
**Study on Homophobia, Transphobia and Discrimination on
Grounds of Sexual Orientation and Gender Identity**

Legal Report: San Marino¹

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1. This report is based on Dr Maria Gabriella Francioni, *The legal and social situation concerning homophobia and discrimination on the grounds of sexual orientation in the Republic of San Marino*, University of the Republic of San Marino, Juridical Studies Department, 2010. The latter report is attached to this report.

Table of Contents

A. EXECUTIVE SUMMARY	3
B. FINDINGS	3
B.1. Overall legal framework	3
B.2. Freedom of Assembly, Association and Expression	10
B.3. Hate crime - hate speech	10
B.4. Family issues	13
B.5. Asylum and subsidiary protection	16
B.6. Education	17
B.7. Employment	18
B.8. Health	20
B.9. Housing and Access to goods and services	21
B.10. Media	22
B.11. Transgender issues	23
Annex 1: List of relevant national laws	27
Annex 2: Report of Dr Maria Gabriella Francioni, <i>The legal and social situation concerning homophobia and discrimination on the grounds of sexual orientation</i> in the Republic of San Marino, University of the Republic of San Marino, Juridical Studies Department, 2010	31

A. Executive Summary

1. The Statutes "Leges Statuae Reipublicae Sancti Marini" that came into force in 1600 and the Laws that reform such Statutes represented the written source for excellence of the Sammarinese legal system.
2. The Republic of San Marino has a few relevant national laws that mention sexual orientation as one of the grounds of discrimination. There are nevertheless many situations not currently covered by national legislation in which citizens might not be legally protected against discrimination on the grounds of sexual orientation and gender identity. This was also recently picked up by a review carried out by the United Nations, which made a recommendation to the Government of San Marino to explicitly state sexual orientation and gender identity in its statute.
3. Same-sex relations, as well as same-sex partnerships, remain invisible both in the public domain and to state regulation. In fact, San Marino has not levelled up the same-sex couples to cohabitants more uxorio, nor to married couples. Same-sex couples do not have access to adoption, although San Marino will allow a single individual to adopt. This latter provision is also used by the government of San Marino to justify the lack of need to recognise same-sex couples the same right to a family.
4. As late as in 2004 Art. 274 of Sammarinese Criminal Code considered as «acts of lust» the facts committed in a public place among same-sex persons was abrogated.
5. Official datum testify the absence of facts on discrimination for sexual orientation and gender identity reasons in San Marino. In this sense, the "Bollettino statistica" (statistics report) published quarterly by the Office of Economic Programming Centre on Elaboration of Datum and Statistics of the Republic of San Marino, does not report Case Laws on the discrimination on the grounds of sexual orientation or gender identity, nor pending suits before the court for this issue. Equally, the Sammarinese Criminal Jurisprudence, containing sentences from 1964 to 1990, does not mention any case of discrimination on the grounds of sexual orientation.
6. Interviews with the Gendarmerie and stakeholders of Sammarinese Commission for the Equal Opportunities confirm the absence of cases of intolerance up to the present day besides from one case brought forward by the president of the national LGBT NGO. The same sources attest no verification of these blameworthy facts of harassment and bullying at school. As regards the labour environment, the Labour Confederations of San Marino has not reported formal cases of dismissal of LGBT persons being forced to leave their work concealing justification of sexual orientation.
7. These quantitative data are extremely concise in giving evidence of the lack, in the San Marino legal system, of discrimination on the grounds of sexual orientation or gender identity against LGBT persons, homophobia, transphobia, and bullying at school. They show the entity of phenomenon but they are not able to explain if and in which measure the rules guaranteeing the equality defend the diversity, the uniqueness and the validity of each experience, included those of LGBT persons.

B. Findings

B.1. Overall legal framework

8. The Republic of San Marino has peculiar features, that are proper of a strongly homogeneous community tied to its past political-constitutional traditions.

9. The legal system of the Republic of San Marino is marked for not possessing a formal constitution; it has documents and laws of a materially constitutional nature. San Marino is a system in which the consuetude, the tardy-Medieval Statute and the laws promulgated by the Great and General Council (Parliament) are in force together with the Common Law (subsidiary and integrative source). The solemn Declaration of the Rights (Law no. 59/1974, as amended by the Law no. 36/2002) has particular relief and, in the system of sources of rights, it hierarchically covers the super-ordered position to the ordinary law proper of strict constitutions.
10. Art. 1 of the Sammarinese Declaration of the Rights establishes that "The Republic of San Marino recognises, as an integral part of its own system, the norms of International law generally recognised and conforms to them its acts and conduct. It complies with the norms contained in the International declarations on human rights and fundamental freedoms (co.1). It reconfirms the right of political asylum. It repudiates war as an instrument to resolve conflicts between States and it conforms, in International action, to the principles ratified in the United Nations Charter (co. 2). Sammarinese law recognises guarantees and enforces the rights and fundamental freedoms enunciated by the European Convention for the Protection of Human Rights and Fundamental Freedoms (co. 3). International agreements protecting the human rights and freedoms officially agreed to and executed, prevail in cases of conflict with internal laws (co. 4)."
11. Essentially, the deeds on which the relations among States on matters of the protection of human rights are based and on which the various States, San Marino also, must address their domestic political and social activity are the following:
 - two Covenants of the United Nations: the «International Covenant on civil and political Rights» and the «International Covenant on economic, social and cultural Rights», adopted in New York by the General Assembly of the UN on 16 December 1966, in conformity to the Universal Declaration of Human Rights; both documents have been ratified by San Marino with Decree no. 109/1985;
 - The "European Convention for the Protection of Human Rights and Fundamental Freedoms" elaborated by the Council of Europe that entered into force on 3 September 1953, ratified by San Marino with Decree no. 22/1989.
12. Article 1 of the Declaration of the Rights is commonly defined like that right formed spontaneously on the grounds of consuetudinary rules practised, with time, by the Community of States in their relations.¹ As it happens in the domestic legal system the rules of International law must be identified in concrete terms in those requirements and needs that are widespread in the international conscience.² The rules of international rights generally recognised and the international declarations on the matter of human rights and individual freedoms are engaged automatically by the legal system of San Marino.³
13. The co. 2 of the aforesaid Art. 1 recognises the institute of asylum as an instrument of the protection of human rights.
14. The International declarations and Conventions on the matter of human rights and freedoms mentioned by co. 1 and 3 of Art. 1 of the Declaration of the Rights constitute over-ordered rule to

1Lonfernini,L.2006 *Diritto Costituzionale Sammarinese*, Università degli Studi della Repubblica di San Marino, Dipartimento di Studi Giuridici, Scuola di Perfezionamento in Diritto Sammarinese, edito dalla Banca Agricola Commerciale della Repubblica di San Marino, Guardagli Editore S.r.l., Rep. San Marino, p. 250.

2 Ibid., pp. 250-251.

3 Ibid., p. 253. The adjustment is a fact that can be pointed and applied to concrete case by Judge; by the Great and General Council that, with law, must conform the domestic rule to the International one, or, in case of doubt or uncertainty, by the College Guarantor opportunely made active.

the legal system of San Marino, i.e. they become not a programmatic obligation but a behaviour kept with the automatic adjustment of domestic rules.⁴

15. Unlike the principles and norms generally recognised of international rights and of the fundamental rights and freedoms enunciated by the European Convention for the Protection of Human Rights and Fundamental Freedoms, for which it provides the automatic adaptation, the international agreements on the matter of protection of human freedoms and rights (Art. 1, co. 4) become binding if the State has approved them by adhesion to the convention. In this case mentioned by co. 4 of Art. 1 of the Declaration of the Rights, the adhesion is a faculty, not a duty. It means that contents of each international agreement officially agreed to and executed by San Marino has direct legal force in the national legal system: it is the source of inspiration in domestic Case Law for the Internal Authorities in the practical implementation and promotion of rights and it makes for interpretation in an evaluative sense of the National juridical values, based on a community of values.
16. The adhesion to the Convention and, by mediate way, to those of the Universal Declaration in virtue of the cited Art. 1, co. 4, of the Sammarinese solemn Law no. 59/1974, determines the prevalence of the super-national values that cannot be disregarded on the domestic sources of rights in hypotheses of contrast.
17. This premises that it is comprehensible that the Declaration of the Rights of San Marino leagues the little Republic to the International system of United Nations and to the European system, i.e. to the dominant juridical culture asserted in the international community, within the elaborations of the continental common law, that it is reflected today in the Constitutional European Common Law amended on human rights by the jurisprudence of the European Court, as well as, symbolically, drawn by the European Union Charter on fundamental rights, including its Art. 21 on sexual orientation as a form of forbidden discrimination.⁵ It is opportune to underline that the signature to the European Convention of the Human Rights has represented a stimulus to improve our Sammarinese legal system in order to assure better fulfilment of human rights and to support the principle of *de jure* pre-eminence, of parliamentary democracy and the respect of human rights, in any case broadly protected and recognised by the tradition of the Republic.⁶
18. However, it is different the recognition that Art. 1 of the Declaration of the Rights performs towards the norms introduced in execution of the European Convention compared with the norms introduced in execution of other International Agreements. While the Covenants do not provide for a system of jurisdictional guarantee (eventually, their verified non-observance can also bring resolutions of military character towards the State become default), the European Convention has founded a permanent Court, the European Court of Human Rights, to which it is due to settle the controversies borne on the initiative of the single individual against his/her own State for violation of fundamental rights and freedoms guaranteed by the same Convention. Therefore, it realises a double guarantee for the individual that holds to be injured inside the State of a right enacted by International norms in the theme of individual rights: a national procedure provided by the domestic legal system and an external procedure provided by the European Convention. Also San Marino is present in the European Court of Human Rights with its own judge.
19. The rights of the European conventional text concerning the private sphere of citizens (Art. 9, Freedom of opinion, of conscience and religion; Art. 10, Freedom of expression; Art. 11, Freedom of reunion and association) are mentioned in the Sammarinese Declaration of the Rights. In fact, Art. 5 of the Law no. 59/1974 contains the solemn declaration that human rights are inviolable (the right to life, to name, to citizenship, the so-called right of *incolato*, that is the right to have a

4 Ibid., pp. 254-255.

5 Guidi, G. 2004, *Le fonti scritte nella Repubblica di San Marino*, G. Giappichelli Editore, Torino. pp. 17-71

6 Selva A., 1990. *La garanzia dei diritti fondamentali nell'ordinamento giuridico sammarinese*, Rivista internazionale dei diritti dell'uomo, 1 Anno III, genn-aprile 1990, Università Cattolica Milano.

residence) and it specifies their contents in the articles that follow it. Its Art. 4, Co. 1, which mentions sex as one of the grounds of discrimination.

20. With the Declaration of Rights, for the first time San Marino has expressly recognised a series of subjective situations of right in a text. Some of them are constants in the history of San Marino, like individual civil and political liberties, freedom of domicile, abode and expatriation, reunion and association, demonstration of beliefs, conscience and cult (Art. 6, co. 1), and are considered as natural and absolute because they are inherent in personality. Instead, the typical rights of the welfare state have the character of novelty, for example the right of gratuitous and free study (Art. 6, co. 2) and the right of social welfare (Art. 9, co. 2) guaranteed indiscriminately to everybody, without regarding personal conditions or gender. The State offers fit structures and means for concretely giving such rights. The rights mentioned by these dispositions are extensively interpreted as regarding “positive actions” that State has to adopt for assuring the respect of these rights, by elimination of obstacles and coercions obstructing the free development of personality.⁷
21. The Art. 4 of the Declaration of the Rights proclaims the prohibition of discrimination on the ground of sex, so as personal, economic, political and religion conditions, for the sake to guarantee equality in front of the law, of admittance to public offices and to the elective offices, of social dignity, rights and freedoms, effective sharing of citizens to the economic and social life of the Country.⁸
22. The Sammarinese legal system regulated by the superior Law no. 59/1974, as amended by the Law no. 36/2002, has the Statutes, too – so-called *Leges Statutae Reipublicae Sancti Marini* – covering the period between XIIIc. and XIIIc.; and for various parts they are still preserving juridical value in acts of ordinary legislation and they have a materially constitutional nature. These Statutes edited in the seventeenth century, the last collection of the statutory legislation of San Marino, mention “child rape” and the “nefarious crime of sodomy” (Rubric LXXIV of the Book III).⁹ Besides, the Sammarinese criminal sources record events of “incest”, i.e. relationships between persons related by blood, among the histories of “ordinary transgression”.¹⁰ And in this country where everybody have always shown the same sensibility on sexual honour, same-sex relations as well as homophobia remain invisible to State regulation. As to say that in San Marino the issue did not exist: all men were virile and all women were feminine.
23. Beside the Statute as a source of right, San Marino has maintained the *ius comune*, that is the right practised by all of the continental European States before making the codices.
24. Inside of the Sammarinese legal system various legislative texts enunciate the prohibition of discrimination on the grounds, among the other reasons, of sexual orientation. So, the Law no. 60/1980 on reform of the school system, to its Art. 1 provides that “in the school [institution] distinctions of race, of sex, of language, of religion, of political opinions are not admitted”. Likewise, the same prohibition is enacted by the Law no. 133/1991, as amended by the Law no. 32/1997, on matter of sporting activity.
25. The prohibition of discrimination on ground of sexual orientation is also provided by some legislative texts for the medical-sanitary sector. In fact, it is present in the Statute of the Sammarinese Croce Rossa - functioning as medical aid - approved with Decree no. 55/1973. The same prohibition is recognised with the Statute enclosed to Decree no. 20/1996 concerning the Order of Surgeons and

7 Mularoni, A. 2006, *Il ricorso alla Corte Europea dei diritti dell'Uomo*, in *Sommario di procedura giudiziaria civile sammarinese*, Parte II, Quaderni di Diritto Sammarinese, Luigi Lonfernini, pp. 355-404, Aiep Editore S.r.l., San Marino, pp.385, 386.

8 The Art. 4 of the Declaration of the Rights proclaims: “Everybody is equal in front of the law, without distinction of sex, of individual economic social politic and religious conditions (co. 1). All citizens have the right to access to public offices and to be elective, accordingly to formalities established by Law (co. 2). The Republic guarantees equal social dignity and equal protection of the rights and freedoms. It promotes conditions for the effective participations of the citizens to the economic and social life of the Country (co. 3).

9 *Leges Statutae Reipublicae Sancti Marini*, MDCCCXCV, p. 176.

10 Palombarini, A. 1997. *Marginalità e devianza femminile nelle fonti criminali sammarinesi. Secoli XVIII-XIX*, n. 15, Collana diretta da Sergio Anselmi, Centro di Studi Storici Sammarinesi, Università degli Studi della Repubblica di San Marino, Editino Ada Antonietti, Aiep Editore S.n.c., Repubblica di San Marino.

Odontologists Independent professionals, besides with the Statute enclosed to Decree no. 101/1999 on the Order of Psychologists. These rules on medical-sanitary matter conform with the principles of World Health Organization (WHO; Organizzazione Mondiale della Sanità, OMS) that deals with social determinants of the inequalities of gender from years. With Decree no. 61/1987 and Decree no. 85/1998 San Marino adheres to the deed of partnership of the WHO sanctioning the principle of health as a fundamental right of equality.

26. The “Charter of the rights and the duties of sick person” of Law no. 43/1989, does not contain dispositions on the matter of equality, limiting itself to enunciate the rights and duties of the patient of which each citizen is a regular holder.
27. The Law no. 44/1997 on the penitentiary system imposes a treatment stamped to absolute impartiality, without discrimination on the grounds of nationality, race, economic and social conditions, political opinions and religious beliefs.
28. It is recent to the integration of the Sammarinese Criminal Code provided by Law no. 66/2008, to prevent and to repress behaviours of discrimination for reasons of hate or violence, for racial, ethnic, national, religious or sexual orientation reasons. In force of the same disposition, the above mentioned forms of discrimination constitute aggravating circumstances of crimes, prosecutable by the judicial office.
29. Nevertheless, when LGBT San Marino proposed for the government to recognise the 17th of May as IDAHO (International Day Against Homophobia and Transphobia), the government rejected the proposition, therefore showing lack of commitment to this area of work. In order to guarantee a more effective level of protection supporting victims of discrimination, the Law no. 97/2008 on the matter of “prevention and repression of violence against women and of gender” confers to the specific national Equal Body called Authority for the Equal Opportunities the power to start a procedure supporting victims of physical or moral violence and discrimination, giving an informative service and to brace them (B.3). Through such legislative interventions no. 66/2008 and no. 98/2008, San Marino in principle deals with gender differences and gives protection to the identities, realising a full and effective protection of so-called different persons. The same interventions allow to line up the Republic to the majority of the European States, which are already equipped for the time of a suitable repressive apparatus on the matter of sexual orientation, solicited by the Directives of the European Union and of the Council of Europe.
30. The Law no. 121/2004 has abrogated the Art. 274 of Sammarinese Criminal Code concerning penal condemnation as «acts of lust» the facts committed in a public place among same-sex persons.
31. In working ambit, with Decree no. 133/1986, the Republic of San Marino has ratified the Convention of the International Labour Organisation (ILO) no. 111 of 1958r, in that making the struggle against discrimination of gender one of the central points of its activity. it prohibits every form of discrimination on the matter of employment and profession. With Law no. 68/1989, the Administrative Court has been founded, with the assignment to exercise the jurisdictional protection of legitimate interest towards the Public Administration also on the matter of working relations involving public institutions.
32. Today, San Marino is also a participating state in the Organisation for Security and Co-operation in Europe (OSCE) which focuses on the elimination of each form of discrimination and in the promotion of respect and mutual understanding.
33. Substantially, by these dispositions San Marino has established specific actions to fight various spheres of discrimination, such as the access to jobs for employees and the self-employed, education, social protection (including welfare and sanitary assistance) social services, access to goods and services and their supply. Judicial and/or administrative procedures settled to strengthen the principle of non-discrimination, and the right of legal and social assistance to victims, are the tools of legal protection recognised to victim of discrimination (B .1.1 – B.3).

34. The Law no. 49/1986, has permanently sanctioned the principle of moral and juridical parity of consorts between man and woman. The norm of the criminal code that punished adultery has been repealed. The equality of consorts finds recognition not only during a marriage but also during separation and after the dissolution or cessation of the civil effects of marriage.¹¹
35. With Law no. 114/2000 and subsequently with Law no. 84/2004 the Sammarinese citizenship of a child born to a Sammarinese mother is recognised. So there is sanctioned equality between man and woman also on matter of citizenship.

B.1.1. Instruments against violation of fundamental rights

36. Evidently, it is not enough to proclaim the formal rights of an individual, to which the norm is direct, and has not concrete possibility to suit the principles guaranteed by the State.
37. The following context highlights the actions allowed to grant the effective exercise of the constitutional principle of equal dignity and rights and equal treatment without distinctions of individual condition, both by the activation of national Bodies (the College Guarantor and the Commission for the Equal Opportunities) and by appeal to the European Court to which San Marino adheres. Instead, the actions that the Sammarinese legal system recognises to citizens for the concrete protection of the principle of non-discrimination for specific juridical spheres, will be examined into their respective areas that follow in this report (B2 – B11).

Effective exercise of the constitutional right of equality: the «College Guarantor» and the «Commission for the Equal Opportunities»

38. Law no. 4/1989 has introduced the judgment of legitimacy of the norms in respect to the principles of the Sammarinese legal system mentioned by the Declaration of Rights of Citizens. The judgment of legitimacy is put into effect both by analysing the form and then it regards to the act and to the procedure of putting it into force, and by analysing the substantial viewpoint and therefore it regards to the contents of act.¹² Such mechanism of the constitutional guarantee conducts to repeal the domestic rules opposed to those rules of Conventions on the matter of human rights, with affect to the pronouncement of illegitimacy. As an exception and for exact reasons, the legislator (the Great and General Council), upon suggestion by the same organ in charge of constitutional legitimacy also, can set a time limit to retrospective effect of the pronouncement with reference to expectations, to a subjective right or to a legitimate interest, that the rule declared illegitimate has made to rise (Art. 7, Law no. 36/2002). In this case, the question of constitutional legitimacy on the matter, for example, of equality is conditioned from the viewpoint of the organ of political address.
39. With Law no. 36/2002, in amending the Law no. 59/1974 on Declaration of the Rights, the judicial body properly qualified to decide on the constitutional legitimacy of the rules is the College Guarantor (Art. 16, of the Law no. 59/1974), to which it is guaranteed full autonomy, independence and neutrality from other bodies or powers of the State.
40. If there is doubt that a norm is backwards in legitimacy in everything or partly, the individual has the possibility to make the control of constitutional legitimacy to the College Guarantor active in an indirect or incidental way. The incidental access to the College Guarantor implies current trial in front of a civil, administrative or criminal judgement (the so-called judge a quo, “from which” the

11 Selva A., 1990, *La garanzia dei diritti fondamentali nell'ordinamento giuridico sammarinese*, Rivista internazionale dei diritti dell'uomo, 1 Anno III, genn-aprile 1990, Università Cattolica Milano, pp. 42-46.

12 Lonfernini, L. 2006, *Diritto Costituzionale Sammarinese*, Università degli Studi della Repubblica di San Marino, Dipartimento di Studi Giuridici, Scuola di Perfezionamento in Diritto Sammarinese, edito dalla Banca Agricola Commerciale della Repubblica di San Marino, Guardagli Editore S.r.l., Rep. San Marino, p. 197.

question is boosted) and it must resolve the concrete case by applying a law or an act that holds unconstitutional.¹³

41. The most evident difficulty of the right of the citizen to raise the question of legitimacy in an incidental way is in regards to the determination of the same question of legitimacy both from the Judge a quo – it will be the Judge a quo to introduce the elements, normative and of facts, that connote the trial within to which the question of constitutional legitimacy takes shape – and from the College Guarantor – that is, the question of legitimacy is conditioned from the result of the constitutional judgement.
42. In order to verify the norm suffering from legitimacy, the College has, at its disposal, not only the written normative, but also the jurisprudence and the doctrine developed in the neighbouring countries not only for reasons of a territorial nature but also for cultural, political, economic and social formation.
43. Therefore, with Art. 16 of the Declaration of the Rights San Marino has mostly made visible those principles that modern State constitutions of advanced democracy have recognised to their citizens.¹⁴ In this research, on the matter of human rights violations based on sexual orientation or gender identity, the College Guarantor must consider the rights recognised at International level to the LGBT community, even if the Sammarinese Constitution does not contain the straight recall to the protection of sexual orientation and gender identity characteristics.
44. The Sammarinese jurisprudence of the College Guarantor from 2003 to 2007¹⁵ does not record appeals inherent in the matter of sexual orientation or gender identity.
45. Further process of guarantee of the constitutional rights on the legal equality of which persons can avail themselves is that carried out by the activity of the Commission for Equal Opportunities, established by Law no. 26/2004. Among its competences and functions it must provide actions and strategies to assure the full juridical equality and the equal opportunities among citizens, to boost to the competent bodies so that they conform the legal system to the principles of juridical equality and to express consultative opinions on bills as regards the respect of the principle of equality. It may collect and verify the statements of facts from individuals and associations regarding the aspects of legal equality and equal opportunities (Art. 2f). However, the Commission has the power to defend collective interests as to the equal opportunities in civil, criminal and administrative suits (Art. 2h): in this sense, it reinforces the protection of the principle of equality on dignity and rights and the harm brought to the victim involved in the trial will be considered damaging to the interest of the whole community.
46. The Commission is appointed from the Great and General Council at the beginning of each legislature, with expiry at the end of the same legislature. The presence of the Commission for the Equal Opportunities within the government can promote diversity and influence the inclusion of LGBT persons.

13 The Judge of proceedings in progress (a quo) with justified ordinance is able not to admit the appeal. The ordinance can not be appealed. Anyhow, the individual has the possibility to reintroduce the appeal in the other degrees of judgement or in different proceedings. With the declaration of inadmissibility the judgement takes again its course. In case the appeal is pronounced as admissible, the proceedings are suspended and the question of legitimacy is established to the College Guarantor. The decision of the College Guarantor can be of rejection or of acceptance (Art. 14 of the Law n. 55/2003). With the sentence of acceptance, the College declares the constitutional illegitimacy of the legislative disposition and it can point out to the legislator the other legislative dispositions whose illegitimacy derives as a result of the adopted decision, in order to amend provisions of its competence. With the sentence of rejection, the College Guarantor declares the question groundless. The sentences of the College are definitive: in an incidental way the question can again be submitted to verification of constitutional legitimacy with different motivations. Prohibitions to the re-statement of the former do not exist if the appeal has been rejected with ordinance as not acceptable or inadmissible. Cit. Lonfernini, 2006, *Diritto Costituzionale Sammarinese*, Università degli Studi della Repubblica di San Marino, Dipartimento di Studi Giuridici, Scuola di Perfezionamento in Diritto Sammarinese, edito dalla Banca Agricola Commerciale della Repubblica di San Marino, Guardagli Editore S.r.l., Rep. San Marino, pp. 200-205.

14 Ibid., pp. 205-206.

15 Istituto Giuridico Sammarinese, 2008, *Giurisprudenza Sammarinese Pernaledal 1964 al 1990*, Aiep Editore.

B.2. Freedom of Assembly, Association and Expression

B.2.1. Political Institutions of San Marino as to the rights of assembly, of association and expression of LGBT persons

47. The right of reunion and association and the right to freely express one's own opinion are fully protected by Art. 6 of the Sammarinese Declaration of the Rights of Citizens, besides the European Convention for the Protection of Human Right and Fundamental Freedoms. Therefore, the same rights can be subjected to restrictions justified by the preponderant imperative of Internal Public Order.¹⁶ Towards opinions and inner determinations, liberty of expression and association, San Marino goes in a direction that privileges the liberty compared with restriction.¹⁷
48. In San Marino, there have never been public debates or conventions concerning LGBT rights depicted as unnatural, diseased, deviant, linked to crime, immoral or socially destabilising, by political figures or by media. There are no known instances of sites used for public debates being blocked for congresses or seminars concerning LGBT rights. In San Marino there are no known acts of crime, neither activity of neo-fascist groups against LGBT venues nor acts of violence against the community site of the Association LGBT of San Marino.
49. The various initiatives concerning LGBT issues have not have met with interference or any disapproval, neither by Authorities nor by media, in full respect of the freedom of expression and assembly. The National Order's Forces have never been reluctant to cooperate with LGBT organisers, but have never been proactive in showing their support either. Some of the appointments advanced on LGBT issues have had the positive participation of the old Sammarinese Government, as testimony of good will to sensitise and to raise awareness around sexual orientation and gender identity with its citizens, to spread understanding of the needs of LGBT people and to favour the social integration of diversity.

