

**THE 'CIVIL UNIONS ACT, 2014' AND ITS
EFFECT ON CIVIL LAW ASPECTS**

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**A Thesis Submitted in Partial Fulfilment of the
Degree of Doctor of Laws (LL.D.)**

Faculty of Laws, University of Malta

July 2014



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- Where I have consulted the published work of others, this is always clearly attributed.
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Abstract

In view of the recently enacted Civil Unions law, this thesis seeks to assess the law and its effects on Civil Law. Chapter one introduces the reader to various family institutions in an attempt to aid the reader with the better understanding of certain concepts discussed further along in this thesis. The purpose for this chapter is to subtly highlight the departure from traditional nuclear families and the emergence of diverse family structures, which are more flexible, accommodating, and all embracing.

Chapter two presents itself as a background and history leading up to the 14th February of this year, which includes all the major developments starting from the decriminalization of homosexual acts in 1973 up until the Parliamentary debates just weeks before enactment. The said developments pave the way for the pivotal focal point of this thesis, that is Chapter three which is all that the title says it is- an in depth analysis of the Civil Unions law, with an article by article approach as well as an exploration of some of the main Civil law aspects which Civil Unions touches upon, such as Family, Maintenance, Adoption, Succession, Separation/Divorce amongst others.

In Chapter four, European legislation is discussed and the local situation is compared in a detailed manner to that of other European countries through detailed and up to date studies by the International advocacy group ILGA Europe. The studies and statistics outline Malta's previous position prior to the introduction of Civil Unions and how this has changed following April 2014. Finally in this thesis's conclusion, certain topics deemed ancillary to Civil Unions and the attainment of equal rights are discussed with the scope of educating the reader on the ways in which Maltese legislation can still improve.

Keywords: Civil Unions, LGBT, Civil Rights, Equality, Civil and Human Rights.

Dedication

To my Fiancé John- For being my strength and my rock whenever I felt like giving up, for putting up with seven years of moaning and bad moods during study time and for always believing in me no matter what. I cannot thank you enough.

To my Parents- for their undying support and for teaching me the values of perseverance, ambition, diligence and tenacity, without which, I would not be where I am today. I hope I've made you both as proud of me as I am of you both as parents.

To my Grandparents- for always showing a tremendous interest in my studies, for pushing me to fulfil my dreams and for encouraging me every step of the way.

Lastly to 'Dodo', my great-aunt and second mother- for providing me with a study sanctuary and for the unparalleled patience throughout the years- I credit a part of my success to you. Thank you.

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- Civil Unions Act, Chapter 530 of the Laws of Malta
- Marriage Act, Chapter 255 of the Laws of Malta
- Embryo Protection Act, Chapter 524 of the Laws of Malta
- Duty on Documents and Transfers Act, Chapter 364 of the Laws of Malta
- Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta
- Equality for Men and Women Act, Chapter 450 of the Laws of Malta
- Press Act, Chapter 248 of the Laws of Malta
- Income Tax Act, Chapter 123 of the Laws of Malta
- Social Security Act, Chapter 318 of the Laws of Malta

European Legislation

- The European Convention on Human Rights (1950)
- Charter of the Fundamental Rights of the European Union (2000)
- The Treaty on the Functioning of the European Union (TFEU)
- European Parliament and Council Directive 2004/58/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 29th April 2004
- Council Directive 2000/78/EC establishing a General Framework for equal treatment in employment and occupation, 27th November 2009
- European Commission Directive 2004/33/EC regarding technical requirements for blood and blood components, 22nd March 2004
- European Convention on the Adoption of Children (Revised), Council of Europe, [CETS No.202]

- Parliamentary Assembly of the Council of Europe, Resolution 1728 on 'Discrimination on the basis of sexual orientation and gender identity' (2010)
- European Parliament Resolution of 2nd April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
- European Parliament Resolution of the 4th February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, [2013/2183(INI)]
- Parliamentary Assembly of the Council of Europe, Recommendation 924 on discrimination against homosexuals, (1981)
- Parliamentary Assembly of the Council of Europe, Recommendation 1915 on discrimination on the basis of sexual orientation and gender identity (2010)
- Council of the European Union Toolkit 17th June 2010 (11179/10)
- Guidelines to promote and protect the enjoyment of all human rights by LGBTI persons, Council meeting 24th June 2013, Luxembourg
- European Commission Memo 08/68 of the 31st January 2008
- Press release by the European Commission- 'Employment equality rules: reasoned opinion to the UK; cases closed for Slovakia and Malta', (IP/09/1778 20/11/2009)

International Legislation

- The Universal Declaration of Human Rights (1948)
- The United Nations Convention on the Rights of the Child, Resolution 44/25, 20th November 1989

Danish Legislation

- The Danish Registered Partnership Act.

Table of Judgements

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- Alexia Portelli u Wessam Mohammed Elsrmani vs Il-Ministru tal-Gustizzja u ta' l- Intern u l-Ufficjal Principali ta' l-Immigrazzjoni, First Hall, Civil Court (Constitutional Jurisdiction), Hon. Judge Dr. G. Caruana Demajo, Ref. 43/2004/1, 16th August 2005
- Raid Mabruk El Masri vs L-Onor. Prim Ministru, l-Avukat Generali tar- Repubblika, il-Ministru tal-Gustizzja u l-Intern, il-Kummissarju tal-Pulizija u l-Ufficjal Principali ta' l-Immigrazzjoni First Hall, Civil Court, Hon. Judge Dr. G. Valencia, Ref. 13/2004/1, 14th October 2004,
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- Toonen vs Australia, Communication No. 488/1992, (U.N. Doc CCPR/C/50/D/488/1992) 31st March 1994.

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- E.B vs France, (App no. 43546/02) ECHR, 22nd January 2008
- K. and T. vs Finland, (App no. 25702/94) ECHR, 12th July 2001
- Schalk and Kopf vs Austria, (App no. 30141/04) ECHR, 22nd November 2010
- Vallianatos and Others vs Greece, (App nos. 29381/09 and 32684/09) ECHR, 7th November 2013

Acknowledgements

Firstly, I would like to thank my supervisor, Dr. Neil Falzon, for the assistance received throughout the writing of this thesis and whose profound knowledge on the subject proved crucial and indispensable.

The persons I would like to thank and who have helped me immensely during the last year are too many to mention, however, I must express my heartfelt appreciation to my proof-readers Mrs Paula Giannoni and Ms Jennifer Pullicino Orlando, who took time out of their busy schedules to read and correct this thesis.

I would also like to take the opportunity to thank the lecturers and academic staff at the Faculty of Laws who have always been accommodating to help me wherever I needed. Lastly, I would like to thank all my family and friends who saturate my student and work life with unfettered love and support, without which I would not have come this far.

Abbreviations

- LGBT- Lesbian, Gay, Bisexual and Transgender
- LGBTI- Lesbian, Gay, Bisexual, Transgender and Intersex
- SL- Subsidiary Legislation
- ECHR- European Convention of Human Rights
- ECtHR- European Court of Human Rights
- ILGA- International Lesbian, Gay, Bisexual, Trans and Intersex Association
- MGRM- Malta Gay Rights Movement
- NGO- Non-Governmental Organization
- UN- United Nations
- MP- Member of Parliament
- AG - Attorney General
- NBTS- National Blood Transfusion Service

“The United Nation’s Declaration of Human Rights promises a world in which everyone is born free and equal in dignity and rights, no exceptions, no one left behind, but we know from experience that eradicating discrimination requires more than changes in laws and policies, it takes a change in people’s hearts and minds as well”.¹

Navi Pillay

United nations High Commissioner for Human Rights

Preliminary Declaration

It must be pre-addressed that, although various conflicting perspectives of civil unions have been analysed, this thesis has been predominantly taken from a pro-civil union viewpoint. The reasoning behind such an approach is a personal one, however, seeing that the majority of Europe and the remainder of the world have slowly been moving towards a harmonization of laws and rights in favour of civil unions, I was felt that there was no reason why Malta should hold back. As the above quotation expounds, it takes a change in the mentality of the general population for civil rights to be equally available to all without prejudice and it is for this reason that I have set my frame of mind to be all-encompassing and in favour of civil unions.

Chapter 1: Introduction: An Overview of the various Institutions

1.1. The Definition of Family, or lack thereof.

¹ Navi Pillay, United Nations High Commissioner for Human Rights, Speech delivered on the 26th July 2013 at the ‘Free and Equal’ campaign press launch <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13585&LangID=E> and <https://www.youtube.com/watch?v=i1CyAc445e0> Both accessed on the 24th April 2014

Till today, there exists no legal definition of the term “family” within Maltese law. Family is not a unitary concept that may be defined through one piece of legislation or a single branch of case law², however, the fact that no such definition exists results in a broad interpretation and leaves plenty of room for uncertainty. The need for a clear definition of the term ‘family’ is predominantly entangled in disputes relating mainly to moral issues as well as possible sexual orientation bias and it is difficult to come up with a definition that will not prejudice or discriminate the rights of certain groups of persons. Contrary to the belief that a concrete definition is fundamental and necessary, a continued lack of interpretation might be seen as beneficial due to the fact that the family is not static and should therefore not be assigned an inflexible definition. It is therefore vital to delineate the boundaries of the term ‘family’ when the courts or legislators come to interpret its applicability.³

The interpretations and elucidations on what constitutes a family undoubtedly vary from country to country and sometimes even within states. Either way, the family is essential for both the social and the economic development of a country since it is the basic and central unit of society⁴. Family is a very contentious area that seldom provides a gratifying clarification to those who seek it. The Maltese Civil Code⁵, although engaging extensively on issues relating to the family, does not explicitly define the term itself. In Article 2 of the said Civil Code, it is held that “The law promotes unity and stability of the family” yet does not go on to define what is meant by the term. This naturally causes confusion as to the appropriate legal understanding of the term. The Civil Code is not the only example of an omission in the definition of the term as many other codes of Maltese law make reference to ‘family’ without clarifying its connotations. It therefore remains unclear whether or not certain family

² Ruth Farrugia, The Impact of EU Legislation on Maltese Family Law, Research on the Family, Monograph Series Number 2, (National Family Commission) 2008, <https://www.academia.edu/168085/Farrugia_Ruth_Impact_of_EU_legislation_on_Maltese_Family_La_w_Monograph_Series_Number_2_published_by_the_National_Family_Commission_2008_ISBN_978-99932-0-591-3> Accessed on the 20th October 2013

³ Ruth Farrugia, Family law (Eds. Aaron Schwabach and Arthur John Cockfield) in the Encyclopedia of Life support systems (EOLSS), Oxford UK, 2004 <<http://www.eolss.net/Sample-Chapters/C04/E6-31-02-06.pdf>> Accessed on the 20th October 2013

⁴ United Nations Press Release, 59th General Assembly, Third Committee of the 6th October 2009 “Governments reaffirm critical importance of family to society”.

⁵ Chapter 16 of the Laws of Malta

structures are able to benefit at law from a multitude of rights and obligations. Former President George Abela, in a speech given by him on the subject of family⁶ held that:

“Il-familja hija impenn għat-tul tal-ħajja bejn raġel u mara, li jista’ jirriżulta fil-prokreazzjoni ta’ individwi ġodda li jagħmlu parti mis-soċjeta’, impenn ċentrali u fundamentali għall-ħajja soċjali”⁷

Towards the end of the same speech, Former President George Abela went on to state that:

“Għalhekk, fil-fehma tiegħi, id-deċiżjoni għandha tittiehed bla dewmien sabiex il-policy nazzjonali tal-familja tiġi ippubblikata u l-liġi tal-familja tiġi aġġornata, bil-għan li jirriflettu r-realtajiet tal-lum u tal-ġejjieni, u dan wara li jiġu definiti u nkunu ċari x’qed nifhmu sew meta nirreferu għal ‘familja’”⁸

This may be of a concern to those members of society such as Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons because a definition of family may not embrace all present ‘family’ forms. In my opinion, if a definition were to be drawn up in the near future, the legislators who draft it must allow for a wide explanation of the term so as to incorporate even those families who do not fit the ‘traditional’ notion of a man, a woman and their children. One should be able to recognize a family when they see one, after looking at the relationship in the ‘de facto’ situation, since it is not always a bond of marriage which creates a family. The United Nations, in Article 16 of the Declaration of Human Rights holds that: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family”⁹.

⁶ George Abela Speech, “Il- Familja: Ilbierah, Illum, Ghada”, 23rd January 2010, http://www.doi-archived.gov.mt/EN/press_releases/2010/01/pr0125.asp Accessed on the 4th November 2013

⁷ Loose Translation: “Family is a lifelong commitment between a man and a woman which may result in the procreation of new individuals who will form part of society and be fundamental to social life”.

⁸ Loose Translation: “Therefore, in my opinion, the decision should be taken without delay for national family policy to be published and family law to be updated, in order for them to reflect the realities of today and of the future and this after defining and being clear what is understood when referring to ‘family’”

⁹ Article 16 of the Universal Declaration of Human Rights <<http://www.un.org/en/documents/udhr>> Accessed on the 20th October 2013

The Declaration of Human rights then continues on to define the family as the natural and fundamental group unit of society which is entitled to protection by society and by the state.¹⁰ It also holds that no person should ever be subject to arbitrary interferences with their privacy, family life or home correspondence nor be subject to attacks upon their honour or reputation¹¹. Although not present in the Declaration itself, it has been widely accepted that the definition which the United Nations gives to family is:

“Any combination of two or more persons who are bound together by ties of mutual consent, birth and/or adoption or placement and who, together, assume responsibility for, inter alia, the care and maintenance of group members, the addition of new members through procreation or adoption, the socialization of children, and the social control of members”¹².

As one may see, the definition given is a rather ‘catch-all’ and ambiguous one which could have been done intentionally so as not to expressly exclude any person or class of persons from forming a family. Similarly Article 8 of the European Convention of Human Rights, holds that “everyone has the right to respect for his private and family life, his home and his correspondence”¹³.

It is crucial that ‘family life’ under this article should be interpreted and understood without any inequality in order for it to embrace all family forms. The global development of legislation must be able to answer to the many challenges and requirements of modern social life. The European Court of Human Rights has thankfully taken a sensible and all embracing approach to the interpretation of ‘family life’. In *K and T vs Finland*¹⁴ it was held by the European Court that “the existence or

¹⁰ Ibid

¹¹ Ibid Article 12

¹² E. Holmes ‘What effect have United Nations actions had on the family?’

http://worldcongress.org/wcf1_spkrs/wcf1_holmes.htm Accessed on the 17th November 2013

¹³ The European Convention of Human Rights

<http://www.echr.coe.int/Documents/Convention_ENG.pdf>

¹⁴ K. and T. vs Finland, App no 25702/94, Strasbourg Judgment of the 12th July 2001

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59587> Accessed on the 27th November 2013

non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties". However, although the European Court has often made similar endeavours to broaden the scope of Article 8 and encompass all non traditional family units, the European court has provided inadequate counsel on the question of LGBT rights, leaving such LGBT families open to discrimination.¹⁵ In fact, the majority of comments passed by judges in cases concerning the widening of Article 8 have only been made 'obiter dicta'¹⁶, such as in the case of *Schalk and Kopf vs Austria* when it held that there was an increasing tendency to include same sex families within the notion of a family. Similarly, in the case of *Vallianatos and Others vs. Greece*¹⁷ the court held, amongst other things, that when other European states legislate on the family, they must take into account "developments in society and changes in the perception of social and civil status issues and relationships".¹⁸ The decision showed that, step by step, the family is changing itself to become a flexible concept not restricted solely to biology.¹⁹

Local case law has also reflected the same approach taken in *K and T vs Finland*, as can be seen in the case of *Alexia Portelli u Wessam Mohammed Elsrmani vs Il-Ministru tal-Gustizzja u ta' L-Intern u l-Ufficjal Principali ta' l-Immigrazzjoni*.²⁰ Here the court held that in order to establish whether or not family life is present, the court should look at the 'de facto' situation rather than the legal definition. The fact that the applicants lived together as a couple and had children together was sufficient for the court to conclude that they had a family life. Similarly, another local judgement *Raid Mabruk El Masri vs L-Onor. Prim Ministru, l-Avukat Generali tar-Repubblika, il-Ministru tal-Gustizzja u l-Intern, il-Kummissarju tal-Pulizija u l-Ufficjal Principali ta' l-Immigrazzjoni*

¹⁵ ILGA Europe, The rights of Children raised in Lesbian, Gay, Bisexual or Transgender families: A European Perspective, December 2008

¹⁶ A comment, thought or illustration made by a judge in the passing of a case which is not necessarily aimed at reaching a decision, and therefore non-binding.

¹⁷ *Vallianatos and others vs. Greece*, App nos 29381/09 and 32684/09, Strasbourg Judgement of the 7th November 2013

¹⁸ 'The Dilution of Family in Human Rights, 30th March 2014, <http://www.zenit.org/en/articles/the-dilution-of-the-family-in-human-rights> Accessed on the 10th April 2014

¹⁹ *Ibid.*

²⁰ *Portelli Alexia et vs Ministru tal-Gustizzja ta' L-Intern*, Civil Court First Hall (Constitutional Jurisdiction) 16th August 2005

mirrored the reasoning given in *K and T vs Finland* that close personal ties should be factored in when interpreting the concept of ‘family life’.²¹

1.2 ‘Marriage’ and ‘Gay Marriage’

Family has often been thought to be synonymous with the term ‘marriage’, however this is no longer accurate nor is it in accordance with the concept of freedom and equality of rights. Traditionally, marriage was only permitted between a man and woman, and although this is largely still the accepted practice, things are gradually changing and countries are beginning to take the necessary measures in allowing homosexual or transgender persons the right to marry²². The definition of marriage itself varies according to the various cultures existent within society and it is safe to say that they vary from one extreme to another, from rigorous heterosexual monogamy to equal homosexual marriage. The Oxford Dictionary, defines marriage as “The formal union of man and woman typically as recognized by law by which they become husband and wife” however, then adds in a ‘sub-definition’ that “(in some jurisdictions) a formal union between partners of the same sex” which thus widens the definition to also provide for the developments which are taking place in many countries across the globe.

Once again, Malta provides no illustrated definition within its laws and the Marriage Act of Malta²³ fails to define the institution. However one may elucidate, from the references to ‘he’, ‘she’, ‘husband’ and ‘wife’ within Article 15(2)²⁴ of the said Marriage Act that the intention was clearly to confer the civil right of marriage solely to a heterosexual couple. In Article 12 of the European Convention of Human Rights it is

²¹ The same reasoning was adopted in *Samir El Yeferni vs L-Onor. Prim Ministru, l-Avukat Generali tar-Repubblika, il-Ministru tal-Gustizzja u l-Intern, il-Kummissarju tal-Pulizija u l-Ufficjal Principali ta’ L-immigrazzjoni* 28th June 2005, First Hall, Civil Court.

²² This can be confirmed through the fact that according to the ILGA Rainbow Index of May 2014, ten European Countries now provide for same sex marriage.

²³ Chapter 255 of the Laws of Malta

²⁴ “The Registrar or other officiating officer shall ask each of the persons to be married, first to one of them and then to the other, whether he or she will take the other as his wife or her husband respectively, and upon the declaration of each of such persons that they so will, made without any condition or qualification, he shall declare them to be man and wife”

stated that: “Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right”.

At first glance one wonders whether or not this statement limits marriage to heterosexual couples due to the reference of ‘men’ and ‘women’. However, with a closer look, one can see that it does not do so, since there is no specification that the right to marry must be with each other. The article simply states that men and women both have the equal right amongst them to marry. Notwithstanding this, the article directs the reader back to the legislation of the country they reside in or are interested in for the purpose of marriage resulting in domestic laws having the crucial and deciding role. Therefore in Malta’s case, this article will re-direct us back to Chapter 255, The Marriage act where Civil marriage is only accessible to heterosexual couples for the moment.

