriminating effect against those foreigners who reside in "less favorable" areas, but also could give way to expedient maneuvers aimed at avoiding the rule applying in those areas. The Netherlands sets up a preferable solution by explicitly providing that "no other norms shall be employed than those applicable to citizens".

Similarly, the legal position of the applicant, as of nationality and residence *status*, plays a relevant role as of the regulation to apply in both the considered legal systems. But, while in the Netherlands regulation the distinction clearly puts Netherlands nationals and permanently resident foreigners on a par, contributing to further stability in society, Italian norms reveal a less coherent system. While a few recently introduced norms open access to family reunification to the bearers of residence permits of a minimum one year-duration, other norms tend to underline the difference in *status* between the right to family unity of nationals and that of citizens.

The confrontation of different concepts of family, according to the Netherlands and the Italian regulation of the right to family unity, allows us to discern the restrictive character of the notion applying to the Italian family reunification procedure, not taking into consideration other affective ties than those based on marriage and parentship. A more equality-oriented discipline in The Netherlands recognizes immigrants the right to reunification with unmarried partners, whether hetero- or homosexual. Still, some differences in treatment remain between nationals and foreigners, since higher requirements are set in case of *de facto* relationships. Although the Italian general rule in family law privileges the institution of the family based on marriage, we could observe that *de facto* heterosexual relationships (and to a more limited extent, homosexual relationships) are still relevant in Italian society and legal system. As a consequence of difference in treatment between immigrants and citizens, only Italians are recognized the right to family life in case of a *de facto* relationship, whether hetero- or homosexual.

As far as the legal position of family members is concerned, a principle of strict dependence from the *status* of the holder of the main residence permit finds application in both considered legal systems. As a consequence, the rights of family members are derived rights flowing from those enjoyed by the holder of the main residence permit. Family members are given a residence document valid on the same terms as the document issued to the person on whom they are dependent. Italian regulation in point bears an uncertain character, since the interpretation of the law and of its implementing rules still remains controversial. Moreover, the correctives set up by the Italian norms to the application of the dependence principle do not encompass explicit protection in case the bearer of dependent residence permit is victim of ill-treatment by the spouse and legal separation or divorce cannot intervene as a consequence of the application of foreign law. An independent residence permit may only be issued upon renewal. The Netherlands immigration law contains specific norms guiding administrators in evaluating the particular circumstances in the described situation. Yet, the law sets high requirements to the achievement of an independent residence permit and may result in extending the dependence period to a longer time than under the Italian rule.

The extent of the enforcement of international law on human rights significantly vary between the two law systems considered. The particular openness of the Netherlands legal order towards international treaty law led national courts to pay special heed to the norms of the European Convention on Human Rights in matter of the right to family life. Nowadays national courts perform a double test of the impugned act, both under national law and under Article 8 of the Convention. The influence of the Convention has also brought to the introduction of the principles flowing from the Strasbourg Court case law into Netherlands legislation. On the other hand, the described achievements of the Netherlands case law and regulation show that the Government adopted a restrictive attitude by applying the important results in jurisprudence according to a strict case-by-case evaluation, to be periodically revised according to the possible change of the particular circumstances of the case. Despite of the fact that the Italian Constitutional Court has recently recognized the preeminence of international treaty norms on national statutes, their influence on the Italian legal system results of very limited impact on the condition of immigrants' families. We may thus conclude that, although the starting point and the path followed by the two considered law systems greatly divert, the outcome of national legislation and case law in both the compared systems seem to adopt a restrictive attitude towards the acceptance of international human rights principles.

We may discern a considerable distinction, in Community law, between the regulation of the right to family unity of European Union (EEA) nationals exercising their right to free movement within Union and that of the EU (EEA) nationals residing in their country of origin. Only the former case receives an articulated discipline, especially due to the decisive action of the European Court of Justice. The lack of hard law and case law in the latter case and in matter of third-country immigrants' right to family unity is the direct consequence of the absence of a community legal basis prior the entry into force of the Treaty of Amsterdam in May 1999. The harmonization of Member States regulation of the right of family unity may be thus forthcoming as a result of the introduction of a new Title IV in the Treaty establishing the European Community relating to visa, asylum, immigration and other policies relating to the free movement of

persons. By examining the European Commission Proposal for a Council directive regulating the right to family reunification and the position of family members, a further separation can be discerned between third-country immigrants holding a residence permit of a minimum one year-duration and other legally staying third-country nationals. The right to reunification is only recognized to the former. Moreover, a community right to family unity only finds application to heterosexual relationships based on marriage, reunification in other cases may only be recognized if single Member States do so. This provision marks a further distinction between foreign nationals and citizens, since the latter are generally recognized the right to freely enjoy other affective ties by national law. Significantly, the Commission's proposal confirms the application of a dependence principle to the *status* of family members, similarly to what provided in Italian and Netherlands immigration law. As a consequence, the prospective harmonization of Member States policies does not seem to lead to a substantial change in the national discipline of the right to family unity and of the dependent *status* of family members from the position of the holder of the main residence permit.

The comparison with The Netherlands, the legal system of which reveals a conspicuous attention for the issue of equality and for the consequences of the dependent *status* of family members, shows that a difference in treatment between immigrants in general and citizens is furthered by Italian regulation in matter of the right of family unity. The still very limited impact of international treaties and relating case-law hinders the full recognition of a more extensive right to family life for immigrants, including *de facto* families and overcoming the requirement of cohabitation of family members. If we consider that the European Commission does not support a fuller application of the principle of equality between immigrants and Member States citizens, rather a further distinction among legally residing foreign nationals, we may conclude that the prospective harmonization of Member States immigration policies will not substantially touch upon the discriminative import of the Italian norms here identified.

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