B.3. Hate crime - hate speech

50. Besides the actions mentioned in par 29 that the Sammarinese legislator has dictated to assure equal rights to each individual, the San Marino legal system takes directly into account in its legislation whether or not hate crime, hate speech or violence are committed with homophobic intent (by Law no. 66/2008 titled "Dispositions on racial, ethnic, religious and sexual discrimination") or on the grounds of sexual orientation (by Law no. 97/2008 regarding the "Prevention and repression of violence against women and of gender"). Furthermore, homophobic intent and violence breaking sexual liberty are aggravating circumstances, prosecutable ex officio, that is prosecutable directly by the Judicial Authority without the necessity of report by victim or another person. The prosecutable ex officio improves the victims' protection in any attempts by the offender to pressurise (at least psychologically) so that they do not sue, report them or lead them to

16 The Art. 6, co. 1, of the Declaration of the Rights establishes: "The Republic recognises to everybody the civil and political rights. Particularly, they are guaranteed the liberties of individual, of domicile, of residence and of expatriation, of reunion and of association, of manifestation, of belief, of conscience and of faith. It is protected the communication's secrecy in any way it happens. The Law can limit the exercise of such rights only in exceptional cases of serious reasons of public and interest order". In the Sammarinese legal system, the exception of "Internal Public Order" represents a fundamental guarantee to safeguard internal coherence, integrity and agreement of the whole institutional system (cit. C. Tamellini, 2003, p. 231) to face situations taking under discussion values that cannot be disregarded or vital interests of its single State community. For example, it is not possible to admit those associations that do not reveal their associative aims or that keep the secrecy of followers (the secret is not to be mistaken with discretion); the protection of public moral and religious sentiments are other purposes that can justify wide restrictions. San Marino is a laic State, i.e. neutral towards opinions and inner determinations, therefore the State cannot, in the name of public interests, alter or stop the free accomplishment of the human personality; but it does not mean that system has to consent to put into practice behaviours offending the rights and the dignity of others (definition cited on the Relation of the Bill "Prevention and Repression of Violence against Women and of Gender" of the Republic of San Marino, p. 6, available at official site of Great and General Council).

17 Mularoni, A. 2006, *Il ricorso alla Corte Europea dei diritti dell'Uomo*, in *Sommario di procedura giudiziaria civile sammarinese*, Parte II, Quaderni di Diritto Sammarinese, Luigi Lonfernini, pp. 355-404, Aiep Editore S.r.l., San Marino, pp. 389-390.

remission. These provisions place San Marino in line with the most advanced international positions.¹⁸

51. The cited Law no. 97/2008 is finalised to extend the protection against each form of physical and/or psychological violence and it represents an excellent result on civil, legal, cultural and social grounds.¹⁹ Through the Law no. 97/2008, San Marino combats discrimination against women in all spheres (including marriage, partnership and other family relations not necessarily implying marriage relationship nor cohabitation), it defends minor victim or witnesses of violence and, at the same time, it extends the protection to multiple discrimination taking place by violence on the grounds of sexual belonging (Art. 1). The notion of violence appealed by the Law no. 97/2008 is borrowed from Recommendation no. 5 dated 30 April 2002, adopted by the Committee of Ministers of the Council of Europe (of which San Marino is a Member State), pointed on parity between men and women, meaning by violence every action “on the grounds of sexual belonging concerning or will concern, whoever is the butt, harms or pains of physics, sexual and psychological nature” (Art. 2). Consequently, also LGBT persons suffering of blameworthy actions because of their sexual orientation or gender identity can obtain protection through this norm.
52. The Law no. 97/2008 through a provision of a mechanism of efficient measures gets civil, criminal and trial protection to victims. In this sense, the State itself takes charges to assure protection and security to victims, psychological support, first care and adequate information to them. Synthetically, the measures of protection are:
- to guarantee protection of the victim's discretion and intimacy, in order to remedy the risk that violence is not denounced to avoid social judgement (Art. 16, Protection of victim's discretion);
 - for the same reason, the victim does not have to bring the case to court to have protection, because it is the same State that prosecutes violence through its own public institutions. In this sense, Art. 19 places duties to signalise to Social Services, Order's Forces, health professionals, teachers²⁰; and Art. 20 (Right of intervention in the criminal trial) legalizes the Authority for the Equal Opportunities to take legal proceedings independently from the legal action by victim.²¹ The power to take part in the proceedings reinforces the victim's protection

18 The actions addressed by those provisions place San Marino in line with nine EU Member States: Belgium, Denmark, Spain, France, The Netherlands, Portugal, Romania, Sweden, a part of the United Kingdom, i.e. Northern Ireland. The same provisions differ in four EU Member States (Germany, Estonia, Ireland, Lithuania) where the criminal law contains provisions making it a criminal offence to incite hatred, violence or discrimination on the grounds of sexual orientation but the same law does not consider homophobic intent as an aggravating factor in common crime. While one EU Member State (Finland) considers homophobic intent an aggravating factor in common crime, it has no provisions making it a criminal offence to incite hatred, violence or discrimination on the grounds of sexual orientation (cit. FRA, 2009c, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, Part II: The Social Situation* p. 37.).

19 Relation on bill “Prevention and repression of violence against women and of gender”, available at the official site of Great and General Council, 2008b.

20 Art. 19, duty to signalise: the Social Services, the Order's Forces, the health professionals, the teachers have the duty to signalise to the Civil Judge the facts of violence known for reasons of their office or their profession, establishing that the signalling does not consist of violation of professional secrecy. This is propedeutic to the adoption of specific measures for the victim's protection. There is a fixed administrative sanction (of euro 500,00) for the violation mentioned.

21 The Law n. 97/2008 introduces a new organism named Authority for the Equal Opportunities, assigning to it the power to act on its own initiative or on signalling from anyone who has an interest (Art. 3, co. 4) and to intervene in civil proceedings and in criminal trials in order to protect victims of violence (Art. 34, co. 1). This means that those who are legalised to demand the inhibitory protection for the violence suffered are not directly the injured party, but the Authority for the Equal Opportunities that take legal proceedings independently from the legal action by the victim. Always, and in any case, the victim has the right to take legal proceedings against the offender, in order to obtain compensation for damages. The powers assigned by this Law to the Authority are the accomplishment of the right to intervene in administrative and civil proceedings and in criminal trials to defend general interests regarding to equal opportunities, already recognised to the Commission for the Equal Opportunities by Art. 2 of Law n. 26/2004, in order to promote and to guarantee equal rights among citizens. In order to conjugate competence, responsibility and efficiency as to various points regulated by the present Law n. 97/2008 on prevention and repression against violence of gender, a slender and specialist composition of the Authority (Art. 33) is provided. Accordingly, the public nature of interest is protected, the legal assistance in proceeding by the Authority is entrusted to State legal profession and the judicial acts are duty-free (Art. 3, co. 8).

and the damage caused to that victim is considered damaging to all of the community, not only of the victim him/herself;

- the victim does not have to pay if case is lost (Art. 17, legal assistance): the offender pays in the case of his/her conviction;
- every victim of physical and/or psychological or homophobic violence, can trust state institutions in the area of protection from violence, confidently they can report any homophobic violence to the police. A mechanism of police registration of the reporting officer encourages reporting hate crime (Art. 32, request for help to Order's Forces).²² Such a databank gathers information both to identify the incident and to face the immediate emergencies drawn up by the intervention of public institutions more suitable for giving the necessary assistance to victims and to prosecute the offenders. The informational system implemented by the Gendarmerie furthers a strong co-operation among public bodies, involving teachers, Medical Corps, Gendarmerie, Neuro-psychiatric Service, Civil Judge and Criminal Judge to take evidence for proceedings against the offender.

53. With Art. 13 of this Law no. 97/2008 a new crime has been configured in Art. 181bis of the Criminal Code, called "Persecution Acts", inclusive of mobbing and stalking. Such kinds of crimes consist of behaviours often innocuous if considered alone but seen together they configure a serious invasion of the personal sphere of the victim.
54. The problem of evidence for the responsibility of psychological abuses remains the crux and the greater difficulty, being for their nature of abuses devoid of documentable checks. So, the Judge will call an attentive, wise and competent estimate of testimonies mostly of the injured person availing himself, if necessary, of professional subjects on reliability of this latest. For example, an LGBT employee suffering of "mobbing" in the workplace must prove both the connection between injurious event and the accomplishment of working services, and the damage of psycho-physical integrity which formality of verification ask for a psycho-somatic examination, with further loss to the victim.
55. Furthermore, the provision no. 97/2008 protects the sexual intangibility of minors but not their sexual orientation matured before eighteen. While norms to protect minors have the aim to safeguard sexual intangibility, that is to preserve a correct development of his/her personality in the specific sphere of sexuality until the age of 18, those meant for protection of individual good do not favour a single profile, rather the identity of person so that it is not violated and degraded. On the contrary, with the completions of the teenage years, that is prior to the coming of age, the under-age person gains the liberty to decide on his/her sexual life having already matured his/her natural instinct of feeling and being a person. Therefore, it would be appropriate to define the different individual spheres of minorities, both of "negative" liberty referring to sexual intangibility (liberty from external interferences) and of "positive" liberty relative to individual personality (liberty to live in a dignified way on the grounds of his/her own predilections), so that the correct identification of the conceptual sphere does not take the risk to mistake the plans of intervention of the provision making them neuter. Events of bullying at school are only an example of violence – psychological in this case – offending both sexual intangibility of LGBT adolescents and their sexual orientation or

²² Practically, when the Gendarmerie has knowledge of events of violence – for example from neighbours of the victim, social services, teachers at school and/or health professionals giving first aid who are obliged to denounce the fact of violence known for reasons of their office or profession (Art. 19) - immediately it executes precautionary interventions to protect the victim (Art. 32), and it is not necessary for the victim to bring an action against the offender. The Gendarmerie accomplishes to create strong co-operation among public bodies: i.e. it signals the fact to the Neuro-psychiatric Service of San Marino so that social services come into contact with the mistreated person to give him/her psychological support, first-aid care and adequate information, to allow him/her to consider possible actions and to reorganise the domestic management (Art. 22-23) ; furthermore, it creates a comprehensive databank that consents to the Civil Judge to acquire precise information in order to protect the victim and to the Criminal Judge to acquire evidence in support of precautions' orders (Art. 32). The Neuro-psychiatric Service transmits the notice to the Tutelar and Civil Judge that values the necessity to begin proceedings against the offender. Then, if the victim brings an action against the offender through his/her advocate, the indictment is unknown to the Gendarmerie and it is transmitted directly to the «Criminal Judge». In one way or another, the fact of violence has a good chance of punishment.

gender identity. The would-be distinction of both aspects of liberty may provoke the activation of backwards measures, impotent steps, from Order's Forces and Magistrate, compelling the victim to confront sanctions, disbelief, repression and misdiagnoses for behaviour. The risk is to nullify the protection of individual rights.

56. In San Marino there are no reports on the extent, character, perpetrators or victims of hate crime. San Marino has no court cases identifying incidents of hate crime and/or hate speech related to homophobic offences, nor phenomena of ultra-nationalism, xenophobia or racism, nor attacks against LGBT venues. There are no acts of hate speech by public figures (such as police authorities, teachers or religious at school).
57. According to an interview with representatives of the two National Equal Bodies – the Commission for the Equal Opportunities and the Authority for the Equal Opportunities - unfortunately there is notice of violence, mostly domestic violence, involving men and women; anyway, there are no cases of violence against LGBT persons, nor experiences of homophobic violence within families.
58. An interview for this report with the Gendarmerie - one Corp of the Order's Forces of San Marino – asserts that there are no complaints collected about hate crime.
59. An interview with the LGBT Association of San Marino confirms the lack of data in this area, but the Association also explained that there has never been work by the government to explain this type of crime, to promote reporting it, and to protect the identity of the victim.
60. In this section, the legislative pattern inherent in punishing serious facts of violence and discrimination attracts the attention of Law no. 121/2004, from which San Marino has abrogated Art. 274 of the Sammarinese Criminal Code concerning the penal condemnation with imprisonment of «acts of lust» committed in public places among two males (such as, for example, an embrace or a kiss), considered more indecent of the obscene acts offensive against decency (Art. 275 c.p., Obscene Acts and Representations). In fact, the acts of lust among same-sex persons was punished with imprisonment of first degree and with disqualification of second degree from political parties and from public offices, while the obscene acts are still today punished with imprisonment of first degree alone.²³

B.4. Family issues

B.4.1. The Sammarinese legislation on matter of reunification

61. On the grounds of legislative dictations of San Marino no. 95/1997 and no. 111/1997 on the matter of permits of stay and residence, LGBT persons do not have access to reunification with foreign partners in San Marino. In fact, these rules provide for the family reunification only for family affairs between men and women, parents and child, and those cohabiting with children. There are no official data on the existence and, in affirmative case, to the number of Sammarinese people living abroad with a foreign partner. Lawsuits currently pending involving citizens of San Marino married

²³ The Art. 274 compiled in Sammarinese Criminal Code that came into force on 1 January 1975 was a cultural heritage of that epoch when there were no equal opportunity movements, and student movements asking for the increase of rights were just beginning. The intention to repeal this Article n. 274 of the Criminal Code was originated by a group of citizens of San Marino promoting an "Istanza d'Arengo" (similar to a petition) dated 1 April 1997, that was passed but never executed (see Relation at the Bill "Abrogation of the Article 274 of Criminal Code", 2002, available at the official site of the Great and General Council). Thus, the Italian Arcigay Association and Italian MP Franco Grillini were promoting a protest against the codes of those legal systems bringing this stigma able to consider as scandalous the simple expression of one's love-affairs in public between homosexuals. They both were called by the Cultural Co-operative "Il Macello" of San Marino and together protested in 1997 in front of the Sammarinese House of Parliament (interview with Sammarinese A. Rossi). Though in an exaggerated manner Mr. Franco Grillini compared the Sammarinese legal system to those of uncivilised countries (Grillini, F. 2006), his initiative was followed by a mobilisation of the public authorities to review the disposition that brought to, exactly, its abrogation.

in another EU country and asking for recognition of their status as a couple in San Marino do not result.

B.4.2. The Sammarinese legislation on matter of family right and cohabitation «more uxorio»

62. On the grounds of Law no. 49/1986 on reform of the family right, San Marino does not recognise same-sex matrimony, nor partnership (registered union) between LGBT persons.
63. Same-sex relationships are a peremptory matter of nullity of the matrimony mentioned by the Art. 132, Law no. 49/1986, because it is considered “sexual deviation” such as to obstruct the normal course of married life. This Sammarinese category of nullity has retroactive consequence, i.e. as though matrimony has never existed.
64. The Law no. 49/1986 concerning the reform of family right aims to bring out the value of the family as natural social life not necessarily founded on matrimony but on a stable and lasting union. Within the rules of the Law no. 49/1986 it finds recognition in the reality permeating modern society called cohabitation more uxorio - that is the so called “union of fact” beyond the juridical scheme of marriage - when lasted unbroken for 15 years.²⁴ So the cohabitation more uxorio is placed as a logical consequence of the essential elements of marriage which, on the grounds of Art. 1, co. 1, Law no. 49/1986 are: the union between men and woman, the monogamous and heterosexual union. The absence of those principles causes the end of the essence of family. At the same way, the Art. 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
65. To evidence that equality between same-sex cohabitation and opposite-sex cohabitation still is far away, it is enough to know that equality between opposite-sex cohabitants and married couples is not entirely realised to this day (the Decree no. 42/2003 on the matter of public subsidised building requests matrimony to the profit of public easy-term loans granted for the purchase or construction of new houses), although the recognition of cohabitation more uxorio has provided an increasingly evident secularisation.²⁵
66. But with the lack of judge's pronunciations on this matter, it is not possible to confirm with certainty whether the discipline on cohabitation more uxorio can not be applied to cohabitation between same-sex couples.
67. It is beyond doubt, the real obstacle that concretely has prevented to the present day the complete regulation of legal cohabitation between same-sex couples is of an ideological nature, because to recognise the legitimacy of same-sex cohabitation has, as G. Zanetti remembers (2003), “an

24 Like this, the Art. 107 qualifies as familiar the cohabitant giving one's services in the family business; and the Art. 124 extends the rules established on matter of judicial separation - regarding to fosterage and parental authority (Art. 112-113-114), familiar dwelling-house (Art. 115), alimony right (Art. 117-119) – to the non-mutual consent interruption of the cohabitation more uxorio lasted unbroken for 15 years. When the continuous relationship for 15 years has passed, juridical binding obligations between the partners arises even if they are not married. For example, they will be extended the right of mutual moral assistance, the common responsibility for debts following the union, the rights of succession headed from surviving cohabitant, a system of universal community of goods, the payment of alimony in case of separation, the succession of cohabitant in the lease of dwelling-house's immovable, social-health services and generally those fiscal easy terms normally recognised to married couples, the right to assist the partner in hospital and to participate in decisions regarding his/her health and life and the right of adoption.

25 Further qualification of the concept “relationship of fact” is given actually from the recent Relation of Bill n. 97/2008 (available on the site of the Great and General Council, 2008b), according to the familiar relationship is “[...] a community of usual and stable life, that leaves apart from the simple existence of mere relations of assistance and solidarity and from the simple cohabitation”. Therefore, the familiar relationship is characterised from a community of usual and stable life, not episodic, and also it can exist independently from a family tie or relation of next of kin and it can leave apart from reciprocal moral and material assistance. Nevertheless, the purposes pursued by this Law n. 97/2008 are, as mentioned at B.3, to guarantee protection against violence, while the rights and duties of married couples and cohabitants remain regulated from the cited Law n. 49/1986 on matter of family right.

indirect but real impact” on the matrimonial institute.²⁶ Besides, the last reason – as statistics testified – is that same-sex couples in San Marino represent a void percentage as no studies or consultation has ever been conducted in this field, so the government believes that there is no true urgency to intervene as a result of the lack of knowledge.

68. In order to promote substantial equal rights, the question of family rights and the institution of registries of civil unions and parenthood are high on the agenda of the LGBT Association of San Marino²⁷ and these issues have been also raised by the Association on a number of occasions to no avail.

B.4.3. The Sammarinese legislation on the matter of adoption, foster child institutions and assisted conception

69. In San Marino the opportunity for LGBT couples to adopt children does not find favourable acceptance. Nor does the relation between children and co-parents in LGBT families have legal recognition.
70. Art. 58 and 62 of the Law no. 49/1986 on family right establish that a single person can apply for a foster child and/or adoption. Because these dispositions do not contain any clarifications on sexual orientation or gender identity for the right of adoption, their formulation seems to recognise the possibility to adopt for same-sex couples too. But the experience with this rule in Sammarinese jurisprudence is not favourable, therefore in practice no single, among the Sammarinese population, results having fostered or adopted to the present day.
71. As regards assisted conception, in the legal system of San Marino the donor insemination institute is absent. Consequently, couples desirous of a child only have the option of assisted conception abroad. In this case, they will be subjected to the legislative dispositions on this matter in force in the specific country where the fact would be produced. In this legal situation, LGBT couples cannot turn to the structures in Italy for assisted conception because the Italian legal system admits this institute only for heterosexual couples.
72. The high costs for assisted conception and their exclusion from the national health service allow its admittance only to rich couples.
73. No objective data regarding San Marino tells of cases of assisted insemination by LGBT citizens of San Marino.
74. An example of agreement between homosexual partners: the “pact of cohabitation”
75. A typology of contract that Italy for example knows far-back already is the so-called “pact of cohabitation”, which validity may be admitted on principle in San Marino also. The “pacts of cohabitation” are accords that partners (heterosexual or homosexual) stipulate in order to regulate patrimonial aspects of their relationship.²⁸ It is an act of contractual and private nature, i.e. it falls within the exercise of negotiation autonomy, and it is stipulated in the application of the general norms established by the Italian Civil Code in theme of obligations. Therefore, in conformity to the Italian Art. 1174 Civil Code by which the performance object of the obligation must be susceptible of the economic evaluation such as accords between partners must exclusively concern patrimonial

26 Sesta, M. 2003, *Commento all'argomento delle "opzioni incompatibili" e le coppie di fatto*, pp. 173-177, in *Elementi di etica pratica. Argomenti normativi e spazi del diritto*, a cura di Gianfrancesco Zanetti, 2^a ristampa marzo 2008, Arti Grafiche Editoriali S.r.l., Urbino, p. 176.

27 Ceccoli, A. 2008, an interview available at sito Stefano Bolognini, www.stefanobolognini.it/attualita/08/sanmarinogay.html. p. 1-2.

28 Bonini Baraldi, M. 2003, *Nuove trasformazioni del diritto di famiglia e coppie di fatto*, Carocci editore S.p.A., Roma, in *Elementi di etica pratica. Argomenti normativi e spazi del diritto*, a cura di Gianfrancesco Zanetti, 2^a ristampa marzo 2008, Arti Grafiche Editoriali S.r.l., Urbino, p. 165 cited in Sesta, M. 2003, p. 175.

available rights: for example, the property relationships among cohabitants, the constitution of a common fund for the expenses effected in the interest of the family nucleus. Consequently, the accord cannot be the object of agreements on personal aspects commonly tackled by cohabitants of the opposite sex and arising in the communion of life founded on emotional ties, assistance and solidarity: such as, for example, the obligations of fidelity, of moral assistance, difficulty of access to information and decisions concerning partner's health.

76. Italian jurisprudence has recognised that such contracts do not oppose with the good custom, since the intent of the partners is to regulate themselves and to guarantee reciprocally their future, setting the economic bases for the constitution of a family community, although only of fact.²⁹ Besides, they do not modify the traditional concept of the family,³⁰ because regulated by norms of different nature from those that regulate the family institute.
77. Frankly, without national legislation, the rights of LGBT persons cannot have practical value.³¹ As M. Sesta explains (2003, p. 173), it's about a "light" discipline, decidedly thin and insufficient for more aspects, mostly directed to protect the weak partner towards a third party and, only in a narrow manner, towards on cohabitant. Many profiles remain excluded, among which those of patrimonial nature: for example the patrimonial consequences to breakup cohabitation, the inheritance because of death, difficulty of cohabitant to follow in the lease of the real estate used as family residence, exclusion from the pension of a dead partner.

B.5. Asylum and subsidiary protection

78. In the Republic of San Marino, the asylum institute is not specifically provided for sexual orientation or gender identity: refugee status is recognised on the grounds of each persecution. Particularly, San Marino mentions the general asylum institute both with the constitutional principle established by Art. 1, co. 2, of the Declaration of the Rights of the Citizens and with the adhesion by Law no. 24/1970 to 1951 Convention on the Statute of Refugees. Through this last mentioned Law no. 24/1970, San Marino grants asylum to persecuted persons with the due reserve of compatible cases with rules regulating the admittance and resident permit in the Republic's territory. This reserve considers the position of San Marino in the core of the Italian peninsula, and then considers the lack of check points on borders and, finally, it considers its restricted territorial dimensions (60,57 km²). For the same reasons, San Marino has never adopted the instrument of adhesion to the Convention on the Statute of Refugees dated 1951, consequently it is not a bound party.
79. In this legislative context, the procedure to grant asylum is not regulated by any Sammarinese legislative rule. It is mere praxis: it is the Congress of State to decide on each single case whether to admit a resident permit for humanitarian reasons. Asylum seekers have no limits of stay and they are integrated with San Marino's people in mutual respect.
80. Interviews with A. Selva, a previous member of the Government among '80/'90 years, and with the actual Secretary for Foreign Affairs, A. Mularoni, confirm that Republic of San Marino has kept unchanged the practice concession of asylum in the course of time, primarily aimed to grant asylum to persons worthy of protection with advance modality as regards international events. In granting either refugee status or a separate form of humanitarian protection, San Marino complies with the

²⁹ The lawfulness and the validity of the pact of cohabitation stipulated by the couples of fact has been affirmed by the same Court of Cassation in the Sentence 8 June 1993, n. 6361: "...[the cohabitation is] not contrary neither to imperative norms, because norms that forbid it do not exist; neither to the public order, that includes the fundamental principles that inform the legal system; neither to the good custom understood ... as the complex of the ethical principles constituent the social ethic in a determined time and in a determined place."

³⁰ Beccari E., 2007, *Studio comparato sulle norme antidiscriminatorie. L'evoluzione della legislazione sammarinese in rapporto agli ordinamenti degli altri paesi europei e degli strumenti di diritto internazionale*, Relazione per la Commissione Pari Opportunità, in collaborazione dell'Istituto Giuridico Sammarinese, in forza della Delibera n. 45 del 21 maggio 2007, p.19.

³¹ Bertone, *The Situation concerning homophobia and discrimination on grounds of sexual orientation in Italy*, Sociological Country Report for the European Union Fundamental Rights Agency 2008.

taken international obligations and at the same time evidence its traditional sensitivity in the protection of human rights. Therefore, it is rare to grant asylum from San Marino because, as mentioned previously, the Country has to consider its actual territorial and economic extent and would be upset over a sudden increase in population.

81. Interviews with experts operating under the Secretariat of Foreign Affairs confirm that the Congress of State has granted asylum during the last decades, but never for cases on the grounds of sexual orientation or gender identity. Because of the innumerable sequence of asylum claims that San Marino receives it is not possible to define if, among these, there are demands on the grounds of sexual orientation or gender identity.