To sum up the position taken by the European Court of Human Rights at present regarding Article 12, *Schalk and Kopf vs Austria* made it very clear that choice of wording in Article 12 must have been intentional, owing to the fact that other articles made use of more general terms such as ‘everyone’ or ‘no one’, whereas Article 12 deliberately mentions men and women.²⁵ Due to the fact that a European consensus on the matter is impossible to reach, Article 9 of the Charter of Fundamental Rights of the European Union must also be consulted which leaves the decision making up to each state independently and fails to attempt to create a uniform and solidary covenant.

Former President George Abela, in the same speech mentioned in the previous sub-chapter also held and questioned:

“Il-liġijiet ċivili tagħna ma jagħtux definizzjoni esplicita ta’ x’inhu żwieġ. Din il-lakuna qiegħda hemm biex tħalli t-triq miftuħa għal interpretazzjoni wiesgħa tal-kelma “żwieġ” sabiex fil-futur tinkludi unjonijiet diversi minn dawk bejn mara

²⁵ This may be especially correct to assume when one considers the probable traditional mindset of the legislators at the time when the Convention was enacted (September 1950)

u raġel jew għax it-tifsira tal-kelma kienet tant evidenti li ma kellhiex bżonn ta' definizzjoni?"²⁶

Malta's marriage laws are one of Europe's most stringent, which makes it harder not to clash with European developments.²⁷ However, Malta recently took a huge step on the 14th April 2014 by introducing Civil Unions, which grants all marriage rights to the partners of such union, with the only difference to marriage being the name of the union. Many conflicting views on the introduction of this piece of legislation have largely (but not exclusively) been based on moral and religious grounding. The symbolic meaning of the institute of marriage is of fundamental importance to the Maltese society where Roman-Catholicism predominates.

However, it is important to understand that Civil marriages and Church/Catholic marriages are not one and the same thing. Although Catholic marriages also require a civil marriage registration at the same time in order to be valid²⁸, it is not the case that a Civil marriage requires concurrent registration within the church. Civil marriage is therefore a right granted to individuals by the state which should be an equal right to all, irrespective of sexual orientation. It is widely held, amongst LGBTI lobbyists that "Civil marriage is a human right and not a heterosexual privilege"²⁹.

Martin Scicluna in his paper 'Same sex: Same Civil Entitlements' states that "The argument by those who favour marriage equality to all (heterosexual and homosexual couples) is founded on the understanding that the right to marry should be recognized for everyone without any discrimination on the grounds of sexual orientation".³⁰ After all, marriage is an institution which promotes love and commitment between the parties, and therefore, extending its capacity, proposes no threat whatsoever to society. All members of society are capable of love, intimacy and commitment which is

²⁶ Loose Translation: Our civil laws do not give us an explicit definition of the meaning of marriage. Is this lacuna there to leave the doors open for a broad interpretation of the word 'marriage' that could include unions in the future, other than those between a man and a woman or is the meaning of the word so obvious that it requires no definition?

²⁷ Charlene Camilleri Zarb, LLD Thesis 2011 "The making and breaking of Marriages and Civil Unions: Is Maltese legislation consistent with European Developments?"

²⁸ Article 21(1) of the Malta Marriage Act

²⁹ Quoted by numerous sources

³⁰ Martin Scicluna, paper on 'Same Sex: Same Civil Entitlements', 2013, The Today Public Policy Institute.

the core of a healthy marriage. It is indeed quite ironic that heterosexual couples seemed to be fighting for the civil right to divorce whilst homosexual couples are fighting for the right to get married.

When a state prevents the provision of rights to certain persons, such persons are cast into a 'legal limbo'³¹ where they feel excluded and discriminated by society and by the state supposedly in place to protect them. It is always healthy to help with the progression of an important institution such as marriage in order to keep it up to date and ensure that it does not become exclusionary. If things never changed, men would still be able to marry twelve year old girls whom they would have never met before their wedding day and treat them as their own property or people would still be imprisoned for marrying persons of a different ethnic race to their own³². These issues are thankfully now unheard of in the majority of countries because marriage has in fact changed to adapt towards the correspondingly changing society.

Another argument against the introduction of same sex marriage has been regarding the procreation of children and the impossibility of such due to obvious reasons. However, nowhere is it held that the procreation of children is a requisite of marriage. In fact, people who are too old or too ill to have children or are perhaps, unfortunately sterile or unable to conceive have never been stopped from getting married³³. By defining marriage in terms of the potential procreation of children offends those family structures which, for whatever reason, do not include children.³⁴

The institution of marriage within the Maltese context is heavily rooted within a Roman Catholic and faith based system. It seems obvious for Maltese citizens to instinctively and automatically associate marriage with a church-like image. Civil marriage however is a secular concept, having no relation to the Roman Catholic Church marriage as some may believe, and it is for this reason that civil unions are not

³¹ Martin Scicluna, paper on 'Same Sex: Same Civil Entitlements', 2013, The Today Public Policy Institute

³² Ibid.

³³ Ibid.

³⁴ Dr N. Falzon, "Malta Gay Rights Movement position paper on marriage equality: Advocating the best options of legislating for same sex couples and families in Malta", 2012.

concerned with religious beliefs in any way. Ecclesiastical authorities are free to regulate religious marriages in any way they deem fit, however, they have no significance towards civil unions granted by the state in equality with civil marriages as these are both solely of a purely civil nature.³⁵

1.3 Cohabitation and the concept of ‘Living apart together’

Cohabitation, sometimes also called ‘Common Law Marriage’ is essentially an affectionate relationship in which the partners of the relationship choose to live together even though they have not contracted marriage.

There are many possible reasons why couples opt for the more flexible cohabitation arrangement as opposed to marriage. The most common is due to the simple fact that it is so unregulated and accommodating to those couples who are morally opposed to the institution of marriage or resist commitment on a formal and legal level. It is attractive because it may be considered as a ‘do it yourself’ form of marriage³⁶ where the couples themselves regulate their situation and where there are no legal ties or dissolution formalities which need to be followed. Another ground for this alternative to marriage is that some couples may actually wish to test the waters of marriage before actually committing themselves, therefore, if it results that they are not compatible with each other, they are at liberty to leave without any repercussions whatsoever. Cohabitation may therefore be viewed as a trial marriage³⁷ where each party to the relationship is able to retain some form of independence. Other reasons

³⁵ Ibid

³⁶ S. Duncan, A. Barlow and G. James ‘Why Don’t they marry? Cohabitation, Commitment and DIY marriage’ 2005, Child and Family Law Quarterly Vol. 17, 383

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029619 Accessed on the 5th January 2014

³⁷ H. Kulu and P. Boyle ‘Premarital cohabitation and divorce: Support for the ‘trial marriage’ theory?’ 2010, Vol. 23, 879 <http://www.demographic-research.org/volumes/vol23/31/23-31.pdf> Accessed on the 5th January 2014

for cohabitation could be a result of one of the partners already having passed through separation or divorce proceedings and would not wish to repeat the experience of marriage a second time around, or maybe, even more simply due to an incapability to marry, possibly due to one of the partners already being legally married or unable to in any other way. Kathleen Kiernan holds that common sense alone would suggest that in periods when divorces were less easily obtained, people would be more likely to choose to enter into cohabitation.³⁸

Cohabitation may be traced back to many centuries ago, such that it has existed long enough to even pre date the institute of marriage³⁹. Despite the fact that Cohabitation is clearly not a new phenomenon and is widely recognized as a growing trend, it is hardly legally regulated. Starting from the 1970s onwards, some countries began to introduce provisions in their law which would afford protection to cohabitants. The countries in the European Union which legally recognize and regulate Cohabitation in some manner or form are Austria, Croatia, Czech Republic, Denmark, France, Germany, Ireland, The Netherlands, Norway, Portugal, Sweden and the United Kingdom⁴⁰. However, what some people fail to understand is that although cohabitants are in fact afforded certain protection by the law in the abovementioned countries, this does not mean that any legal status is conferred to the couple⁴¹. Malta has not kept itself up to date with the trend on legalizing cohabitation. Statistics show that in the year of 2012, in Malta, the percentage of live births outside of marriage was that of 25.7%⁴² which is a considerable increase from the 13.2% in the year of 2001⁴³. Although these statistics and numbers are not conclusive evidence of cohabiting situations, they could be indicative of such occurrences. Due to these rather high

³⁸ K. Kiernan "The rise of Cohabitation and Childbearing outside marriage in Western Europe", 2001, International Journal of Law, Policy and the Family 15

<http://www.stats.ox.ac.uk/~martin/BS3b/Kiernan.pdf> Accessed on the 2nd February 2014.

³⁹ "Cohabitation" International Encyclopedia of Marriage and Family 2003

<<http://www.encyclopedia.com/topic/Cohabitation.aspx>> Accessed on the 5th January 2014

⁴⁰ Martin Scicluna, paper on 'Same Sex: Same Civil Entitlements', 2013, The Today Public Policy Institute.

⁴¹ Catherine Fairbairn 'Common law marriage and Cohabitation', 2013, Library of the House of Commons, Home affairs section, UK.

⁴² European Commission Statistics on the percentage of live births where the mother's marital status at the time of birth is other than married, within the European Union, ranging from 2001-2012

http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=TPS00018 Accessed on the 9th February 2014.

⁴³ Ibid

statistics where a quarter of Maltese children are being born outside of marriage, further research into the parental situation behind such births might be a good idea, and might be able to shed better light onto the possibility of such parents being cohabiting couples. If this really is the case, it is all the more reason for an attractive cohabitation regime to be put in place.

The increase in such live births outside of marriage can also be seen amongst all the 28 European Union countries, rising steadily from 28.5% in 2001 to 39.3% in 2011⁴⁴.

Another interesting statistic from the United Kingdom is that the number of opposite sex cohabiting couples almost doubled from 1.5million in 1996 to 2.9 million in 2013⁴⁵.

This increase may also be seen as a contributing factor to the 3% decline of Marriages celebrated within the United Kingdom, from 12.6 million in 1996 to 12.3 million in 2013⁴⁶. Likewise, in the case of same sex cohabitation rates within the United Kingdom, the increase has been immense, with 16,000 cohabiting couples in 1996 increasing to 89,000 in 2013. This is also held to be an underestimation due to the fact that since the introduction of Civil Partnerships, same sex couples are no longer recorded as cohabiting.

Although a Cohabitation bill was in fact drafted in Malta in the summer of 2012, it never made its way to be passed by parliament due to a change in government in the months following its proposal. In its stead a Civil Unions Bill was drafted by the newly elected Maltese Labour government which affords protection to same sex couples as well as anyone wishing to form a union as opposed to marriage. A Cohabitation Bill is however still in the pipeline⁴⁷. With regard to same sex couples, "Cohabitation law is by definition, inferior to either same-sex marriage or a Civil union because it merely acknowledges the physical presence of two persons living under the same roof without the fundamental underpinning of long term commitment and love entailed by the kind

⁴⁴ Ibid

⁴⁵ Office for National Statistics UK, Family and Households, 2013 <http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2013/stb-families.html> Accessed on the 9th February 2014

⁴⁶ Ibid

⁴⁷ Times of Malta article 'Laws on Cohabitation and Gender identity next in line' 21 April 2014, Accessed on the 23 April 2014,

of nucleus or extended family structure created between same-sex couples”.⁴⁸

Cohabitation regimes do not understand the nature of the relationship between the person in such arrangement, and in fact, any persons, including siblings, family members or friends may enter into a state of cohabitation. For this reason, Cohabitation is viewed as the most restricted form of legal recognition due to the minimal rights it confers.

A Cohabiting couple may choose to draw up a legal agreement with a lawyer or notary public in order to manage their relationship. This could be compared to a pre-nuptial agreement of marriage where spouses are able to stipulate rights and responsibilities as well as determine certain elements for the possibility of an eventual relationship breakdown. However, the enforceability of such an agreement within a court of law is yet to be determined. Such a measure is also not in any way automatic, and requires the initiative by the couple which therefore excludes those couples who are either legally unaware of this possibility, do not have the financial means or simply do not feel comfortable regulating an eventual breakdown of their relationship.

Another growing concept is that of Living Apart Together (LAT) which is a relatively new family form. It is the situation in which couples, usually in an intimate relationship with each other, live in separate dwelling houses as opposed to together. The reasoning behind this is not easily determined, however it could be due to lack of financial support and the increased costs of housing and maintenance. The couples therefore choose to continue their relationship whilst still living with their parents. Another reason comes in the form of a defensive mechanism where one or both of the partners wish to avoid the recurrence of a previously failed marriage or cohabitation and wish to retain their own time and space alone.

Since the concept of Living Apart Together, has only recently been defined, there exists no legal regulations or protection afforded in the favour of the partners to such a relationship. However, the question remains: Do LAT couples actually want to have any legal rights in their favour? It has been argued that those couples who view their LAT relationship as a stepping stone towards cohabitation or marriage are more likely to

⁴⁸ Martin Scicluna Paper on ‘Same Sex: Same Civil Entitlements’, 2013, The Today Public Policy Institute.

approve of legislation or protection whilst those couples who view their LAT relationship as an alternative to cohabitation or marriage do not feel the need for any protection since the point of their relationship would be to avoid such legalities.⁴⁹ In fact, as it was held by Lyssens Danneboom et al, LAT partners “lead separate lives, have no shared home and are not economically interdependent, therefore, in the event of separation or death, there is nothing to protect”.⁵⁰

1.4 Civil Unions and Partnerships

Marriage no longer remains the sole institution for the formation of unions or the bearing of children. The introduction of same sex unions and partnerships has made a major difference to the vulnerable position that same sex couples have faced throughout the years and has now become the most widely adopted means of recognition amongst such couples. Also, through the registration of such a union or partnership, the couple that was previously thrust into a ‘legal limbo’⁵¹, is now recognized as an official social entity with a right to enjoy certain benefits by the state.

The first country to introduce a Civil Partnership was Denmark in 1989 and such decision has consequently paved the way for many other countries to adopt similar forms of legislation. There are currently 9 European countries⁵² that solely provide for same sex unions or partnerships (without also providing for same sex marriage), with Malta being the ninth country to introduce such legislation on the 14th of April 2014. There are four other countries that provide for full equality through same sex marriage

⁴⁹ S. Duncan et al “Legal rights for people who ‘Live Apart Together’?”, 2012, Journal of social welfare and family law https://www.academia.edu/2701784/Legal_rights_for_people_who_live_apart_together Accessed on the 11th January 2014

⁵⁰ V. Lyssens Danneboom et al. “Living apart together (LAT) and the law: Exploring legal expectations amongst LAT individuals in Belgium, June 2013, <http://sls.sagepub.com/content/22/3/357.full.pdf+html> Accessed on the 11th January 2014

⁵¹ When a person or certain members of society are left without recourse due to some legal provision or court ruling.

⁵² Austria, Czech Republic, Finland, Germany, Hungary, Ireland, Luxembourg, Malta and Slovenia

whilst also supporting unions and/or partnerships at the same time⁵³ and another four countries which recognize marriage but not unions or partnerships at the same time⁵⁴

Unlike cohabitation, a union or partnership actually acknowledges the personal relationship and the intimacy that comes with it. It is not something that can be entered into by siblings, friends or family members who live together as is the case with cohabitation. A civil union or partnership can take two different forms- those which are subordinate to marriage and those which are fundamentally equivalent to marriage. Usually the unions and/or partnerships which are subordinate to marriage provide a legal framework which is of inferior quality when compared to that provided for through marriage, and therefore still discriminatory. On the other hand, those which are fundamentally equivalent to marriage would be wholly equal to marriage in all but name and would have no differences in their legal weighting.⁵⁵ Malta has in fact adopted a Civil Union law which is of the latter form and therefore, equal to marriage in terms of rights and obligations, but different solely in name.

It can ultimately be held that apart from the importance of the term ‘marriage’, all that remains is a set of legal rules and regulations governing the institute, just like there would for a union or partnership. As Jens M. Scherpe aptly put it:

“Marriage, in the end, is nothing but a form of registered partnership. Despite the name, what is being offered by the state through marriage is merely a legal framework. Everything that extends beyond the legal framework is cultural and social and thus also beyond immediate state regulation”.⁵⁶

States regulating civil unions or partnerships could also view such regulation as a stepping-stone to the subsequent acceptance of same sex marriage in the future, as

⁵³ Belgium, France, The Netherlands and The United Kingdom (excluding Northern Ireland which although provides for Civil partnerships, does not recognize same sex marriages)

⁵⁴ Spain, Portugal, Denmark and Sweden (the latter two having previously recognized a recognized partnership up until the introduction of same sex marriage in 2012 and 2009 respectively).

⁵⁵ Jens M. Scherpe, ‘The legal Recognition of same sex couples in Europe and the role of the European court of Human Rights’, 2013.

⁵⁶ Ibid

was in the case of Denmark⁵⁷. It must be said that wherever there has been a change to the institution of marriage (such as with the introduction of divorce legislation) it has always been accompanied with an inherent fear that such introduction would destroy the institution in the process, however, this has never been the case so far.

⁵⁷ The Danish registered partnership act of the 7th June 1989 was repealed and replaced with a gender neutral marriage law on the 15th June 2012.

Chapter 2: A History of Developments leading up to Civil Unions

2.1 Introduction

In terms of the rights towards same sex couples, the first move forward took place in the year 1973 when the governing party of the time repealed the law within the Criminal Code which criminalized adultery and sodomy. The provision which criminalized homosexuality stemmed from the Maltese adoption of the British Penal Code, in which such clause was already present. However, on Thursday the 11th of January of 1973, after a heated debate in parliament and resistance from the church⁵⁸ as well as the opposition party, a milestone was reached and sodomy was no longer considered to be a criminal action. After this date, homosexual persons⁵⁹ were able to get along with their private lives without the fear of consequently facing criminal charges. However, even though such a landmark was reached, the stigma of being homosexual remained strongly present within the Maltese citizenry.

Malta has always played a very conservative position when it came mingling politics with moral issues, possibly, in my opinion, due to the strong Catholic ethos present throughout its community. The first time any form of legal recognition for LGBTI persons was promised by a political party, it came in the form of a political manifesto. The Nationalist Party and former President Eddie Fenech Adami, in their electoral programme of 1998, promised that:

“Without prejudice to the rights and obligations of a legally valid marriage, we will establish at law the rights and obligations of men and women who live together while unmarried (cohabitation). We will safeguard the rights and interests of the children of such unions. These children should not suffer for reasons that are beyond their control. The law

⁵⁸ For example, a Pastoral letter was issued on the 31st December 1972 in ‘Lehen is-sewwa’ by Archbishop Michael Gonzi and others whereby homosexuality was held to be a sickness and a grave sin, which had serious implications on religious morals and therefore should not be decriminalized.

⁵⁹ As well as anyone else who carried out acts of sodomy, including heterosexual couples and males who have sex with males but were not homosexual.

will seek to protect each person from exploitation or unfair treatment”.⁶⁰

Although this promise would not have targeted same sex couples directly, nor provide them with a form of union which symbolizes the affection it merits, if enacted, it would have at least provided for the relationship in terms of legal rights. As can be witnessed, such a Cohabitation law never came to be, and was never mentioned or promised again by any political party up until 2012. This bar another brief mention in former President George Abela’s opening parliamentary speech in May of 2008 where it was held:

“Ma nistgħux, iżda, ma naffrontawx ċerti realtajiet li qed niltaqgħu magħhom fis-soċjetà llum. Għalhekk il-Gvern bi ħsiebu jipproponi leġislazzjoni bil-għan li jiġu mħarsa minn kull sfruttament persuni li jgħixu flimkien barra mir-rabta taż-żwieġ”.⁶¹

Although this statement was merely made during an opening parliamentary speech and was not a clear-cut promise by the electorate, it can still be held to be an important view and expression of the will of the Government, albeit not implemented immediately.

In June of 2001 the Malta Gay Rights Movement (MGRM) was founded, a non governmental organization (NGO) which is Malta’s leading institution for the promotion of equality through social policies. Its mission and objective is “to achieve full equality for LGBT people in Maltese society; a society that enables people to live openly and fully without fear of discrimination based on one’s sexual orientation, gender identity and gender expression”⁶². Many developments within the LGBTI

⁶⁰ Nationalist Party Program, 1998 <http://www.maltadata.com/pn-98.htm> Accessed on the 13th April 2014

⁶¹ Former President George Abela Opening Parliamentary speech, Plenary Seating 1, May 10th 2008 <http://www.parlament.mt/sittingdetails?sid=7&legcat=7&forcat=12> Accessed on June 4th 2014
Loose translation: We cannot avoid and confront certain realities which we are encountering in today’s society. For this reason, it is the government’s intention to propose legislation which will protect persons who are living together outside of marriage, from abuse.

⁶² MGRM mission statement <http://www.maltagayrights.org/aboutus.php> Accessed on the 18th March 2014

community following the formation of MGRM, may in fact be directly attributed to the persistence and determination of the same organization. As it so happens, the Civil Unions Act today was mainly enacted after MGRM's tenacity and constant pressure to the relevant authorities for something to be done about the situation.

One of MGRM's latest 'projects' included an informative document entitled 'Equality for lesbian, gay, bisexual and transgender people in the 2013-2018 legislative period'⁶³, coupled with a questionnaire which was sent to the three main contending parties of the 2013 General Election; The Malta Labour Party, The Malta Nationalist Party and Alternattiva Demokratika. In this document, MGRM stressed on the measures which needed to be taken in certain fields that still lacked LGBT protection. Amongst these, one will find the recommendation for the need to legislate on Gender Identity once and for all in order to further safeguard the rights and interests of transgender persons. The paper calls for more focus on the younger LGBT persons who sometimes unnoticeably face daily discrimination at home from their families and at school from their teachers and fellow students. Such younger LGBT persons need more policies which would help to combat the social exclusion they may feel, particularly in the sphere of education. A child who is discriminated against based on their sexual orientation or gender identity might not be as capable to learn and thoroughly enjoy their learning experience as other children do. A remedy for this suggested by the same paper is for more recognition within the media, since the public promotion that homophobia and transphobia are unacceptable in modern day society could reduce the prejudice and discrimination felt by LGBT persons.

In February of 2013, before the impending Maltese parliamentary elections, the Malta Labour party, in its electoral manifesto, was the first political party to promise to introduce a form of civil union law in Malta. The political program held the following:

“Indaħħlu d-dritt ta' 'Civil Union' għal koppji tal-istess sess.
Inwaqqfu Kunsill Konsultattiv, bil-parteci-pazzjoni u s-sehem

⁶³ MGRM, 'Equality for Lesbian, Gay, Bisexual and Transgender people in the 2013-2018 legislative period', February 2013
http://www.maltagayrights.org/latest.php?ref=arty2013#.US_CSOYugLY.facebook Accessed on the 24th March 2014

tal-NGOs f'dan il-qasam, li jagħti pariri lill-Gvern dwar issues li għandhom impatt fuq il-komunità LGBT".⁶⁴

In the same manifesto, the Malta Labour government also promised a number of other things such as a new cohabitation law, a more refined and specific law for transgender persons, more LGBT awareness through education in order to prevent bullying as well as the signing of Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Protocol 12 would provide an extensive ban on any ground of discrimination, but has not yet been ratified by Malta.

2.2 Amendments to the Criminal Code

Apart from the initial changes in 1973, a number of other changes were made to the Criminal Code in relation to LGBT rights, in particular following an incident in January 2012 where a teenage lesbian couple were physically attacked by two men and a woman in Hamrun. The girls were seen kissing on a public bench in the locality, when they began to receive verbal abuse from passers by. The verbal abuse soon turned physical and the girls were both left suffering from injuries, which were thankfully not too severe. The two men were consequently fined five hundred euro each whereas the woman was fined fifty euro. Another incident in February of the same year saw an off-duty bus driver, employed by the country's public bus company 'Arriva', attack two lesbian passengers while they were on a bus. The man was subsequently sacked by Arriva and criminally charged with causing injury to the women as well as disrupting the public peace.

A survey conducted in 2011 by the European Union Agency for Fundamental Rights showed that 28% of Maltese LGBT persons felt threatened or were attacked more than three times in their lifetime, while 34% felt the same at least once.⁶⁵ The following year in 2012, 50% of the respondents from the Maltese LGBT community were

⁶⁴ Malta Labour Party's Electoral Political Manifesto of February 2013
<http://election.josephmuscat.com/manifest.pdf> Accessed on the 24th May 2014

Loose translation: "We shall introduce a civil union for same sex couples. A consultative council will be set up with the participation of relevant non governmental organizations in this sphere, which will advise the government on issues regarding the LGBT community"

⁶⁵ Times of Malta Article 'Constitutional change of enormous value', 24th October 2013,
<http://www.timesofmalta.com/articles/view/20131024/local/Constitutional-change-of-enormous-value-.491664> Accessed on the 4th June 2014

threatened or attacked in the last 12 months, the third highest statistic in the European Union.⁶⁶ These shocking statistics together with both the abovementioned Maltese public incidents were one of the main reasons to spark another change in the Criminal code. In February of 2012, shortly after the second incident, the former Prime Minister Lawrence Gonzi instructed former Justice Minister Chris Said to review Malta's hate crime law. Prior to the ensuing amendments, the Maltese Criminal Code only provided for increased punishments in the case of 'xenophobia' or crimes which were racially or religiously aggravated. A consultation process ran through the month of February where discussions and relative analysis with concerned groups such as MGRM were held. Following this, in March of 2012, it was announced that a Bill to improve the Maltese situation on hate crime towards LGBT persons and extend the scope of hate crime within the Criminal Code was to be presented to parliament. On the 19th June 2012, Act VIII was passed by the House of Representatives which would amend various articles of the Criminal Code of Malta. Article 83B in particular, on the general provisions applicable to offences that are racially aggravated or motivated by xenophobia, there shall be added the following paragraph:

“Aggravated or motivated, wholly or in part by hatred against a person or a group, on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion”⁶⁷

The same grounds, which now provide for the inclusion of sexual orientation and gender identity, were also included in a number of other Articles within the Criminal Code such as Article 222A on the increase of punishment in certain cases, Article 82A on the incitement to racial hatred and many others. It also amended Article 6 of the Press Act⁶⁸ which now also includes sexual orientation and gender identity in their grounds where the exposure to hatred, threats or insults towards such groups by means of the press, will be subject to imprisonment as well as a fine (multa).

⁶⁶ European Union Agency for Fundamental Rights, Survey data explorer- LGBT Survey 2012 <http://fra.europa.eu/DVS/DVT/lgbt.php> Accessed on the 4th June 2014

⁶⁷ Article 83B of the Criminal Code of Malta as amended by Act VIII of 2012

⁶⁸ Chapter 248 of the Laws of Malta

The amendment to the Criminal Code sparked numerous modifications across the legal spectrum, with notable changes being made to the Equality for Men and Women Act⁶⁹ to include sexual orientation and gender identity in its definition of discriminatory grounds. The National Commission for the Promotion of Equality (NCPE) also widened its remit in 2012, from only tackling cases related to gender and racial discrimination, to now also include cases of discrimination based on sexual orientation, gender identity, age and religion.⁷⁰

These amendments were all welcome news to many LGBT individuals and LGBT groups, since the message was now clearer than before that discrimination on the grounds of sexual orientation as well as gender identity is no longer acceptable and will incur harsher sanctions.

2.3 The proposed Cohabitation Bill of 2012

Following the introduction of Divorce in 2011, talks were once again initiated on the topic of cohabitation. On the 28th of August of the year 2012, former Minister of Justice Chris Said proposed a Bill of law entitled ‘The Rights and Obligations of Cohabitants Act, 2012’⁷¹. Although many acknowledged that it was indeed a long overdue step in the right direction, it was not however commended by the majority of gay lobbyists. Gabi Calleja, the Malta Gay Rights Movement co-ordinator held that the Bill “continued to stigmatise same sex couples and their families by preventing access to equal right and creating a separate form of recognition that is by far inferior to marriage”.⁷² In fact former Minister Chris Said, when asked whether or not this bill would mean that same sex couples became a recognised family unit, he made it clear that the registration of a civil cohabitation partnership by couples of the same sex

⁶⁹ Chapter 456 of the Laws of Malta as amended by Act IX of 2012

⁷⁰ Times of Malta Article ‘Equality Commission given a wider remit’, 8th March 2012
<http://www.timesofmalta.com/articles/view/20120308/local/Equality-commission-given-a-wider-remit.410126> Accessed on 15th March 2014

⁷¹ Later on replaced by a newer and slightly amended version entitled ‘The Civil Partnerships and Rights and Obligations of Cohabitants Act, 2012’

⁷² Gabi Calleja, Times of Malta Article ‘Bill based on what our society accepts’ 29th August 2012,
<http://www.timesofmalta.com/articles/view/20120829/local/Bill-based-on-what-our-society-accepts-.434759> Accessed on the 7th May 2014

would not mean that such couple was to be on the same level as a family.⁷³ However, although many LGBT lobbyists did feel displeased with the proposed bill, it must be kept in mind that the real focus point of the bill was the regulation of cohabiting scenarios in general and not aimed directly at satisfying the rights of LGBT persons, and therefore, views and expectations by the legislators and the LGBT lobbyists on the bill's outcome were not on the same level.

Prior to the proposal of the bill, a number of consultation meetings were held, where LGBT lobbyists such as the Malta Gay Rights Movement had the opportunity to present propositions. A position paper on marriage equality⁷⁴ was in fact presented to the Ministry at this stage which gave an in depth analysis on the best form of legal recognition that may be afforded to same sex couples. The MGRM later expressed its disappointment since the majority of demands and proposals in the paper presented were not acceded to and the Bill failed to achieve even the slightest level of recognition acceptable. In fact, many of the so-called rights which the Bill claimed to confer, could already be accessed through the drawing up of a notarial deed. The Bill listed its objective as "to provide for the rights and obligations of cohabitants in both civil partnerships as well as unregistered cohabitation and to provide for connected matters such as maintenance and dependency during cohabitation and after its termination".⁷⁵ The Bill had defined a cohabitant in its article 3 where it was held to be:

"One of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship, who are not related to each other within the prohibited degrees of relationship or married to each other, and who immediately before the time the relationship ended, whether through death or otherwise, as living with the other adult as a couple for a period:

⁷³ Chris Said, "Mhux se tkun fuq l-istess livell ta' familja" (Loose translation: No, they would not be on the same level as a family), Interview by the Times of Malta, published on the 28th August 2012 <http://www.timesofmalta.com/articles/view/20120828/local/bill-provides-for-civil-cohabitation-partnerships.434707> Accessed on the 8th May 2014

⁷⁴ Dr N. Falzon, "Malta Gay Rights Movement position paper on marriage equality: Advocating the best options of legislating for same sex couples and families in Malta", 2012.

<http://www.maltgayrights.org/latest.php?ref=localcamp04> Accessed on the 2nd June 2014

⁷⁵ Objects and Reasons of the 'Civil partnerships and Rights and Obligations of Cohabitants Act, 2013'

- (a) of two years or more, in the case where they are the parents of one or more dependent children and
- (b) of five years or more, in any other case”⁷⁶

It is therefore evident that the only main requirements for being considered ‘de facto’⁷⁷ cohabitants, even without the drawing up of a public deed, were the duration of the relationship and the element of joint residence. Other factors such as the degree of financial dependence of either adult on the other, the degree to which they present themselves as a couple and whether there exist any dependent children, amongst others, were to be also taken into account by the court in order to determine the applicability of ‘cohabitant’ status.

The other option is a ‘de jure’⁷⁸ one, where the couples would both opt to enter into a cohabitation agreement via public deed, in accordance with Article 5 of the Bill. Here the couple would have then be presented with a ‘civil partnership certificate’. This would have only been valid had the couple obtained independent legal advice or joint advice if the right to independent legal advice was waived in writing. Such a public deed may contain provisions for maintenance due to any dependants, mutual as well as individual obligations, a description of the dwelling house where cohabitation is intended to be established and also any provisions on the upbringing and maintenance of common children, if any.

The main provisions of the Bill were the legal recognition of the cohabiting partner as ‘next of kin’ and the acknowledgement of a cohabiting partner as a tenant in respect of any lease of a dwelling place where cohabitation exists. Apart from these two provisions, the Bill had left much to be desired. A major concern was expressed on the methods of termination of such partnership. Apart from termination due to death of one of the partners, subsequent marriage between the same two partners and the agreement to terminate by way of public deed, another two rather informal methods were also listed. Firstly, a partner could also contract marriage with a third party which

⁷⁶ Article 3(1) of the ‘Civil Partnerships and Rights and Obligations of Cohabitants Act, 2012’

⁷⁷ A ‘de facto’ situation is one concerning facts but which is not officially sanctioned. In this case the couples would be carrying out an existing practice as though it were legal, yet in reality, no such law exists.

⁷⁸ By contrast to ‘de facto’, ‘de jure’ means a state of affairs which is sanctioned and according to the operation of law.

would automatically render the cohabitation agreement null, and secondly, a partner could simply file a judicial act unto the other partner, informing the other party of the termination. These two provisions were considered perfunctorily unceremonious, as it made it possible for a cohabitant to part with his partner without reason, without proceedings and possibly without even uttering a word. This could have had serious effect on any children born to the union, leaving them unaccounted for and defenceless. This coupled with the fact that the Bill contained no provisions on the possibility of public celebrations left heterosexual cohabitants as well as same sex cohabiting couples feeling antagonized and estranged by the legislators.

2.4 Parliamentary Debates and Meetings pre-Civil Unions

Between the 2013 elections (where civil unions were first proposed), up until the commencement of the parliamentary procedure behind Malta's Civil Union law on the 30th September of 2013, a Consultative Council was set up in order to begin drafting a Civil Unions Bill which would be later on examined by parliament in a series of debates. The Consultative Council, which was promised to be set up in the same provision of the Labour Party's manifesto as Civil Unions, was set up in April of 2013, shortly after the government's election, with the purpose of preparing the draft piece of legislation that would regulate civil unions. Many non-governmental organisations were asked to form part of this council and give their personal recommendations and these were: The Malta Gay Rights Movement, Aditus Foundation, Drachma, Drachma parents support group, LGBT Labour and the University of Malta's student group 'We Are'.

The First and Second readings, held over five plenary sessions between the 30th September 2013 and the 16th December 2013 did not go into the actual merits of the Bill and details of its Articles. Instead, during these plenary sessions, more anthropological issues were discussed as opposed to legal strong points. In fact, the meetings mainly revolved around both political parties contending the pros and cons of introducing the law and what needed to be changed and how.

The majority of the scrutiny placed on the Civil Unions (then) Bill 20 of 2013 then occurred during the Committee Stage meetings by the Consideration of Bills Committee following the second reading. Three such meetings occurred; on the 4th, 18th and 25th of February, which were, for the first time ever, open to the public and which I attended. The reason that the need was felt for such meetings to be open to the public was for such members of the public to be able to give their own input, since the law being debated has an immense social impact. During such meetings, each and every article was individually analysed and scrutinized by both political parties. In this sub-chapter I shall outline the main points of debate that were discussed in the above-mentioned meetings.

The first debate, which opened up the meeting by the Consideration of Bills Committee,⁷⁹ was that of why civil unions would also be available to opposite sex couples. In this session, the opposition party brought up the argument that now opposite couples had two options since, apart from civil unions; there still remained the option to contract a civil marriage. This was in fact suggested to be amended, with the Opposition party propositioning for the civil union option to be eliminated for opposite sex couples while the governing party propositioning for a civil marriage available to both and the complete removal of civil unions. A consensus was however reached for the Bill to remain the same and for civil unions to remain accessible to both same and opposite sex couples.⁸⁰

There was an ardent debate on whether or not Article 5 of the Bill should also emphasize the effective registration of a civil union in order to claim its validity. It was opined by the Opposition party that registration of a civil union would ensure a degree of legal certainty and the civil benefits would only apply only to those couples that intended to regulate their union. On the other hand, since registration is not essential for the validity of a civil marriage⁸¹, it was argued by the government that therefore it should likewise not be an essential requisite for a civil union, which would mar the civil

⁷⁹ Parliamentary Sitting number 16, Consideration of Bills Committee- Tuesday 4th February 2014

⁸⁰ Ibid

⁸¹ Article 12(1) of Chapter 255- The Marriage Act

union's catchphrase of "on a par with marriage", as was promised. Here it is important to envisage a situation where a possible fault or oversight by the Public Registry in the registering of a civil union would lead to the non-existence of that union. This would not be acceptable, and in such a scenario, the Public Registry would have to effectively register the Civil Union as of the date the Union was entered into between the couples, upon proof of a ceremony and formalities such as the publication of the banns.⁸² This method does not however allow for a scenario where upon the death of a partner, a claim would be made by the surviving partner to the relationship that a Civil Union existed due to the proof of a stable and lengthy relationship. This would go against the principle of mutual consent and would allow for possible fraudulent claims, and is the reason why retroactive registration will only be permitted upon solid proof of a clerical error by the Public Registry.⁸³

The Committee reached a standstill when Article 4(2)(a)(ii) relating to adoption⁸⁴ was tackled, and the Opposition party disputed why Professor Angela Abela, the head of the department of family studies, was not invited to attend the meeting and give her professional opinion. The Opposition party representatives urged, before any decisions were taken in the field of adoption and same sex parenting, that a notable family expert such as Professor Abela be first consulted. Even though Gabi Calleja⁸⁵ rightly pointed out that Professor Abela's main expertise concerns heterosexual families and that there are possibly other more experienced individuals who are competent in the field of homosexual families, matters relating to adoption were consequently postponed to the next committee stage meeting, in order to properly assess the articles and their implications in the presence of Professor Abela.⁸⁶

⁸² Article 12(3) of the Marriage Act holds that a civil marriage will have effect if the civil marriage was completed and delivered for registration, and therefore that the necessary form was filed in and duly signed in the presence of the witnesses and then delivered for registration in the Public Registry. Once it is registered it can therefore have effects with regards to 3rd parties. If however, even though the process leading up to registration was duly carried out, the registration in itself did not take place, this would not render the marriage null. The same should therefore apply for Civil Unions.

⁸³ Parliamentary Sitting number 16, Consideration of Bills Committee, Tuesday 4th February 2014

⁸⁴ Discussed in further detail in Chapter 3

⁸⁵ Coordinator of the Malta Gay Rights Movement

⁸⁶ Parliamentary Sitting number 16, Consideration of Bills Committee- Tuesday 4th February 2014

In fact, the second committee stage meeting⁸⁷ predominantly revolved around the issue of adoption and parenting, with Professor Abela giving a detailed and precise evaluation of the topic by means of a short presentation before the committee. In this presentation it was noted several times that Malta has not yet carried out any studies on LGBT families involving children and that research was therefore limited to foreign findings.⁸⁸ Apart from the studies presented by Professor Abela, she also commented on how education on the topic of LGBTI families needed to be promoted in schools in order for these family scenarios to eventually become treated equally and stressed on the need for a more thorough adoption screening process, both for potential homosexual parents as well as heterosexual ones.⁸⁹

On the third and final Committee Stage meeting it was decided that the entire Bill would be re-discussed. In fact, certain issues which were already debated in the 2 previous meetings were resurfaced and discussed afresh. Regarding the issue of registration, tackled in the first Committee stage meeting, Hon. Beppe Fenech Adami on behalf of the Opposition party, made a valid point that although the Opposition's proposed amendment to include a clause stating that the registration of a Civil Union was essential for the validity of that union was dismissed, Article 4 of the Act held that "a civil union, once registered, shall mutatis mutandis have the corresponding effects and consequences in law of civil marriage". This was at first held to be contradictory to the government's dismissal of the opposition's proposal, however, after much confusion and more discussion, it was established that one had to distinguish between 'effects' and 'validity'. The Opposition party's proposal to add a clause requiring registration for validity would have meant that if a civil union was not registered, it would be rendered null, which was not the scope of the law. On the other hand, registration is required in order for the civil union to benefit from the civil effects in the same way a civil marriage does.⁹⁰

⁸⁷ Parliamentary Sitting number 17, Consideration of Bills Committee, Tuesday 18th February 2014

⁸⁸ Which shall be discussed in further detail in my subchapter on Adoption in Chapter 3

⁸⁹ Parliamentary Sitting number 17, Consideration of Bills Committee, Tuesday 18th February 2014

⁹⁰ Parliamentary Sitting number 18, Consideration of Bills Committee, Tuesday 25th February 2014

On the same Article 4, another debate was contended on the meaning of the '*mutatis mutandis*' clause in the Bill. As will be seen in the next Chapter on the contents of the Act, the phrase '*mutatis mutandis*' is used with the scope of extending all laws to become applicable to Civil Unions where this was possible. The Opposition Party felt that instead of '*mutatis mutandis*', the phrase 'where applicable' should be used as they felt it would be clearer to the reader whilst keeping with the same meaning.⁹¹ The Attorney General who was present for the Committee stage meeting however dismissed the claim that the two phrases meant one and the same thing. If the amendment were to take place and the phrase '*mutatis mutandis*' be substituted with 'where applicable', the implications of the Articles in the Act would have a totally different meaning. If the Articles/Laws mentioned in Civil Unions were to apply only where applicable, one would have a look at a specific clause, see if it could apply to Civil Unions and if it could not, the process would stop there. On the other hand, if the legislators were to retain the '*mutatis mutandis*' provision, one would again look at a specific clause, see if it applies to Civil Unions or not, and if no, it would be possible to adapt the meaning of the said clause to become applicable to Civil Unions.