B.6. Education

82. San Marino does not have reports on the diffusion of harassment and bullying in the school environment. Nor are data available on the sense of isolation and vulnerability felt by LGBT adolescents consequently to homophobia, biphobia, or transphobia and/or hate speech. No cases of San Marino's people emerges on hostility to have an LGBT teacher for their child.
83. With Art. 1, co. 5, of Law no. 60/1980 on the matter of reform of school's system, San Marino recognises the subjective right for teachers and students to enter a school's institution indiscriminately regardless of economic conditions of their families, political opinions, religion, race, language, sex diversities. To all citizens and residents, school gives the necessary tools – knowledge, education on democratic life, preparation to work – with the aim to promote the liberty of each person (Art. 1, co. 2), to guarantee the harmonious development of the personality favourable to each one's identity (Art. 1, co. 3), to overcome social conditioning and to combat precocious exclusion from formative process (Art. 27, co. 2). Owing to make easy to programme the necessary interventions to achieve the purposes of school, teachers of individual classes arrange at the beginning each school year the “didactic programming” (programmazione didattica), to jot down the psycho-social investigations, functional diagnoses, didactic units (Art. 18) of students. Then, the Class Council (Consiglio di Classe) elaborates an “Individual Educational Plan” means of defining specific objectives, didactic passages and strategies of integration. However, by individual interventions and inter-disciplinary initiatives the school provides for the integration of subjects with difficulties, in agreement with the National Minor Service and the family.
84. The Sammarinese school addresses to adult citizens, too, in order to promote a further cultural and professional growth (Art. 1, co. 6), by folk-culture's disciplines, additional classes, periodic refresher courses, specific cultural courses on guidance (Art. 2, co. 4).
85. The Proper Secretariat of State for Public Instruction and Culture promotes refresher courses for teachers. Furthermore, the same Secretary will provide, together with the schools' Executives, to organise training for teachers (Art. 28). The Department of Formation of the University of San Marino organises qualifications and refresher courses for teachers, mostly for those in support of differently able students, together with the proper Secretariat of State.
86. Particularly interesting in educational system of San Marino is the formation course called curriculum “Nuovi Saperi Sammarinesi”, because it includes sex education. Its aim is to allocate “knowledge” and to give answers to the development of personality and to the promotion of forms of dialogue and integration among different values.³² The curriculum has a vertical structure, i.e. by grade from childhood to secondary school, and it is articulated with educational areas, specific more and more to growing of the school's level. Among the different educational areas of the formation's

32 Direzione Scuola dell'Infanzia, *Orientamenti educative e didattici per la scuola dell'infanzia della Repubblica di San Marino*, Segreteria di Stato per l'Istruzione e la Cultura della Repubblica di San Marino, Direzione della Scuola dell'Infanzia, stampa Arti Grafiche Della Balda. 2009.

project, questions of gender, sexual orientation and discrimination are talked about already from junior secondary school when the student starts to define his/her gender roles or sexual preferences. But these arguments are not reinforced by a vocabulary to name and discuss sexual difference, non-traditional family arrangements or relationships and the discussion of sexual orientation in class that may raise awareness and combat homophobia, even if it lacks a specific discipline on LGBT issues. Certainly there are educational duties on sexual orientation and the relationship between gender identities, and generally he/she makes it if pertinent with the arguments of his/her lessons and with personal initiative, but in an optics untied from institutional formative context.

B.7. Employment

87. San Marino mentions non-discrimination on the grounds of employment as one of the fundamental principles by its Art. 9, co. 1, of the Declaration of the Rights, that recites: "The work is right and duty of each citizen ...". This principle has concrete fulfilment by specific legislative rules, according to the following International dispositions on the matter of elimination of all forms of discrimination at work³³: the Employment Equality Directive 2000/78/EC, although it has not been implemented from San Marino because it is not an EU Member State; the Convention no. 100 of 1951 adopted by the International Labour Organization (ILO)³⁴, ratified from San Marino with Decree no. 53/1985; the treaty European Social Charter of 1961 of the Council of Europe³⁵, to which San Marino adheres.
88. Exactly, the specific dispositions adopted by San Marino to regulate the right of equal treatment in employment are:
89. the Law no. 7/1961, regarding the protection of labour and of workers employed in the private sector. It establishes for the first time precisely rules on the matter of equal services between man and woman, physique and moral protection of employees, social security and assistance guaranteed to all employees without any distinction. This rule establishes that private working relationship must be disciplined by the Collective Contract of Labour, drawn up between registered Syndicate Confederations of employers and employees (Law no. 7/1961, Art. 8). The Collective Contract of Labour has erga omnes efficacy and relative inviolable³⁶, i.e. it has compulsory efficacy to all employees pertaining to the categories to which the Contract concerns (Art. 9, Law no. 7/1961), therefore without any discrimination; and in case of concurrence of several Contracts, the most favourable clauses to employees will be applied. In San Marino, the Collective Contract of Labour between syndicates is particular because it has Lawforce, regulating institutes that elsewhere, particularly in the Italian system, find footing in the Constitution, in the Civil Code and in the Labour Statute;
90. the Law no. 23/1977, Art. 7, prohibits the dismissal by reason of free opinion and expression;
91. however, it is only with the Law no. 40/1981 that it ratifies the full and complete parity of the conditions between employees of different sexes. Its Art. 1 expressly prohibits every form of discrimination on the grounds of sex as regards to access to work at all levels of professional hierarchy. Derogations to these dispositions are admitted only for particularly heavy functions, established by Collective Negotiation, i.e. the private negotiation cannot depart from rules on matter of right of employment in order to not alter or attenuate its foundations.

33 Precisely, such International dispositions sanction the right of the equal opportunities without discriminations on the grounds of sexual orientation and they impose to the Member States the adoption of suitable measures in order to guarantee the enforcement of such principle in those areas regarding access to work, the conditions of employment, remuneration and career advance included.

34 Convention C100 on equal treatment of employment, available at www.ilo.org/public/italian/region/eurpro/rome/standards/C100.htm

35 Available at official site of the Council of Europe. www.coe.int/socialcharter

36 Guidi, G. 2004, *Le fonti scritte nella Repubblica di San Marino*, G. Giappichelli Editore, Torino, pp. 139-144.

92. Employment has a public function, i.e. it is our State that enacts economic and professional choices suitable for making the right of work effective and it is the same State that takes care of employment and recess from the work's contract. The employment of each worker – Sammarinese, resident or forensic – does not enter into the private negotiation, but it needs a permit granted only by the State. It will be guaranteed to each worker that equal opportunity in gaining the taller title compatible with his/her own working abilities, besides the promotion in the career. However, also weak categories will result employed in the Sammarinese labour market, i.e. those categories that have the necessity contrasting with the urgency of the employer (for example, pregnant women and for the care of child, etc.) or that have not had the necessary competences (with disability) that is why personal conditions they would not find adequate work to their abilities if not assisted. Similarly, the recess from the work's contract is excluded to the individual negotiation and it prohibits different data of the peremptory hypotheses estimated ex lege. Through this system the San Marino State itself worries about the entire realisation of the non-discrimination principle in the world of work.³⁷

B.7.1. The actions for the effective protection of the equal opportunities in the labour place

93. The mere recognition of the equal treatment principle does not necessarily prevent discrimination. It needs to verify the effectiveness of actions to assert one's rights. For this reason, Sammarinese law on the matter of rights of employment places obligations on the employer to protect employees from discrimination and to ensure equal treatment on the grounds of sexual orientation. The role of employers has implication for the perception of LGBT persons for a safe and inclusive work environment.
94. Substantially, the positive actions provided from the Republic of San Marino to workers to protect effectively the equal opportunities on the labour place are judicial and non-court-record instruments. They are:
95. Art. 7 of Law no. 131/2005, has established an informational sharing system on territorial, urbanistic, contributory and security labour sites and has given to the Labour Inspectorate the duty to predispose, periodically, specific actions co-ordinated together with the Police Forces and other surveillance bodies, inspection bodies present on the territory;
96. with Law no. 128/1989, the verification of infractions on labour sites is due to the officers of the Labour Office (Inspective Section) and they adopt administrative fines applied by the management of the same Labour Office (Art. 1, 2, 3, 4). Opposite to the ordinances issued by the management of the Labour Office is allowed to appeal to the Administrative Judicial of Appeal (Art. 5), within a time and procedures settled by the Law no. 68/1989. Against this Appeal it is possible to propose the querela nullitatis to count vices of procedure. Such jurisdictional proceedings meet the requirement of quickness of the sentence. The expenses of judgement fall on the party that loses the suit. Besides, autonomous relief is recognised to the possibility that the judicature condemns the author of the discriminatory behaviour to pay compensation for moral damages, not patrimonial damages only. In short, it is a legitimate assertion to the thickness of the cited judicial remedy, because quickness, costs falling on losing party and compensation for damages are not only patrimonial, but support the employee with relatively simple instruments of trial;
- alternatively, the victim may recourse to non-court-record instruments, i.e. those circumscribed to the figures of the Labour Confederations of San Marino. The role of these Confederations is

³⁷ It is interesting to notice that the model selected by San Marino has been underway in Italy since 1993, when it began the privatisation of the right of public labour (as Legislative Decree 3 February 1993, n. 29, see at G.U., 1993), following Testo Unico Legislative Decree 30 March 2001, n. 165, see at G.U., 2001). Instead, the liberalisation of the private labour market took place in 2003 (and precisely with the Law 14 February 2003, n. 30 (G.U. 2003a), better known as Legge Biagi, like the jurist's name of its deed, Prof. Marco Biagi). It is the private autonomy, not the State as in San Marino, that in Italy founds the efficaciousness to the labour contracts, i.e. it is the encounter between demand and offer compared on market that it is considered a relatively better mechanism in satisfying the right of the person to work on the basis of his/her abilities.

to engage judicial or administrative procedures against discrimination. Their better nearness with the labour environments makes the dimension non-judicial on anti-discriminatory protection easily brought about;

- finally, if an employee is subject to discrimination and he/she believes to have access to complaint mechanisms, he/she can address him/herself to the Authority for Equal Opportunity that has among its specific competence those of address and of prevention of physical or psychological violence of gender and to face mobbing also (Art. 13 Law no. 97/2008). Besides, the Commission for the Equal Opportunities can cover for worker, and LGBT also, to have access to the non-discrimination right (see B.3). However, in San Marino the presence of the National Equality Bodies within the government can promote diversity in the workplace and influence the inclusion of LGBT persons.
97. Opposite, in spite of those instruments to protect equality for workers, the main problem is the burden of proof, because it is asking for a sharing out between employer and worker, so that the victim must disclose his/her sexual orientation to protect the non-discrimination right. The consequence is that if he/she is reluctant to deal with the publicity, to avoid a court case and renounce to protect their constitutional right of non-discrimination.
98. However, Art. 7 of Law no. 23/1977 declares as null “the dismissal caused by reasons of political creed and of religious faith or in any case of reasons of freedom of thought and of expression, and by belonging to a syndicate”. The objective difficulty for the application of this disposition is double: the employee has the difficulty to accomplish the burden of proof that the dismissal is having reference to the typical hypothesis mentioned by the rule; and the employer never will tell whether interruption of the work relationship has reference to one or more of the afore-mentioned reasons, to avoid incurring penal sanctions.
99. From an interview with the Secretary of Association LGBT of San Marino – M. Pazzini - testimonies appear on cases of homosexual employees in public employment forced to transfer place of work due to harassment reasons on the grounds of their sexual orientation. President of the Association Federico Podeschi is also pursuing a legal claim against the Secretary of State for Foreign Affairs following an alleged accusation of removing him from a diplomatic appointment because of his sexual orientation.

B.8. Health

100. The public Social Welfare Institution (I.S.S.) of the Republic – originated in 1955, with Law no. 42 - gives the evidence that there are primarily the persons in the middle of the health system.³⁸ Well qualified Medical Corp, periodically brought up-to-date, constantly collaborating with foreign hospital Institutes, suggests positive responses from personnel both on appropriate visits and upon disclosure of sexual orientation and acceptance of the patient’s LGBT status.
101. The infection of HIV/AIDS is considered as a problem concerning everyone, not only LGBT people. LGBT people also can be blood donors in San Marino and they are not considered as ill. They are careful with verifications and numerous checks executed in various occasions that provide for blood endowed with standard of security particularly elevated.³⁹
102. The lack of data on health of LGBT persons of San Marino and how many disclose their sexual orientation or gender identity to their doctor in San Marino, do not afford to know if their relationship with doctor improved after discussing their sexual orientation. Interviews for this report with the

38 Podeschi, C. *ISS per il 2008 raggiunti gli obiettivi. Migliore controllo della spesa sanitaria, maggiore qualità dei servizi per 32mila assistiti*,

available at: www.sanmarinokey.com/notizie/bilancio-iss-san-marino, 2009.

39 Official site of Sammarinese Blood-Donor Association (AVSSO). www.avss.sm/home.htm

health authorities and with the Association LGBT of San Marino show that visibility of LGBT persons is very limited.

103. An interview with the Secretary of LGBT Association of San Marino reveals the absence of experiences with healthcare for LGBT persons considering the lack of recognition of “next of kin” status as, for example, affecting access to information and decision-making about a partner’s health and treatment and problems with hospital visitation in intensive care.

B.9. Housing and Access to goods and services

104. The Sammarinese legal system recognises at Constitutional level the contribution of sports activity for the development of personality of people, for preparation to free and responsible exercise of fundamental rights (Art. 11 of Law no. 59/1974, as amended by Law no. 36/2002). In relation to this principle for the realisation of a sporting, equal, supportive, tolerant environment, accessible to everybody, San Marino:

105. has adopted the Law no. 32/1997 on the matter of sports, repealing the previous Law no. 133/1991. It enacts the equality of citizens in access to sporting activity, both in non-competitive and in professional sport. Such rights are considered as fit activity for improving the physical and psychic abilities, as a factor of prevention of illnesses and as instrument to favour social gatherings (Art. 1, co. 1). The State has provided the territory with sports grounds, with green equipment, of services and organisational structures suitable for favouring motor and recreational sports activities. The exercise of sporting activities is free and it is recognised both in individual and collective form (Art. 48). The right of free sporting activity is extraneous to each influence of religion, politics, race and economic status (Art. 7, co. 2);

- and it has signs International and European Conventions adopted within the Organisms to which it adheres. These documents are:
- European Cultural Convention of the Council of Europe, signed on 19 December 1954, adopted by San Marino with Decree no. 8/1986;
- European Sport for All Charter of the Council of Europe, approved on 20 March 1975, signed by San Marino but never adopted;
- European Convention on Spectator violence and misbehaviour at sport events and in particular of football matches of the Council of Europe, signed in 1983 and in force since 1985, signed by San Marino but never adopted;
- Anti Doping Convention of the Council of Europe, adopted on 16 November 1989, ratified by San Marino with Decree no. 122/1989;
- European Sport Charter integrated by the Code of Sports Ethics, adopted in 1992 by the SPORT DEVELOPMENT COMMITTEE (CDDS) responsible on sport matter within the Council of Europe, signed by San Marino but never adopted;
- Enlarged Partial Agreement on Sport (EPAS) adopted in 2007 by the Council of Europe, to which San Marino adheres by Resolution of the Congress of State;
- Convention Against Doping in Sport of UNESCO, dated 19 October 2005, in force since 1 February 2007, adopted by San Marino with Council Decree no. 32/2010. It is an outline document of general character correlated to themes on sport within the Council of Europe, and it is tightly connected to the promotion of the general principle of protection of the cultural estate of UNESCO;

- in this International context, San Marino has agreed the World Anti-Doping Agency (WADA) of the Council of Europe, born in 1999 by collaboration between the European Commission and the Member States of the European Union.
106. These documents recognise to all citizens the right of sport, they delineate a series of politics and sporting common practices and they establish the responsibility for the adherent States to guarantee the real application of such right. However, they intend to realise a European and International co-operation so as to allow everybody the access to sporting activities without any distinction of sex, race, colour, language, religion etc., and to protect the sportsmen from illegal or dangerous practices such as, for example, the abuse of drugs, sexual harassment or exploitation (particularly of women and children).
107. The basic philosophy subtending the Sammarinese approach on matter of sport with the aforementioned Sammarinese Law no. 32/1997 and with the adhesion to the International and European Conventions is to consider sport not only as a private concern, but as a sphere to which the public powers participate, too. The strategic approach provided for sports activity adopted in daily practice is regarding the complementary action of State with national sporting organisations of a non-profit nature assuring the access to the physical activities since the elementary school and guaranteeing the formation of qualified teachers and funding the sporting world.
108. Through a petition to the Captains Regents and to the Government of San Marino⁴⁰, the group of citizens of San Marino named "Atleti Agonisti" signals some reserve on the real protection of the right to practise the preferred sporting activity in our Country. The promoters say about the following anomalies to be resolved in Sammarinese sports:
- disparity of the sports ground and their use from the sporting federations and sports society;
 - anomalies in the funding distribution on public contributions to the Olympic Federations;
 - the athletes to which it is asked for International performances cannot count upon any tool of protection, support, incentive, as at the contrary it is provided by the Olympic Charter, besides by all the other Countries.
109. The result of this initiative is not known because the petition is currently opened to the signatures of everybody who want adhere to it.
110. It is worth bringing to attention a currently bill about requalification and the updating of the Sammarinese discipline of 1997, no. 32, on sporting activity. Such initiative is borne for the need both to acknowledge all the Directives of the International Olympic Committee (C.I.O.) – whose principles, addresses and decisions San Marino has to follow, as established by Art. 7, co.3, Law no. 32/1997 - and to realise concretely the signed International Conventions, previously quoted. The bill specifically considers the matter of discrimination that LGBT persons can experience in sport. For this reason, efficacious instruments on the prevention against every form of discrimination are elaborating in order to encourage many more persons to approach sports activity, without any fear.

B.10. Media

111. In order to oppose the diffusion of hate messages, San Marino prohibits the divulgation of discriminating messages to the communication craft through the Art. 3, co. 2, of Law no. 97/2008 on matter of prevention and repression of violence against women and of gender (cit. B3). The

⁴⁰ Available at www.petitiononline.com/120663/petition.html

inhibitory tutelage is the instrument adopted by the legislator to grant concrete content to such prohibition.

112. LGBT persons of San Marino are not subject to a particular form of stereotyping because the San Marino's media do not use semi-erotic illustrations - that contribute to prejudice and to reinforce the idea that sexual orientation is only about sexual activity and preferences – nor only speak about incidents of homophobic speech that can contribute to consider homosexuality a taboo and to depict LGBT persons as deviant, diseased, unnatural or, worse still, immoral or socially destabilising.

B.11. Transgender issues

113. In San Marino there is no published research nor official information on the experience of transgender people, their living conditions and transphobia.

B.11.1. Hate Crime

114. As mentioned in B.3, with Law no. 97/2008 giving full civil, penal and trial protection to the victims of violence, San Marino influences the perception of safety of its citizens through mechanisms of protection and guarantee providing for the mobilisation of the State Institutions. Therefore, victims of crime experienced regularly can report on transphobic hate crimes without fear.
115. According to official information of the media, court cases of San Marino, and the interview for this report with the Association LGBT of San Marino, no datum testifies the lack of confidence by victims (heterosexual, transgender or homosexual) towards the public Authorities due to the belief that they will be inappropriately in interactions with members of the police and personnel of medical corps when they need their assistance.
116. With the same Law no. 97/2008 and with Law no. 66/2008, San Marino has extended its legal protection to the dignity of persons by sanctioning the explicit prohibition of racial, ethnic, religious and sexual discrimination and discrimination of gender (cit. B.3). In doing so, the strict enforcement of the laws here examined, risks to fall within the defence of transgenderism, because they prohibit violence on the grounds of sexual belonging (that it emphasises the difference of gender assigned at birth), without doing any specific reference about the protection of “gender identity” or gender expression (that it leaves aside the real sexual identity).

B.11.2. Freedom of Assembly

117. In San Marino there are no any NGOs with a specific focus on transgender people.
118. San Marino has - as mentioned in this report - its national LGBT Association as the unique chance for lesbian, gay, bisexual and transgender persons to multiply efforts, strengthen networks, coordinate campaigns, exchange best-practice and formulate political demands and strategies. This Association represents a tremendous support by the participants and for the groups.

B.11.3. Family issues

119. Those who marry after the transition have the possibility of proposing themselves as adoptive parents. According to Italian transsexual and transgender organisations⁴¹, however, prejudices in the assessment process undermine this possibility.
120. In San Marino, marriages in which at least one partner has submitted himself/herself to a sex reassignment proceeding do not appear, neither have proposals of adoption by parents emerged.
121. Nevertheless the current legislation, would annul a marriage in the case that one of the partners was to have a gender reassignment, since the resulting couple would be in a same-sex relationship without an equivalent opportunity to legally recognise their relationship.

B.11.4. Employment

122. There is no evidence of official complaints of transgender people in the Sammarinese's labour market because of their gender reassignment or gender identity. There are no reported cases of the required use of gender inappropriate toilets at work, for inappropriate remarks or harassment, or physically assault. There are no cases of unemployment for reasons of gender identity, discrimination upon recruitment, no full-time job, discrimination in the area of pay, with regards to opportunities for career advancement, or the engagement in dangerous or illegal activities to survive.

B.11.5. Education

123. As already declared on this matter, there is no San Marino data reporting female-to-male or male-to-female transgender individuals or those that identify as intersexed, intergender or androgynous. In the same way, there are no notes of harassment or bullying at school experienced by transgender persons.
124. In the schools of San Marino, educational materials and lectures as instrument to provide knowledge on transgender and LGB issues are not distributed.

B.11.6. Health

125. San Marino has no law expressly regulating sex reassignment proceedings. The absence of rules on this matter can be explained with the scarce, when non-existent, relief of these facts in the judicial praxis of our Country. Should it be better to issue a specific legislative norm on this matter?
126. In San Marino, as elsewhere, the laws also originate from actual social needs. Actually, it should be superfluous to submit a parliamentary discussion on this thorny problem and subsequently spark a heated debate on this matter, when whoever wants to submit him/herself to this operation can turn to the specialised structures of the surrounding territory and fall into the legal sphere of the Country in which these operations are physically made. Therefore, it appears unlikely that an immediate intervention by legislator to regulate the needs of transgender people would occur – just think that San Marino has not even provided for termination of pregnancy discipline.
127. With the lack of a specific Sammarinese discipline regulating sex reassignment proceedings, referring to the Law no. 43/1946 on the matter of order for registry-offices and the Law no. 42/1955 on the matter of the institution of the obligatory system of Social Welfare, it is evident that parties

41 Sito ufficiale Osservatorio Nazionale sull'Identità di Genere. www.onig.it

interested in obtaining a new identity card with the due personal data changes must make two requests to the Judicial Authority:

128. first, he/she must be authorised to have the required surgery. This judicial authorisation allows the person to obtain this surgery in public hospitals free of charge. Since the hospital structure of San Marino does not execute such surgery, the subject must apply to fixed structures abroad so that the National Health Fund allows free treatment (Art. 3, co. 2, Law no. 42/1955), with the authority received by the family doctor (Art. 4, co. 2, Law no. 42/1955) subject to the visa of the public Social Welfare Institution (I.S.S.) of the Republic (Art. 4, co. 3, Law no. 42/1955). If there is no authorisation of a judge, nothing prevents the transsexual person to undergo this surgery by addressing foreign health structures, and consequently falling into the jurisdiction of these countries. In this case, the subject will be excluded from the free health service and the cover of the hospitalisation cost including the numerous therapies for reassignment falls on the transgender applicant. However, the induction to transgender people to turn to foreign hospital structures has the negative consequence that the transsexual does not feel they have the necessary assistance from the State to face a conscious choice, nor to have the appropriate treatment by health professionals (i.e. psychiatrists about transition) of the nation. As result, the transsexual person could avoid doctors' visits as much as possible due to fear of inappropriate behaviour or could prefer to escape national care at home. To live uncomfortably can also have terrible consequences to consider, such as suicide; secondly, after sex reassignment surgery, the transgender person can ask for a judicial order which gives consent to change the details of sex and name in the records of the Registrar of Civil Status of San Marino, as requested by Art. 15/99-103 of Law. no. 43/1946.
129. Nor do sex reassignment proceedings appear in the Sammarinese legal system, to re-enact the difficulties faced by transgender persons. But according to COWI (2009), it is very difficult to collect Case Law on this subject. It seems that:
130. a) the lack of a judge's prior authorisation for surgery cannot preclude a subsequent recognition of the individual's right to sexual identity, if authorisation could have been given in such a case⁴²;
131. b) male to female reassignment surgery is usually authorised only when the person has had complex surgery including orchidectomy, penectomy and vaginoplasty. If the person is not able (for example due to illness) or unwilling to undergo these complex procedures, she cannot obtain the judicial order and the consequent sex reassignment, even if she takes prescribed sex hormones. In Italy, only in two cases has the judge ordered a sex reassignment after a simple orchidectomy; and only in one case did a judge order a sex reassignment without any operation, as the transsexual person in question was very ill and probably close to death⁴³;
132. c) female to male reassignment surgery is usually authorised when the person has had surgery, including mastectomy and hysterectomy. By contrast, phalloplasty is not required because it is a very difficult operation, with a high failure rate.
133. The current provisions also make it impossible for a transsexual individual to have their gender changed unless they undergo a gender reassignment, which does discriminate against those who cannot undergo this treatment for different reasons.
134. The site of the Association LGBT of San Marino provides information within the LGBT community (cfr. B10) and it dedicates space to aspects of transgender health care and to a guide of hormone therapies and treatment.

42 Italy, Court of Milano, 5 October 2000; cit. in COWI, *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Italy (study carried out for the European Union Agency for Fundamental Rights)*, 2009, p. 12.

43 Italy, Court of Roma, 18 October 1997; cit. in COWI, *The social situation concerning homophobia and discrimination on grounds of sexual orientation in Italy (study carried out for the European Union Agency for Fundamental Rights)*, 2009, p. 13.

B.11.7. Media

135. In order to orientate the sensitivity of public opinion, San Marino prohibits divulgation of discriminating messages by the communication craft, through Art. 3 of Law no. 97/2008 on the matter of prevention and repression of violence against women and of gender (cit. B 10).
136. By contrast, as already mentioned in B10, the Sammarinese information has dedicated scarce space to information on the individual and social conditions of transgender and LGB persons.
137. A great role is having the strong potentialities given by the Sammarinese press and the site of Association LGBT of San Marino (cit. B2 – B10): on one hand, transgender and LGB communities have found a space to communicate freely and to exercise their rights; on the other hand, public opinion finds information to cast in this unknown world.

Annex 1

B.11.8. List of relevant national laws etc.

GAZZETTA UFFICIALE (Italy)

1993, 6 febbraio, no. 30, S.O.

Decreto Legislativo 3 febbraio 1993, no. 29

Razionalizzazione della organizzazione delle Amministrazioni pubbliche e revisione della disciplina in materia di pubblico impiego a norma dell'Art. 2 della legge 23 ottobre 1992, no. 421.