Wherever a change would be needed, the interpretation of the article would be changed to make the necessary changes for Civil Unions. The question was raised by the opposition as to that happens with those situations where it would be impossible to adapt an article of a certain law to apply to civil unions as well as civil marriages. In response to this, it was held that the phrase "save as provided in this act"⁹² was there to account for those instances in Article 4 of the Act which due to certain reasons cannot be deemed applicable to civil unions in any way, such as the provisions related to the holy ritual. In the same meeting, more points of discussion arose, which are far too plentiful (and some even trivial) to discuss in full, however, the above-mentioned issues were the ones I deemed most crucial to the understanding of the debate surrounding Civil Unions.

⁹¹ Ibid.

⁹² Article 4(1) of Chapter 530- The Civil Unions Act.

2.5 The Amendment to the Constitution

Along with the previous talks of a new Civil Unions law, there was also the talk of an amendment to the Constitution of Malta. On the 20th June 2013, the Opposition MP Claudette Buttigieg put forward a private member's Bill which proposed an amendment to the Maltese Constitution, concurring with a proposal made by the Nationalist Party in its 2013 electoral programme.⁹³ The amendment proposed was a simple addition of 'sexual orientation' to the grounds of discrimination listed in Articles 32 and 45 of the said Constitution. Although a mere two word addition may seem minor, the protection afforded to the LGBT community would in comparison be quite a major one. The amendment was welcomed and approved by the Labour party and other LGBT organisations, however a further addition of 'gender identity' as another ground was requested over and above the sexual identity ground. NGOs and MGRM in particular appealed for such an addition since the inclusion of gender identity would serve to also afford protection to transgender persons.

There is often a misconception that sexual orientation and gender identity both mean one and the same thing, however, this is not so. The two concepts are entirely different. Whilst sexual orientation refers to an individual's attraction to a member of the same and/or opposite sex, gender identity is distinct and refers to an individual's identification as a member of a different sex from the one assigned to them at birth.⁹⁴ Put more simply, it is the difference between who you are and who you love.

The amendment was made and the Constitutional amendment Act X of 2014 was unanimously passed by Parliament on the 14th February 2014 along with the Civil Unions Act. The amendment now meant that Article 32 on the fundamental rights and freedoms of an individual as well as Article 45 on the protection from discrimination

⁹³ Proposal 99 of the 2013 PN electoral programme 'Drittijiet ta' persuni LGBT: Fil-Kostituzzjoni tiddaħħal klawsola li tipproteġik minn diskriminazzjoni a bażi ta' orjentazzjoni sesswali. Dan ifisser li jekk liġi jew prattika amministrattiva tkun tippermetti diskriminazzjoni ta' dan it-tip, allura tkun tista' tigi dikjarata nulla'. Loose Translation: A clause will be added to the constitution which would protect LGBT persons from discrimination based on their sexual orientation. This would mean that if any law or practice would allow for discrimination based on sexual orientation, this could be declared null.

⁹⁴ Human Rights Campaign, 'Sexual Orientation and Gender Identity: Terminology and Definitions' <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> Accessed on the 18th June 2014

on certain grounds, both include sexual orientation and gender identity in their list of grounds, finally giving a constitutional remedy to LGBT persons. No law may be discriminatory on either of these grounds, and if such an instance occurs, compensation will be available to seek based on this amendment. Following the unanimous approval by the Maltese House of Representatives of this amendment, Malta became the first country in Europe⁹⁵ to provide for gender identity as a discriminatory ground within its Constitution, the most supreme of all legal texts.

⁹⁵ Council of Europe Article 'Malta recognizes same-sex civil partnerships' <http://www.coe.int/t/dg4/lgbt>
Accessed on the 18th June 2014

Chapter 3: The Civil Unions Act, 2014.

3.1 Introduction

On the 14th of April of the year 2014, after contentious deliberation on the matter, the legal Bill entitled “The Civil Unions Act, 2014” was passed by parliament with 37 votes in favour, 30 abstentions and 0 votes against. The Bill was signed two days later by President Marie Louise Coleiro Preca on the 16th of April 2014, where it effectively became law. The Civil Unions Act, 2014 is Act IX of the year and is situated in Chapter 530 of the Laws of Malta.

The law enacted is a very simplistic and minimalist one, purportedly modelled on the Danish Registered Partnership Act of 1989.⁹⁶ According to Dr. Neil Falzon, in the summer of 2013, when the Consultative Council was entrusted with the drafting of the Civil Unions Bill, they were faced with two drafting options.⁹⁷ The first was to draft a very long and complex law that would target all Maltese legislative material that connected in any way to marriage, make an extensive list of all rights and obligations and afterwards, proceed to amend each piece of legislation to also include the term ‘partner’ wherever there was mention of a ‘spouse’ or a ‘husband’ or ‘wife’. This was in fact the method employed in the United Kingdom’s Civil Partnership Act of 2004 which has a total of 429 pages of detailed amendments to various laws that touch upon marriage in any way or form. The second option was to draft a straightforward and less complex, catch-all law that would only contain a few provisions, yet have the same effect.

Maltese legislators settled for the latter option since, despite that the former may be considered more thorough at first glance, there exists a number of risks that go with it. Apart from the fact that the process is a long and tedious one, it could also result in an Act which would leave same sex couples of a civil union at a disadvantage. The reason

⁹⁶ Times of Malta Article ‘Civil Unions law will give same sex couples same rights, duties, as married couples’, October 14th 2013 <http://www.timesofmalta.com/articles/view/20131014/local/civil-liberties-bill-will-give-gay-couples-same-rights-duties-as-married-couples.490275>

⁹⁷ Personal face-to-face meeting with Dr. Neil Falzon, the lawyer who drafted the law, 21st April 2014, Valletta office.

for this is because when attempting to amend all present legislation, the legislators run the risk of omitting what may seem like a minor article or chapter of law, however, if left unamended, could change the whole scope of the equality which the Civil Unions Act aims to achieve. It also means that for every legislative change that has some legal connection to spouses, such new law would not be applicable to partners of a civil union unless the act is amended.⁹⁸

In the case of Malta's Civil Unions law, all marriage rights are mirrored to civil unions because wherever 'spouse', 'husband' or 'wife' is included in Maltese legislation, it should be interpreted to also include partners of a civil union. The law therefore equates marriage with a civil union and spouse with a civil union partner without the need of such an elaborate act.⁹⁹ The same would obviously apply, not just to rights, but also to the obligations that a marriage would bring about, including support, fidelity, maintenance and others which shall be expanded on later on in this chapter.

3.2 An in depth analysis of the Civil Unions Act and its Articles

Article 2 of Act IX of 2014 is the first significant article, which gives a brief list of interpretations to some terms which will later be used throughout the act. Most notably is that for the purposes of this act, a "partner" shall refer to a person of either sex, male or female, who has contracted into a civil union. The terms 'spouse', 'husband' and 'wife' have been done away with since they have connotations that would imply a marriage. The doors are left open in terms of the sex of the partner through the use of words 'either sex' and therefore it is to be understood that couples of the opposite sex may also enter into a civil union should they wish. Although it is argued that there exists no fundamental difference between a civil marriage and a civil union with the exception of the name of the 'contract', some opposite sex couples may prefer to enter into a union as opposed to a marriage simple because of this name

⁹⁸ Ibid

⁹⁹ Information received from an informative meeting (which I attended) on the newly enacted Civil Unions law, 24th April 2014, Excelsior Hotel, Floriana.

difference. It was also argued that if a civil union law was introduced to Malta and was open solely to same sex couples, it would result in the creation of another form of discrimination, this time towards couples of the opposite sex who would be deprived of the option of a civil union.¹⁰⁰ The most prominent code of law which Act IX refers to is the Chapter 255 of the Laws of Malta- 'The Marriage Act', and in fact, in the same article 2, it is laid down that any reference to "the Act" within the civil unions act, shall refer to the Marriage Act¹⁰¹.

Article 3 on 'The establishment of civil unions' makes it clear that any person who fulfils the requirements to enter into a marriage according to the provisions laid down in the Marriage Act, are able to contract and register their civil union¹⁰². Therefore, as laid down by the Marriage Act, a person may register their civil union if they are at least sixteen years of age, not incapable, interdicted or of infirm mind and not bound by any previous marriage. A marriage or civil union will also be rendered void if it is contracted with an ascendant or descendant in the direct line, with a brother or sister of full or half blood, with a person related by affinity in the direct line or with an adopter, adopted person or descendant, husband or wife of the adopted person.

The main article and crux of the Civil Unions act lies in Article 4, which confers equal rights to a civil union as to a civil marriage. The article holds the following:

"4. (1) Save as provided in this Act a civil union, once registered, shall *mutatis mutandis* have the corresponding effects and consequences in law of civil marriage contracted under the Act.

(2) Without prejudice to the generality of sub-article (1):

(a) Articles 3 to 16 (both included), 18 to 20 (both included), 33, 34, 36(3) and 38 of the Act shall *mutatis mutandis* apply to civil unions:

Provided that:

(i) The reference to "wife", "husband" and "man and wife" in article 15(2) of the Act shall be construed as a reference to

¹⁰⁰ Parliamentary Sitting number 16, Consideration of Bills Committee- Tuesday 4th February 2014

¹⁰¹ Article 2 of the Civil Unions Act: "'Registrar' shall have the same meaning as assigned to it in the Marriage Act, hereinafter referred to as 'the Act'"

¹⁰² Article 3 of the Civil Unions Act "Save as provided in this Act, all persons fulfilling the requirements to enter into marriage in accordance with the Act may register their partnership as a civil union"

partners in a civil union insofar as the said sub-article applies to civil unions; and
(ii) The reference to "born or conceived" in article 20(2) of the Act shall be construed as also including children adopted by partners in a civil union;
(b) Articles 35 to 66 (both included) and 66A to 66N (both included) of the Civil Code shall mutatis mutandis apply to civil unions".

Firstly, sub-article (1) details that once a civil union is registered, all effects and consequences that a civil marriage gives rise to, shall also apply in respect of civil unions. The phrase 'mutatis mutandis' is used here so as to make it clear that those provisions, which to the casual eye would seem to apply to a spouse and not a civil union partner due to the wording, may be altered accordingly to also apply to civil unions and its partners.

This sub-article is of a very general nature and alone, confers each and every right and obligation which spouses of a civil marriage are entitled to, to a same or different sex couple within a civil union. This includes all laws of Malta as well as legal publications and any other benefits granted by the state. It is pivotal to highlight that the mirroring of laws does not only apply to already present legislation, but also applies to any future legislation too. Such rights shall be discussed and analysed in further detail later on in this chapter. Sub article (2)(a) of Article 4 then goes on to pin point specific articles within the Marriage act which shall mutatis mutandis apply to a civil union. At first glance, one may notice that a number of articles within the Marriage act have been left out in so far as civil unions are concerned, and this due to the fact that they are all provisions concerning Catholic marriages and Canon law- and therefore provisions which fall beyond the scope of civil unions.

Article 15(2) of the Marriage act could be held to be one of the most important articles in the act as it relates to the form of civil marriages and the vows which the parties exchange. Due to extensive references to a couple of the opposite sex such as 'husband', 'wife', 'he', 'she' and 'man and wife', the legislators felt the need to add extra protection in article 4 of Civil unions act, holding that such terms shall be

interpreted as partners of a civil union when the sub-article relates to a civil union. Likewise, in article 20(2) of the marriage act, which relates to the effects of a valid marriage in relation to children once the marriage is declared void. Here, children adopted by partners in a civil union are also accounted for apart from children who are born and conceived into such relationship. Lastly, the provisions relating to personal separation and divorce are also available for partners in a civil union to avail themselves of, through article 4(2)(b) of the Civil Unions act.

Article 5 deals with the form of a civil union and holds that it should be contracted in the form laid out in the Civil Unions Act. Although no specific arrangement is laid down further on in the Act, we can conclude that the same form for a civil marriage under the Marriage Act would apply for a union. This would refer us once again to article 15(2) of the Marriage Act, where a civil marriage is contracted in the presence of a registrar or an officer of the marriage registry as well as in the presence of at least two witnesses. The registrar or officer would then ask the persons to be married whether they will take the other to be their husband or wife and once such a declaration is made, they are declared to be man and wife. In the case of a civil union, this process is reflected, with the exception being that the registrar or officer will ask the couple whether they wish to take the other as their partner and later on declared them as partners of a civil union. As explained in my previous chapter, the Opposition party had proposed an amendment within this article, so as to include the phrase 'the registration of a Civil Union is essential for the validation of the said Civil Union and the civil effects of the same union'.¹⁰³ This amendment was rejected, for the simple reason, that although civil rights and effects would only begin once a civil union was registered, the civil union would not be rendered completely null and non-existent if, for reasons unknown, the civil union did not complete the final step of registration.¹⁰⁴

A fundamental article within the Act is found in Article 6, which holds that when a marriage (not a union or partnership) is contracted abroad by two persons of the same sex, once in Malta, their same sex marriage is also deemed to be a marriage in terms

¹⁰³ Parliamentary Sitting number 16, Consideration of Bills Committee- Tuesday 4th February 2014

¹⁰⁴ The reasoning behind this decision is explained in more detail in Chapter 2.4 of this thesis.

of Maltese law. This is a big issue for Malta, as there now exists the option for Maltese same-sex couples to contract marriage in one of the countries where same sex marriage is legal¹⁰⁵, come back to Malta, and be legally recognized as spouses to a civil marriage. The introduction of such article makes Malta one of only four countries¹⁰⁶ in the world to recognize same sex marriages contracted abroad as marriages within their own legislation, whilst not allowing for same sex marriage to be contracted within the country itself. The only requirements for this article to apply are listed in Article 18 of the Marriage act where, firstly, the formalities for the validity of marriage by the law of the country where such marriage was celebrated must have been observed and secondly, both parties are capable of contracting marriage by the law of the country of their respective domicile. The article goes on to state that unions of equivalent status¹⁰⁷ contracted abroad shall also be valid and recognised in the same manner as a civil union contracted in Malta, with the same conditions of validity listed in the above paragraph relating to formalities and capacity.

Article 7 relates to the offence of bigamy, where a person contracts a civil union with a person who is bound by another civil union, by a union of equivalent legal status or by a marriage. In the event of such an occurrence, the civil union contracted by such persons shall be deemed to be void. This article may be seen in conjunction with Article 15 of the Civil Unions act which amends the Criminal Code of Malta. Here, immediately following article 196 of the Criminal Code¹⁰⁸, there shall be added a new article; Article 196A where the offence of bigamy provided for in article 196 shall also be committed in terms of a civil union and a partner of such union shall be liable to the same punishment of imprisonment of a term between thirteen months to four years.

¹⁰⁵ Countries currently allowing for same sex marriage (as of May 2014): Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, part of Mexico, The Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, United Kingdom (excluding Northern Ireland), part of the United States of America and Uruguay.

¹⁰⁶ Israel, Malta, Mexico and the state of Oregon along with the federal government of the United States of America

¹⁰⁷ To be determined by the Minister responsible for the public Registry through the introduction of a list comprising of all such unions.

¹⁰⁸ "A husband or wife who, during the subsistence of a lawful marriage, contracts a second marriage, shall, on conviction, be liable to imprisonment for a term from thirteen months to four years".

As shall be explained in greater detail in Chapter 4, even after the removal of the discriminatory clause in Malta's transposition of the Free Movement Directive 2004/38/EC, a problem still remained with regards to non-EU nationals in relationships with Maltese citizens. This discrimination has however been removed through the introduction of the transitory provision in Article 8, which states that where any union of equivalent status or marriage was contracted prior to the 14th of April¹⁰⁹ and where either partner/spouse is a third country national¹¹⁰, the legal residence of such third country national shall be deemed to have commenced from the date of the marriage or union of equivalent status. This transitory article is of paramount importance as it remedies a situation which, since August 2011, placed European nationals in a same sex relationship with a third country national coming to Malta on a superior standing to third country nationals in a same sex relationship with a Maltese national.

In order to aid in the prevention of any form of discrimination, Article 9 specifies that "in situations where the rights and obligations of civil partners are unclear, every effort shall be made to ensure that the determination of such rights and obligations is such that equates them to those enjoyed by spouses". This article is inserted as a form of clarification and does not create any new right or obligation in favour of civil union partners, but rather, simply there to strengthens the effectiveness of the arguably broad Article 4. In the case of any confusion or uncertainty as to the applicability of a right or obligation to a civil union partner, this article confirms that the courts must endeavour to keep civil unions on a par with marriage. All rights and obligations must be mirrored, whatever the outcome.

Article 10 holds that the Minister responsible for the public registry may, by regulation, provide a list of the unions of equivalent status to the civil unions granted under the Act. The reasoning behind such provision of a list is the fact that not all unions or partnerships are of equal status since some countries may provide what may be termed a 'union' yet confer minimal or no rights at all. It is therefore impossible for a couple to contract such a 'union' or, 'partnership' of unequal status and then

¹⁰⁹ The coming into force of the Civil Unions act

¹¹⁰ Not being a Citizen of Malta or of a Member State of the European Union

come to Malta and benefit from the full rights which are granted through our civil union. Hence, the rights and obligations conferred under the Civil Unions Act are only equally applicable to those unions which the Minister, in his or her opinion, deems to be of corresponding calibre. Sub-article (2) of the same Article 10 provides for the Minister to be able to remove any listed union of equivalent status if he/she believes that it no longer fulfils the requirement of “equivalent status”.

The provision in the Civil Code relating to the surname adopted by spouses following a marriage can be found in Article 4 of the said Code. Article 11 of the Civil Unions act holds that a new sub-article be inserted immediately following sub-article (10) of Article 4 of the Civil Code. This will provide for the surname choices which partners to a civil union may have when applying for the publication of banns of a civil union. The first option is for both partners to adopt the surname of either one of the partners in the union, or to use both surnames in any order of their choice. The second option would be for both the partners to retain their own surname. If no choice is specified on the application of the publication of the banns, the latter option of retaining their own surnames will be automatically presumed. Unlike in a marriage, the option for one of the partners to adopt a double-barrel surname comprising both maiden and partners surname whilst the other partner keeps their own surname, is not an available option for same sex couples contracting a civil union.

In Title II of the Civil Code relating to filiation, Sub-Title III deals with children conceived and born out of wedlock. Article 12 of the Civil Unions act stipulates that a new article be added to this sub-title immediately after Article 100A. The new Article 100B now deals with parenthood in civil unions for children who are adopted jointly by same sex partners or of children who are subsequently recognized by a second parent following a Civil Union. Notwithstanding any other provisions of the Civil Code or other laws, such children shall “be recognized for all intents and purposes of law as having parents of the same sex and all rights and obligations of parents towards their children and of

children towards their parents under this Code or under any other law shall apply to such children and parents”¹¹¹.

It is further stated that whenever a law or administrative measure requires a person to declare the name and particulars of their mother and/or father, a child adopted or recognized by parents of the same sex shall be entitled to declare the names of both their mothers or both their fathers, as the case may be, as opposed to those of the mother or father.

Another addition to the Civil Code introduced through Article 13 of the Civil Unions act, targets Title VIII of ‘Acts of Civil status’, in particular to Sub-Title III on acts of Marriage. Immediately after Article 295, a new Article 295A shall be added whereby all provisions under the sub-title of acts of marriage shall *mutatis mutandis* also apply to civil unions contracted under the Civil Unions act. It is also laid down in sub Article (2) of the said Article 13 that the form of civil unions shall be in the manner stipulated in Form EE of part II of the First Schedule to the Civil Code. Such Form EE, is in fact added to part II of the First Schedule through Article 14 of the Civil Unions act. The new Form EE called, an ‘ Act of Civil Union’ is identical to Form E (The act of Marriage) in terms of structure, however, all references to ‘husband’ or ‘wife’ have been replaced with the gender nonspecific term ‘parties of a civil union’. Also, in the Act of Marriage, the details of the parties’ mother and father are requested, whereas in the Act of Civil Union it is requested to give the details of the ‘parents’, leaving such requirement gender neutral once again. The marriage registrar is here referred to as simply the registrar, since no allusions to marriage are made in Form EE.

Lastly, Article 16 of the Civil Unions act provides for a change to be made to Article 244 of the Civil Code. Article 244 falls under the general provisions of the title ‘Acts of Civil status’ and deals with births, deaths and marriages in foreign countries. Article 16 ordains for “unions of equivalent status”¹¹² to be added immediately following the word ‘marriages’, both within sub article (1) as well as in the marginal note of the

¹¹¹ Article 100B sub-article (1) of the Civil Code, Chapter 16 of the laws of Malta

¹¹² Which will be specified on a list which the Minister may, via a regulation, issue under the Civil Unions act

article. This article will allow for any act of birth, death, marriage or union of equivalent status that has been drawn up or registered in a foreign country by a competent authority to be, upon the request by an interested party and upon the satisfaction of authenticity by the Director of Public Registry, registered in Malta and/or Gozo in the same way as if it were drawn up by the competent authorities of Malta or Gozo.

3.3 The Process behind the contracting of a Civil Union.

For persons who wish to apply to enter into a civil union, the process is fairly simple and treated almost the same as if it were a civil marriage. It is firstly important to note that persons wishing to enter into a civil union must have attained at least 18 years of age, or require the consent of their parents if they are between the age of 16 and 18. Any person contracting a civil union must be either single, divorced, annulled or widowed, and therefore anyone who is solely legally separated would not satisfy the requirements of an eligible candidate for civil union partner.

With regards to the necessary documentation required, this varies according to the nationality of the parties. If both parties to the civil union are Maltese citizens, they need only present a photocopy of their identity cards, photocopies of the identity cards of their chosen witnesses, and, if either party was previously married or in a union, a copy of such union or marriage certificate along with a copy of the divorce or annulment certificate.

If however, either or both of the parties are not Maltese citizens, yet still citizens of the European Union, apart from the documents mentioned above in the case of two Maltese citizens, they are also required to present a copy of the resident's registration certificate, a copy of the partner's birth or adoption certificate and a copy of the partner's free status certificate¹¹³, or if this is not available, an affidavit by a person well known to the partner, confirming that there is no obstacle to the union. If such

¹¹³ This is a document usually released by the Public registry equivalent of a country which states that no act of marriage or union has been registered in that registry.

document is not in the English or Maltese language, it shall be translated and duly apostilled.¹¹⁴

If one of the parties to the prospective civil union is a third country national, they must also present a copy of their valid passport as well as a copy of their valid residence card. No minimum residency period is required before the contracting of the civil union, however, another meeting at least 3 days prior to the union is necessary in order to reconfirm all the documents and vet the draft civil union act.¹¹⁵

3.4 Registering marriages, unions or unions of equivalent status contract abroad, in Malta

One must also envisage those scenarios where couples already contracted same sex marriage or civil union in another country prior to the coming into force of the Maltese Civil Unions Act. Whereas previously, upon return to Malta, they were not legally considered partners or spouses, this is now possible, such that same sex married couples are duly recognised as married spouses and not just partners. In order to register such union or marriage in Malta it is imperative that one of the parties is in fact Maltese, such that one of the main requirements is the presentation of a letter issued by the department of citizenship and expatriate affairs addressed to the Public Registry, confirming that the person indicated in the act is a citizen of Malta. Besides this, the original and legalized act of civil status or act of marriage, which must be authenticated by the competent authority of the country which issued it, as well as a declaration by the couple attesting the surname/s after their marriage or union must also be provided.¹¹⁶

¹¹⁴ An 'Apostille' refers to the authenticated of a foreign document issued by a state party to the Hague Convention of 1961 in order to facilitate its use in another state.

¹¹⁵ Ministry for Home affairs and National Security Malta; Civil Union FAQs https://mhas.gov.mt/en/MHAS-Departments/Land%20Public%20Registry/Documents/Public%20Registry/FAQS%20-%20Civil%20Unions_.pdf Accessed on the 29th May 2014

¹¹⁶ Ibid.

3.5 The Civil Rights

Once a civil union has been established, the rights and obligations attached to such should automatically kick in and couples of such a union should begin to benefit from the protection afforded to them through such rights. In this sub chapter I will focus on the most important aspects of the various civil rights granted through the introduction of civil unions. Such rights are vital and imperative for the harmonious and equal position at law for same sex partners.

3.5.1 The Right to Family, Stability and Acceptance

The first and most fundamental right which partners are afforded once they enter into a civil union is that they are now able to officially begin a legally recognized family. According to Article 2 sub article (2) of the Maltese Civil Code; “Spouses shall have equal rights and shall assume equal responsibilities during marriage. They owe each other fidelity and moral and material support”.¹¹⁷ This is a fundamental right which may now be enjoyed, without question, by partners of the same sex through the introduction of Article 4 in the Civil Unions Act.¹¹⁸

The creation of a new legal relationship for same sex partners also creates a sense of stability in terms of their relationship. Once such a union becomes official and regulated, the couple are able to feel recognized by society as opposed to being outcast and having their relationship rejected. Being accepted by the community and forming part of a stable and formal relationship may in turn lead to social and economic benefits to society as the couple are now able to share resources and finances.

Another vital right and advantage is that the formation of legal same sex unions will contribute to a better and wider social acceptance. The more legal recognition that is placed on such relationships means that the general public are more likely to accept

¹¹⁷ Chapter 16 of the laws of Malta

¹¹⁸ As explained in Chapter 3.1, Article 4 touches on all the rights and obligations conferred to spouses in a civil marriage and mirrors them equally to partners of a civil union, even though each right and/or obligation is not individually made reference to.

the union and value it. As the informative paper by Martin Scicluna correctly holds- “The introduction of legislation will act as an important step in publicly valuing same sex relationships [...] It will be much harder to ignore this commitment both in law and in everyday life”. Following on from this argument, such recognition should lead to a decrease in homophobic violence and abuse and on any form of discrimination in general against such couples, resulting in a more peaceful and accepting society where same sex couples may demonstrate their relationship with confidence and without fear.

All provisions within the Civil Code and other laws which are related to matters of the family are automatically assumed by same sex partners and therefore, all that follows Article 2 sub article (2) of the same code can be said to also apply to civil unions. This includes rights and obligations such as maintenance, family needs, matrimonial home, protection from domestic violence duties towards children and parenting and privileged communication, to note but a few.

3.5.2 The Right to apply for Adoption

Perhaps one of the more contentious aspects of the debate surrounding the Civil Unions Act was the issue of same sex adoption. Seeing that the method opted for by the council in charge of drafting was one where each and every right granted to spouses would be mirrored for same sex partners, once passed, it therefore also automatically bestowed the right to adopt onto same sex couples. However, the majority of Maltese citizens seemed to be completely against this, such that a survey commissioned by the church and carried out by ‘Misco Malta’ revealed that 80% of the population were against same sex adoption¹¹⁹. Another poll conducted by the Malta Today website demonstrated that whereas 24.7% of the respondents agreed with the Civil Unions bill in its entirety, 45.2% agreed with the bill all except for the granting of

¹¹⁹ Survey carried out by ‘Misco Malta’ in October 2013 on 500 respondents’ views on the Civil Unions (then) Bill. <http://www.timesofmalta.com/articles/view/20140112/local/Survey-80-per-cent-against-gay-adoption.502248> Accessed on the 25th April 2014

right to adopt¹²⁰. This undoubtedly leads to questions about the democratic validity of the method used in the process of drafting this piece of legislation, since it arguably ignores the will of the majority in this particular case.

Irrespective of the absent endorsement by the majority of the population, the Civil Unions Act was passed in its entirety and Malta became the 10th country¹²¹ in Europe to provide for same sex adoption rights¹²². Article 114 sub article (3) of the Civil Code of Malta holds that “save in the case of two spouses living together, an adoption decree shall not be made authorizing more than one applicant to adopt a person”. This article, although it does not hinder a single person’s right to apply for adoption under Article 114 sub article (1), stresses that no two persons, unless they are spouses who live together, are able to adopt. This therefore excludes two friends, two family members or two mere acquaintances from the right of adoption application since it would be wrong to have parents which are not intimately connected in some way or form. Through the Civil Unions act, this article now applies to same sex and heterosexual partners who have contracted a civil union and not just to spouses. The wording of the article, however, still precludes cohabiting couples from such right since they do not satisfy the requirements.

The granting of such right of the application for adoption to same sex couples has also brought Malta more in line with the European Convention on the Adoption of Children. When it was first enacted in 1967, the convention only provided for adoption by “two persons married to each other whether they adopt simultaneously or successively or by one person” and did not provide for the possibility of a same sex couple to adopt, even though a single gay parent could. In the new and revised convention (post 2008), Article 7 now provides that:

¹²⁰ Survey carried out by ‘Malta Today’ on the 17th November 2013 on 554 random respondents’ views on the Civil Unions (then) Bill.

http://www.maltatoday.com.mt/news/data_and_surveys/31546/majority-favour-civil-unions-but-not-gay-adoption-20131117#.U3TLbShAusE Accessed on the 25th April 2014

¹²¹ Along with Denmark, France, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom.

¹²² ILGA, Malta adopts same sex civil union law, 14th April 2014

<http://www.marriageequality.ie/news/2014/04/14/ilga-malta-adopts-samesex-civil-union-law> Accessed on the 10th May 2014

- “1. The law shall permit a child to be adopted
 - a. by two persons of different sex who are married to each other or where such an institution exists, have entered into a registered partnership together
 - b. by one person
2. States are free to extend the scope of this convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this convention to different sex couples and same sex couples who are living together in a stable relationship”.¹²³

Although sub article 2 does not enforce an obligation, as may be seen through the words “states are free”, it seems to denote that it is only fair and in the interest of equality that same sex couples be granted the same right of applying for joint adoption as opposite sex couples are. This is particularly the case when taking into account the fact that it is already possible for a single gay person to adopt. Malta has now extended the scope of the convention to include the possibility of same sex couples to adopt jointly and both be recognized as parents as opposed to the prior situation where couples would have to adopt singularly, leaving the second parent legally in the dark. So far however, Malta has not yet extended the scope of the convention to also include joint adoption by persons who have not registered any marriage or civil union and are merely cohabiting together in a stable relationship. This may however be considered once the drafting of a Maltese Cohabitation Bill is further along the process.

In view of the disagreements by the population regarding same sex parenting and the fear of the possible negative effects it may have on the adopted children, a number of foreign studies have been referred to such as those by Biblarz and Stacey as well as Deborah Dempsey which were presented by Professor Angela Abela in the Committee Stage meeting referred to in the previous chapter.¹²⁴ As explained in sub-chapter 2.4, Malta has not yet conducted any form of study on the topic, and therefore it is only

¹²³ European Convention on the Adoption of Children, Council of Europe, [CETS No.202]
<http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm> Accessed on the 29th April 2014

¹²⁴ Parliamentary Sitting number 17, Consideration of Bills Committee, Tuesday 18th February 2014

foreign studies which may be analysed. Although data analysis is still in its premature stages, it has emerged to be quite evident that the primary method of evaluation and assessment should be on the ability to parent a child, lifestyle and on character rather than on sexual orientation.

Indeed, a 2005 study has shown that there has been no evidence of negative ramifications on children that were adopted by gay or lesbian parents when compared to those children adopted by heterosexual parents¹²⁵. “In sum, while there are limitations in studies to date, many of them have been conducted and the valid ones appear to universally come to the same conclusions: that children raised by gay and lesbian parents adjust positively and their families function well”¹²⁶. On the same topic of gay and lesbian parenting abilities, sociologist Dr. Judith Stacey has held that even with such data limitations there is no acknowledged or legitimate academic who has argued that being raised by gay or lesbian parents is somehow disadvantageous or detrimental to children.¹²⁷

In fact, quite to the contrary of certain beliefs, there now exists strong evidence that gay or lesbian same sexed families constitute supportive environments in which to raise children.¹²⁸ In a children’s report conducted by the International Lesbian and Gay Association (ILGA) in 2008 it was held that “there is considerable social scientific and psychological literature that demonstrates that the successful raising of a child is not dependent upon the gender or sexual orientation of his or her parents(s)”¹²⁹. It is therefore argued that the prevention of legal recognition and lack of adoption options by same sex partners may actually be detrimental to children. In the scenario where a same sex couple wishes to jointly adopt a child but are unable to due to legal impediments, the child, who has already been alienated from a loving and caring

¹²⁵ Evan B Donaldson Adoption Institute, *Expanding Resources for children: Adoption by gays and lesbians*, March 2006.

¹²⁶ Ibid

¹²⁷ Dr. J. Stacey, 29th January 2005, ‘Experts dispute Bush on gay adoption issue’, *The New York Times* <http://www.nytimes.com/2005/01/29/politics/29marry.html?pagewanted=print&position=&r=0> Accessed on the 11th May 2014

¹²⁸ Deborah Dempsey, *Same sex parented families in Australia*, CFCA paper no. 18, 2013

¹²⁹ ILGA, *The rights of children raised in Lesbian, Gay, Bisexual or Transgender families: A European perspective*, December 2008.

family once already in his or her lifetime, is further deprived of a second chance to a family.

On the 18th July 2014, Professor Susan Golombok, the Director of the centre for family research at the University of Cambridge, gave a presentation at the University of Malta on the 'Perspectives of Rainbow families'. In this presentation she gave an overview of 35 years of research revolving around the parents and children in a same sex family. Her studies, which began in the 80s and continued up until today showed that the quality of same sex parents did not differ from that of homosexual parents, but rather, quite the contrary. Professor Golombok also maintained that the sexual orientation or identity of the parent did not affect the child's gender in any way, with the only downfall being that children from same sex parented families were more exposed to stigmatisation, especially during school. It was for this reason that a lot of emphasis was made for stronger education in schools, directed towards both the children and the parents, on the LGBT family topic, in order to raise a society where same sex families would not be considered out of the ordinary any longer.¹³⁰

When taking into account the fact that there has been a steady increase of children being put up for adoption coupled an equally vast quantity of same sex couples who wish to adopt them yet are denied the right to apply for such, this would seem all the more sustainable. In a different scenario where one of the same sex partners has already conceived or adopted a child, the second same sex parent is deprived of any legal recognition towards the child resulting in the child having a parent who is essentially a 'legal stranger'. The repercussions of this exclusion are abundant such that it is impossible to list them all, however they include discrimination towards otherwise simple actions such as travel, medical decisions, educational decisions, immigration, succession and representation in legal matters. Moreover, it presents a situation where, should something happen to the biological or adoptive parent of the child such as death, serious illness or imprisonment, the other partner, who is seen by

¹³⁰ Presentation by Susan Golombok, July 2014, 'Lesbian and gay families: Are the kids alright?', [http://aditus.org.mt/aditus/Documents/Golombokpresentation\(Rainbowconference2014\).pdf](http://aditus.org.mt/aditus/Documents/Golombokpresentation(Rainbowconference2014).pdf) Accessed on the 28th July 2014

the child as an equally legitimate parent, is stripped off all legalities and rights towards the child. In this case it would be more remote family who would gain legal guardianship of the child, and the second parent would be left without claim. It is therefore equally arguable that the introduction of Civil Unions is in the best interest of the child as it further strengthens the legal bond between such parents and their children, of which there already exist many such family scenarios.

A landmark European case on this matter is that of *E.B vs France*¹³¹. In this case, a lesbian woman who had been in a cohabiting long term relationship with her lesbian partner since 1990, applied for adoption in 1998 and was rejected on the basis of her sexual orientation. An appeal to the French Conseil d'Etat in 2002 proved unsuccessful as it upheld the previous rejection. E.B later appealed to the European Court of Human Rights where the case was later heard before the Grand Chamber, arguing that the rejection of her application resulted in a violation of Article 14 in conjunction with Article 8 of the European Convention of Human Rights which, in turn, the French government claimed fell outside the scope of such articles. The Grand Chamber, contrary to what the French government submitted, argued that the applicant's homosexuality was in fact the determining factor of the rejection. Based on this reasoning, the Court held that since the French government made it possible for single individuals to adopt, it could not use this policy restrictively and refuse a single person's application on the grounds of their sexual orientation, thus effectuating discrimination. The fact that the potentially adopted child would never have a paternal figure given the lesbian relationship was no cause for refusal since children adopted by single females faced the same shortcoming, yet were not so deprived. Applying such a right selectively to heterosexual individuals therefore was discriminatory. Such judgement sparked praise by the LGBT community as it was the first such judgement to uphold a claim that denial of person's right to apply for adoption based on their sexual orientation constituted a violation of Article 14 of the European Convention of Human Rights, with a 10 versus 7 majority. However, although things seem to be progressing,

¹³¹ E.B vs France (Application no. 43546/02) Grand Chamber judgment of the 22nd January 2008 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84571>

this judgement does not directly touch upon the right to same sex joint adoption, in spite of the fact that it may be considered a cause of precedent.

Through the introduction of the Civil Unions Act, Malta now also allows for same sex joint adoption apart from the already existing right for a single homosexual person to adopt¹³². However what must be understood is that what is being granted here, is the right for a same sex couple to jointly apply for adoption, which does not necessarily mean that all same sex couples are now able to adopt immediately since adoption is not an inherent right of an individual. They will be subject to the same screening process¹³³ as heterosexual couples, which will ultimately determine whether or not they are given the ability to adopt. No single person or couple, whether they are heterosexual or homosexual have the right to adopt a child because such a right does not exist. What does exist however, is the right to be scrutinized by the an adoption board which will be the sole 'judge' as to whether or not the person/s are fit to adopt. Such judgement must not take into account the sexual orientation of the candidate/s but must be based solely on what is felt to be in the best interest of the child.

In the scenario where there is a homosexual biological or adoptive parent of a child prior to a civil union, then once the civil union is contracted, the second partner may enter into what is known as a 'second parent adoption'. Here the partner would adopt the child of his or her partner¹³⁴ through an application to the court and the need to undergo the usual screening process would no longer be necessary, bar in any exceptionally rare scenarios. If on the other hand, a civil union has already been entered into and one of the partners adopts or gives birth to a child, the fact that they are in a civil union means that the child is automatically presumed to be the child of the other civil union partner.

¹³² The right was not directly conferred to single homosexual persons, but to any single person, be it homosexual or heterosexual. However, the point to be made is that it was already previously possible for single homosexuals to apply for adoption.