2001, 9 maggio, no. 106

Decreto Legislativo 30 marzo 2001, no. 165, *Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche;*

2003, 26 febbraio, no. 47

Legge 14 febbraio 2003, no. 30, *Delega al governo in materia di occupazione e mercato del lavoro.*

GREAT AND GENERAL COUNCIL (San Marino)

1946

Legge 12 dicembre 1946, no. 43, *Legge sull'ordinamento per lo Stato Civile*, available at <http://www.consigliograndeegenerale.sm>

1955

Legge 22 dicembre 1955, no. 42, *Riordinamento della Legge 1950, no. 10, Istituzione di un sistema obbligatorio di Sicurezza Sociale. Legge che istituisce un sistema obbligatorio di Sicurezza Sociale*, available at <http://www.consigliograndeegenerale.sm>

1961

Legge 17 febbraio 1961, no. 7, *Legge per la tutela del lavoro e dei lavoratori*, available at <http://www.consigliograndeegenerale.sm>

1970

- a) Decreto 4 giugno 1970, no. 24, *Adesione e ratifica della Convenzione sullo Statuto dei Rifugiati*, available at <http://www.consigliograndeegenerale.sm>
- b) Legge 10 settembre 1973, no. 29, *Parificazione di diritti della donna*, available at <http://www.consigliograndeegenerale.sm>

1973

Decreto 20 dicembre 1973, no. 55, *Decreto che approva lo Statuto della Società Croce Rossa Sammarinese*, available at <http://www.consigliograndeegenerale.sm>

1974

Legge 8 luglio 1974, no. 59, *Dichiarazione dei diritti dei cittadini e dei Principi Fondamentali dell'Ordinamento Sammarinese*, available at <http://www.consigliograndeegenerale.sm>

1977

Legge 4 maggio 1977, no. 23, *Legge che detta norme sulle sanzioni disciplinari e sui licenziamenti individuali e collettivi*, available at <http://www.consigliograndeegenerale.sm>

1980

Legge 30 luglio 1980, no. 60, *Riforma dell'ordinamento scolastico*, available at <http://www.consigliograndeegenerale.sm>

1981

Legge 25 maggio 1981, no. 40, *Parità tra uomo e donna in materia di lavoro*, available at <http://www.consigliograndeegenerale.sm>

1985

- a) Decreto 9 maggio 1985, no. 53, *Adesione alla Convenzione dell'Organizzazione Internazionale del Lavoro no. 100 relativa alla parità di remunerazione fra la manodopera maschile e quella femminile per uno stesso lavoro*, available at <http://www.consigliograndeegenerale.sm>
- b) Decreto 26 settembre 1985, no. 109, *Adesione ai Patti dell'Organizzazione delle Nazioni Unite firmati a New York il 19 Dicembre 1966*, available at <http://www.consigliograndeegenerale.sm>

1986

- a) Decreto 28 gennaio 1986, no. 8, *Adesione e ratifica della Convenzione Culturale Europea (Parigi 19 dicembre 1954)*, available at <http://www.consigliograndeegenerale.sm>
- b) Decreto 10 novembre 1986, no. 133, *Adesione alla Convenzione dell'Organizzazione Internazionale del Lavoro no. 111 riguardante la discriminazione in materia di impiego e di professione*, available at <http://www.consigliograndeegenerale.sm>
- c) Legge 26 aprile 1986, no. 49, *Riforma del diritto di famiglia*, available at <http://www.consigliograndeegenerale.sm>

1987

Decreto 13 maggio 1987, no. 61, *Decreto ratifica degli emendamenti apportati agli articoli 24 e 25 dell'atto costitutivo dell'Organizzazione Mondiale della Sanità*, available at <http://www.consigliograndeegenerale.sm>

1989

- a) Legge 19 gennaio 1989, no. 4, *Regolamentazione dell'art. 16, secondo comma, della legge 8 luglio 1974 NO. 59 (dichiarazione dei diritti dei cittadini e dei principi fondamentali dell'ordinamento sammarinese)*, available at <http://www.consigliograndeegenerale.sm>
- b) Decreto 9 marzo 1989, no. 22, *Ratifica Convenzioni del Consiglio d'Europa sui Diritti dell'Uomo*, available at <http://www.consigliograndeegenerale.sm>
- c) Legge 28 aprile 1989, no. 43, *Carta dei Diritti e dei Doveri del malato*, available at <http://www.consigliograndeegenerale.sm>
- d) Legge 28 giugno 1989, no. 68, *Della giurisdizione amministrativa, del controllo di legittimità e delle sanzioni amministrative*, available at <http://www.consigliograndeegenerale.sm>
- e) Decreto 18 dicembre 1989, no. 122, *Ratifica della Convenzione del Consiglio d'Europa contro il doping*, available at <http://www.consigliograndeegenerale.sm>
- f) Legge 21 dicembre 1989, no. 128, *Sanzioni amministrative per l'assunzione abusiva dei lavoratori subordinati*, available at <http://www.consigliograndeegenerale.sm>

1991

Legge 23 ottobre 1991, no. 133, *Disciplina dell'attività sportiva*, available at <http://www.consigliograndeegenerale.sm>

1996

Decreto 23 febbraio 1996, no. 20, *Riconoscimento giuridico Ordine dei Medici Chirurghi e degli Odontoiatri libero professionisti*, available at <http://www.consigliograndeegenerale.sm>

1997

- a) Legge 13 marzo 1997, no. 32, *Disciplina dell'attività sportiva*, available at <http://www.consigliograndeegenerale.sm>
- b) Legge 29 aprile 1997, no. 44, *Ordinamento penitenziario*, available at <http://www.consigliograndeegenerale.sm>

- c) Decreto 4 settembre 1997, no. 95, *Legge che disciplina la concessione dei permessi di soggiorno e delle residenze ai cittadini non sammarinesi*, available at <http://www.consigliograndeegenerale.sm>
- d) Decreto 7 ottobre 1997, no. 111, *Ratifica Decreto 22 settembre 1997, no. 105, "Regolamento di applicazione della legge che disciplina la concessione dei permessi di soggiorno e delle residenze ai cittadini non sammarinesi"*, available at <http://www.consigliograndeegenerale.sm>

1998

Decreto 15 settembre 1998, no. 85, *Decreto Ratifica degli strumenti per gli emendamenti agli artt. 24 e 25 della Costituzione dell'Organizzazione Mondiale della Sanità*, available at <http://www.consigliograndeegenerale.sm>

1999

Decreto 5 ottobre 1999, no. 101, *Modifiche dello Statuto degli Psicologi della Repubblica di San Marino*, available at <http://www.consigliograndeegenerale.sm>

2000

Legge 30 novembre 2000, no. 114, *Legge sulla cittadinanza*, available at: <http://www.consigliograndeegenerale.sm>

2002

- a) Legge 26 febbraio 2002, no. 36, *Revisione della Legge 8 luglio 1974 no. 59 "Dichiarazione dei Diritti dei Cittadini e dei Principi Fondamentali dell'Ordinamento Sammarinese"*, available at <http://www.consigliograndeegenerale.sm>
- b) Relazione al Progetto di legge *Abrogazione dell'articolo 274 Codice Civile*, available at: http://www.consigliograndeegenerale.sm/new/proposte_di_legge/vis_lavori.php3?twi...

2003

- a) Decreto 18 marzo 2003, no. 30, *Ratifica ed esecuzione del Protocollo no. 12 alla Convenzione per la Salvaguardia dei Diritti dell'Uomo e delle Libertà Fondamentali del Consiglio d'Europa*, available at <http://www.consigliograndeegenerale.sm>
- b) Decreto 18 marzo 2003, no. 31, *Ratifica ed esecuzione del Protocollo no. 13 alla Convenzione per la Salvaguardia dei Diritti dell'Uomo e delle Libertà Fondamentali del Consiglio d'Europa, relativo all'abolizione della pena di morte in tutte le circostanze*, available at <http://www.consigliograndeegenerale.sm>
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- b) Legge 17 giugno 2004, no. 84, *Modifiche alla Legge 30 novembre 2000, no. 114, (Legge sulla Cittadinanza)*, available at: <http://www.consigliograndeegenerale.sm>
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- c) Legge 28 aprile 2008, no. 66, *Disposizioni in materia di discriminazione razziale, etnica, religiosa e sessuale*, available at <http://www.consigliograndeegenerale.sm>
- d) Seduta Consigliare del 14.05.2008, esaminata Istanza d'Arengo no. 11, *Cittadini Sammarinesi per l'istituzione della "Giornata Mondiale contro l'Omofobia" da celebrarsi il 17 maggio di ogni anno*, presentata il 6 aprile 2008, Istanza d'Arengo semestrale aprile-ottobre 2008 agli Eccellentissimi Capitani Reggenti, available at:
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- e) Legge 20 giugno 2008, no. 97, *Prevenzione e repressione della violenza contro le donne e di genere*, available at <http://www.consigliograndeegenerale.sm>

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- b) Seduta Consigliare del 04.03.2009, esaminata Istanza d'Arengo no. 12, *Cittadini Sammarinesi affinché venga introdotta, in tutte le scuole sammarinesi di ogni ordine e grado, una strategia anti bullismo tramite percorsi didattici ad integrazione delle materie già esistenti e l'introduzione di un consulente scolastico qualificato*, Arengo del 5 ottobre 2008, Agli Eccellentissimi Capitani Reggenti della Repubblica di San Marino, available at:
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Annex 2

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**The Legal and Social Situation Concerning
Homophobia, Transphobia and Discrimination on
Grounds of Sexual Orientation
and Gender Identity
in the Republic of San Marino**

Republic of San Marino, July 2009 - September 2010

TABLE OF CONTENTS

1. A SUMMARY AND ANALYSIS OF THE OVERALL SITUATION OF LGBT PERSONS LIVING IN SAN MARINO	34
2. THE COLLECTION OF DATA	37
3. KEY FINDINGS CONCERNING LGBT PEOPLE LIVING IN THE REPUBLIC OF SAN MARINO	40
3.1 The Principle of Equality guaranteed by the Sammarinese legal system	42
3.1.1 Instruments against violation of fundamental rights	51
3.2 Attitudes towards LGBT persons	56
3.3 Criminal Law – Hate crime	58
3.4 Freedom of Assembly, Association, Expression	63
3.5 Family and other Social Issues	69
3.6 Employment	73
3.7 Education	78
3.8 Health Service	81
3.9 Religion	82
3.10 Sport	84
3.11 Media	87
3.12 Asylum and Subsidiary Protection	89
3.13 Multiple Discrimination	90
3.14 Transgender Issues	92

CONCLUSIONS	100
BIBLIOGRAPHY AND WEB-SITE	105

1.

A SUMMARY AND ANALYSIS OF THE OVERALL SITUATION OF LGBT PERSONS LIVING IN SAN MARINO

On the grounds of the contents of both the Statutes "*Leges Statuae Reipublicae Sancti Marini*" that came into force in 1600 and the Laws that reform such Statutes, so called *Reformationes* - that up to few decades ago represented the written source for excellence of the Sammarinese legal system - the historical legacy of San Marino legislation is characterised by silence rather than negation or repression of homosexuality.

The Republic of San Marino has relevant national laws that mention sexual orientation as one of the grounds of discrimination. Therefore, the State gives the instruments, of legislative and technical nature, against the discriminations that take place and so that conditions for the concrete realization of the principle of equality take place, by mechanisms of very low cost but not always of easy accessibility for the victim of discrimination.

Same-sex relations, as well as same-sex partnership, remain invisible to state regulation. In fact, San Marino has not levelled up the same-sex couples to cohabitants *more uxorio* nor to married couples. Same-sex couples have not access to adoption.

Official datum on territorial base testify the absence of facts on discrimination for sexual orientation and gender identity reasons in San Marino. In this sense, the "Bollettino statistica" (statistics report) published quarterly by the *Office of Economic Programming Center on Elaboration of Datum and Statistics* of the Republic of San Marino, on the specific chapter "justice" does not report Cases Laws on the ground of discriminations for sexual orientation or gender identity, nor pending suits appear or note yet not come before the Court (that monthly the Gendarmeria of San Marino communicates to the national statistical office). Equally, the *Sammarinese Criminal Jurisprudence*⁴⁴, containing sentences from 1964 to 1990, does not mention any case of discrimination on the grounds of sexual orientation. Interviews with Gendarmeria and stakeholders of Sammarinese *Commission for the Equal Opportunities* confirm

⁴⁴ Istituto Giuridico Sammarinese, 1999.

the absence of cases of intolerance up to the present day. The same sources attest no verification of these blameworthy facts of harassment and bullying at school. As regards the labour environment, the Labor *Confederations* of San Marino, interviewed for this report, have not reported formal cases of dismissal of LGBT persons being forced to leave their work concealing justification of sexual orientation.

These quantitative datum are extremely concise in giving evidence of the lack in the San Marino legal system of discrimination on the grounds of sexual orientation or gender identity against LGBT persons, homophobia, transphobia and bullying at school. They show the entity of phenomenon but they are not able to explain *if* and *in which measure* the rules guaranteeing the equality defend the diversity, the uniqueness and the validity of each experience, included those of LGBT persons. For this reason, qualitative analysis besides quantitative investigation need.

Moving from these considerations it results inescapable an exploration of the acceptances and attitudes towards LGBT persons, i.e. it needs to recognize the opinion and the behaviour of single individuals and the civil society towards LGBT persons. Objective datum summarizing the attitudes of adults of San Marino towards LGBT persons do not exist. But there is an investigation on perception of Sammarinesi teen-agers signalling that little less of half of them considers “enough/very heavy” to have homosexual relations.

The Association LGBT of San Marino explains that homosexuals is not an autonomous reality for many people. For this reason – such Association specifies - LGBT persons made themselves invisible in the Sammarinese society as strategy of survival. Certainty, as in the whole small communities also in San Marino the gossip is often spread, with the consequence that the most normal of the liberties, to quietly live his/her own life, is often denied.

Afterwards, the same Association LGBT of San Marino is mobilising for the legal recognition of same-sex partnerships and against homophobia and discrimination, including speaking out against the influence of the Catholic Church in hampering a process of change on these issues.

Besides, it must specify the absence of prohibitions to freedom of reunion, assembly and expression against LGBT issues, both from State and from influence of the Catholic Church. However, any prohibition is made to the Association LGBT of San Marino for the important rule playing within both the LGBT community to increase their rights awareness and in the Sammarinese society to increase the sensitivity on LGBT issues.

The largely unavailable data concerning the qualitative aspects of live of the openness LGBT does not permit to know the magnitude of the problems that this group meets in their everyday lives in San Marino.

2.

THE COLLECTION OF DATA

The material for this report is referring to the actual condition of San Marino's legislation concerning criminal law, rules of health service and school institution, of family rights, of asylum, from which their review emerges the strong sensibility of the Republic of San Marino towards the delicate question of the discrimination in all forms. The dispositions cited in this report are available at the official site of the *Great and General Council*.

Then, it is here referring to the following relations:

- a study for the Sammarinese *Commission of the Equal Opportunity*, compiled by Dott.ssa Elisa Beccari (2007), in collaboration with the Sammarinese Juridical Institute of the University of the Republic of San Marino. It is a study on anti-discriminatory rules in force in San Marino compared with those of the systems of European Countries, in order to remark some inefficiencies;
- report edited by N. De Luigi, C. Perillo, N. Santangelo, P. Zurla (2009) involving a sample of secondary schools' students of San Marino, in order to investigate on perceptions and representations of youths concerning difference of gender.

Also, for this report the following sources have been collected:

- the Association LGBT of San Marino, to investigate the general issues of which the association is spokesman;
- press on the dailies of San Marino: they are named *La Tribuna Sammarinese*, *San Marino Oggi*, *L'Informazione*. These sources give the LGBT representations by press;
- data collected through interviews held in San Marino with various stakeholders:
 - Dott. Cinzia Cesarini, Director UOC (*Unità Operativa Complessa*) Nursing Home Service of San Marino;

- Ing. Giorgio Chiaruzzi, first President from 2008 to summer 2009 of public organization FORUM DEI GIOVANI. He has talking about past arguments faced by Forum dei Giovani in Sammarinese educational system;
- Managing Committee of FORUM DEI GIOVANI;
- Dott. Damiano Gennari, Responsible of the *Centro Salute Borgo*. He has explained the health services;
- Prof. Maurizio Gobbi, teacher of history, of philosophy and of Sammarinese history. He has mentioned the content of San Marino Statutes on matter of “child rape” and “nefarious crime of sodomy”;
- Dott.ssa Maria Domenica Michelotti, Member of the *Authority for the Equal Opportunities*; Executive of the School of Infancy. She has provided information on the activity of the National Equal Body and indications on the school environment of San Marino;
- Avv. Antonella Mularoni, Judge of the European Court for the Human Rights for seven years from November 1st, 2001 to October 31st, 2007; actually, Secretary of State for the Foreign Affairs;
- Dott. Susy Serra, Coordinator of the *Commission for the Equal Opportunities*; infancy-school Headmaster;
- Mr. Michele Pazzini, Secretary-General of the Association LGBT of San Marino;
- Dott.ssa Alessandra Renzi, Officer of Secretariat of State for the Tourism, the Sport, the Economic Programming and the Relations with the local production office (A.A.S.P.). She has mentioned information on Sammarinese sport;
- Dott. Alessandro Rossi, follower of Cultural Co-operative “Il Macello”; past Captain Regent; currently co-ordinator of the “Sinistra Unita” party. He talked about the movement brought to the abrogation of *Art. 274* of Sammarinese Criminal Code that was condemning the *acts of lust* committed in public spaces;
- Avv. Alvaro Selva, Professional; Member of the Sammarinese Government in ‘80/’90 years;
- Dott.ssa Antonella Sorcinelli, Administrative Director of the public health institution (I.S.S.). She has spoken about health argument;

- Dott.ssa Luana Stacchini, Director UOC (*Unità Operativa Complessa*) Minor Service of San Marino;
- the Gendarmeria of San Marino, Office of Precautionary of First Aid Services;
- in order to tackle the Sammarinese situation with International and Italian reality about homophobia and discrimination on the grounds of sexual orientation, the following reports have been considered:
 - the sociological Italian report, March 2009, carried out by *COWI (Danish Institute for Human Rights)*;
 - the FRA (*European Union Agency for Fundamental Rights*, 2009) analysis concerning European Countries situation.

3.

KEY FINDINGS CONCERNING LGBT PEOPLE LIVING IN THE REPUBLIC OF SAN MARINO

Recently, the Republic of San Marino has co-sponsored together with sixty-five Countries a strong declaration heard on *December 18th, 2008*, by the *United Nations General Assembly*, in order to call for the global decriminalization of homosexuality and condemns human rights violations based on sexual orientation or gender identity⁴⁵.

However, the Republic of San Marino made itself conspicuous during its Presidency at the Ministers Committee of the Council of Europe for the six-month period of November 2006/May 2007, by calling every Member States of the Council to adopt the necessary measures to carry out the *Reccomendation (2002) 5*, dated 30 April 2002, of the *Committee of Ministers*⁴⁶, on matter of violence against women and of gender. In order to give concrete realization to the objects pursued by the Recommendation, the Republic of San Marino makes active a working group, presided by Dott. Patrizia Busignani responsible for the campaign, that has created the report entitled “*On the actual situation of the Sammarinese law on violence against women and lines of interventions for repression and protection of victims*”⁴⁷. It is a comparative examination between the legal system of San Marino and that of other European Countries. The wants highlighted by the report on the actual situation of the Republic of San Marino on the matter of discrimination have been overcome with the formulation of rule *n. 66/2008* on matter of racial, ethnical, religious and sexual discrimination, and Law *n. 97/2008* on “Prevention and Repression of violence against women and of gender” (both dispositions will be properly faced at § 3.3).

In this context of juridical instruments adopted from the Republic to combat discrimination, the Juridical Studies Department of the University of the Republic of San Marino welcomes the specific request dated July 2009 from the international consultancy firm *COWI A/S* and the *Danish Institute for Human Rights (DIHR)* to prepare a comprehensive

⁴⁵ Cit. at official site of United Nations.

⁴⁶ Available at official site of Council of Europe.

⁴⁷ Cit. Beccari E., 2007, p. 5.

study on homophobia and discrimination on the grounds of sexual orientation. The present report come into a wider comparative study covering all European Union Member States on the situation regarding homophobia and sexual discrimination asked from the European Parliament.

The analysis of this report follows the EU's socio-legal interdisciplinary methodology and it is based on the key findings provided by the *European Union Agency for Fundamental Rights* (FRA) as suitable to summarize the experience of LGBT people⁴⁸. The specific areas examined are the following: attitudes towards LGBT persons, hate crime and hate speech, freedom of assembly, labour market, education, health, religious institution, sports, media, asylum, multiple discrimination, transphobia and discrimination on the grounds of gender identity and gender expression.

Such information looks at the legal and the sociological aspects of LGBT (*Lesbians, Gays, Bisexuals and Transsexuals*) people living in San Marino and it is drawn from legislatives rules, interrogations, questionnaires, in order to investigate all the juridical measures of protection adopted by the regular holder of rights, mostly of protection of the rights by LGBT persons, to compare with the comprehensive social analysis.

The present document has mere descriptive nature and it does not substitute, nor integrate, at any interpretative title, the contents of variables examined. The cognitive investigation allows to individualize the critical factors, it suggest current human rights problems, it may contribute to increase the rights awareness for LGBT issues, in order to guarantee the exactly fulfilment of the principle of equality, of non-discrimination and equal

⁴⁸ On summer 2007, the *European Parliament* has discussed the need for a *Directive* covering all the grounds of discrimination listed in *Art. 13 of EC Treaty* and every sector contained to the *Racial Equality Directive 2000/43/EC* on racial discrimination (education, social security, healthcare and access to goods and services). Therefore, the *European Parliament* with the aim of assisting the *Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (CNS)* asked the newly established *Fundamental Rights Agency (FRA)* to develop a comprehensive, comparative report covering all European Union Member States on the situation regarding homophobia and sexual orientation discrimination. In response, the Agency carried out a legal and social research project during 2007 and 2008 to evidence for actions needed in order to respect, protect and promote the fundamental rights of LGBT persons across the EU. The comparative legal analysis was based on 27 national legal studies covering all EU Member States drafted on the basis of detailed guidelines provided by the *FRA* to compare with the comprehensive social analysis. The *FRA* (2009b, p. 3) believes to combat fundamental rights violations effectively requires first of all a firm political commitment to the principles of equal treatment and non-discrimination, against homophobia, against LGBT and transgendered persons. Secondly, it requires good knowledge of the situation based on robust data guiding the development of evidence based policies and action. The develop data collection mechanisms, promote research and actively encourage LGBT people to come forward and lodge complaints on incidents of discrimination. It is in this context that also the University of San Marino has received the request to draw up a report concerning the living condition of LGBT persons of this Country.

opportunities. But the duty to formulate programs and norms, to translated concretely corrective measures, is beyond the assignments of the university institute and of its research work.

As the protection of certain rights is offered under the safeguard of the Sammarinese consitutional system, this analysis can not leave apart from a brief mention of the sound foundations on which are based the tradition of San Marino and its legal system (§ 3.1). It is by the virtue of these foundations that the protection of the civil and political freedoms are constant into the San Marino's history.

3.1

THE PRINCIPLE OF EQUALITY GUARANTEED BY THE SAMMARINESE LEGAL SYSTEM.

The Republic of San Marino has peculiar features, that are proper of a strongly homogeneous community tied to its past political-constitutional traditions.

The legal system of the Republic of San Marino is marked for not possessing a formal constitution; it has documents and laws of materially constitutional nature. San Marino is a system in which the consuetudes, the tardy-Medieval Statute and the laws promulgated by the *Great and General Council* (our Parliament) are in force together with the Common Law (subsidiary and integrative source). The solemn *Declaration of the Rights* (*Law n. 59/1974*, as amended by *Law n. 36/2002*) has particular relief and, in the system of sources of rights, it hierarchically covers the super-ordered position to the ordinary law proper of strict consitutions.

Art. 1 of the Sammarinese Declaration of the Rights establishes that «The Republic of San Marino recognises, as an integral part of its own system, the norms of International law generally recognised and conforms to them its acts and conduct. It complies with the norms contained in the International declarations on human rights and fundamental freedoms (co.1). It reconfirms the right of political asylum. It repudiates war as an instrument to resolve conflicts between States and it conforms, in International action, to the principles ratified in the United Nations Charter (co. 2). Sammarinese law recognises, guarantees and enforces the rights and fundamental freedoms enunciated by the European Convention for the Protection of Human Rights and Fundamental Freedoms (co. 3). International agreements protecting the human rights

and freedoms, officially agreed to and executed, prevail in cases of conflict with internal laws (co. 4)».

Essentially, the deeds on which the relations among States on matters of the protection of human rights are based and on which the various States, San Marino also, must address their domestic political and social activity are the following:

- two Pacts of the *United Nations Organisation*: the «*International Pact on civil and political Rights*» and the «*International Pact on economic, social and cultural Rights*», adopted in New York by the *General Assembly* of *ONU* on 16 December 1966, in conformity to the *Universal Declaration of the Human Rights*; both documents have been ratified by San Marino with *Decree n. 109/1985*;
- the «*European Convention for the Protection of Human Rights and Fundamental Freedoms*» (*CEDU*), elaborated by the Council of Europe that entered into force on 3 September 1953, ratified by San Marino with *Decree n. 22/1989*.

The International law named by *Art. 1, co. 1*, of the *Declaration of the Rights* is commonly defined like that right formed spontaneously on the grounds of consuetudinary rules practised, with time, by the Community of States in their relations⁴⁹. As it happens in the domestic legal system, the rules of International law must be identified in concrete terms in those requirements and needs that are widespread in the international conscience⁵⁰. The rules of International right generally recognised and the International declarations on the matter of human rights and individual freedoms are engaged automatically by the legal system of San Marino⁵¹.

Co. 2 of the aforesaid *Art. 1* recognises the institute of asylum as an instrument of protection of human rights. Through this disposition, San Marino has proved its International obligations in favour of the rights, mostly for the more weaks. However, *Art. 1* becomes part of the Sammarinese tradition in granting hospitality and protection, of which it has always shown generosity, also at cost of serious risks jeopardizing its political existence⁵².

The International declarations and conventions on the matter of human rights and freedoms mentioned by *co. 1* and *3* of *Art. 1* of the *Declaration of the Rights* constitute over-

⁴⁹ Cit. L. Lonfernini, 2006, p. 250.

⁵⁰ Cit. L. Lonfernini, 2006, pp. 250-251.

⁵¹ The adjustment is a fact that can be pointed and applied to concrete case by Judge; by the *Great and General Council* that, with law, must conform the domestic rule to the International one, or, in case of doubt or uncertainty, by the *College Guarantor* opportunely made active. Cit. L. Lonfernini, 2006, p. 253.

⁵² Cit. L. Lonfernini, 2006, pp 254-258.

ordered rule to the legal system of San Marino, i.e. they become not a programmatic obligation but a behaviour kept with the automatic adjustment of domestic rules⁵³.

Unlike the principles and norms generally recognised of International right and of the fundamental rights and freedoms enunciated by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, for which the Sammarinese *Declaration of the Rights* provides the automatic adaptation, the International agreements on the matter of protection of human freedoms and rights (*Art. 1, co. 4*) become binding if the State has approved them by adhesion to the convention. In this case mentioned by *co. 4* of *Art. 1* of the *Declaration of the Rights*, the adhesion is a faculty, not a duty. It means that contents of each International agreement officially agreed to and executed by San Marino has direct legal force in the national legal system: it is the source of inspiration in domestic Case-Law for the Internal Authorities in the practical implementation and promotion of rights and it makes for interpretation in an evolutive sense of the National juridical values, based on a community of values.

The adhesion to the Convention and, even though by mediate way, to those of the Universal Declaration in virtue of the cited *Art. 1, co. 4*, of the Sammarinese solemn *Law n. 59/1974*, determines the prevalence of the super-national values that cannot be disregarded on the domestic sources of rights in hypotheses of contrast.

This premises, it is comprehensible that the *Declaration of the Rights* of San Marino leagues the little Republic to the International system of United Nations and to the European system, i.e. to the dominant juridical culture asserted in the International community, within the elaborations of the continental common law, that it is reflected today in the Constitutional European Common Law amended on human rights by the jurisprudence of the European Court, as well as, symbolically, drawn by the European Union Charter on fundamental rights, including its *Art. 21* on sexual orientation as a form of forbidden discrimination⁵⁴. It is opportune to underline that the signature to the *European Convention of the Human Rights* has represented a stimulus to improve the Sammarinese legal system in order to assure better fulfilment of human rights and to support the principle of *de jure* pre-eminence, of parliamentary democracy and the respect of human rights, in any case broadly protected and recognised by the tradition of the Republic⁵⁵.

⁵³ Cit. L. Lonfernini, 2006, pp. 254-255.

⁵⁴ G. Guidi, pp. 17-71, 2004.

⁵⁵ Cit. Selva A., 1990.

However, it is different the recognition that *Art. 1* of the *Declaration of the Rights* performs towards the norms introduced in execution of the *European Convention* compared with the norms introduced in execution of other *International Agreements*. While the Pacts do not provide for a system of jurisdictional guarantee (eventually, their verified non-observance can also bring resolutions of military character towards the State become default), the European Convention has founded a permanent Court, the *European Court of Human Rights*, to which it is due to settle the controversies borne on the initiative of the single individual against his/her own State for violation of fundamental rights and freedoms guaranteed by the same Convention. Therefore, it realises a double guarantee for the individual that holds to be injured inside the State of a right enacted by International norms in the theme of individual rights: a national procedure provided by the domestic legal system and an external procedure provided by the European Convention. Also San Marino is present in the European Court of Human Rights with its own judge.

The rights of the European conventional text concerning the private sphere of citizens (*Art. 9, Freedom of opinion, of conscience and religion; Art. 10, Freedom of expression; Art. 11, Freedom of reunion and association*) are mentioned in the Sammarinese *Declaration of the Rights*. In fact, *Art. 5* of *Law n. 59/1974* contains the solemn declaration that human rights are inviolable (the right to life, to name, to citizenship, the so called right of *incolato*, that is the right to have a residence) and it specifies their contents in the articles that follow it. *Art. 4, Co. 1*, mentions sex as one of the grounds of discrimination.

With the *Declaration of the Rights*, for the first time San Marino has expressly recognised a series of subjective situations of right in a text. Some of them are constants in the history of San Marino, like individual civil and political liberties, freedom of domicile, abode and expatriation, reunion and association, demonstration of beliefs, conscience and cult (*Art. 6, co. 1*) and are considered as natural and absolute because they are inherent in personality. Instead, the typical rights of welfare state have the character of novelty, for example the right of gratuitous and free study (*Art. 6, co. 2*) and the right of social welfare (*Art. 9, co. 2*) guaranteed indiscriminately to everybody, without regarding personal conditions or gender. The State offers fit structures and means for concretely giving such rights. The rights mentioned by these dispositions are extensively interpreted as regarding “positive actions” that State has to adopt for assuring the respect of these rights, by elimination of obstacles and coercions obstructing the free

development of personality⁵⁶. In this sense, the Declaration has not prohibit any differentiated treatment justified, at the contrary, because the equality guarantees the protection of diversities which identities ask for equal respect, that is much more than tolerance. It is the particular case of sexual differences.

Art. 4 of the Declaration of the Rights proclaims the prohibition of discrimination on the ground of sex, so as personal, economic, political and religion conditions, for the sake to guarantee equality in front of the law, of admittance to public offices and to the elective offices, of social dignity, rights and freedoms, effective sharing of citizens to the economic and social life of the Country⁵⁷.

The Sammarinese legal system regulated by the superior *Law n. 59/1974*, as amended by *Law n. 36/2002*, has the Statutes, too – so called *Leges Statutae Reipublicae Sancti Marini* – covering the period between XIIc. and XIIIc.; and for various parts they are still preserving juridical value in acts of ordinary legislation and they have a materially constitutional nature. These Statutes edited in the seventeenth century – the last collection of the statutory legislation of San Marino – mention “child rape” and the “nefarious crime of sodomy” (Rubric LXXIV of the Book III)⁵⁸. Besides, the Sammarinese criminal sources record events of “incest”, i.e. relationship between persons related by blood, among the histories of “ordinary transgression”⁵⁹. And in this country where everybody, noble and plebeians, rich and poor, have always shown the same sensibility on sexual honour, the same-sex relations as well as homophobia remained invisible to State regulation. As to say that in San Marino the issue did not exist: all men were virile and all women were feminine.

A considerable detail is the call to the statutory rule of the Rubric LXII, Book I, to the Christian recognition of an equal dignity among sex⁶⁰.

⁵⁶ A. Mularoni, 2006, pp.385, 386.

⁵⁷ Art. 4 of the *Declaration of the Rights* proclaims: “Everybody is equal in front of the law, without distinction of sex, of individual economic social politic and religious conditions (co. 1). All citizens have the right to access to public offices and to be elective, accordingly to formalities established by Law (co. 2). The Republic guarantees equal social dignity and equal protection of the rights and freedoms. It promotes conditions for the effective participations of the citizens to the economic and social life of the Country (co. 3).

⁵⁸ *Leges Statutae Reipublicae Sancti Marini*, MDCCCXCV, p. 176.

⁵⁹ A. Palombarini, 1997.

⁶⁰ Rubric LXI of Book I of the *Leges Statutae* acts: “ On interpretation of *Statutes* and *Reformations*. Since the *Statutes* do not involve in any way interpretation, and from words of them sometime quarrels rise, we establish, and we order, that every time a law or a *Reformation* speaks in a masculine genus it has to be meant also in a feminine one, provided the contents of Statute agrees to feminine sex, and if it speaks in plural sense it has to be meant also in singular one, etc.” (*Leges Statutae Reipublicae Sancti Marini*, MDCCCXCV, pp. 68-69). Obviously, means of the statement is different than the present-day: the feminine identity presents itself for centuries tightly anchored to

On the grounds of the statutory texts, Sammarinese legal system has never known the inequality among its members in front of the law⁶¹. In fact, by the statutory terms on *iura regalia*⁶², contained on § 4 and 5 of the Rubric III of Book I of the *Leges Statutae*, that identifies the *princeps* in the sovereign people, it comes down the *status civitatis* (citizenship) does not place individuals of San Marino in condition of subjects. In the Sammarinese legal system, the *status civitatis* has not beginning on July 14th, 1789, but it is more ancient than the date of beginning of the French Revolution. Its origins have to be searched in the statutory terms characterizing the Republic of an history and a culture of its own, though circumscribed at local ambit⁶³. Besides, the principle of the unit of juridical subject is already a constitutional datum for centuries, recognised and celebrated as a boast of the Republic and it is esteemed as *perpetua libertas*⁶⁴. From the *iura regalia*, proclaimed by Statute, they come down, for constant and continuous evolution, all the attributes of the sovereignty of the Republic which, as the paragraph of Art. 2 of the *Declaration of the Rights* proclaims, “it resides in the people, that exercises it in the statutory forms of the representative democracy”.

Beside the Statute as a source of right, San Marino has maintained the *ius comune*, that is the right practised by all of the continental European States before making the codices. Professor Vittorio Scialoja (1926) wrote as follow, judge of San Marino already: “*The ius comune in force in San Marino is not the Roman Law nor the elaboration of Giustiniano but it is that right came forming and developing on the grounds of the Roman Law, the Canon Law and the Consuetudes of the most civil States of European continent and particularly of Italy. It must be sought in writings of the most authoritative jurisconsults and in decisions of the most renowned Courts*”. Art. 3-bis of the solemn Declaration calls the *ius comune* as subsidiary and integrative source, not residual nor secondary, that ends up by being the most important and meaningful source of the

matrimony and family. Only in the recent times, precisely in 1973, the first purposeful law is enacted on the matter of equal rights for the Sammarinese woman. Only in this date it is recognised to woman the possibility to assume offices and public jobs au pair of man, the possibility to be elected in Parliament and to alienate and to oblige freely the non-dotal goods (*Law n. 29/1973*). Later, this equality is sanctioned by the constitutional rule of the Sammarinese legal system dated 1974 (*Law n. 59*), that solemnly confirms the moral and juridical equality of woman. The moral and juridical equality of spouse will find definitive recognition in 1986, with law on reform of the family rights. Before these moral and juridical recognitions, the condition of woman was equal to minor, considered legally incapable. This justified a legal system of perpetual protection of woman. Cit. M. Ugolini, 2005, p. 30.

⁶¹ P. G. Peruzzi, 1998, pp. 112-117.

⁶² See P. G. Peruzzi (1998, p. 16, note n. 8) for a reconstruction of the question on regal rights in the intermediate doctrine, which solds the formulae of the past – those contained in the Statutes in force – with the assertions more recently by doctrine on theme of independence and sovereignty.

⁶³ Cit. M. Ugolini, 2005, p. 26.

⁶⁴ Cfr. G. Carducci, 1966, pp. 357-388. Cit. P. G. Peruzzi, 1998.

Sammarinese legal system. When law or local consuetudes do not regulate the law suit matter, the judge must appeal to the *ius commune*, as subsidiary but very broad source, therefore it is becoming the framework of the Sammarinese system. This is not the place to go deep into such definition. What it must be in relief is the recall made by Scialoja (1926) to the elaboration of law of the “more civil States of European continent”. Therefore, in the Sammarinese legal system the *jus commune* gives to judge a complex of general principles, interpretative canons and methodological criteria of which jurisprudence avails itself to evolutively interpret the positive law, that is *ius proprium*, and to provide to *casus omissus*⁶⁵. This *communicatio* and inter-exchange of juridical solutions among the most civil State of the European continent has determined the opening and justified the permeability of the Sammarinese legal system to acknowledge the historically succeeding evolutive stimulus, particularly on the matter of protection of human rights. Trought the discerning influence exercised on the development of the Sammarinese legal system by *jus commune* – its recall to the common conscience - San Marino draws to the historical Sammarinese conscience and to its tradition of liberty⁶⁶, that is to those relations between sovereign power and its citizens. Therefore, San Marino can testify to have maintained alive the juridical memory of a culture that has done great the European juridical culture⁶⁷, based on general principles of liberty, equality and democracy, already immanent in the Sammarinese legal system.

And it is exactly this jurisprudencial nature that gives peculiarity to the Sammarinese legal system. Nevertheless, today it results reasonable to affirm that changes of the last years introduced by the special legislation in almost all sectors of right and of civil procedure, and therefore in the freedoms discipline too, make primarily applies the special legislation, even being fundamental for the Sammarinese jurist operator the reference to the jurisprudence and to the juridical doctrine. This shift has been produced by the rules on International Law too, that Republic of San Marino makes working in the National Sammarinese system, in accordance with *Art. 1* of *Law n. 59/1974* of the *Declaration of the Rights*, but also by its *Art. 16* inherent in the judgement of

⁶⁵ This legal system is not of lacunae to integrate by recourse to other legal systems, but it is of the cases omitted. This means that the Sammarinese legal system must be always considered constitutionally as complete and consequently it is with the application of the general principle of “heter-integration” that wants of system are resolved necessarily through consolidation and generalization of the discipline already contained in the legal system. The continuity of the fundamental institutions of the State and of its life has a constitutional importance and it is guaranteed as fundamental principle of the Sammarinese legal system by the proem of *Law n. 59/1974* on Declaration of the Rights of citizens. Cit. P.G. Peruzzi, 1998.

⁶⁶ Carlo Arturo Jemolo, Sentence 15 July 1953; cit. A. Selva, 1990, p. 44.

⁶⁷ Cit. A. Selva, 1990, pp. 42-46.

constitutionality of the rules related to the conformity to fundamental principles of the legal system. And this, we repeat it, strengthens the protection of individual rights by San Marino.

Inside of the Sammarinese legal system various legislative texts enunciate the prohibition of discrimination on the grounds, among the other reasons, of sexual orientation. So, *Law n. 60/1980* on reform of the school system, to its *Art. 1* provides that “*in the school [institution] distinctions of race, of sex, of language, of religion, of political opinions are not admitted*”. Likewise, the same prohibition is enacted by *Law n. 133/1991*, as amended by *Law n. 32/1997*, on the matter of sporting activity.

The prohibition of sexual discrimination is also provided by some legislative texts for the medical-sanitary sector. In fact, it is present in the Statute of the Sammarinese *Croce Rossa* - functioning as medical aid - approved with *Decree n. 55/1973*. The same prohibition is recognised with the Statute enclosed to *Decree n. 20/1996* concerning the Order of Surgeons and Odontologists Independent professionals, besides with the Statute enclosed to *Decree n. 101/1999* on the Order of Psychologists. These rules on medical-sanitary matter conform with the principles of *World Health Organization (WHO; Organizzazione Mondiale della Sanità, OMS)* that deals with social determinants of the inequalities of gender from years. With *Decree n. 61/1987* and *Decree n. 85/1998* San Marino adheres to the deed of partnership of the *WHO* sanctioning the principle of health as a fundamental right of equality.

It is right and proper to signal that the “*Charter of the rights and the duties of sick person*” of *Law n. 43/1989* does not contain dispositions on the matter of equality, limiting itself to enunciate the rights and duties of the patient of which each citizen is a regular holder.

Law n. 44/1997 on the penitentiary system imposes a treatment stamped to absolute impartiality, without discrimination on the grounds of nationality, race, economic and social conditions, political opinions and religious beliefs.

It is recent the integration of the Sammarinese Criminal Code provided by *Law n. 66/2008*, to prevent and to repress behaviours of discrimination for reasons of hate or violence, for racial, ethnic, national, religious or sexual orientation reasons. In force of the same disposition, the above mentioned forms of discrimination constitute aggravating circumstances of crimes, prosecutable by the judicial office. In order to guarantee a more effective level of protection supporting victims of discrimination, *Law n. 97/2008* on the matter of “prevention and repression of violence against women and of gender” confers to the specific national Equal Body

called *Authority for the Equal Opportunities*, the power to start a procedure supporting victims of physical or moral violence and discrimination, giving an informative service and to brace them (§ 3.3). Through such legislative interventions *n. 66/2008* and *n. 98/2008*, San Marino deals with gender differences and gives protection to the identities, realising a full and effective protection of the persons so-called different. The same interventions allow to line up the Republic to the majority of the European States, which are already equipped for the time of a suitable repressive apparatus on the matter of sexual orientation, solicited by the Directives of the *European Union* and of the *Council of Europe*.

Law n. 121/2004 has abrogated the *Art. 274* of the Sammarinese Criminal Code concerning penal condemnation as «*acts of lust*» the facts committed in a public place among same-sex persons.

In employment ambit, with *Decree n. 133/1986*, the Republic of San Marino has ratified the Convention of the *International Labour Organisation (Organizzazione Internazionale del Lavoro, OIL) n. 111 of 1958r*, in that making the struggle against discrimination of gender one of the central points of its activity, it prohibits every form of discrimination on the matter of employment and profession. With *Law n. 68/1989*, the Administrative Court has been founded, with the assignment to exercise the jurisdictional protection of legitimate interest towards the Public Administration also on the matter of working relations involving public institutions.

Today, San Marino is also present in the *Organisation for Security and Co-operation in Europe (Organizzazione per la Sicurezza e per la Cooperazione in Europa, OSCE)* that is very busy in the elimination of each form of discrimination and in the promotion of respect, too.

Substantially, by these dispositions San Marino has established specific actions to fight various spheres of discrimination, such as the access to jobs for employees and the self-employed, education, social protection (including welfare and sanitary assistance), social services, access to goods and services and their supply. Judicial and/or administrative procedures settled to strengthen the principle of non-discrimination, and the rights of legal and social assistance to victims, are the tools of legal protection recognised to victim of discrimination (§ 3.1.1 – 3.3).

Law n. 49/1986 has permanently sanctioned the principle of moral and juridical parity of consorts between man and woman. The norm of the criminal code that punished adultery has

been repealed. The equality of consorts finds recognition not only during a marriage but also during separation and after the dissolution or cessation of the civil effects of marriage⁶⁸.

With *Law n. 114/2000* and subsequently with *Law n. 84/2004*, the Sammarinese citizenship of a child born to a Sammarinese mother is recognised. So there is sanctioned equality between man and woman also on the matter of citizenship.

Therefore, in considering the above mentioned dynamics founding the expression of the Sammarinese legal system, it is possible to assert that adaptation of rules to the concrete interests of single individual must be measured and compared with the logics subtended to different systems, both ascribed to a juridical culture more circumscribed, which is that domestic legal system, and ascribed to a wider culture, which always goes through the right over national border⁶⁹. This is the juridical context in which they live together the inhabitants of this Country that it has always been respectful of other people's identities, but at the same time very proud of its own.

Recently, the Mount Titano, historical subject, has acquired also the title of Universal Patrimony of the Humanity from *Unesco (United Nations Educational, Scientific and Cultural Organisation)*.

3.1.1 - INSTRUMENTS AGAINST VIOLATION OF FUNDAMENTAL RIGHTS

Evidently, it is not enough to proclaim the formal rights of an individual, to which the norm is direct, and has not concrete possibility to suit the principles guaranteed by the State.

The following context highlights the actions allowed to grant the effective exercise of the constitutional principle of equal dignity and rights and equal treatment without distinctions of individual condition, both by the activation of national Bodies (the *College Guarantor* and the *Commission for the Equal Opportunities*) and by appeal to the *European Court* to which San Marino adheres. Instead, the actions that the Sammarinese legal system recognises to citizens for the concrete protection of the principle of non-discrimination for specific juridical spheres, will be examined into their respective areas that follow in this report (from § 3.2 to 3.14).

⁶⁸ Cit. Selva A., 1990, pp. 42-46.

⁶⁹ Cit. P.G. Peruzzi, 1998.

Effective exercise of the constitutional right of equality: the «College Guarantor» and the «Commission for the Equal Opportunities»

Law n. 4/1989 has introduced the judgment of legitimacy of the norms in respect to the principles of the Sammarinese legal system mentioned by the *Declaration of Rights of Citizens*. The judgment of legitimacy is put into effect both by analysing the form and then it regards to the act and to the procedure of putting it into force, and by analysing the substantial viewpoint and therefore it regards to the contents of act⁷⁰. Such mechanism of the constitutional guarantee conducts to repeal the domestic rules opposed to those rules of Conventions on the matter of human rights, with affect to the pronouncement of illegitimacy. As an exception and for exact reasons, the legislator (the *Great and General Council*), upon suggestion by the same organ in charge of constitutional legitimacy also, can set a time limit to retrospective effect of the pronouncement with reference to expectations, to a subjective right or to a legitimate interest, that the rule declared illegitimate has made to rise (*Art. 7, Law n. 36/2002*). In this case, the question of constitutional legitimacy on the matter, for example, of equality is conditioned from the viewpoin of the organ of political address.

With *Law n. 36/2002*, of amending of *Law n. 59/1974* on *Declaration of the Rights*, the judicial body properly qualified to decide on the constitutional legitimacy of the rules is the *College Guarantor* (*Art. 16, of Law n. 59/1974*), to which it is guaranteed full autonomy, independence and neutrality from other bodies or powers of the State.

If there is doubt that a norm is backward in legitimacy in everything or partly, the individual has the possibility to make the control of constitutional legitimacy to the College Guarantor active *in an indirect or incidental way*. The incidental access to the College Guarantor implies current trial in front of a civil, administrative or criminal judgement (the so-called judge *a quo*, “from which” the question is boosted) and it must resolve the concrete case by applying a law or an act that holds unconstitutional⁷¹.

⁷⁰ Cit. L. Lonfernini, 2006, p. 197.

⁷¹ The Judge of the proceedings in progress (*a quo*) with justified ordinance is able not to admit the appeal. The ordinance can not be appealed. Anyhow, the individual has the possibility to reintroduce the appeal in the other degrees of judgement or in different proceedings. With the declaration of inadmissibility the judgement takes again its course. In case the appeal is pronounced as admissible, the proceedings are suspended and the question of legitimacy is established to the *College Guarantor*. The decision of the *College Guarantor* can be of rejection or of acceptance (*Art. 14 of Law n. 55/2003*). With the sentence of acceptance, the College declares the constitutional illegitimacy of the legislative disposition and it can point out to the legislator the other legislative dispositions whose illegitimacy derives as a result of the adopted decision, in order to amend provisions of its competence. With the sentence of rejection, the *College Guarantor* declares the question groundless. The sentences of the College are definitive: in an incidental way, the question can again be submitted to verification of

The most evident difficulty of the right of the citizen to raise the question of legitimacy in an incidental way is in regards to the determination of the same question of legitimacy both from the Judge *a quo* – it will be the Judge *a quo* to introduce the elements, normative and of facts, that connote the trial within to which the question of constitutional legitimacy takes shape – and from the *Collegio Garante* – that is, the question of legitimacy is conditioned from the result of the constitutional judgement.

In order to verify the norm held suffering from legitimacy, the Collegio has at its disposal not only the written normative, but also the jurisprudence and the doctrine developed in the neighbouring Countries not only for reasons of a territorial nature but also for cultural, political, economic and social formation.

Therefore, with *Art. 16* of the *Declaration of the Rights*, San Marino has mostly made visible those principles that modern State constitutions of advanced democracy have recognised to their citizens⁷². In this search, on the matter of human rights violations based on sexual orientation or gender identity, the *Collegio Garante* must consider the rights recognised at International level to LGBT community, even if the Sammarinese Constitution does not contain the straight recall to the protection of sexual orientation and gender identity characteristics.

The Sammarinese jurisprudence of the Collegio Garante from 2003 to 2007⁷³ does not record appeals inherent in the matter of sexual orientation or gender identity.

Further process of guarantee of the constitutional rights on the legal equality of which persons can avail themselves is that carried out by the activity of the *Commission for Equal Opportunities*, established by *Law n. 26/2004*. Among its competences and functions, it must provide actions and strategies to assure the full juridical equality and the equal opportunities among citizens, to boost to the competent bodies so that they conform the legal system to the principles of juridical equality and to express consultative opinions on bills as regards the respect of the principle of equality. It may collect and verify the statements of facts from individuals and associations regarding the aspects of legal equality and equal opportunities (*Art. 2, lett. f*). However, the Commission has the power to defend collective interests as to the equal opportunities in civil, criminal and administrative suits (*Art. 2, lett. h*): in this sense, it reinforces

constitutional legitimacy with different motivations. Prohibitions to the re-statement of the former do not exist if the appeal has been rejected with ordinance as not acceptable or inadmissible. Cit. L. Lonfernini, 2006, pp. 200-205.

⁷² L. Lonfernini, 2006, pp. 205-206.

⁷³ Istituto Giuridico Sammarinese, 2008.

the protection of the principle of equality on dignity and rights and the harm brought to the victim involved in the trial will be considered damaging to the interest regarding of the whole community.

The Commission is appointed from the *Great and General Council* at the beginning of each legislature, with expiry at the end of the same legislature. The presence of the *Commission for the Equal Opportunities* within the government can promote diversity and influence the inclusion of LGBT persons.

Appeal to the «European Court of the Human Rights»

Consequently to the ratification from San Marino of the *European Convention on Human Rights and Fundamental Freedoms* (following shortly called “Convention”) and the subsequent *Protocols*, the principles of the Sammarinese *Declaration of the Rights* grows strength and they have been further reconfirmed, both for their singling out and for their interpretation by the European Court’s jurisprudence. Therefore, the dissertation on human rights is tightly connected with the development, extent and assertion of social and political sensibilities evolved inside the single community and inside the International Community. In conclusion, the human rights are the ensemble of subjective rights subscribed in Constitutions, in Laws or they are derived from a tradition *and* from a continued practice⁷⁴.

The agreement from San Marino to the *European Convention* gives the right to every Sammarinese citizen to appeal the *European Court of Human Right* if he/she retains to undergo lesions of rights protected by the *European Convention* as, for example, to be victim of discrimination on the grounds of sexual orientation penalised by the *European Convention*.

It is a mechanisms at International level to adopt only if domestic law cannot ensure the individual freedoms. Subject to exhaustion of domestic legal remedies, every physical person, non-government organization or privates’ group that believing to be victim of a violation from a State adherent to the *Convention* and to the subsequent *Protocols*⁷⁵, can take legal proceeding to the *European Court of Human Rights* (so -called “individual appeal”, *Art. 34* of the *Convention*).

The appeal to the *European Court of Human Rights* is very complex. The recurring subject must not acquit serious formalities in order to avoid that he/she renounces to take legal

⁷⁴ L. Lonfernini, p. 93, 2006.