¹³³ Handled by the 'Agenzija Appogg'

¹³⁴ In the case that the child in question is the biological child of the partner, the second partner would only be able to enter into such second parent adoption if the father of the child is deceased or unknown.

3.5.3 The Right to Succession

At law, through the provisions governing succession in Title III of Part II of the Civil Code, spouses are granted numerous automatic inheritance benefits just for being the spouse of the deceased. Prior to the enactment of the Civil Unions Act, couples that were not married were unable to benefit from any of these granted benefits and this lack of provision was therefore seen as a hindrance to equality and a promotion of discrimination.

Inheritance in Malta is usually regulated either through consanguinity (a blood tie relation) or by affinity (by marriage as opposed to blood), which therefore excludes any provisions for anyone other than family. This may seem fair at first glance, however, for those in a same sex relationship, it may not. The only remedy was to make a will which specifically provides for your same sex partner or any other person you wish, however, if no will was drawn up before the death of the deceased, such persons remain left out of any inheritance.

It was also argued that the automatic provisions granted to spouses, such as that of the reserved portion¹³⁵, might go against the wishes of the testator. Here, one fails to recognize the possibility that the testator may have purposely excluded his/her spouse due to personal reasons, yet through such reserved portion granted by law, this would not be possible and his/her wishes would not be adhered to. When seen in this light, the discrimination is present towards spouses who are unable to exclude their respective spouse from their inheritance, whereas same sex couples were able to do so since there existed no alternative provisions which would automatically protect the other partner in this case.

However, with the introduction of the Civil Unions Act, all this has changed and same sex partners are now able to benefit from two scenarios in terms of succession rights. The first is related to intestate succession¹³⁶ and in particular to Articles 808 and 810 of the Civil Code. Article 808 states that where the deceased has left behind any children

¹³⁵ The reserved portion is a credit right on the value of the estate of the deceased.

¹³⁶ The situation when a person dies without having left a will or has not disposed of the whole of the estate

(or their descendants) along with a spouse, the inheritance would devolve in such a way that one half would fall upon on such children and/or descendants and the other half upon the spouse. Since this article is one which bestows a right and benefit towards the spouse, the introduction of the Civil Unions Act holds that it shall also have the corresponding effect towards partners in a civil union. On the other hand, Article 810 holds that if there are no children or further descendants of the deceased, then the whole of the estate would devolve unto the spouse, and therefore also to the civil partner.

The second scenario relates to testate succession where a will containing the testator's wishes is available. Here, should the testator not have provided at all or else provided minimally for his or her spouse or civil partner, such spouse or civil partner is able to invoke his or her rights under Articles 631 and 632. The first Article 631 holds that if the deceased is survived by children or their descendants as well as by a spouse (and therefore also a civil partner), the reserved portion due by law to such spouse or partner is of one fourth (1/4) of the estate of the deceased. On the other hand, according to Article 632, if the deceased has no children and leaves only his or her spouse or partner, then the reserved portion due is of one third (1/3). Such provisions naturally would only apply, if through the testator's dispositions, the spouse or partner would have been inherited less than the one third or one fourth respectively.

Over and above the right to intestate succession and the testate right to the reserved portion, the spouse or partner, in both scenarios is also granted the right of habitation under Article 633 of the Civil Code. Such habitation right would be over the spouse/partner's residence at the time of the deceased's death whether it is owned in full by the deceased or jointly with the surviving spouse or partner. Article 635 also grants the right of use over the furniture inside the home if owned by the deceased.

In addition to the rights relating to inheritance, same sex partners are now also afforded the right to draw up an 'unica charta' will together. Up until the introduction of civil unions such a right, granted in Article 592 of the Civil Code was only available to married couples¹³⁷, and this is made clear through the wording of Article 595 which

¹³⁷ Article 592 of Chapter 16 of the Laws of Malta "A will made by husband and wife in one and the same instrument, or, as is commonly know, unica charta, is valid".

holds that “It shall not be lawful for any two or more persons, other than a husband and wife, to make a will in one and the same instrument, whether for the benefit of any third party or for mutual benefit”. Such wording may seem quite restrictive, however, through the provisions of Article 4 of the Civil Unions Act, all rights which are afforded to spouses of a civil marriage will equally apply to civil partners of a civil union. The fact that all such rights shall apply ‘mutatis mutandis’ is of great importance here, because the wording of Article 595 is now adapted to also apply to civil partners.

Nonetheless, since April, speculation by notaries as to whether or not they should publish an unica charta will between two civil union partners has still occurred, particularly due to the fact that the civil code provision on unica charta wills has still retained its restrictive wording. Since there have been no guidelines on how to interpret certain provisions of the law in relation to civil unions, notaries have been left confused as to which course of action to take when faced with this scenario. Is it advisable to suggest to the civil union partners to make two separate wills as opposed to one unica charta until matters are clarified through further legislative material or court interpretations?

3.5.4 Fiscal and Social Benefit Rights

A person could be in a serious relationship for twenty years with another, yet, if they are not married or in a civil union, their relationship status is legally still ‘single’. Being single in the eyes of fiscal law means that one is not able to benefit from certain tax benefits. This therefore meant that same sex couples, prior to the enactment of the Bill, were discriminated against, as no matter how far their relationship progressed, they would still be deemed ‘single’ and still be subject to more unfavourable tax rates. This would also be the same if the same sex couple contracted a marriage abroad and returned to Malta because Malta did not recognise a foreign same sex marriage up until now.

Married couples are entitled to the option of filling in a joint Inland Revenue tax form which would mean that the tax brackets are widened and less income tax is ultimately

paid than would have been payable had they filled in separate forms. Same sex couples are now also able to fill in their joint income tax return and efforts are currently underway to amend such forms to include the option for this. However, it is important to remember that even though certain formalities and administrative changes have not been fully implemented following the enactment of the Civil Unions Act, these cannot prove to be hurdles or obstacles of the rights granted by such Civil Unions since the rights began to exist as soon as the law was passed, irrespective of the administrative delays which followed.

Likewise, all new social welfare schemes, such as housing schemes for example, which are usually promulgated with specific prerequisites for spouses, are also equally applicable to partners of a civil union. Civil union partners, like spouses, are now exempt from the payment of stamp duty on the assignment of immovable property following consensual or judicial separation or divorce, on the dissolution of the community of acquests or on any partition of property held in common by the civil partners between the surviving civil partner and the heirs of the deceased partner.¹³⁸

Tax on capital gains is also not payable on a contract of donation where the donor is donating to his/her spouse or civil partner.¹³⁹ A civil union partner shall also be entitled to a survivor or widower's pension, granted by the Social Security Act¹⁴⁰ upon the death of the other partner, as well as other social benefits such as the one time wedding grant and the VAT¹⁴¹ refund on costs incurred for the wedding, which shall also apply to civil union ceremonies.

Lastly, under Chapter 364 of the Laws of Malta relating to duty paid on the inheritance of immovable property or any rights thereto, spouses are granted certain tax exemptions which are, now, likewise applicable to civil union partners. A surviving civil partner will be entitled to a complete exemption of succession duty, on the immovable

¹³⁸ Article 32(3) of Chapter 364 of the laws of Malta- Duty on Documents and Transfers act

¹³⁹ Article 5(2)(e)(i) of Chapter 123 of the laws of Malta- Income Tax act.

¹⁴⁰ Chapter 318 of the laws of Malta

¹⁴¹ Value Added Tax

which served as the ordinary residence of the deceased partner as well as on the value of usufruct of any immovable property.¹⁴²

For the purpose of the abovementioned fiscal benefits, although the Civil Unions act provides the 'mutatis mutandis' umbrella clause, many debates have arisen as to whether wherever spouses are referred to in fiscal laws, such benefits should also apply to civil union partners. In fact, there exists a general principle that fiscal benefits must not be merely interpreted or deduced from other provisions (such as the mutatis mutandis application of civil unions), but rather, should emanate clearly from fiscal laws themselves. In view of this perspective, one begins to doubt whether such benefits may actually be applied, which defeats the certainty which the mutatis mutandis provision aims to achieve.

After personal correspondence with the Commissioner for Inland Revenue, Mr. Marvin Gaerty, it was revealed that it was the intention of the Inland Revenue department to propose amendments in the upcoming budget for the relevant fiscal laws to clearly detail and stipulate that the benefits already applicable to spouses would equally apply to partners of a civil union, thus eliminating all doubt on the matter.

3.5.5 Leave and Visitation Rights

Prior to the enactment of the Civil Unions act, same sex couples were also discriminated on seemingly trivial things such as hospital visitation rights, leave from work and prison visits, which are however considered vital to the equality of a same sex relationship, and rightly so as, through the introduction of civil unions, same sex couples are able to benefit from each and every right granted to heterosexual couples, including such seemingly trivial provisions that can be found in subsidiary legislation. Under Chapter 452 of the laws of Malta¹⁴³ for example, there are two pieces of subsidiary legislation which were previously held to be unfair towards homosexual couples. The first is Subsidiary Legislation (S.L) 452.88 dealing with regulations on urgent family leave. In Regulation 4 it is held that when the need arises for a person to

¹⁴² Article 35(2)(iii) and 35(1)(b) of Chapter 364, respectively.

¹⁴³ The Employment and Industrial Relations Act

take time off from work due to urgent family matters, then 'urgent leave' would be granted to the employee. The regulation refers to the three scenarios of accidents, sudden illness or sickness as well as presence during births and deaths, and in each one goes on to attribute them only to the employees 'immediate family'. Sub Regulation 4(3) furthers that 'immediate family' means the husband, wife, married or unmarried children or other members of the family up to the first degree, whether or not they live together.

Similarly in SL 452.101 on minimum special leave entitlement, bereavement leave is only granted to the employee "on the occasion of the death of the spouse, parent, son, daughter, brother or sister of the employee"¹⁴⁴. As is evident from both these regulations on employment leave, same sex partners were not included. This meant that it was not possible for an employee to be able to properly mourn the loss of his/her partner in case of death. This situation has now been remedied and same sex couples may now make use of both the abovementioned provisions when such an unfortunate situation occurs. On a lighter note, the couple are also able to benefit from two days leave on the occasion of their civil union which is granted to couples contracting marriage in the latter regulation.

In the prison regulations¹⁴⁵, provisions relating to visitations and important information make reference to "any near relative" or "family". Prior to legislation on civil unions, it was strongly debated whether or not a same sex family was deemed to be a family at all. The definition of "any near relative" given in Article 2 of the prison regulations, is limited to the spouse, ascendant, descendant, brother or sister of the prisoner along with their spouses as well as the ascendants, descendants, brothers and sisters of the prisoners spouse. Apart from the abovementioned persons, and only with the antecedent approval of the Minister responsible for prisons, "any other person with whom the prisoner has had an established relationship prior to his current admission"¹⁴⁶.

¹⁴⁴ Article 2 of Subsidiary Legislation 452.101 under the definition of 'bereavement leave'

¹⁴⁵ Subsidiary Legislation 260.03

¹⁴⁶ Regulation 2, under the definition of a "near relative", paragraph (d)

Although this regulation does in fact, indirectly provide for same sex partners to be able to visit their loved one whilst serving a prison sentence, this was only possible upon receiving prior consent from the Minister responsible for prisons. Through civil unions legislation, same sex partners of a civil union will no longer require any prior approval and can visit their partner the same way a spouse can visit another spouse. Prison visits between persons in a serious relationship together are always encouraged in order for the couple to continue strengthening their relationship and to prevent eventual breakdown due to estrangement.

Lastly, as regards to hospital visits, although there exist no legal provisions as to the eligibility of visitors to hospital patients, there are certain areas such as intensive care and high dependency wards where only certain members of the immediate family are allowed to visit. Same sex couples were previously denied the right to visit their partners when they were situated in the aforementioned ward because they were unable to prove their legal relations. Civil unions have allowed same sex partners to be able to form a legal union, recognized for all intents and purposes. It has also allowed for a civil union partner to be considered in the same manner as a spouse when it comes to taking important medical decisions such as termination of life support, emergency treatment or even organ donation.

3.5.6 Rights to Separation and Divorce

Unfortunately, for every piece of legislation that regulates the smooth functioning of a loving relationship, there is also a piece of legislation regulating the procedure for a possible eventual breakdown of the same relationship. The introduction of a new legalized and formal civil union means that laws on dissolution must also equally apply to such unions.

Providing such a legal framework to partners of a civil union ensures that there would be a formal and protected mechanism available to them to settle any discord. Through this procedure, the state and judiciary is equally satisfied that the proper provisions are made available to both parties.

The partners of a civil union are able to agree on certain terms themselves, however, they may also avail themselves of court ordered remedies, identical to those available to married couples.¹⁴⁷

The equal applicability of separation and divorce rights for civil union partners is expressly enshrined in the Civil Unions Act¹⁴⁸ under Article 4 sub article (2) paragraph (b). Here specific reference is made for Articles 35-66 (both included) of the Civil Code in relation to personal separation as well as Articles 66A-66N (both included) of the Civil Code in relation to Divorce, to apply *mutatis mutandis* to civil unions.

The remedies available through such legal recourse are plentiful, and include maintenance, residence of the matrimonial home, lump sum payments, arrangements in the custody of dependant children, claims on pensions and the division of property. Unless the partners agree between themselves on these issues, the court would be burdened with these decisions, which must be taken after having considered a multitude of factors, most importantly on the partner's resources and/or needs. Once separation or divorce proceedings are completed, all the civil rights and obligations granted to civil union partners towards each other shall cease. However, separation or divorce proceedings shall have no effect on the rights and/or obligations of the partners as parents in respect of their children.¹⁴⁹ Due to the introduction of same sex adoption, the provisions for a dissolution of a civil unions dissolution have become all the more important and this due to the fact that dependant children must be accounted for. This is especially significant when the courts are faced with a scenario where one of the parents is a biological parent and the other is not. Here, in the case of a child who is the biological child of one partner to a civil union but not of the other partner and where such non-biological partner has successfully gone through the process of second parent adoption, upon the dissolution of the union, the non-biological parent is equally legally obligated towards the child and would have equal rights towards him or her. If however, no second parent adoption has been entered into, upon dissolution, the non-biological partner of the civil union would have no legal attachment whatsoever towards the child, as would be the case with marriage.

¹⁴⁷ Martin Scicluna Paper on 'Same Sex: Same Civil Entitlements', 2013, The Today Public Policy Institute.

¹⁴⁸ Unlike many other rights which are unspecified in the Civil Unions act because they apply without the need of provision through the generality of article 4(1),

¹⁴⁹ Article 66L(2) of Chapter 16 of the laws of Malta- The Civil Code

In order for civil partners to obtain a divorce, as in the case with married couples, they are not required to have already obtained a separation agreement. The court must however be satisfied that the couple have lived apart from each other for at least 4 years in the immediately preceding 5 years or for 4 years consequent to the date of legal separation. Another essential factor is that the court should be convinced that there exists no reasonable prospect of reconciliation between the parties. Once separated or divorced, the partner forfeits all rights to any further claims against the other former partner regarding maintenance if such partner enters into another contract of marriage or civil union.¹⁵⁰

¹⁵⁰ Article 66M of Chapter 16 of the laws of Malta- The Civil Code.

Chapter 4: European and Global Developments

4.1 An Introduction on LGBTI rights in Europe and the world.

Today, we live in a world where it is still criminalised and illegal to be gay in just over seventy-six countries. In five of these countries and in parts of two others¹⁵¹, being gay is even punishable by the death penalty, even though such sexual activity may be consensual, and the rest are punishable with imprisonment. It was only on the 31st March 1994, following a decision given by the UN Human Rights Committee in *Nicholas Toonen vs. Australia*¹⁵², that it was declared that criminalizing homosexuality violated Human Rights law. Many countries have in fact decriminalized homosexuality throughout the years, with the majority of countries doing so between the 1960s and 1970s.¹⁵³ Homosexuality is now legal in all European Member states, which have now all repealed any past laws that criminalized homosexuality, with Northern Cyprus being the last European territory to do so in January of 2014. As explained in Chapter 2, Malta decriminalized homosexual activity in 1973, well before some other European counterparts such as the United Kingdom, Spain and Portugal.

There have been numerous recommendations and resolutions by the Parliamentary Assembly of the Council of Europe throughout the years on the issue of LGBT rights. It is important to keep in mind that such recommendations and resolutions are merely opinions of its members and, although not binding upon Member States, they hold a strong declaratory role.¹⁵⁴ The first of such recommendations was given in October 1981, where the assembly primarily urged those Member States in which homosexual acts were still liable to criminal proceedings to abolish such laws. It also recommended

¹⁵¹ Iran, Saudi Arabia, Sudan, Yemen and Mauritania as well as parts of Nigeria and Somalia.

¹⁵² Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

¹⁵³ BBC news article "Where is it illegal to be gay?" 10th February 2014
<http://www.bbc.com/news/world-25927595> Accessed on the 3rd June 2014

¹⁵⁴ Recommendations by the Parliamentary Assembly http://www.ilga-europe.org/home/guide_europe/council_of_europe/lgbt_rights/recommendations_of_the_parliamentary_assembly Accessed on the 2nd June 2014

for Member States to ensure the equality of treatment towards LGBT persons, especially in the public sector.¹⁵⁵

Another significant resolution by the Assembly was in April 2010 where this time Member States were called upon to assure fundamental rights to LGBT persons, particularly in their freedom of expression, association and assembly. It was also advised for Member States to provide legal remedies for cases of violations, to condemn all types of hate speech, to include sexual orientation and gender identity in legislation where grounds of discrimination are listed or mentioned, to ratify Protocol 12 of the ECHR and to give next of kin status to LGBT couples, amongst many others.¹⁵⁶ This resolution was once again reiterated in a further recommendation of 2010 where the Assembly recommended that the committee of members monitor the implementation of the contents of the abovementioned resolution.¹⁵⁷

The treaty of Amsterdam is said to be the starting point of solid and legal European developments for the protection of LGBTI rights. Signed in 1997 and operative as of 1999, the treaty extended gay rights across Europe and marked the commencement of the European Union's power to adopt measures against discrimination in the fields of sexual orientation and gender identity. The Amsterdam Treaty is the basis for which Article 19 of the Treaty on the Functioning of the European Union (TFEU) is built and the first Treaty to explicitly provide for the protection of the ground of sexual orientation. The Article holds that:

“Without prejudice to the other provisions of the treaties and within the limits of the powers conferred by them upon the union, the council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent

¹⁵⁵ Recommendation 924 (1981) on discrimination against homosexuals
<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta81/erec924.htm> Accessed on the 3rd June 2014

¹⁵⁶ Resolution 1728 (2010) on 'Discrimination on the basis of sexual orientation and gender identity'
<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/eres1728.htm> Accessed on the 3rd June 2014

¹⁵⁷ Recommendation 1915 (2010)
<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/erec1915.htm> Accessed on the 3rd June 2014

of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.¹⁵⁸

The Amsterdam Treaty in fact laid the foundations for the emergence and surge of numerous laws and directives in the area of anti-discrimination, two of which I shall discuss in further detail in the next sub-chapters. On the 30th June 2010, the Council of Europe adopted a ‘toolkit’ which was aimed at safeguarding the enjoyment of rights by LGBT persons. The toolkit itself was a non-binding compilation of recommendations for EU Member States to work together in order to help decriminalise same sex relations across the globe and further condemn any discriminations on the basis of sexual orientation and/or gender identity. The listed purpose of the toolkit was “to promote and protect the human rights enjoyed by LGBT people within its external action [...] and proactively react to cases of Human Rights violations of LGBT people”.¹⁵⁹ The toolkit was scheduled to be reviewed every 3 years, and in 2013, following its first review, the toolkit’s document status was upgraded from non-binding to binding and new guidelines were also added. Four main priorities were listed in the toolkit which were: 1.To eliminate discriminatory laws and policies 2.To promote equality and non discrimination in the public sector 3.To combat state or individual violence versus LGBT people and 4.To support the LGBT human right defenders.¹⁶⁰

On the 11th December 2012, in a speech presented at the celebration for International Human Rights day, the UN Secretary General Ban Ki-Moon held:

“Let me say this loud and clear: Lesbian, Gay, Bisexual and Transgender people are entitled to the same rights as everyone else. They too are born free and equal. I stand

¹⁵⁸ Article 19(1) TFEU (Ex Article 13 TEC)

¹⁵⁹ Council of the European Union Toolkit 17th June 2010 (11179/10)
<http://www.consilium.europa.eu/uedocs/cmsUpload/st11179.en10.pdf> Accessed on the 5th June 2014

¹⁶⁰ Guidelines to promote and protect the enjoyment of all human rights by LGBTI persons, Council meeting 24th June 2013, Luxembourg,
https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf Accessed 5th June 2014.

shoulder to shoulder with them in their struggle for human rights”.¹⁶¹

In the same speech, Ki-Moon made a valid and strong argument that no single human being has the capability to determine to whom human rights should apply and to whom they should not. He also heavily criticised the “anti-propaganda” bills being discussed by Russia and Ukraine which would criminalise public discussion on the topic of homosexuality. Till today, Ukraine has not in fact approved such laws, however, Russia enacted a law in June of 2013 which prohibits the mentioning of homosexuality in the presence of minors, including mentions online, with hefty fines for those who contravened this provision.