⁷⁵ The Republic of San Marino has ratified the *Convention* and *Protocols n. 1, 2, 4, 6, 7* (and 8, nevermore in force) dated 9 March 1989, with *Decree n. 22/1989*; and *Protocols n. 12 e 13* dated 18 March 2003 with *Decree n. 30/2003* and *Decree n. 31/2003*.

proceeding to the *European Court*⁷⁶. But the admittance of request to the *European Court* is conditioned to the possible examination and approval of the *European Committee*. In addition, the *European Court of the Human Rights* is not a body of “fourth appeal” next to the National Courts, but it is an International Court authorized to decide on appeals having as object exclusively violations of the *Convention* and *Protocols* in force ratified by the State respondent in judgment. Besides, the *European Court* calls the governments concerned to take effective measures to restore the status of those stateless persons: that is the Court founds its activity on “subsidiarity principle”, it means that the petitioner must have lifted at domestic level the complaint/complaints later on appeal to the Court, at least complaining the substance of the violation of the article/articles of the *Convention* or *Protocols*⁷⁷.

According to *European Court of Human Rights*⁷⁸, till today sentences and decisions or pending cases do not exist involving the Sammarinese State as respondent for reason of sexual intolerance.

⁷⁶ The appeal may be compiled without defending counsel, it is exempt from taxes, it can be written in one of the official languages of the adherent States to the Convention. The use of official language of the Court, English or French, becomes compulsory only when the decision of receiving from the Court is intervened. It is provided the benefit of legal aid if petitioner has not an adequate income. Such procedures conform with economic and quick logical of judgements and they are finalized to avoid that victim renounces to resort to Court.

⁷⁷ A. Mularoni, 2006, p. 358.

⁷⁸ See official site of European Court of Human Rights.

3.2

ATTITUDES TOWARDS LGBT PERSONS

The attitudes towards LGBT persons are regarding to the social consideration and to the opinion of acceptability on LGBT issues. This dimension results from rules and norms menaging the social life and, particularly, from the degree of acceptance of behaviors deep-seated in daily reality. Possible forms of social sanctions give difficult to LGBT persons the access to their rights.

No data are available about the acceptance and attitudes towards LGBT persons living in the Republic of San Marino, nor concerning the acceptance of same-sex marriages or adoptions allowed to homosexual couples.

According to the Association LGBT of San Marino, homosexuality is invisible to all⁷⁹. The same Association regards this social exclusion as being upheld by a religious creed⁸⁰ - and by the ideological offensive from the Vatican against homosexuality - and by a contest focusing on traditional family values⁸¹, confirming in this sense the forensic NGOs' regards.

An inquiry carried out by the Sammarinese press "San Marino Notizie" on March, 2nd, 2007, asked its readers about the opportunity to elaborate a solution for the "cohabitations of fact", somehow proving about their attitudes towards different kinds of family constellation. The affirmative responses has been 56 per cent, negative responses has been 30 per cent due to observant Catholics keeping faith with the Church's dogma and with the explicit critical position of Pontiff against homosexuality, the 6 per cent adheres to recognition of homosexual couples. Substantially, it results that while civil marriage (not religious) and cohabitation of fact between heterosexual do not meet ethical difficulty of acceptance by the civil society, it surprises the scarce consent (6%) with legalization of homosexual couples. This indicates the existence of a strong resistance towards LGBT people⁸².

A different inquiry investigated morality of teenagers of San Marino aged 14-18. It was submitted between December 2007 and January 2008 to a sample of 77,6 per cent of adolescent

⁷⁹ Cit. newspaper *L'Informazione*, 2009b. Cit. Bolognini, 2008, pp. 1-2.

⁸⁰ Official site of Association LGBT of San Marino, p. 12

⁸¹ Cfr. Bolognini, 2008, pp. 1-2.

⁸² Cit. Beccari E., 2007, p. 20-21.

students of San Marino frequenting secondary schools in territory and out of territory, by the Secretariat of State for the Education, Culture, University and Young Policies, in collaboration with the national Commission for UNESCO, the Formation Department and the Communication Department of the University of San Marino and the scientific-educational unit of Forlì (Italy) of the University of Bologna⁸³. The theme investigated regarded the lack of balance of gender relation (between man and woman) looking for opinions and choices of normative character of youths of San Marino and by which they interpret the social context and intervene in relationships⁸⁴. Therefore, the assignment of this research is not study the quantitative diffusion of specific forms of abuses, nuisances and sexual violences, esteeming for example number and type of maltreatments verified among the Sammarinese student population, on the contrary to analyse the cultural deeply-rooted of stereotypes, representations and social conventions towards violence.

For this reason, the main theme of homosexuality was intentionally placed among an ample repertory of deviant and criminal behaviours⁸⁵, asking the respondents for an assessment of their opinion on the seriousness on homosexuality with inclusive values in interval from 1 to 5 (at all serious/very serious). The judgement sprung on acceptability towards homosexuality has shown a divided opinion of students: 45,9 per cent considers homosexual behaviour as “enough/very serious”, 40,5 per cent holds it as “not at all serious/not very serious” and, among these, 28 per cent does not consider homosexuality (gay man or lesbian woman) a great sin.

According to Mr. Michele Pazzini – he is the Secretary-General of LGBT Association of San Marino - «28% is a good result referring to the backward culture on sexual orientation in which San Marino lives ... »⁸⁶.

However, the investigation has shown that homosexuality is considered as immoral from little less than half of younger people of San Marino. Following this, only a minority does not

⁸³ De Luigi N., Perillo C., Santangelo N., Zurla P., 2009. Cit. newspaper *L'Informazione*, 2009a.

⁸⁴ De Luigi N., Perillo C., Santangelo N., Zurla P., 2009, pp. 222-223.

⁸⁵ The opinions demanded to respondents on seriousness of deviant and criminal behaviours, deliberately inclusive of homosexuality, in order to see if Sammarinese society considers such condition as a crime or not, were the following: to rape a person, to go with prostitutes, to unplug thorn to person in a coma, to abort, to kill a person for interest, to turn over a pedestrian without staying to lend a help, to abduct a person to get a ransom, to falsify the signature of parent on the book of absences, to use heroin or cocaine, to kill a person for passion, not to report a person that we have seen to steal, to smoke hashish and marijuana, to accelerate with medicines the death of an elderly suffering person that does not desire to live anymore, to prostitute oneself, not to report a friend committing a theft, not to return to cashier the more money received as rest, to use tablets ecstasy, to take the bus without paying ticket, to have homosexual relationships, to purchase clothes with false brand. Cit. De Luigi N., Perillo C., Santangelo N., Zurla P., 2009, p. 228.

⁸⁶ See at official site of Association LGBT of San Marino, pp. 10-11.

consider homosexuality a great sin. Therefore, it signals the necessity, and auspice, that educational school adopts all the suitable tools to give exact qualifications about diversity, respect, sexual orientation, genus identity, struggle for civil rights, equal opportunities and freedoms, etc. While sexual difference is referring to biological difference between male and female, gender diversity is referring to role socially built that in a certain culture it is attributed to man and to woman; and it is re-conveyed unchanged from generation to generation. Instead, “equality” means mostly consciousness to be men and to be women and being au pair⁸⁷. This concept of equality recalls explicitly the relation with common life where everybody develops his/her identity in the respect of biological, cultural and social differences of other people.

A culture believing to the equality guarantees and defends uniqueness and validity of every experience and it protects the right of each subject to take word like person in the relationships of community.

3.3

CRIMINAL LAW – HATE CRIME

This section addresses a number of dimensions related to hate crime and hate speech, including the prevalence of physical assaults motivated by sexual orientation or gender identity (distinguished from other kinds of hate crime motivated by, for example, racism or anti-Semitism), the character of the assaults and the perpetrators, procedures for reporting incidents of hate crime and police or other authorities’ methods for responding to such reports and attacks on LGBT venues.

In San Marino there are no reports on the extent, character, perpetrators or victims of hate crime. San Marino has no court cases identifying incidents of hate crime and/or hate speech related to homophobic offences, nor phenomena of ultra-nationalism, xenophobia or racism, nor attacks against LGBT venues. There are no acts of hate speech by public figures (such as police authorities, teachers or religious at school).

According to an interview with representatives of the two National Equal Bodies – the *Commission for the Equal Opportunities* and the *Authority for the Equal Opportunities* - unfortunately there is notice of violence, mostly domestic violence, involving men and woman;

⁸⁷ Cit. L. Gobbi, 2009, pp. 2-4.

anyway, there have not been cases of violence against LGBT persons or reported experiences of homophobic/transphobic violence within families.

An interview for this report with the Gendarmeria - one Corp of the Order's Forces of San Marino – asserts that there have been no reported complaints and/or cases with regards to violence either verbally or psychically against LGBT persons.

An interview with the Association LGBT of San Marino confirms these data.

Besides the actions mentioned at § 3.1.1 that the Sammarinese legislator has dictated to assure equal rights to each individual, the San Marino legal system takes directly into account in its legislation whether or not hate crime, hate speech or violence, are committed with homophobic intent (by *Law n. 66/2008* titled “Dispositions on racial, ethnic, religious and sexual discrimination”) or on the grounds of sexual orientation (by *Law n. 97/2008* regarding the “Prevention and repression of violence against women and of gender”). Furthermore, homophobic intent and violence breaking sexual liberty are aggravating circumstances, prosecutable *ex officio*, that is prosecutable directly by the Judicial Authority without the necessity of report by victim or another person. The prosecutable *ex officio* improves the victims' protection to the attempts of the offender to pressurise (at least psychologically) so that they do not sue report them or lead them to remission. These provisions place San Marino in line with the most advanced international positions⁸⁸.

The cited *Law n. 97/2008* is finalised to extend the protection against each form of physical and/or psychological violence and it represents an excellent result on civil, legal, cultural and social grounds⁸⁹. Trough *Law n. 97/2008*, San Marino combats discrimination against women in all spheres (including marriage, partnership and other family relations not necessarily implying marriage relationship nor cohabitation), it defends minor victim or witnesses of violence and, at the same time, it extends the protection to multiple discrimination taking place by violence on the grounds of sexual belonging (*Art. 1*). The notion of *violence* appealed by *Law*

⁸⁸ The actions addressed by those provisions place San Marino in line with nine EU Member States: Belgium, Denmark, Spain, France, The Netherlands, Portugal, Romania, Sweden, a part of the United Kingdom, i.e. Northern Ireland. The same provisions differ in four EU Member States (Germany, Estonia, Ireland, Lithuania) where the criminal law contains provisions making it a criminal offence to incite hatred, violence or discrimination on the grounds of sexual orientation, but the same law does not consider homophobic intent as an aggravating factor in common crime. While one EU Member State (Finland) considers homophobic intent an aggravating factor in common crime, it has no provisions making it a criminal offence to incite hatred, violence or discrimination on the ground of sexual orientation (cit. *FRA*, 2009c, p. 37.).

⁸⁹ Cit. Relation on bill “Prevention and repression of violence against women and of gender”, available at official site of Great and General Council, 2008b.

n. 97/2008 is borrowed from the *Recommendation n. 5* dated 30 April, 2002, adopted by the Committee of Ministers of the *Council of Europe* (of which San Marino is a Member State), pointed on parity between men and women, meaning by violence every action “*on the grounds of sexual belonging concerning or will concern, whoever is the butt, harms or pains of physics, sexual and psychological nature*” (Art. 2). Consequently, also LGBT persons suffering of blameworthy actions because of their sexual orientation or gender identity can obtain protection through this norm.

Law n. 97/2008 through a provision of a mechanism of efficient measures gets civil, criminal and trial protection to victims. In this sense, the State itself takes charges to assure protection and security to victims, psychological support, first care and adequate information to them. Synthetically, the measures of protection are:

- to guarantee protection of the victim’s discretion and intimacy, in order to remedy the risk that violence is not denounced to avoid the social judgement (*Art. 16, Protection of victim’s discretion*);

- for the same reason, the victim does not have to bring the case to court to have protection, because it is the same State that prosecutes violence through its own public institutions. In this sense, *Art. 19* places *duties to signalize* to Social Services, Order’s Forces, health professionals, teachers⁹⁰; and *Art. 20 (Right of intervention in the criminal trial)* legalizes the *Authority for the Equal Opportunities* to take legal proceedings independently from the legal action by victim⁹¹. The power to take part in the proceeding reinforces the victim’s protection and the damage caused to that victim is considered damaging to the interest regarding of the whole community, not only of the victim;

⁹⁰ *Art. 19, duty to signalize*: the Social Services, the Order’s Forces, the health professionals, the teachers have the duty to signalize to the Civil Judge the facts of violence known for reasons of their office or their profession, establishing that the signalling does not consist of violation of professional secrecy. This is propedeutic to the adoption of specific measures for the victim’s protection. There is a fixed administrative sanction (of euro 500,00) for the violation mentioned.

⁹¹ *Law n. 97/2008* introduces a new organism named *Authority for the Equal Opportunities*, assigning to it the power to act on its own initiative or on signaling from anyone who has an interest (*Art. 3, co. 4*) and to intervene in civil proceedings and in criminal trials, in order to protect victims of violence (*Art. 34, co. 1*). This means that those who are legalised to demand the inhibitory protection for the violence suffered are not directly the injured party, but the *Authority for the Equal Opportunities* that takes legal proceedings independently from the legal action by the victim. Always, and in any case, the victim has the right to take legal proceedings against the offender, in order to obtain compensation for damages. The powers assigned by this Law to the *Authority* are the accomplishment of the right to intervene in administrative and civil proceedings and in criminal trials to defend general interests regarding to equal opportunities, already recognised to the *Commission for the Equal Opportunities* by *Art. 2 of Law n. 26/2004*, in order to promote and to guarantee equal rights among citizens. In order to conjugate competence, responsibility and efficiency as to various points regulated by the present *Law n. 97/2008* on prevention and repression against violence of gender, a slender and specialistic composition of the *Authority (Art. 33)* is provided. Accordingly to the public nature of the interest protected, the legal assistance in proceeding by the *Authority* is entrusted to State legal profession and the judicial acts are duty-free (*Art. 3, co. 8*).

- the victim does not have to pay if case is lost (*Art. 17, legal assistance*): the offender pays in the case of his/her conviction;

- every victim of physical and/or psychological or homophobic violence, can trust state institutions in the area of protection from violence, confidently they can report homophobic violence to the police. A mechanism of police registration of the reporting officer encourages reporting hate crime (*Art. 32, request for help to Order's Forces*)⁹². Such a data-bank gathers information both to identify the incident and to face the immediate emergencies drawn up by the intervention of public institutions more suitable for giving the necessary assistance to victims and to prosecute the offenders. The informational system implemented by the Gendarmeria furthers a strong co-operation among public bodies, involving teachers, Medical Corps, Gendarmeria, Neuro-psychiatric Service, Civil Judge and Criminal Judge to take evidence for proceedings against the offender.

With *Art. 13* of this *Law n. 97/2008* a new crime has been configured in *Art. 181bis* of the Criminal Code, called "*Persecution Acts*", inclusive of *mobbing* and *stalking*. Such kinds of crimes consist of behaviours often innocuous if considered alone but seen together they configure a serious invasion of the personal sphere of the victim.

The problem of evidence for the responsibility of psychological abuses remains the crux and the greater difficulty, being for their nature of abuses devoid of documentable checks. So, the Judge will call an attentive, wise and competent estimate of testimonies mostly of the injured person availing himself, if necessary, of professional subjects on reliability of this latest. For example, an LGBT employee suffering of "mobbing" in the workplace must prove both the connection between injurious event and the accomplishment of working services, and the damage

⁹² Practically, when the Gendarmeria has notice of events of violence – for example from neighbours of the victim, social services, teachers at school and/or health professionals giving first aid who are obliged to denounce the fact of violence known for reasons of their office or profession (*Art. 19*) - immediately it executes precautionary interventions to protect the victim (*Art. 32*), and it is not necessary for the victim to bring an action against the offender. The Gendarmeria accomplishes to create a strong co-operation among public bodies: i.e. it signals the fact to the Neuro-psychiatric Service of San Marino, so that social services come into contact with the mistreated person to give him/her psychological support, first-aid care and adequate information, to allow him/her to consider possible actions and to reorganise the domestic management (*Art. 22-23*) ; furthermore, it creates a comprehensive databank that consents to the Civil Judge to acquire precise information in order to protect the victim, and to the Criminal Judge to acquire evidence in support of precautions' orders (*Art. 32*). The Neuro-psychiatric Service transmits the notice to the Tutelar and Civil Judge, that values the necessity to begin proceedings against the offender. Than, if the victim brings an action against the offender through his/her advocate, the indictment is unknown to the Gendarmeria and it is transmitted directly to the «Criminal Judge». In one way or another, the fact of violence has a good change of punishment.

of psycho-physical integrity which formality of verification ask for a psycho-somatic examination, with further loss to the victim.

Furthermore, the provision *n. 97/2008* protects the sexual intangibility of minors but not their sexual orientation matured before eighteen. While norms to protect minors have the aim to safeguard *sexual intangibility*, that is to preserve a correct development of his/her personality in the specific sphere of sexuality until the age of 18, those meant for protection of individual good do not favour a single profile, rather the identity of person so that it is not violated and degraded. On the contrary, with the completions of the teenage years, that is prior to the coming of age, the under-age person gains the liberty to decide on his/her sexual life having already matured his/her natural instinct of feeling and being a person. Therefore, it would be appropriate to define the different individual spheres of minorities, both of “negative” liberty referring to sexual intangibility (liberty *from* external interferences) and of “positive” liberty relative to individual personality (liberty *to* live in a dignified way on the grounds of his/her own predilections), so that the correct identification of the conceptual sphere does not take the risk to mistake the plans of intervention of the provision making them neuter. Events of bullying at school are only an example of violence – psychological in this case – offending both sexual intangibility of LGBT adolescents and their sexual orientation or gender identity. The would-be distinction of both aspects of liberty may provoke the activation of backward measures, impotent steps, from Order’s Forces and Magistrature, compelling the victim to confront sanctions, disbelief, repression and misdiagnoses for behaviour. The risk is to nullify the protection of individual rights.

Though these lacunae - that it is desirable they will be resolved in order to avoid to mistake the plans of intervention for protection of individual rights - the Sammarinese legal system on matters of violence, hate crime and hate speech recognises all the presuppositions to protect victim suffered of violence for homophobic reasons and for sexual orientation, also when these facts are committed within family and against minors.

The inexistence of data on cases of violence on grounds of homophobic intent and sexual orientation does not permit to value the deterrent effect of these measures protecting victims. Clearly, even though presuppositions exist to protect victim of violence on the grounds of sexual orientation too, the provision is recent and as each law it lives in the legal system through its interpretation and application from jurisprudence.

Nevertheless, through these dispositions on the matter of hate crime, San Marino protects the individuality of everybody, without exception for sexual belonging and orientation, and it confirms its attention in the effective protection and promotion of fundamental rights considered prerequisites of democracy, freedom, security and justice, as set out by *Articles 6 and 7 of the Treaty on European Union*. However, the same dispositions aligns the Republic of San Marino within the most advanced positions. These positions have also been solicited by the *European Council* with the promotion of a proper Campaign to prevent and to combat violence against women and of gender, whose program has been approved on 21 June 2006, and to which also San Marino has adhered (cit. § 3).

In this section, the legislative pattern inherent in punishing serious facts of violence and discrimination attracts the attention of *Law n. 121/2004*, from which San Marino has abrogated the *Art. 274* of the Sammarinese Criminal Code concerning penal condemnation with imprisonment of «*acts of lust*» committed in public place among same-sex persons (such as, for example, an embrace or a kiss), considered more indecent of the obscene acts offensive against decency (*Art. 275 c.p., Obscene Acts and Representations*). In fact, the acts of lust among same-sex persons was punished with imprisonment of first degree *and* with disqualification of second degree from political parties and from public offices, while the obscene acts are still today punished with imprisonment of first degree alone⁹³.

3.4

FREEDOM OF ASSEMBLY, ASSOCIATION, EXPRESSION

This section regards the possibility of LGBT persons to freely exercise their right to freedom of assembly, reunion and expression.

⁹³ *Art. 274* compiled in the Sammarinese Criminal Code that came into force on 1 January 1975, was a cultural heritage of that epoch when there were no equal opportunity movements, and student movements asking for the increase of rights were just beginning. The intention to repeal this *Article n. 274* of the Criminal Code was originated by a group of citizens of San Marino promoting an “*Istanza d’Arengo*” (similar to a petition) dated 1 April 1997, that was passed but never executed (see Relation at the Bill “Abrogation of Article 274 of the Criminal Code”, 2002, available at official site of Great and General Council). Thus, the Italian Arcigay Association and Italian MP. Franco Grillini were promoting a protest against the codes of those legal systems bringing this stigma able to consider as scandalous the simple expression of one’s love-affairs in public between homosexuals. They both were called by the Cultural Co-operative “Il Macello” of San Marino and together protested in 1997 in front of the Sammarinese House of Parliament (an interview with Sammarinese A. Rossi). Though in an exaggerated manner Mr. Franco Grillini compared the Sammarinese legal system to those of uncivilised countries (cit. F. Grillini, 2006), his initiative was followed by a mobilisation of the public authorities to review the disposition that brought to, exactly, its abrogation.

Political Institutions of San Marino as to the rights of assembly, of association and expression of LGBT persons

The right of reunion and association and the right to freely express one's own opinion are fully protected by Art. 6 of the Sammarinese *Declaration of the Rights of Citizens*, besides the *European Convention for the Protection of Human Right and Fundamental Freedoms*. Therefore, the same rights can be subjected to restrictions justified by preponderant imperative of *Internal Public Order*⁹⁴. Towards opinions and inner determinations, liberty of expression and association, San Marino goes in a direction that privileges the liberty compared with restriction⁹⁵.

In San Marino, there have never been public debates or conventions concerning LGBT rights depicted as unnatural, diseased, deviant, linked to crime, immoral or socially destabilising, by political figures or by media. There are no known instances of sites used for public debates being blocked for congresses or seminars concerning LGBT rights. In San Marino there are no known acts of crime, neither activity of neo-fascist groups against LGBT venues nor acts of violence against the community site of the Association LGBT of San Marino.

The various initiatives concerning LGBT issues have not met interferences or any disapproval, neither by Authorities nor by the media, in full respect of the freedom of expression and assembly. National Order's Forces have never been reluctant to cooperate with LGBT organisers. Some of the appointments advanced on LGBT issues have had the positive participation of the Sammarinese Government, as testimony of good will to sensitise and to raise awareness around sexual orientation and gender identity with its citizens, to spread understanding of the needs LGBT and to favour the social integration of diversity.

Many initiatives were organized in 2008r by the new-born LGBT Association of San Marino:

⁹⁴ Art. 6, co. 1, of the *Declaration of the Rights* establishes: "*The Republic recognises to everybody the civil and political rights. Particularly, the liberties of individual, domicile, residence and expatriation, reunion and association, manifestation, belief, of conscience and faith are guaranteed. The communication's secrecy is protected in any way it happens. The Law can limit the exercise of such rights only for exceptional cases of serious reasons of public and interest order*". In the Sammarinese legal system, the exception of "Internal Public Order" represents a fundamental guarantee to safeguard internal coherence, integrity and agreement of the whole institutional system (cit. C. Tamellini, 2003, p. 231), to face situations taking under discussion values that cannot be disregarded or that are of vital interests of the single State community. For example, it is not possible to admit those associations that do not reveal their associative aims or that keep secrecy of followers (the secret has not to be mistaken with discretion); the protection of public moral and religious sentiments are other purposes that can justify wide restrictions. San Marino is a laic State, i.e. neutral towards opinions and inner determinations, therefore the State cannot, in the name of public interests, alter or stop the free accomplishment of the human personality; but it does not mean that system has to consent to put into practice behaviours offending the rights and the dignity of others (definition cited on the Relation of the Bill "Prevention and Repression of Violence against Women and of Gender" of the Republic of San Marino, p. 6, available at official site of *Great and General Council*).

⁹⁵ Cit. A. Mularoni, 2006, pp. 389-390.

- the public conference held by the same Association LGBT of San Marino, in February 2008, entitled “*Does diversity exist?*” (original title “*La diversità esiste?*”), where the theme on diversity was discussed. Three Ministers of San Marino contributed as keynote speakers: Dott. F. Michelotti, the then-Secretary of State of Instruction and Culture; Dott. M. Chiaruzzi, the then-Secretary of State for Health and Equal Opportunities; Dott. I. Foschi, the then-Secretary of Justice;
- the celebration of the “*Worldwide Day against Homophobia*”, took place on 17 May 2008, in San Marino, where the French documentary “*L’Homophobie, ce douloureux problème*” (translated in English language is: *Homophobia, this grievous problem*) was screened. Cinema is an excellent tool for circulation of ideas. Also this event was supported by the above mentioned three Secretariats of State: for the Instruction and the Culture, for the Justice, for the Equal Opportunities;
- participation – and its debut – in the “Pride” in Bologna on 28 June 2008. Among the demonstrators there were also numerous Sammarinese heterosexual couples, regularly registered to the association⁹⁶, proving their support to the equal rights without distinctions on the ground of sexual orientation;
- *San Marino International Festival* (SMIAF) was the first edition of the festival of Sammarinese and International artists and took place in the historical Centre of San Marino on 23 August 2008. During the demonstration, the Association LGBT of San Marino set out a photo session entitled “*Next-door Neighbour*” (original title “*Vicini di Casa*”). It constituted of six photographs taken by the photographer Marco Vincenzi during the Pride of Bologna the same year, reproducing those moments not particularly significant but equally crucial on that day, in order to show up the daily normality. Each single picture was positioned on one of the six colours of the rainbow of the gay’s flag, that took up the whole side of exhibition. The showroom was in the cloister of the ancient ex-Convent S. Chiara inaugurated on 1609 and currently used by the Sammarinese University. During the Festival SMIAF, Mr. Michele Pazzini (Secretary-General of Sammarinese LGBT Association) has performed a monologue dedicated to life of Harvey Milk – he was the first city councilman openly gay - on the occasion of the thirty-year of his died;

⁹⁶ Cit. S. Bolognini, 2008, p. 1.

- review «*Towanda*», organised in October/November 2008, with a cycle of four screenings dedicated entirely to women's homosexuality. The meetings took place in San Marino (at public site of the Social Centre of Fiorentino) and they saw a large presence, also of persons not registered at the Sammarinese Association LGBT proposer the review;

The vivacity of the Sammarinese LGBT NGO continued at the beginning of 2009 year, through two informative and awareness-raising campaigns on the whole Republic's territory by affixing posters. One of these posters recited "*Mama knows about it*" (original title *Mamma lo sa*), to encourage the *outing*, that is to encourage LGBT people to disclose their sexual orientation/gender identity. The second message entitled "*Make your voice heard*" had the aim to improve young persons' awareness in school to denounce their experiences of bullying.

Further initiative without impediments has been the already cited (§ 3.3) protest happened in 1997 at the Square of Pianello, in front of Public Palace (our Parliament building), on the initiative of the Sammarinese Cultural Co-operative "Il Macello" and with the participation of the Bolognese deputy Franco Grillini (2006), at that time President of the Italian LGBT NGO *Arcigay*: "*I have make it – he saies – to arouse the consciences*"⁹⁷. Following to this initiative, our *Great and General Council* discussed and agreed the abrogation of *Art. 274 criminal code* that condemned by prison the acts of lust in public places between same-sex persons.

Supports to the LGBT instances from the Government Bodies

Besides the above mentioned efforts made by the Sammarinese Government to facilitate the Association LGBT in creating public awareness on LGBT issues, the government bodies do not give further supports to the LGBT instances, for example public services and/or funds, at the contrary to the general recommendations pointed out by the European Union institutions in order to ensure conditions to encourage LGBT political or cultural activities. Because of this lack of support, the right of assembly can result greatly limited, and impact of issues and integration of LGBT person could result modest. The Association LGBT of San Marino is a non-governmental organization created and living without government funding. Earlier this

⁹⁷ F. Grillini, 2006.

Association LGBT will have anymore a seat of its own, conceded only one year ago by the previous government⁹⁸.

During 2007 and 2008 years, the *Great and General Council* has rejected four “*Istanze d’Arengo*” (like petitions) asking for LGBT issues. In particular they were regarding to:

- *Istanza d’Arengo n. 55*, was dated 7 October 2007, sustained by a signing of well undred citizens. It proposed to the Sammarinese Government to discuss the promotion of public debates on discrimination, in order to deepen the knowledge and the education on matter of equal treatment of LGBT persons. The petitioners proposed for example to promote public debates on various aspects of discriminations detriment the minority LGBT, to combact homophobia and bullying at school through education on social diversity, to introduce suitable and functional dispositions for protection of persons apart from sexual orientation and gender identity and sexual orientation⁹⁹;
- *Istanza d’Arengo n. 11*, was submitted on 4 April 2008. The subscribers citizens of San Marino asked that the «*World Day Against Homophobia*» (IDAHO) was celebrated on 17 May every year, as an expression of condemnation against discrimination on grouds of sexual orientation and gender identity. The celebration is born from decion of WHO/OMS in 1990r to erase homosexuality from the list of mental illness. Therefore, it is recognised that homosexuality and bisexuality are not illness but variations of sexual orientation¹⁰⁰. At present, more than 40 Nations observe the World Day Against Homophobia;
- *Istanza d’Arengo n. 12*, was submitted on 5 October 2008, both by citizens of San Marino and by LGBT Association of San Marino. The petitioners asked the Government to draft a strategy to fight bullying in the schools of San Marino of any order and extent. The proposed strategy consisted both of didactic-formative activities inside the existing school matters and of introduction in every school of a qualified school consultant to support students with an emotive guidance. The emotive consultant should be an health professional of mediation - like the model introduced for example in Wales - directly accessible by student without authorisation of his/her parents or teachers, contributing to formation and growth of the student, contributing to his/her sanity without those problems

⁹⁸ Cit. M. Pazzini, on *L’Informazione*, 2009b.

⁹⁹ Available at official site of Consiglio Grande e Generale, 2008a.

¹⁰⁰ Available at official site of Consiglio Grande e Generale, 2008d.

that often influence the school way such as scarce performance and definitive abandon of school¹⁰¹;

- *Istanza d'Arengo n. 13*, was submitted on 5 October 2008, signed by citizens of San Marino and by the Association LGBT of San Marino. They asked for adopting 1 December of every year as «*World AIDS Day*» - as it was already doing for example for the “world-day without tobacco” sensitizing against harms of smoke – to celebrate the first case of Aids diagnosed on 1 December 1981. The “World AIDS Day” was initially organised by a specific Organization of the United Nations related on AIDS called *UNAIDS (Joint United Nations Programme on Hiv/Aids)*; actually, the policy commitments on AIDS is under the responsibility of the Non-Governmental Organization *WASNGO (World Aids Campaign)* adopting the banner “*Stop AIDS. Keep the Promise*”. During last years, the “World AIDS Day” has been adopted by numerous Governments, International Organizations and Associations in lots of part of the world, to increase conscience of worldwide diffusion of virus HIV¹⁰². Even if the petition was rejected, on 1st December 2008 the Association LGBT of San Marino celebrated the day in San Marino (inside of the Commercial Centre “Atlante” of Dogana) in any case.

It is not possible to know in brief time, reconcilable with pledges of this report, about the “arguments” of these rejections by the Sammarinese Council, to have contents, values and aims contained in their political message.

Therefore, an evident political message is that of the National Body responsible for the equal treatment named *Commission for the Equal Opportunities*, which interview with its Stakeholders confirms the full availability of the Bodies of San Marino to face LGBT rights, to carry on precautionary activity and of contrast against every kind of discrimination, on the grounds of sexual orientation also, in accordance to its aims of promoting and guaranteeing equal rights among citizens (by *Art. 2 of Law n. 26/2004*, cited at § 3.3). Till today, the *Commission for the Equal Opportunities* has faced cases of domestic violence against women and minors, but not events on discrimination against LGBT persons. The fact that cases on inequality against LGBT persons are not faced by the Commission lets well hope – these stakeholders say - that besides

¹⁰¹ Available at official site of Consiglio Grande e Generale, 2009b.

¹⁰² Available at official site of Consiglio Grande e Generale, 2009a.

wisecrack named by singles, even annoying, heavy episodes of violence and/or insult have not been verified.

3.5

FAMILY AND OTHER SOCIAL ISSUES

The refusal of discrimination's forms on grounds of sexual belonging and sexual orientation, let alone the promotion of equal rights, have determined everywhere the evolution of constitutional rules to regulate the relation of cohabitation between couples not bound together by a matrimonial tie. The themes here following consider the Sammarinese rules on matters of reunification, of family right and adoption with particular referring to LGBT couples.

The Sammarinese legislation on the matter of reunification

On the grounds of legislative dictations of San Marino *n. 95/1997* and *n. 111/1997* on the matter of permit of stay and residence, LGBT persons do not have access to family reunification with foreign partners in San Marino. In fact, these rules provide for the family reunification only for family affairs between men and woman, parents and child, and those cohabiting with children. There are no official data on the existence and, in affirmative case, to the number of Sammarinese people living abroad with a foreign partner. Lawsuits currently pending involving citizens of San Marino married in another EU country and asking for recognition of their status as a couple in San Marino do not result.

The Sammarinese legislation on the matter of the family right and cohabitation «more uxorio»

On the grounds of *Law n. 49/1986* on reform of the family right, San Marino does not recognise same-sex matrimony, nor *partnership* (registered union) between LGBT persons.

Same-sex orientation is a peremptory matter of nullity of the matrimony mentioned by *Art. 132, Law n. 49/1986*, because it is considered "sexual deviation" such as to obstruct the normal course of married life. This Sammarinese category of nullity has retroactive consequence, i.e. as though matrimony has never existed.

Law n. 49/1986 concerning the reform of family right aims to bring out the value of the family as natural social life not necessarily founded on matrimony but on a stable and lasting union. Within the rules of *Law n. 49/1986* there is the recognition of the reality permeating modern society called *cohabitation more uxorio* - that is the so called “union of fact” beyond the juridical scheme of marriage - when lasted unbrokenly for fifteen years¹⁰³. So the *cohabitation more uxorio* is placed as a logical consequence of the essential elements of marriage which, on the grounds of *Art. 1, co. 1, Law n. 49/1986*, are: the union between men and woman, the monogamous and heterosexual union. The absence of those principles causes the end of the essence of family. At the same way, *Art. 12* of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* guarantees the right of matrimony in its formula more classic¹⁰⁴.

This premised, it is comprehensible that the union of fact between same-sex partners is not recognised by the Sammarinese legal system. It makes exception the right of each individual to live in accordance with one’s choices, ideas and personal experiences ascribed to the sphere of individual right and not to the traditional materially constitutional concept of family institute based on heterosexual and monogamous union.

To evidence that equality between same-sex cohabitation and opposite-sex cohabitation still is far away, it is enough to know that equality between opposite-sex cohabitants and married couples is not entirely realised to this day (*Decree n. 42/2003* on the matter of public subsidised building requests matrimony to the profit of public easy-term loans granted for the purchase or construction of new houses), although the recognition of *cohabitation more uxorio* has provided an increasingly evident secularization¹⁰⁵.

¹⁰³ Like this, *Art. 107* qualifies as familiar the cohabitant giving one’s services in the family business; and *Art. 124* extends the rules established on the matter of judicial separation - regarding to fosterage and parental authority (*Art. 112-113-114*), familiar dwelling-house (*Art. 115*), alimony right (*Art. 117-119*) – to the non-mutual consent interruption of the *cohabitation more uxorio* lasted unbroken for 15 years. When the continuous relationship for 15 years has passed, juridical binding obligations between the partners arise even if they are not married. For example, they will be extended the right of mutual moral assistance, the common responsibility for debts following the union, the rights of succession headed from surviving cohabitant, a system of universal community of goods, the payment of alimony in case of separation, the succession of cohabitant in the lease of dwelling-house’s immovable, social-health services and generally those fiscal easy terms normally recognised to married couples, the right to assist the partner in hospital and to participate in decisions regarding his/her health and life and the right of adoption.

¹⁰⁴ A. Mularoni, 2006.

¹⁰⁵ Further qualification of the concept “relationship of fact” is given actually from the recent Relation of bill n. 97/2008 (available at site of the *Great and General Council*, 2008b), according to the familiar relationship is “[...] a community of usual and stable life, that leaves apart from the simple existence of mere relations of assistance and solidarity and from the simple cohabitation”. Therefore, the familiar relationship is characterised from a community of usual and stable life, not episodic,

But with the lack of judge's pronouncements on this matter, it is not possible to confirm with certainty whether the discipline on cohabitation *more uxorio* can not be applied to cohabitations between same-sex couples.

It is beyond doubt, the real obstacle that concretely has prevented to the present day the complete regulation of the legal cohabitation between same-sex couples is of an ideological nature, because to recognise the legitimacy of same-sex cohabitation has, as G. Zanetti remembers (2003), "*an indirect but real impact*" on the matrimonial institute¹⁰⁶. Besides, the last reason – as statistics testified – is that same-sex couples in San Marino represent a void percentage, so that there is no a true urgency to intervene.

Actually, the non-regulation of juridical condition of same-sex union can strongly hinder the individual freedom of people that, as Bonini Baraldi writes (2003), "*want to have access to a juridical statute but are unable of it*". The non-protecion of such situation is translated into an illegitimate discrimination on the grounds of sexual orientation, today expressly forbidden by Art. 21 of the *European Union Charter on fundamental rights*, besides by the *Declaration* dated December 18th, 2008, promoted by the *United Nations General Assembly* signed by San Marino, as well as the Recommendation *Rec. (2002) 5* of the *Committee of Ministers of the Council of Europe* to which San Marino adheres (cit. § 3).

In order to promote substantial equal rights, the question of family rights and the institution of registries of civil unions and parenthood are high on the agenda of the Association LGBT of San Marino¹⁰⁷.

The Sammarinese legislation on matters of adoption, foster child institute and assisted conception

In San Marino the opportunity for LGBT couples to adopt children does not find favourable acceptance. Nor does the relation between children and co-parents in LGBT families have legal recognition.

and also it can exist independently from a family tie or relation of next of kin and it can leave apart from reciprocal moral and material assistance. Nevertheless, the purposes pursued by this *Law n. 97/2008* are, as mentioned at § 3.3, to guarantee protection against violence, while the rights and duties of married couples and cohabitants remain regulated from the cited *Law n. 49/1986* on the matter of family right.

¹⁰⁶ Cit. M. Sesta, 2003, p. 176.

¹⁰⁷ Cit. A. Ceccoli, 2008, p. 1-2.

Art. 58 and 62 of Law n. 49/1986 on the family right establish that a single person can apply for a foster child and/or adoption. Because these dispositions do not contain any clarifications on sexual orientation or gender identity for the right of adoption, their formulation seems to recognise the possibility to adopt for same-sex couples too. But the experience with this rule in the Sammarinese jurisprudence is not favourable, therefore in practice no single, among the Sammarinese population, results having fostered or adopted to the present day.

As regards assisted conception, in the legal system of San Marino the donor insemination institute is absent. Consequently, couples desirous for a child only have the option of assisted conception to foreign structures. In this case, they will be subjected to the legislative dispositions on this matter in force in the specific country where the fact would be produced. In this legal situation, LGBT couples cannot turn to the structures in Italy for assisted conception, because the Italian legal system admits this institute only for heterosexual couples.

The high costs for assisted conception and their exclusion from the national health service allow its admittance only to rich couples.

Nor objective datum regarding San Marino tells of cases of assisted insemination by LGBT citizens of San Marino.

An example of agreement between homosexual partners: the “pact of cohabitation”

A typology of contract that Italy for example knows far-back already is the so called “pact of cohabitation”, which validity may be admitted on principle in San Marino also. The “pacts of cohabitation” are accords that partners (heterosexual or homosexual) stipulate in order to regulate patrimonial aspects of their relationship¹⁰⁸. It is an act of contractual and private nature, i.e. it falls within the exercise of negotiation autonomy, and it is stipulated in the application of the general norms established by the Italian Civil Code on theme of obligations. Therefore, in conformity to the Italian *Art. 1174 Civil Code* by which performance object of obligation must be susceptible of economic evaluation, these accords between partners must exclusively concern patrimonial available rights: for example, the property relationships among cohabitants, the constitution of a common fund for the expenses effected in the interest of the family nucleus. Consequently, the accord cannot be the object of agreements on personal aspects commonly tackled by cohabitants of opposite sex and arising in the communion of life founded on emotional

¹⁰⁸ Matteo Bonini Baraldi, 2003, p. 165. Cit. Michele Sesta, 2003, p. 175.

ties, assistance and solidarity: such as, for example, the obligations of fidelity, of moral assistance, difficulty of access to information and decisions concerning partner's health.

Italian jurisprudence has recognised that such contracts are not contrasting with the good custom, since the *partners* mean to regulate themselves and to guarantee reciprocally their future, setting economic bases for the constitution of a family community, although only of fact¹⁰⁹. Besides, they do not modify the traditional concept of family¹¹⁰, because their union is regulated by norms of different nature than those of the family institute.

Frankly, without national legislation the rights of LGBT persons cannot have practical value¹¹¹. As M. Sesta explains (2003, p. 173), it's about a "light" discipline, decidedly thin and insufficient for more aspects, mostly directed to protect the weak partner towards a third party and, only in a narrow manner, towards on cohabitant. Many profiles remain excluded, among which those of patrimonial nature: for example, the patrimonial consequences to breakup cohabitation, the inheritance because of death, difficulty of cohabitant to follow in the lease of the real estate used as family residence, exclusion from the pension of a dead partner.

3.6

EMPLOYMENT

This section examines a variety of issues regarding to discrimination on the grounds of sexual orientation in employment, namely how LGBT persons access their rights in the labour market and seek redress for discriminatory treatment, the invisibility of LGBT persons, evidence of the level of experienced discrimination and homophobia in the workplace, the prevalence of discrimination in the labour market, employers' attitudes and responsibilities towards LGBT persons. Mostly, it is in the sphere of the relation of subordinate working that it is necessary to discuss the gender's discrimination – where for example it can persit the phenomenon of occupational segregation – because here its consequences can be more damaging that elsewhere

¹⁰⁹ The lawfulness and the validity of the pact of cohabitation stipulated by the couples of fact has been affirmed by the same *Court of Cassation* with Sentence 8 June 1993, n. 6361: "...[the cohabitation is] *not contrary neither to imperative norms, because norms that forbid it do not exist; neither to the public order, that includes the fundamental principles that inform the legal system; neither to the good custom understood ... as the complex of the ethical principles constituent the social ethic in a determined time and in a determined place.*"

¹¹⁰ Cit. Beccari E., 2007, p.19.

¹¹¹ Cit. Bertone, 2008.

and it can create strong limit to the development of the human person, in considering that the work is the main tool of social inclusion and one of the ways to assure a free and dignified existence.

San Marino mentions non-discrimination on the grounds of employment as one of the fundamental principles by its *Art. 9, co. 1*, of the *Declaration of the Rights*, that recites: “*The work is right and duty of each citizen ...*”. This principle has concrete fulfilment by specific legislative rules, according to the following International dispositions on the matter of elimination of every form of discrimination at work¹¹²: the *Employment Equality Directive 2000/78/EC*¹¹³, although it has not been implemented from San Marino because it is not an EU Member State; the *Convention n. 100 of 1951* adopted by the *International Labour Organization (ILO)*¹¹⁴, ratified from San Marino with *Decree n. 53/1985*; the treaty *European Social Charter of 1961* of the Council of Europe¹¹⁵, to which San Marino adheres.

Exactly, the specific dispositions adopted by San Marino to regulate the right of equal treatment in employment are:

- *Law n. 7/1961*, regarding the protection of labour and of workers employed in the private sector. It establishes for the first time rules on the matter of equal services between man and woman, physique and moral protection of employees, social security and assistance guaranteed to all employees without any distinction. This rule establishes that private working relationship must be disciplined by the Collective Contract of Labour, drawn up between registered Syndicate Confederations of employers and employees (*Law n. 7/1961, Art. 8*). The Collective Contract of Labour has *erga omnes* efficacy and relative inviolable¹¹⁶, i.e. it has compulsory efficacy to all employees pertaining to the categories to which the Contract concerns (*Art. 9, Law n. 7/1961*), therefore without any discrimination; and in case of concurrence of several Contracts, the most favourable clauses to employees will be applied. In San Marino, the Collective Contract of Labour between syndicates is particular because it has Lawforce, regulating institutes that

¹¹² Precisely, such International dispositions sanction the right of the equal opportunities without discriminations on the grounds of sexual orientation and they impose to the Member States the adoption of suitable measures in order to guarantee the enforcement of such principle in those areas regarding access to work, the conditions of employment, remuneration and career advance included.

¹¹³ Available at official site of the *Council of the European Union*.

¹¹⁴ Available at official site of *ILO*.

¹¹⁵ Available at official site of the *Council of Europe*.

¹¹⁶ G. Guidi, 2004, pp. 139-144.

elsewhere, particularly in the Italian system, find footing in the Constitution, in the Civil Code and in the Labour Statute;

- *Law n. 23/1977, Art. 7*, prohibits the dismissal by reason of free opinion and expression;
- however, it is only with *Law n. 40/1981* that it is ratified the full and complete parity of the conditions between employees of different sex. Its *Art. 1* expressly prohibits every form of discrimination on the grounds of sex as regards access to work at all levels of professional hierarchy. Derogations to these dispositions are admitted only for particularly heavy functions, established by Collective Negotiation, i.e. the private negotiation cannot depart from rules on the matter of right of employment in order to not alter or attenuate its foundations.

Employment has a public function, i.e. it is our State that enacts economic and professional choices suitable for making the right of work effective and it is the same State that takes care of employment and recess from the work's contract. The employment of each worker – Sammarinese, resident or forensic – does not enter into the private negotiation, but it needs a permit granted only by the State. It will be guaranteed to each worker that equal opportunity in gaining the taller title compatible with his/her own working abilities, besides the promotion in the career. However, also weak categories will result employed in the Sammarinese labour market, i.e. those categories that have the necessity contrasting with the urgency of the employer (for example, pregnant women and for the care of child, etc.) or that don't have the necessary competences (with disability) that is why personal conditions they would not find adequate work to their abilities if not assisted. Similarly, the recess from the work's contract is excluded to the individual negotiation and it prohibits different data of the peremptory hypotheses estimated *ex lege*. Through this system, the San Marino State itself worries about the entire realization of the non-discrimination principle in the world of work. And it is precisely in this legislative situation that LGBT persons do not meet hindrances in employment¹¹⁷.

¹¹⁷ It is interesting to notice that the model selected by San Marino has been underway in Italy since 1993, when it began the privatisation of the right of public labour (as *Legislative Decree 3 February 1993, n. 29*, see at G.U., 1993), following runned in *Testo Unico Legislative Decree 30 March 2001, n. 165*, see at G.U., 2001). Instead, the liberalisation of the private labour market took place in 2003r (and precisely with *Law 14 February 2003, n. 30* (G.U. 2003a), better known as *Legge Biagi*, like the jurist's name of its deed, Prof. Marco Biagi). It is the private autonomy, not the State as in San Marino, that in Italy founds the efficaciousness to the labour contracts, i.e. it is the encounter between demand and offer compared on market that it is considered a relatively better mechanism in satisfying the right of the person to work on the basis of his/her abilities.

The actions for the effective protection of the equal opportunities in the labour place

The mere recognition of the equal treatment principle does not necessarily prevent discrimination. It needs to verify the effectiveness of actions to assert one's rights. For this reason, Sammarinese law on the matter of rights of employment places obligations on the employer to protect employees from discrimination and to ensure equal treatment on the grounds of sexual orientation. The role of employers has implication on the perception that LGBT persons feel for a safe and inclusive work environment.

Substantially, the positive actions provided from the Republic of San Marino to workers to protect effectively the equal opportunities on the labour place are judicial and non-court-record instruments. They are:

- *Art. 7 of Law n. 131/2005*, has established an informational sharing system on territorial, urbanistic, contributory and security labour sites and has given to the Labour Inspectorate the duty to predispose, periodically, specific actions co-ordinated together with the Police Forces and other surveillance bodies, inspection bodies present on the territory;
- with *Law n. 128/1989*, the verification of infractions on labour sites is due to the officers of the Labour Office (Inspective Section) and they adopt administrative fines applied by the management of the same Labour Office (*Art. 1, 2, 3, 4*). Opposite to the ordinances issued by the management of the Labour Office is allowed to appeal to the Administrative Judicial of Appeal (*Art. 5*), within a time and procedures settled by *Law n. 68/1989*. Against this Appeal it is possible to propose the *querela nullitatis* to count vices of procedure. Such jurisdictional proceedings meet the requirement of quickness of the sentence. The expenses of judgement fall on the party that loses the suit. Besides, autonomous relief is recognised to the possibility that the judicature condemns the author of the discriminatory behaviour to pay compensation for moral damages, not patrimonial damages only. In short, it is a legitimate assertion the thickness of the cited judicial remedy, because quickness, costs falling on losing party and compensation for damages that are not only patrimonial, support the employee with relatively simple instruments of trial;
- alternatively, the victim may recourse to non-court-record instruments, i.e. those circumscribed to the figures of the Labor Confederations of San Marino. The role of these

Confederations is to engage judicial or administrative procedures against discriminations. Their better nearness with the labour environments makes the dimension non-judicial on anti-discriminatory protection easily brought about;

- finally, if an employee is subject to discrimination and he/she believes to have access to complaint mechanisms, he/she can address him/herself to the *Authority for Equal Opportunity* that has among its specific competence those of address and of prevention of physical or psychological violence of gender and to face *mobbing* also (*Art. 13 Law n. 97/2008*). Besides, the Commission for the Equal Opportunities can cover for worker, and LGBT also, to have access to the non-discrimination right (see § 3.3). However, in San Marino the presence of the National Equality Bodies within the government can promote diversity in the workplace and influence the inclusion of LGBT persons.

Opposite, in spite of those instruments to protect equality for workers, the main problem is the burden of proof, because it is asking for a sharing out between employer and worker, so that the victim must disclose his/her sexual orientation to protect the non-discrimination right. The consequence is that the victim, if reluctant to deal with the publicity, avoids the court case and renounces to protect his/her constitutional right of non-discrimination.

However, *Art. 7 of Law n. 23/1977* declares as null “*the dismissal caused by reasons of political creed and of religious faith or in any case of reasons of freedom of thought and of expression, and by belonging to a syndicate*”. The objective difficulty for the application of this disposition is double: the employee has difficult to accomplish the burden of proof that the dismissal is having reference to the typical hypothesis mentioned by the rule; and the employer never will tell whether interruption of work relationship has reference to one or more of the afore-mentioned reasons, to avoid incurring penal sanction.

There aren't sociological researches about forms of disadvantage at work concerning the San Marino reality. The San Marino's jurisprudence has not recorded complaints nor cases of LGBT persons forced to leave jobs or being fired due to homophobic reactions. According to the Syndicate Confederations of San Marino, there are not formal cases of dismissals conceal reasons of sexual orientation.

The composition of the Sammarinese labour market can lead to the perception that facts of discrimination, on grounds of sexual orientation or gender identity also, come true with very difficult. First, because the access to the public sector occurs only by public competition with

qualifications and examinations. Secondly, because the sector of entrepreneur is of non-negligible dimensions in Sammarinese's occupational system and it does not faced problems of occupational segregation for definition. Some potential concern can arises in connection to the subordinate workers in the private sector, due to the "trial period" during which both parties can freely withdraw without any justification, therefore it is relatively simply to be excluded from the labour environment for sexual reasons.

From an interview with the Secretary of Association LGBT of San Marino – M. Pazzini – anecdotal evidence shows that there have been cases of lesbian and gay employees in public employment who have been forced to transfer their working place for harassment reasons on the grounds of their sexual orientation.

The lack of results and the invisibility of LGBT persons partially mask the real magnitude of the problem in San Marino.

3.7

EDUCATION

This section examines bullying and harassment of LGBT youth in schools and its impact, as well as the invisibility of sexual orientation issues in school curricula and in culture of San Marino. The general visibility of sexual orientation issues in schools and teachers trained, prepared and inclined to discuss the issue of sexual identity and orientation contribute to represent a positive LGBT images in education and to favour social inclusion of LGBT students. They also have the positive consequences for the self esteem of LGBT youth, fosters positive attitudes towards homosexuals, which do not increase the sense of isolation and vulnerability felt by homosexual adolescents¹¹⁸.

San Marino does not have reports on the diffusion of harassment and bullying in the school environment. Nor are there data available on the sense of isolation and vulnerability felt by LGBT adolescents consequently to homophobia, biphobia, or transphobia and/or hate crimes/speech. No cases of San Marino's people emerges on hostility to have an LGBT teacher for their child.