Later, on the 26th September 2013, the first ever ministerial meeting on LGBT rights was held at the United Nations. The meeting was scheduled to take place after a 2011 report by the UN showed extensive violations and discriminations in the field. Here a declaration was signed by a group of cross regional ministers for the elimination of violence and discrimination against individuals based on their sexual orientation or gender identity, with a commitment to end all mistreatment and victimization. Kenneth Roth, the Executive Director of ‘Human Rights Watch’ stated that “the challenge now for both the United Nations and the individual countries will be to turn that commitment into action”¹⁶².

On the 4th February 2014, after ten previous requests by the European Parliament to the Commission to release a comprehensive strategy instrument on the topic, another resolution was developed on “The EU roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity”. Parliament called upon the commission to finally draw up an action plan that would feature numerous topics such as: Horizontal actions to implement the roadmap, general provisions in the field of non-discrimination (particularly in employment, goods and services, health and education), actions that would target transgender and intersex persons specifically,

¹⁶¹ Ban Ki-Moon speech, 11th December 2012 <http://www.hrw.org/news/2012/12/17/un-ban-ki-moon-condemns-homophobic-laws> Accessed on the 5th June 2014

¹⁶² Kenneth Roth statement, 26th September 2013 <http://www.hrw.org/news/2013/09/26/un-landmark-ministers-meeting-lgbt-rights> Accessed on the 9th June 2014

hate speech and hate crime, asylum and many others.¹⁶³ On the topic of Asylum, it may be beneficial to note that in November 2013 Malta granted asylum to a gay eighteen-year-old Nigerian man for the first time ever. The Refugee Appeals Board of Malta quoted a judgement by the European Court of Justice¹⁶⁴, which pronounced that gay asylum seekers from African countries where gay persons are jailed for being gay, would qualify for asylum within Europe. In fact, under Sharia law, being gay in Nigeria was punishable by imprisonment and also by possible death through flogging and/or stoning, and it was for this reason why Malta felt it necessary to protect this man from such anti-gay persecution, the first asylum grant of its kind for Malta.¹⁶⁵

4.2 The Employment Equality Framework Directive [2000/78/EC]

The Employment Equality Directive was the first of a number of Directives to be enacted on LGBT rights following the ratification of the Treaty of Amsterdam. The objective of the Directive, laid down in Article 1, is

“to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”.¹⁶⁶

Ideally the Directive would serve to protect vulnerable individuals, such as LGBTI people, from any discrimination arising in the employment industry due to their sexual orientation or gender identity. This could include the refusal of a job, harassment at work by an employer or by colleagues or even being unjustly fired. Anything that

¹⁶³ European Parliament Resolution, 4th February 2014, [2013/2183(INI)], <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0062+0+DOC+XML+V0//EN> Accessed on the 10th June 2014

¹⁶⁴ Due to data protection on such matters, after contacting the Refugee Appeals Board personally, I was unable to get any further details on the case such as names, dates and references.

¹⁶⁵ Article by Independent Malta, ‘Gay man granted asylum in Malta due to persecution in Nigeria’, 24th November 2013, <http://www.independent.com.mt/articles/2013-11-24/news/gay-man-granted-asylum-in-malta-due-to-persecution-in-nigeria-3278143490> Accessed on the 10th July 2014.

¹⁶⁶ Article 1 of The Employment Equality Framework Directive 2000/78/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML> Accessed on the 13th June 2014

would compromise the accomplishment of untroubled employment would go against the purpose of the Directive, especially when such LGBTI people are placed at an evident disadvantage when compared to heterosexual individuals. There are obviously some exceptions, since there may be genuine and legitimate justifications to the refusal of a job on the basis of being LGBTI due to certain job characteristics, however such refusals must be deemed appropriate.

All European Member States adopted the Directive unanimously in the year 2000 and most states were given 3 years to transpose the majority of the law into their own legislation. In the case of the Member States forming part of the 2004 enlargement, and therefore including Malta, the Directive needed to be transposed upon entry to the European Union. The Directive was incorporated into Maltese legislation through Legal Notice 461 of 2004, the 'Equal Treatment in Employment Regulations, 2004'. According to a press release by the European Commission, the Directive was not properly implemented in Malta since it neither covered access to self-employment nor did it protect against victimisation on the basis of sexual orientation with regard to civil servants.¹⁶⁷ This situation was however rectified following infringement proceedings against Malta and subsequent amendments were then carried out. The Equal Treatment in Employment Regulations now provides that it applies to all persons, both in the public as well as the private sector and also includes service with the government, thus bringing Maltese law in line with the Directive.¹⁶⁸ The power to hear such employment cases was vested in the Industrial Tribunal as well as to the Civil Courts, since any person who suffers any maltreatment under this Directive is entitled to legal protection.

On August 12th of the year 2014, an amendment to the Equal Treatment in Employment Regulations was made via Legal Notice 274 of 2014.¹⁶⁹ Through this Legal

¹⁶⁷ European Commission Memo 08/68 of the 31st January 2008

¹⁶⁸ Press release by the European Commission- 'Employment equality rules: reasoned opinion to the UK; cases closed for Slovakia and Malta', IP/09/1778 20/11/2009 http://europa.eu/rapid/press-release_IP-09-1778_en.htm Accessed on the 13th June 2014

¹⁶⁹ L.N. 274 of 2014

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26271&l=1>

Notice, along with the existing definition of discriminatory treatment, there shall now be added the following paragraph:

“In so far as the ground of sex is concerned, any less favourable treatment of a person who underwent or is undergoing gender reassignment, which for the purpose of these regulations shall mean where a person is considering or intends to undergo, or is undergoing or has undergone, a process, or part of a process, for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”.¹⁷⁰

This amendment is proof of the growing awareness in respect of LGBT rights in all spheres. However, to date, there still exists no legal protection against discrimination in the access to and supply of goods and services, where abuse against LGBTI people may still be witnessed. This is also the case in the area of Education and Healthcare, where bullying and preferential treatment is still carried out to the detriment of LGBTI people.

4.3 The Free Movement of Persons Directive [2004/38/EC]

On the 29th April 2004, just two days prior to Malta’s accession to the European Union, the European Parliament and Council introduced Directive 2004/28/EC on the rights of citizens of the union and their family members to move and reside freely within the territory of the Member States. The European Union is well aware that the definition of ‘Marriage’ and its requirements fall within the sole duty and competence of the Member States themselves, making it nonviable for the Union to propose Europe-wide legislation governing these issues. It is impossible to pressure Member States to implement registered partnerships and civil unions if they have not taken the initiative themselves, as situations vary considerably from state to state. The European Union

¹⁷⁰ Article 2 of L.N. 274 of 2014, amending Regulation 2 of the Equal Treatment in Employment Regulations.

has not remained silent on this issue of legal recognition of same sex couples, and attempts have been made in order to ‘introduce a certain degree of harmonization and consistency through the region’.¹⁷¹ As the Vice-President of the Commission and Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding aptly put it:

“If you live in a legally recognized same sex partnership or marriage in country A, you have the right- and this is a fundamental right- to take this status and that of your partner to country B. If not, it is a violation of EU law, so there is no discussion about this. This is absolutely clear, and we do not have to hesitate on this”.¹⁷²

The Directive was one of the first directives of the European Union to provide a detailed definition of what is considered to be a ‘family member’. In article 2, it is held that:

“2. ‘Family member’ means:
(a) The spouse;
(b) The partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
(c) The direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);
(d) The dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)”.

The proviso in Article 2(b), which states that the registered partnership must be recognized by the host member state made it impossible for Malta to grant automatic entry and residence rights to the registered partner of a European citizen since Malta

¹⁷¹ Dr N. Falzon, “Malta Gay Rights Movement position paper on marriage equality: Advocating the best options of legislating for same sex couples and families in Malta”, 2012.

¹⁷² Viviane Reding, European Parliament debate of the 7th September 2010 ‘Discrimination of same sex married or in civil partnership couples’ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100907+ITEM-017+DOC+XML+V0//EN&language=EN> Accessed on the 13th May 2014

previously provided no legal recognition of any union other than marriage. In fact, the only article that Malta was able to 'make use of' so to speak, was Article 3 of the Directive. This article was specifically provided for in respect of those Member States that did not recognize LGBT rights. It holds that:

“The host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

[...]

(b) The partner with whom the Union citizen has a durable relationship, duly attested”.

This provision seems fairly reasonable, since it in no way imposes for Member States to recognize partnerships issued by other Member states, but only simply required such states to 'facilitate' the entry after verifying that a stable relationship exists between the persons. Even though the provision does not specifically target same sex couples, the preliminaries of the Directive explicitly asserts that the Charter of fundamental rights of the European union is to be respected and that Member States ought to implement the Directive without any discrimination on a number of grounds, including sexual orientation. However, when the time came for Malta to transpose the Directive into Maltese legislation in 2007, the definition given to 'other family members' was amongst others, said to include “the partner with whom the Union citizen has a durable relationship unless such relationship is in conflict with the public policy of Malta”. Malta's previously strict public policy meant that same sex relationships would not be included in the scope of this directive. This gave rise to a number of problems, not only in Malta, but in other Member States too where the Directive was not transposed correctly. In fact, a number of reports and discussions targeted at eliminating the remaining discriminatory clauses. The European Parliament resolution of the 2nd April 2009 with regard to the application of Directive 2004/38/EC called on Member States to:

“Fully implement the rights granted under Article 2 and 3 of Directive 2004/38/EC not only different sex spouses, but also to the registered partner, member of the household and the partner, including same sex couples recognized by a Member

State, irrespective of nationality [...] without imposing the recognition of same sex marriages”¹⁷³

In fact, Maltese and European Commission officials engaged in numerous talks as of April 2010¹⁷⁴ with regard to Malta’s incorrect interpretation of the Directive which is intended to recognize ALL partners “in a durable relationship” with European citizens, irrespective of whether this is in compliance with public policy or not. The way Malta had transposed the Directive meant that same sex couples would not enjoy the same rights in Malta as they were entitled to in other Member States of Europe. This meant that upon relocation to Malta, same sex couples in registered unions, would effectively lose their civil status and all the rights and responsibilities attached to the said status. This was further aggravated with respect to third country nationals in relationships with European citizens, as the way things stood, Malta would not even facilitate their entry into the country.

The European Commission pushed for Malta to rectify its position, even though it may go against the public policy of the state and finally, on the 12th August 2011, a Legal Notice¹⁷⁵ was published, deleting the discriminatory clause and fully transposing the Directive into Maltese law. Subsidiary Legislation 460.17 the ‘Free movement of European nationals and their family members order’ now holds in its Article 3 that:

“A Union citizen may enter, remain and reside in Malta, seek and take up employment or self employment therein and shall enjoy equal treatment with Maltese nationals [...] and such right shall be also applicable to other family members accompanying or joining the Union citizen, including those who are not nationals of a Member State, and to the partner with whom the Union citizen has a durable relationship”.¹⁷⁶

¹⁷³ European Parliament resolution of 2 April 2009 on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0203+0+DOC+XML+V0//EN> Accessed on the 30th May 2014

¹⁷⁴ Malta Today Article of August 15th 2011
<http://www.maltatoday.com.mt/news/national/12046/malta-removes-discriminatory-clause-in-free-movement-law#.U4iQ2ChAusE> Accessed on 13th May 2014

¹⁷⁵ Legal Notice 329 of 2011

¹⁷⁶ Ibid Article 3(1)

What the Maltese legislators may have failed to realise however is that the same Subsidiary Legislation defines a 'Union citizen' as "any person having the nationality of a Member State, but does not include Maltese nationals". Therefore, although the remedial amendment was very much welcomed by the LGBTI community and put Malta on the right track with regard to the free movement of all persons regardless of their sexual orientation, it also created an 'anomalous situation'.¹⁷⁷ Seeing that this clause did not apply to Maltese citizens meant that Maltese persons in relationships with third country nationals were afforded less protection than citizens of other Member states in relationships with third country nationals. This last hurdle was only rectified once the Civil Union act, 2014 came into force on the 14th April 2014.

4.4 Malta's position within Europe

Since the introduction of the Civil Unions Act into Maltese legislation, much has changed with respect to Malta's position and ranking within the European Union in terms of LGBTI rights. The ILGA of Europe conducts a yearly review of the LGBTI situation in European countries and, with its findings, creates a Rainbow map as well as an index which demonstrates each country's ranking when compared to others. The Rainbow map produces a percentage, with 100% reflecting full equality and respect for LGBTI rights and 0% reflecting a gross violation of human LGBTI rights and zero respect. The index on the other hand gives an in depth analysis of the factors leading up to the percentage given on the rainbow map. Six categories of rights are listed and for each category, a number of rights related to that grouping follows suit. The categories are those of 1.Equality and non-discrimination 2.Family 3.Bias motivated speech and violence 4.Legal gender recognition 5.Freedom of assembly, association and expression and 6.Asylum. For every listed right that a country grants to its LGBTI community, a prescribed percentage point is added to the country's total score.

¹⁷⁷ Malta Independent article of the 28th August 2011 'LGBT community faces legal anomaly after discriminatory rule is revoked' <http://www.independent.com.mt/articles/2011-08-28/news/lgbt-community-faces-legal-anomaly-after-discriminatory-rule-is-revoked-297843> Accessed on the 13th May 2014

Needless to say, Malta's score has recently escalated tremendously following the Civil Unions Act enactment which granted numerous rights to LGBTI people. In this chapter I shall delve into most of the rights listed in the six categories mentioned above and comment on those which Malta already granted to LGBTI people prior to the Civil Unions Act, those that have recently changed, as well as those that have not yet been granted.

In May of 2013, upon the issue of the 2013 edition of the Rainbow map and index, Malta's total score was that of 35%, ranking in 18th place, along with Slovenia and the Czech Republic, out of a total of 49 European countries. The 35% was achieved due to certain rights that were already in place prior to the enactment of the Civil Unions Act, such as the non-discrimination and equality on sexual orientation and gender identity in the employment sector due to the transposition of Directive 2000/78/EC, the protection against hate crime and hate speech within the Criminal Code as well as the existence of procedures for legal gender recognition, name change and the change of gender on official documents. Additional points were also granted due to the fact that LGBTI associations are able to operate without any impediments or setbacks and freedom of expression by LGBTI people is not limited or hindered in Malta. Moreover, public events or demonstrations such as gay pride events were held in Malta in the five years prior to the index date without any state obstruction, which also gained more percentage points. However, the Maltese population's welcoming of these events seems to be more one of tolerance as opposed to acceptance.¹⁷⁸

Following the enactment of the Civil Unions Act in April 2014, Malta's score percentage shot up by a remarkable 22%, resulting in a total score of 57%. This score increase meant that Malta is now ranked as the 11th best country in Europe in terms of LGBTI rights. Malta is now well above the European average of 46%. The point increase mainly arose due to the fact that Malta enacted legislation on Civil Unions which were similar to marriage in terms of rights.¹⁷⁹ Apart from this, points were also gathered for

¹⁷⁸ T. Comodini Cachia and I. Refalo, 2000 'Legal study on homophobia and discrimination on the grounds of sexual orientation in Malta'

¹⁷⁹ Less points would have been awarded had Malta enacted a law that provided for Civil Unions, yet which limited rights when compared to marriage.

the inclusion of 'sexual orientation' and 'gender identity' within the Maltese Constitution. Other major contributors to Malta's point accumulation include the enabling of joint adoption by same sex couples as well as second parent adoption, automatic co-parent recognition and the possibility of transgender persons to marry a person of the opposite gender. The abovementioned factors were all the improvements gained since the enactment of the Civil Unions Act, placing Malta at a higher level with respect to LGBTI rights and making Malta the fastest climber of the year.

Malta has yet to achieve full equality in terms of LGBTI rights, as according to the index, there are many rights which other countries have already granted to its LGBTI community, yet Malta has not. The main limitation is obviously due to the fact that Malta opted for a Civil Union as opposed to Marriage equality which carries greater reverence and more human rights 'points'. Another weakened area is in the field of goods and services. Many countries have in fact provided for the inclusion of 'sexual orientation' and 'gender identity' in their laws governing the access to and supply of goods and services, however, this is still a lacking area in Malta. Cohabitation law which has been provided for in other countries over and above civil unions and marriages is also not yet provided for in Malta, albeit being presently discussed by parliament.

As mentioned above, Malta places 11th among European countries, ranking behind the United Kingdom, Belgium, Spain, The Netherlands, Norway, Portugal, Sweden, France, Iceland and Denmark respectively¹⁸⁰. If one were to compare Malta to European Member States only, it would further increase our position to 9th place, being quite an achievement for our tiny Maltese island. The United Kingdom comes in at first place, scoring a total of 82% on the index. The reasoning behind such a high score would be that the United Kingdom sanctions and endorses all the rights listed within the index, with the exception of a few. The only rights which the UK lacks in providing its LGBTI citizens with is a law that would target and protect intersex persons, a law on gender expression as well as hate speech law which includes gender identity. Another cause

¹⁸⁰ Statistics as at May 2014: 82%, 78%, 73%, 70%, 68%, 67%, 65%, 64%, 64%, 60% respectively.

for point deduction, which the UK and every other European country has suffered due to non adherence, is that it is still acceptable and often required for there to be a 'gender identity disorder' diagnosis.¹⁸¹ Such a diagnosis serves as a form of stigmatization towards transgender persons who feel cast out and labelled due to such diagnosis, making them feel as though they have some form of sickness or disease.

On the other hand, ranking in last place with a mere 6% on the index chart is Russia. Russia has often been the subject of strong criticism when it comes to LGBTI rights. Since the collapse of the Soviet Union in 1991, some progress was made to liberalize certain anti-gay legislation, most notably the decriminalization of homophobic acts in 1993, however, little has been done since. In fact, the majority of rights listed in the index do not apply to Russia, with the measly 6% being gained only due to certain transgender provisions. These are the allowance for a transgender person to marry a person of the opposite sex, to change their name and to amend their gender on official documentation. Such lack of recognition and protection, especially that there exists no prohibition on the discrimination based on sexual orientation or gender identity in any of the social sectors, means that Russian LGBTI individuals are forced to seek asylum in other countries where they may find acceptance.

Despite the lack of adequate provisions of rights towards LGBTI people in countries such as Russia, Azerbaijan, Armenia and Monaco, other countries have taken numerous initiatives to better their position. Notwithstanding the fact that no European can claim 100% equal treatment for LGBT people, this slow moving progress has still made Europe the most 'LGBT friendly' continent and 'frontrunner' in the equal treatment of LGBT people.¹⁸²

¹⁸¹ A diagnosis by a psychologist or physician which is used to identify males or females who experience resentment towards their birth sex and feel a strong sense of identity with the opposite sex.

¹⁸² P. Ebels, 'Europe still best place to live for gay people' EU Observer, 5th June 2012, <http://euobserver.com/lgbti/116481> Accessed on the 20th June 2014

Chapter 5: Conclusion

5.1 Same-Sex Marriage, Cohabitation and Gender Identity

Even after the Introduction of Civil Unions in Malta, which was a huge milestone for our country, talks are still being made regarding further improvements to the lives of the LGBTI community. Many issues have in fact been left untouched and not given any importance. In this conclusion I will attempt to go over the main areas and topics that still remain unlegislated, as well as give an in depth analysis on the proposals which have already been the subject of discussion by our legislators.

The main issues which remain unadulterated in terms of legislation¹⁸³ are those of same sex marriage, cohabitation and gender identity law. Cohabitation has already been extensively tackled in previous chapters, and although a first attempt at a Cohabitation law did not pull through, discussions are being made as to the future introduction of such legislation; one that would provide for much more extensive protection than the previous Bill that was proposed in 2012 . As regard to same-sex marriage, it is my opinion that Maltese legislators should not act too hastily upon this since the introduction of Civil Unions was already a great change and immense improvement to our small conventional island. In the future however, one could be able to envisage a situation where a system of same sex marriage would replace the current civil union system. In this case, one may ask what would happen to those couples who have already entered into a civil union- would they receive an automatic 'upgrade' to the status of civilly married spouses, or would this involve some form of re-registration? Although this scenario has not yet been tackled, since Malta has still not reached the time in which to be talking about same sex marriages, this would very much depend on whether or not civil unions would also remain an option, or whether it would be replaced in its entirety. In the former scenario, the couple would then have the option to either retain their status as civil partners to a union or else to go through a process o switch to civilly married spouses.

¹⁸³ And also the reason why Malta has lost percentage points on to the ILGA Index

Another major issue is the topic of Gender identity. The transgender community received their first form of recognition as a result of Act XVIII of 2004, through the life-changing introduction of Articles 257A to 257D which provided for the possibility of officially changing the annotation on the indication of sex assigned at birth. Along with the said change in the sex assigned via the birth certificate, other formalities were also able to change, such as the name of the person as well as other official documents. Prior to this date, transgender persons were not able to have their gender altered in any way and were forced to live in a society where everything containing indication to their gender was a constant reminder of this injustice as well as an invitation to ridicule. The abovementioned articles were further strengthened through the introduction of a further and equally fundamental Act- Act VII of 2013. This Act amended Article 257C in particular, by enabling a person who has been allowed the request to change gender to benefit from all the civil rights of a person from their new acquired sex, including the noteworthy capacity to marry.

Although, as one may witness from the above, many favourable breakthroughs have been achieved for the transgender community in Malta, some still believe that there is room for more improvement on the issue. The Civil Code has remained insufficient when it comes to the fundamental human rights of a transgender person since there still exist clauses that can be held to be discriminatory. Amongst these are the clauses in Article 257A which only allow for the changes in the act of birth once it has been determined by court experts that the person has undergone an irreversible sex change operation and this only applies to unmarried persons.¹⁸⁴

In the year of 2010, consultation meetings were held by relevant organizations which led to the drafting of a 'Gender Identity Bill' by MGRM, which was subsequently presented by labour MP Evarist Bartolo as a private member's Bill on the 10th

¹⁸⁴ Article 257A of the Civil Code of Malta: "(1) It shall be lawful for any unmarried person domiciled in Malta to bring an action for an annotation regarding the particulars relating to sex which have been assigned to him or her in the act of birth.

(2) Before delivering judgement, the Court shall appoint experts to verify whether the person who has brought the action has, in fact, undergone an irreversible sex change from that indicated in the act of birth or otherwise always belonged to such other sex".

December 2010, firstly at a press conference at the European Commission Representation office in Valletta, and later on that same day, in parliament, however it never made its way to be placed on parliament's agenda for debate.¹⁸⁵ The reasoning behind the drafting of this proposed Bill was to facilitate the gender recognition of transgender persons irrespective of whether they have undergone gender re-assignment surgery or not.

The proposed Gender Identity Act proposes to remove the clause by which gender reassignment surgery is made necessary to the attainment of a legal gender change, which at the same time would also remove the necessity of another invasive as well as offending medical examination by the court to determine whether such surgery had taken place. The motivation for this argument is due the fact that the gender reassignment surgery is a huge deal for a person, apart from also being a tremendously lengthy and costly process. Our legislators must also take into consideration the fact that some people due to a certain medical condition may not be able to undergo surgery at all or possibly do not feel comfortable risking their lives with such a major operation, or more plainly, simply cannot afford it. Is it therefore fair to preclude these transgender person's from accessing their right to request a gender change?

It is simply nonsensical that, in the face of the insistence by Maltese law for gender reassignment surgery to be carried out on the transgender person, this surgery is ironically not performed in Malta, resulting in further obstacles to the process as well as additional expenses incurred. In fact, the Bill proposes that the system be totally revamped and, instead of a court based system with a deciding judgement, the process would merely become an administrative one where the transgender person deals directly with the Public Registry. A person's self determination should also include the right to determine one's own gender identity and this should not be the ultimate decision of any court, doctor or psychiatrist.

¹⁸⁵ MGRM Article 'Proposed Gender Identity Act for Malta'
<http://www.maltgayrights.org/localcampaignsselected.php?title=Proposed%20Gender%20Identity%20Act%20For%20Malta> Accessed on the 2nd July 2014

The Bill also proposes to eliminate the requirement which states that the person undergoing the process for a legal gender change is to be an unmarried person. The reasons for this proposed removal are plentiful, but most importantly, due to the fact that it is damaging and morally wrong for the state to compellingly require that a couple enter into annulment procedures to irrevocably dissolve their marriage (albeit already possibly legally separated) in order for such transgender person to go through a gender change. In the case that an annulment is not possible, due to the rigorous requisites required to obtain one, that transgender person would be forced to continue life without the possibility of recourse under Articles 257A to 257D, and continue to face humiliation, injustice and suffering. It is important to keep in mind that the proposal to remove the 'unmarried' requisite will clearly not prejudice or hinder parental rights, if the transgender person has any children.

In our current system, after satisfying the condition of being unmarried and after confirming that an irrevocable gender reassignment surgery has taken place, an annotation is made in the transgender person's acts of civil status, which annotation remains visible on the original, for all third parties to see. This does not fully respect the transgender person's right to privacy. The proposal intends to modify the system such that once the competent authorities accept a request by a transgender individual to have their gender altered, the approved gender-change would be entered into a new secret register, not available for public viewing, as is the procedure with the case of adopted children.¹⁸⁶ This new transgender register would be the best way in order to safeguard the privacy and confidentiality of such transgender person, as due to them under basic human rights laws. The government is currently in the process of reviewing whether gender reassignment surgery and hormone therapy should begin to form part of National Health Service. Two options are being discussed which would be

¹⁸⁶ Times of Malta Article, 'Draft Bill proposes legal simplification of sex-change registrations' <http://www.timesofmalta.com/articles/view/20101210/local/draft-bill-proposes-legal-simplification-of-sex-change-registrations.340293> Accessed on the 2nd July 2014

either to offer the service for free in Malta's public hospital Mater Dei, or else to pay for the applicants surgery overseas.¹⁸⁷

5.2 Intersex Persons

Another issue, which has long been existent in Maltese society, yet never given much attention, is that of 'Intersex' persons. An intersex person is one who is born with ambiguous genitalia, making it complex and difficult to distinguish a male from a female.¹⁸⁸ In Malta, although gender reassignment surgery is not carried out in general, an exception is made and gender reassignment surgery for intersex children is performed as it is estimated that one child per year in Malta is born intersex.¹⁸⁹ Malta, like the majority of other countries, does not yet have any legislation in place where intersex persons are concerned.

It has become a bone of contention as to what should be the established process used in order to classify and label a baby as male or female, and who should take the ultimate decision; the parents, the doctor, or neither or the two? In fact, government MP Deborah Schembri, during a debate on sexual orientation discrimination held that the initial decision to identify a child as male or female should not be taken lightly.¹⁹⁰ Many a time, parents take a rash or impulsive decision as to which sex their child should belong to, which may result in serious repercussions later on in life. In fact, many parents of intersex children resorted to labelling their child as female for the

¹⁸⁷ Times of Malta Article 'Health service may offer free sex change surgery'
<http://www.timesofmalta.com/articles/view/20140505/local/health-service-may-offer-free-sex-change-surgery.517672> Accessed on the 3rd July 2014.

¹⁸⁸ The Definition given by the Council of Europe in an explanatory memorandum to Resolution 1952 on Children's right to physical integrity is "The term "intersex" refers to atypical and internal and/or external anatomical sexual characteristics, where features usually regarded as male or female may be mixed to some degree. This is a naturally occurring variation in humans and not a medical condition. It is to be distinguished from transsexuality, a phenomenon where someone has an evident sex, but feels as if he or she belongs to the other sex and is therefore ready to undergo a medical intervention altering his or her natural sex."

¹⁸⁹ Times of Malta Article 'Pink on intersex and stalking'
<http://www.timesofmalta.com/articles/view/20070518/local/pink-on-intersex-and-stalking.17525>
Accessed on the 3rd July 2014

¹⁹⁰ The Malta Independent 'Intersex babies should not face immediate surgery, MP insists'
<http://www.independent.com.mt/articles/2013-12-03/news/constitutional-amendment-on-sexual-orientation-major-step-forward-3370876929> Accessed on the 3rd July 2014.

simple reason that the reassignment surgery was simpler to arrange than it would be for a male. This is a life changing decision which should not be taken lightly, let alone taken for the sole reason of ease and simplicity. Sometimes, believing that gender assignment surgery on children may be the solution to all problems, could actually be the start of such problems since a wrong decision could be made.¹⁹¹

Germany has become the first country in Europe and one of the few countries in the world to legislate in terms of intersex persons. In November 2013, Germany introduced a piece of legislation whereby a third gender category is introduced; the indeterminate gender. The idea is that parents of intersex children should not take any impulsive decisions regarding their child's gender and especially not go ahead with gender related surgeries which could have serious reverberations. In this way, the parent would be able to give the child an indefinite gender until the said child became mature enough to fully understand and be aware of their gender, and then make the crucial decision themselves, when the time is right. Many have criticised the German initiative, claiming that the indeterminate gender may be the cause of further discrimination faced by the subject, especially whilst growing up. Problems such as school and public bathrooms which only cater for males or females have not been properly assessed. In the light of these conflicting views, it is my opinion that although Germany's measure was a step forward which, if nothing else, creates awareness on the topic of intersex, more focus should be placed on banning the irreversible gender reassignment surgeries performed on babies, since once the decision is made and the surgery completed¹⁹², there is no turning back.

5.3 Other Issues and Concluding Thoughts

Lesbian, Gay, Bisexual and Transgender communities have also pushed for legislation or amendments to other, more controversial, topics such as the introduction of in-vitro fertilization as a possibility for LGBT couples as well as the introduction of

¹⁹¹ Ibid

¹⁹² Including the removal of vital internal reproductive organs

surrogacy and sperm donations which would create parenting opportunities for LGBT couples.

On the 1st of January of the year 2013, the Embryo Protection Act¹⁹³ came into force, and although the draft Bill, prior to enactment, was heavily criticized by the LGBT community for its clear cut discrimination on gay couples, the law was passed without any major amendments to its original draft. The law is clear and immediately, in the definitions set out under Article 2, defines a prospective parent as either of “two persons of the opposite sex who are united in marriage or who have attained the age of majority and are in a stable relationship with each other”. MGRM have described this exclusive law as being “inherently homophobic in nature”¹⁹⁴ since it expressly impedes single persons or lesbian couples from accessing this alternate possibility of being able to have children. The wider picture is that it goes against the right to form a family, whereby heterosexuals are given unfounded preference over homosexuals towards this right. Criminal sanctions are imposed to any person who provides or assists in any medically assisted procreation procedure to a person who does not satisfy the requirements of a prospective parent, such that the person would incur a fine (multa) of between ten and twenty-three thousand euros or five years imprisonment or both.¹⁹⁵ The abovementioned restrictions leave lesbian couples as well as single women with the only option to seek help with in-vitro fertilization services from countries abroad at their own expense, whilst still paying their tax contributions that ironically help heterosexual couples obtain the same services free of charge from the Maltese Public Hospital.

The same Embryo Protection Act also prohibits and criminally sanctions other practices such as surrogacy and gamete (sperm and egg) donations. It has been argued that the criminalization of these procedures does not have much to do with the intended scope of embryo protection, but is just a further encouragement of the restricted model of a

¹⁹³ Chapter 524 of the Laws of Malta

¹⁹⁴ Times of Malta Article ‘IVF ban for gay couples ‘intolerant’
<http://www.timesofmalta.com/articles/view/20120801/local/IVF-ban-for-gay-couples-intolerant-.431010> Accessed on the 9th July 2014

¹⁹⁵ Article 5 (2) of Chapter 524- The Embryo Protection Act

family which should no longer apply in today's world.¹⁹⁶ Why should the state be the ultimate judge on what a person decides to do with his or her sperm or eggs? These decisions need be taken solely by the individual and any state criminalisation on such a decision should, in my unprofessional opinion, be considered an unjustified intrusion. In fact, whereas surrogacy might be considered as an easily caught procedure which is hard to hide from state officials, impregnation as a result of a sperm donation is a much harder process to penalise since loopholes in the system exist and a pregnant woman may easily blame her pregnancy on a drunken night out where the father was not known.

Any person who contravenes the prohibition of gamete donation may be held liable to a fine (multa) of ten to twenty-three thousand euros or five years imprisonment or both.¹⁹⁷ In the case of surrogacy, the person who transfers a human embryo into a woman who is prepared to give up her child immediately and permanently after birth is liable to a fine of between five and fifteen thousand euros or three years imprisonment or both.¹⁹⁸ On the other hand, the surrogate mother is liable to the said punishment with a decrease of one or two degrees. Since, for example, in the case of in vitro fertilization, only the medical practitioner is penalised and not the party or parties involved, it is therefore possible to carry out this service in another country other than Malta and not risk being criminalized upon return to Malta. However, since all or most of the parties are criminalised in procedures such as surrogacy or sperm donation, it would not be possible to carry out the procedure outside of Malta, since upon return, one may be criminalised.

The Yogyakarta principles, in principle number twenty four, explains that since everyone has the right to found a family regardless of their sexual orientation or gender identity, then states should:-

¹⁹⁶ Times of Malta Article 'IVF bill 'discriminatory'-MGRM'
<http://www.timesofmalta.com/articles/view/20120731/local/ivf-bill-discriminatory-mgrm.430856>
Accessed on the 9th July 2014

¹⁹⁷ However, if it is proved that the medical practitioner took all the necessary steps to ensure that the parties were prospective parents, he or she shall be exempt from liability.

¹⁹⁸ Article 6(f) of Chapter 524- The Embryo Protection Act

“take all the legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity”.¹⁹⁹

Another controversial and debatable topic is that of blood donation in Malta by LGBT persons. The current position is that gay men who specifically state that they have had sex with other males are banned from giving blood for donation.²⁰⁰ The ban is placed irrespective of whether the male has been celibate for a substantial amount of time, and instead, is an outright ban once confirmation has been made that such sexual practice with another male has been engaged in. The National Blood Transfusion Service (NBTS) claims that the prohibition is not one made based on being homosexual, but rather is a prohibition on the sexual activity and practice that is the deferral that makes blood donation ‘high risk’.²⁰¹ However, if one were to consider this claim, the argument could be raised that there are also heterosexual males who engage in similar high-risk sexual activities with females, and yet, according to the NBTS, such males are not prohibited from donating blood since the activity was not engaged with another male.²⁰² When I raised this point of issue with a Doctor at the NBTS, the response received was that statistics²⁰³²⁰⁴ showed that homosexual males were more promiscuous and the risk of infection was much higher than with heterosexual males.²⁰⁵

¹⁹⁹ Principle 24, Yogyakarta Principles http://www.yogyakartaprinciples.org/principles_en.htm Accessed on the 9th July 2014

²⁰⁰ Face-to-face meeting with a member of the NBTS on the 23rd July 2014 at the Blood Donation Unit in Gwardamangia

²⁰¹ Ibid

²⁰² Ibid

²⁰³ MSMs of all races continue to be the risk group most severely affected by HIV- Factsheet by the Center for Disease Control, March 2014, <http://www.cdc.gov/nchhstp/newsroom/docs/CDC-MSM-508.pdf> Accessed on the 21st July 2014

²⁰⁴ Di-ve news article, Dr. Alex Aquilina, the Medical Director of the NBTS- ‘in a practicing MSM the incidence of potential blood transmitted diseases is 50 times greater than within the heterosexual community’, 24th July 2013, <http://www.di-ve.com/lifestyle/why-can't-gay-men-donate-blood> Accessed on the 21st July 2014

²⁰⁵ Ibid

The United Kingdom²⁰⁶ has recently adopted a procedure whereby, instead of a categorical and complete ban, males who have sex with males (MSMs) are allowed to donate blood if it is declared that they have been celibate for at least one year prior to the donation. The reasoning behind this was that the country no longer felt, after one year has passed from such sexual activity, that the risks of infectious diseases being transferred through blood donation were high. Although many other countries around the world have also adopted this one-year deferral,²⁰⁷ Malta has still refused to take on this different approach instead of its indefinite ban.

Directive 2004/33/EC, in point 2.1 of Annex III dealing with permanent deferral criteria for donors, lists sexual behaviour that puts persons at high risk of acquiring severe infectious diseases through blood as one of the permanent deferrals. It is important to note that it is up to each Member State to interpret what constitutes as 'high risk' and that analysis on this matter must be constant and on-going. In a recent press release²⁰⁸ by the Court of Justice of the European Union with regard to the case of Geoffrey Léger v Ministre des affaires sociales et de la santé and Établissement français du sang²⁰⁹, AG Paolo Mengozzi held that 'a sexual relationship between two men does not itself constitute conduct that justifies permanent exclusion from giving blood. In order to change Malta's views on the matter, it was claimed²¹⁰ that proof to the contrary must clearly emerge that MSM activity is no longer considered high risk after a specified amount of time.

Lastly, in this conclusion I have attempted to delineate the issues that Malta has yet to deal with in the future when it considers possible developments to the law at present. Tweaks and updates to the Civil Unions Act are expected to be prolific in the coming months, and even years, since the topic is significantly avant-garde to Malta and one which still has to go through the process of trial and error. What is of fundamental

²⁰⁶ Excluding Northern Ireland

²⁰⁷ Sweden, Finland, Czech Republic, Hungary, Australia, Japan, Argentina and Brazil.

²⁰⁸ Court of Justice of the European Union Press Release number 111/14, Luxembourg, 17th July 2014 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-07/cp140111en.pdf> Accessed on the 20th July 2014

²⁰⁹ Case C-528/13

²¹⁰ Face-to-face meeting with a member of the NBTS on the 23rd July 2014 at the Blood Donation Unit in Gwardamangia

importance however, is that a cardinal milestone was reached with the inclusion of sexual orientation and gender identity in the Maltese Constitution. Since such a mention is made in the Maltese Constitution, it is now possible for an individual to take proceedings to the European Court of Human Rights in Strasbourg for any possible violation of the said Constitution on any discrimination based on sexual orientation or gender identity, which would most likely compel the government to concede.

To a large extent, it is my opinion that Malta has done enough in the last year to safeguard the rights of LGBTI people. The first major step has been accomplished, to the degree that there now exists a system for the recognition of unions between two persons of the same sex. This is something that would have been unheard of a few years ago for Malta and which is therefore evidence that Malta is gradually and progressively letting go of its moral hegemony. As the lawyer and political philosopher Charles de Montesquieu once held; “In the state of nature... all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law”. Protection at law has now been granted, and although equality is no where close to being fully achieved or recovered at this moment in time, it is my opinion that it is imminent and forthcoming.

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