¹¹⁸ Cit. *FRA*, 2009c, pp. 74-75.

With *Art. 1, co. 5*, of *Law n. 60/1980* on the matter of reform of school's system, San Marino recognises the subjective right for teachers and students to enter a school's institution indiscriminately regardless of economic conditions of their families, political opinions, religion, race, language, sex diversities. To all citizens and residents, school gives the necessary tools – knowledge, education on democratic life, preparation to work – with the aim to promote the liberty of each person (*Art. 1, co. 2*), to guarantee the harmonious development of the personality favourable to each one's identity (*Art. 1, co. 3*), to overcome social conditionings and to combat precocious exclusion from formative process (*Art. 27, co. 2*). Owing to make easy to programme the necessary interventions to achieve the purposes of school, teachers of individual classes arrange at the beginning each school year the “didactic programming” (*programmazione didattica*), to jot down the psycho-social investigations, functional diagnoses, didactic units (*Art. 18*) of students. Then, the Class Council (*Consiglio di Classe*) elaborates an “Individual Educational Plan” means of defining specific objectives, didactic passages and strategies of integration. However, by individual interventions and inter-disciplinary initiatives the school provides for the integration of subjects with difficulties, in agreement with the National Minor Service and the family.

The Sammarinese school addresses to adult citizens, too, in order to promote a further cultural and professional growth (*Art. 1, co. 6*), by folk-culture's disciplines, additional classes, periodic refresher courses, specific cultural courses on guidance (*Art. 2, co. 4*).

There is the proper Secretariat of State for Public Instruction and Culture that promotes refresher courses for teachers. Furthermore, the same Secretary will provide, together with the schools' Executives, to organise training for teachers (*Art. 28*). The Department of Formation of the University of San Marino organises qualifications and refresher courses for teachers, mostly for those in support of differently able students, together with the proper Secretariat of State.

Of particularly interest in the educational system of San Marino is the formation course called *curricolo “Nuovi Saperi Sammarinesi”*, because it includes sex education. Its aim is to allocate “knowledge” and to give answers to the development of personality and to the promotion of forms of dialogue and integration among different values¹¹⁹. The so called *curricolo* has a vertical structure, i.e. by grade from childhood to secondary school, and it is articulated with educational areas, specific more and more to growing of the school's level. Among the different

¹¹⁹ Cit. Direzione Scuola dell'Infanzia, 2009.

educational areas of the formation's project, questions of gender, sexual orientation and discrimination are tackled, already from junior secondary school when a student starts to define his/her gender roles or sexual preferences. But these arguments are not reinforced by a vocabulary to name and discuss sexual difference, non-traditional family arrangements or relationships and discussion of sexual orientation or gender identity in class, that may raise awareness and combat homophobia and transphobia, even if a specific discipline on LGBT issues lacks. Certainly, there are teachers that face the sexual orientation and the relationship between gender identities issues in one's educational duties, and generally they make it if pertinent with the arguments of their lessons and with personal initiative, but in an optics untied from institutional formative context.

An interview for this report with Association LGBT of San Marino, highlights its project to contribute earlier to the sensibilization of LGBT issues in the schools of San Marino by the promotion of debates for teachers on bullying and discrimination.

As a part of the Sammarinese educational system it must be mentioned the Forum of Young People (Forum dei Giovani) of San Marino, which operation protects democracy and it is representative of young people. In particular, the Forum is free from political influence and it is a non-profit body; it outlines the themes talking about by its Assembly, composed from citizens and residents in San Marino of age 15 to 32 inclusive, within the Forum's Regulation and Law *n. 91/2007*. This Forum is an internal organization of Secretariat of State for the Education and the Culture to which juvenile politics are delegated.

Since 2008 year, when it was originated, the Forum has supported various initiatives about youth: debates, public meetings, parties. In range these initiatives, the Forum has dedicated a season called "*Friday of the Forum*" to a series of evening meetings, on Friday exactly, during which the young people can compare themselves with experts and Secretaries of State on different youth themes, such as first home loan, work abroad, entertainment inside Sammarinese border, problematics for admission in list to work of teaching at secondary State schools, deepening about Sammarinese militia.¹²⁰ Till today, LGBT issues have never been discussed because – it emerges from interview with the Forum's Steering Committee – they are not pointed out, yet. If the youths of FORUM have not selected this argument because it is not subject of interest it is impossibile to know. It will be certainly argued when proposed and selected.

¹²⁰ An interview with past President of the Forum, Ing. G. Chiaruzzi. See also official site of FORUM DEI GIOVANI.

In short, although the Sammarinese educational system does not include the specific subject on sexual orientation, it seems to be able to affirm that it recognises the bases that makes desirable the treatment of the matter. Such educational system is a reality in respect of a multiple action, engaging several partners, targeting:

- a) public authorities: such as teachers, health services and politicians;
- b) civil privates' institutions: associations, groups, movements;
- c) University and families.

By involving several cultural and social partners, San Marino implements anti-discrimination practices and promotes in the culture the respect of differences. And this educational system lines up San Marino besides the mostly progressed Countries.

But this formative procedure careful to equality and to respect of diversities encounters the social-cultural context of San Marino characterized by a strong attachment to the traditional family and the heterosexual orientation.

This cultural dimension favours the murmuring more or less uttered in the school environment, bullying and harassment, truly extant in San Marino as interview with Association LGBT of San Marino denounces. This may lead LGBT youth to difficult relationship with classmates, to absenteeism and truancy in secondary school, thus reducing their chances to enter higher or further education.

3.8

HEALTH SERVICE

This section looks at issues of homophobia and discrimination in access to health services, the recognition of same-sex partners as “next of kin”, the health of LGBT persons and the stigmatisation attached to HIV status and gay and bisexual persons, in San Marino.

The public Social Welfare Institution (*I.S.S.*) of the Republic – originated in 1955r with *Law n. 42* - gives the evidence that there are primarily the persons in the middle of the health system¹²¹, i.e. San Marino does not consider the health like a cost but a source of wealth on which to intervene. Well qualified Medical Corp, periodically brought up-to-date, constantly

¹²¹ Cit. C. Podeschi, 2009.

collaborating with foreign hospital Institutes, suggests positive responses from personnel both on appropriate visits and upon disclosure of sexual orientation and acceptance of the patient's LGBT status.

This health system of San Marino does not regard to homosexuality as a problem nor in pathological terms.

The infection of HIV/AIDS is considered as a problem concerning everyone, not only LGBT people. LGBT people also can be blood donors in San Marino and they are not considered as ill. There are careful verifications and the numerous checks executed in various occasions that provide for blood endowed with the standard of security particularly elevated¹²².

The lack of data on healthcare of LGBT persons of San Marino and how many disclose their sexual orientation or gender identity to their doctor in San Marino, do not afford to know if their relationship with doctor improved after discussing their sexual orientation. Interviews for this report with the health authorities and with the Association LGBT of San Marino show that visibility of LGBT persons is very limited.

An interview with the Secretary of LGBT Association of San Marino reveals the absence of experiences with healthcare for LGBT persons that could potentially result from the lack of recognition of "next of kin" status as, for example, affecting access to information and decision-making about a partner's health and treatment and problems with hospital visitation in intensive care.

3.9

RELIGION

Outside of the national boundary, the hierarchies of the Catholic Church have been strongly critical toward the possibility of legal recognition of same-sex partnerships, publicly arguing that such unions are against nature and must not be passed by Parliament¹²³. Church

¹²² Cit. official site of Sammarinese Blood-Donor Association (AVSSO).

¹²³ C. Bertone, 2008.

leaders have also criticized medias broadcasts presenting positive images of gay and lesbian life¹²⁴.

The Catholic religion is largely predominant in the Republic of San Marino; the Catholic Church of San Marino is an integral part of the Italian Catholic Church. In the service religion, the Ecclesiastical Authorities of San Marino pray for the Pope and for his messages' realization. And yet, they do not mention an exact position towards homosexuality. The Association LGBT of San Marino interviewed for this report interprets such silence maybe due to the abstent of LGBT persons' participation to the Catholic initiatives and rites, because of unfavourable Pope's assertions on LGBT persons.

The Association LGBT of San Marino (2008) denounces that *"the influence of Catholic Church on politics contributes to impede a process of change. This obliges LGBT persons to live among the discrimination, despite the assertion of equality and human rights' respect"*, i.e. the strong attachment of the Sammarinese people to the Catholic tradition influences attitudes towards LGBT persons, with consequences on aspirations harboured and integration of diversities in the civil society.

It is inadmissible that universal rights are dependent on other people's opinions, religious or less, but at the same time it is not possible to escape to the historical roots charactering the society of San Marino that, what's more, they are present in its Constitution and that institutions have the charge to apply. The cultural patrimony of the Sammarinese society is the result of inseparable secular and religious paths and, as such, it incorporates both the contribution of the civil institutions to protect the human rights and the Christian perspective. And the public action favors, it doesn't hinder, the share of each subject of the community to the social trial. In conclusion, it is proper this articulated system of mutual balancing and permanent dialectics between diversities present in the Sammarinese society that legitimates the whole social structure, within to which those irreducible antinomies realize a pacific cohabitation and an order not adversarial among free and equal men.

In this social context, the experience of every day has not produced antisocial behaviors particularly dramatic against LGBT. In fact, there are not cases of hostility by Catholic teachers to LGBT issues because of religious beliefs. Neither there are evidences on the existence and/or extent of homophobia and discrimination against LGBT persons by the institutions of the

¹²⁴ C. Bertone, 2008.

Catholic Church of San Marino. The meets of catechism for young and for adults periodically organized by the nine Parish Churches of San Marino in their own structures, are open to everybody without exception, and cases of hostility or denying to participate to homosexuals do not emerge.

Nor note of Catholic local authorities denying use of their spaces for congresses or seminars and for event concerning the lives and the rights of LGBT persons appear in San Marino. An interview with the Association LGBT of San Marino confirms this point.

It has to be noted that an adverse criticism against the Catholic Church because of its hostility to LGBT issues, on behalf of Honorary Consul of the Republic of San Marino in Cardiff of the United Kingdom of Great Britain and Northern Ireland - the Sammarinese Federico Podeschi, openly gay - has provoked his censorship from Authorities of San Marino. The censorship from Authorities of San Marino has been dictated on account of his position of diplomatic list at the moment of his declarations, and not due to his sexual orientation.

3.10

SPORT

This section addresses the difficulties of practising sports as an open LGBT person and the use of homophobic jargon in professional and non-professional sport settings.

The Sammarinese legal system recognises at Constitutional level the contribution of sports activity for the development of personality of people, for preparation to free and responsible exercise of fundamental rights (*Art. 11 of Law n. 59/1974*, as amended by *Law n. 36/2002*). In relation to this principle for the realisation of a sporting, equal, supportive, tolerant environment, accessible to everybody, San Marino:

- has adopted *Law n. 32/1997* on the matter of sports, repealing the previous *Law n. 133/1991*. It enacts the equality of citizens in access to sporting activity, both in non-competitive and in professional sport. Such right is considered as fit activity for improving the physical and psychic abilities, as a factor of prevention of illnesses and as instrument to favour social gathering (*Art. 1, co. 1*). The State has provided the territory with sports ground, with green equipment, of services and organisational structures

suitable for favouring motor and recreational sports activities. The exercise of sporting activities is free and it is recognised both in individual and collective form (*Art. 48*). The right of free sporting activity is extraneous to each influence of religion, politics, race and economic status (*Art. 7, co. 2*);

- and San Marino has signed International and European Conventions adopted within the Organisms to which it adheres. These documents are:
 - *European Cultural Convention* of the Council of Europe, signed on 19 December 1954, adopted by San Marino with *Decree n. 8/1986*;
 - *European Sport for All Charter* of the Council of Europe, approved on 20 March 1975, signed by San Marino but never adopted;
 - *European Convention on Spectator violence and misbehaviour at sport event and in particular of football matches* of the Council of Europe, signed in 1983 and in force since 1985, signed by San Marino but never adopted;
 - *Anti Doping Convention* of the Council of Europe, adopted on 16 November 1989, ratified by San Marino with *Decree n. 122/1989*;
 - *European Sport Charter* integrated by the *Code of Sports Ethics*, adopted in 1992 by the Sport Development Committee (CDDS) responsible on the sport matter within the Council of Europe, signed by San Marino but never adopted;
 - *Enlarged Partial Agreement on Sport* (EPAS) adopted in 2007 by the Council of Europe, to which San Marino adheres by *Resolution of the Congress of State*;
 - *Convention Against Doping in Sport* of UNESCO, dated 19 October 2005, in force since 1 February 2007, adopted by San Marino with *Council Decree n. 32/2010*. It is an outline document of general character correlated to themes on sport within the Council of Europe, and it is tightly connected to the promotion of the general principle of protection of the cultural estate of UNESCO;
 - in this International context, San Marino has agreed the *World Anti-Doping Agency* (WADA) of the Council of Europe, born in 1999 by collaboration between the European Commission and the Member States of the European Union.

These documents recognise to all citizens the right of sport, they delineate a series of politics and sporting common practices and they establish the responsibility for the adherent States to guarantee the real application of such right. However, they intend to realise an European

and International co-operation so as to allow everybody the access to sporting activities without any distinction of sex, race, colour, language, religion etc., and to protect the sportsmen from illegal or dangerous practices such as, for example, the abuse of drugs, sexual harassment or exploitation (particularly of women and children).

The basic philosophy subtending the Sammarinese approach on the matter of sport with the afore-mentioned Sammarinese *Law n. 32/1997* and with the adhesion to the International and European Conventions is to consider sport not only as a private concern, but as a sphere to which the public powers participate, too. The strategic approach provided for sports activity adopted in the daily practice is regarding the complementary action of State with national sporting organisations of a non-profit nature, assuring the access to the physical activities since the elementary school and guaranteeing the formation of qualified teachers and funding the sporting world.

Through a petition to Captains Regents and to Government of San Marino¹²⁵, the group of citizens of San Marino named “Atleti Agonisti” signals some reserve on the real protection of the right to practise the preferred sporting activity in this Country. The promoters say about the following anomalies to be resolved in Sammarinese sports:

- disparity of the sports ground and their use from the sporting federations and sports society;
- anomalies in the funding distribution on public contributions to the Olympic Federations;
- the athletes to which it is asked for International performances cannot count upon any tool of protection, support, incentive, as at the contrary it is provided by the Olympic Charter, besides by all the other Countries.

The result of this initiative is not known because the petition is currently opened to the signature of everybody who want adhere to it.

It is worth bringing to attention a currently bill about requalification and the updating of the Sammarinese *discipline of 1997r, n. 32*, on sporting activity. Such initiative is borne for the need both to acknowledge all the Directives of the *International Olympic Committee (C.I.O.)* – whose principles, addresses and decisions San Marino has to follow, as established by *Art. 7, co.3, Law n. 32/1997* - and to realise concretely the signed International Conventions, previously

¹²⁵ Available at site <http://www.petitiononline.com/120663/petition.html>

quoted. The bill specifically considers the matter of discrimination that LGBT persons can experience in sport. For this reason, efficacious instruments on the prevention against every form of discrimination are elaborating in order to encourage many more persons to approach sports activity, without any fear.

As regarding to the real national situation of LGBT persons in sport, an interview with Officer of the Secretariat of State for Sport - Dott. A. Renzi - shows that in San Marino homophobic verbal abuses in order to ridicule the referee during sporting events or slogans chanted by fans against the opposing team do not occur. In San Marino demonstrations of neo-fascist groups or hooligan groups expressing anti-LGBT sentiment there have never been. Sports Associations of San Marino have not any openly LGBT people; and LGBT sports groups or LGBT non-professional clubs have not emerged.

Although concrete cases of homophobia in sports are not present in San Marino, Sammarinese policy agenda and action plan give constantly priority on the matter of antidiscrimination, of each form, and the efforts are permanent to nip in the bud violence during bouts. This circumstance moves away from the majority of the European Countries, where according to *FRA* (2009c) placing homophobia on the anti-discrimination agenda has only a limited focus particularly compared with efforts to reduce racism.

3.11

MEDIA

This section examines how LGBT persons and their lives are represented and portrayed in the public and private media, as well as visual and written media: for example the internet, newspapers and television. The collaboration of the European Commission with music channel MTV is an example on potentialities of media representations of LGBT people. This initiative includes an advertisement spot, a Creative Competition, targeting younger audiences in relation to race discrimination, as well as the annual journalist award which rewards journalists who contribute to a better understanding of diversity and problems of discrimination¹²⁶. This initiative at EU- level represents valuable measures in both using the media to change public attitudes and

¹²⁶ Cit. *FRA*, 2009c, p. 95.

encouraging those working in the media to re-examine their portrayal of those belonging to particular social groups and minorities.

In order to oppose the diffusion of hate messages, San Marino prohibits the divulgation of discriminating messages to the communication craft through the *Art. 3, co. 2, of Law n. 97/2008* on the matter of prevention and repression of violence against women and of gender (cit. § 3.3). The inhibitory tutelage is the instrument adopted by the legislator to grant concrete content to such prohibition.

In San Marino - as across the EU¹²⁷ - the media coverage of LGBT persons is characterized by a limited visibility of their arguments; although gay men are more visible than lesbian, bisexual or transgender persons which are practically invisible.

LGBT persons of San Marino are not subject to a particular form of stereotyping because the San Marino's media do not use semi-erotic illustrations - that contribute to prejudice and to reinforce the idea that sexual orientation is only about sexual activity and preferences – nor only speak about incidents of homophobic speech - that can contribute to consider homosexuality a taboo and to depict LGBT persons as deviant, diseased, unnatural or, worse still, immoral or socially destabilising.

The press of San Marino does not use homophobic language. In the newspapers, LGBT persons and issues find space for their nuance and inform perspective. Incidents of homophobic discourse which would not be accepted appearing in the journal in negative sense and of condemn.

LGBT representation on public Sammarinese radio and television, called *San Marino RTV*, is rare. Seldom television offers coverage on significant political and social LGBT events or on significant laws passed by the *Great and General Council* on matter of sexual orientation or gender identity. For example, no notice has been given with regards to the participation of Association LGBT San Marino, in the “Gay Pride” celebrations; or when in 2004r the *Law n. 121* repealed the *Art. 274* of the *Criminal Code* condemned with imprisonment the homosexual acts committed in public place, or in 2008r when the *Law n. 66* on aggravating the criminal sanction for acts of sexual discrimination and the *Law n. 97* concerning the protection of victims of violence on the grounds of sexual belonging (cfr. § 3.3) were adopted, the notice was given by news

¹²⁷ Cit. *FRA*, 2009c, p. 12.

and newspapers only. No public debate on television or on the radio have taken place, to explain the force of these rules.

The TV station *San Marino RTV* is neutral towards LGBT persons and issues. According to an interview with its contributors for this report, they appear happy to give television space to LGBT issues.

The sole LGBT NGO existing in San Marino (Associazione Culturale LGBT San Marino) communicates with the public opinion and it argues its issues both through its website – lgbtsanmarino.splinder.com/ - and by interventions on Sammarinese dailies (as *La Tribuna Sammarinese*, *San Marino Oggi* and *L'informazione*), without any periodicity or distinction of newspaper. The web-site of Association LGBT San Marino is a tool of sociability for everybody that want to exchange suggestions and opinions; however, it contains a comprehensive collection with links giving a general guide to patients in the health service, newspapers, publishing companies, publications and articles, books, anthologies, radio features, films and conferences and generally a greater awareness.

3.12

ASYLUM AND SUBSIDIARY PROTECTION

In the Republic of San Marino, the asylum institute is not specifically provided for sexual orientation or gender identity: refugee status is recognised on the grounds of *each* persecution. Particularly, San Marino mentions the general asylum institute both with the constitutional principle established by *Art. 1, co. 2*, of the *Declaration of the Rights of the Citizens* (cit. § 3.1) and with the adhesion by *Law n. 24/1970* to *1951 Convention on the Statute of Refugees*. Through this last mentioned *Law n. 24/1970*, San Marino grants asylum to persecuted persons with the due reserve of compatible cases with rules regulating the admittance and resident permit in the Republic's territory. This reserve considers the position of San Marino in the core of the Italian peninsula, and then considers the lack of check points on borders and, finally, it considers its restricted territorial dimensions (60,57 kmq). For the same reasons, San Marino has never adopted the instrument of adhesion to the *Convention on the Statute of Refugees dated 1951*, consequently it is not a bound party.

In this legislative context, the procedure to grant asylum is not regulated by any Sammarinese legislative rule. It is mere praxis: it is the *Congress of State* to decide on each single case whether to admit a resident permit for humanitarian reasons. Asylum seekers have no limits of stay and they are integrated with San Marino's people in mutual respect.

Interviews with A. Selva, a past member of the Government among '80/'90 years, and with the actual Secretary for Foreign Affairs, A. Mularoni, confirm that Republic of San Marino has kept unchanged the practice concession of asylum in the course of time, primarily aimed to grant asylum to persons worthy of protection with advance modality as regards international events. Well then, in granting either refugee status or separate forms of humanitarian protection, San Marino complies with the taken international obligations and, at the same time, evidences its traditional sensitivity in the protection of human rights. Therefore, it is rare to grant asylum from San Marino because, as mentioned previously, the Country has to consider its actual territorial and economic extent, that would be upset over a sudden increase in population.

Interviews with experts operating under the Secretariat of Foreign Affairs confirm that the *Congress of State* has granted asylum during the last decades, but never for cases on grounds of sexual orientation or gender identity. Because of the innumerable sequence of asylum claims that San Marino receives, it is not possible to define if, among these, there are demands on the grounds of sexual orientation or gender identity.

3.13

MULTIPLE DISCRIMINATION

This section describes issues affecting LGBT persons with disabilities, of an ethnic minority background and/or the elderly. In fact, LGBT persons with disabilities can experience reactions both of their sexual orientation and of their disability, increasing their vulnerability; elderly LGBT persons have been marginalized in their teen, during their adulthood and in the final stage of their lives; LGBT people belonging to an ethnic and/or religious minority backgrounds can suffer the risk of homophobia and harassment from people of the cultural backgrounds as heterosexist and/or of the same minority. When this doing, LGBT people suffers

the severe consequences of confronting sanctions for their behavior, disbelief, repression and misdiagnoses.

For the Republic of San Marino, there is no data on LGBT persons' experiences of multiple discrimination, either unlike lesbian women and gay men, or LGBT migrants or disabled gays.

As mentioned at § 3.3, the activity of the *Commission For the Equal Opportunities* attributes to the struggle against each form of discrimination a prioritise circumstance (*Art. 2 of Law n. 26/2004*). According to an interview granted for this report, the Co-ordinator of the *Commission For the Equal Opportunities* - S. Serra - highlights that with regards to the process involving each case of discrimination, the Commission considers vital the value of the intersection of each grounds, identity and social role, realizing a wide cooperation involving appropriate national structures e/o authorities. This integrated approach by which the National Equal Body prioritises multiple discrimination on treatment cases (gender, ethnic origin, religious believe, sexual orientation, age, physical and mental disability) is not present in the majority of the European States, rather it is adopted only by Netherlands, Ireland and Romania¹²⁸.

Sammarinese legislation considers multiple discrimination an aggravating circumstance (*Law n. 66/2008 and Law n. 97/2008*, see § 3.3).

According to interview with Director of the Minor Service of San Marino, none of the two branches of the Service – i.e. one residential structure, in which the patient with more serious impairment lives; the workshop laboratories as “atelier”, attended daily from patients with lesser disability that live unlike the first ones live in their family - has established multiple identity groups including the intersection of sexual orientation and other grounds. One of issues periodically faced by promoters in order to facilitate experiential dynamics among patients is related to sexuality, but it is devoid of elaboration on LGBT issues.

An interview with Director of National Nursing Home refers that sexual orientation at elderly persons is one of the experiences considered by health staff in giving appropriate cares and services.

In spite of that, special groups for disabled or elderly LGBT persons are not established, nor for general LGBT persons. But – the two Health Directors say - the staff has the necessary experience to involve every diversity, or rather in the activities carried out by the health

¹²⁸ Cit. FRA, 2009c, p. 104.

structures every precaution (providing counselling, support, shelter) is taken at the aim of focusing on breaking isolation and at least to reduce their difficult vulnerable position. As a matter of fact, it is by the intersection and cooperation among the existing structures that the health services resolve the particular exigencies of disabled or elderly people in combining with their sexual identity. This practice is referring to the little territorial dimensions of San Marino, but it cannot be enough to identify and to tackle about specific problems faced by person of different orientation and identity.

3.14

TRANSGENDER ISSUES

Transgender persons prefer to be another gender than their birth gender. The feeling of lack of belonging to biological birth sex drives transsexual to adjust his/her body in order to realize his/her identity by proceeding to physical alterations, such as hormone treatment or surgery. Since the transsexual experience has a complexity that goes beyond the sexual orientation of person, it is commonly adopted the English term *transgender* because at best it renders the passage from gender identity to the identity choosed¹²⁹. Transgender persons face transphobia and discrimination on the grounds of their gender identity and expression and not necessarily because of their sexual orientation. The sexual orientation of transenders is often confused with their gender identity, so that transgender people faces more severe prejudice than lesbians, gays or bisexuals.

According to *FRA* (2009c, p. 119), available data confirm that the percentage of transgender people experience forms of abuse is significantly more than LGB persons.

In San Marino there is no published research nor official information on the experience of transgender people, their living conditions and transphobia. Nothing let us perceive the presence of transgender persons among citizens of San Marino or its residents.

Attitudes towards transgender people

¹²⁹ Cit. A. Amato, 2005.

With the lack of data on the experiences of transsexuals living in San Marino, the reference of two studies¹³⁰ at EU level can describe the attitudes that they face: the first of these studies was involving 151 psychology and engineering students in Britain; the second was involving 407 undergraduate and graduate students. Such researches show that transphobia appears to be closely linked with religious and heterosexist attitudes, a belief in the biological basis of gender identity and little previous contact with gender minorities. With the consequence of a bad situation for transgender people, with affect of their lives and lack of visibility.

At the contrary to these studies, in San Marino the strong religious creed and the conception of the heterosexual family widespread among its citizens' mentality are never become in transphobia.

Treatment of transgender people by their families

The unavailable data concerning transgenderism in San Marino it is not possible to know the extent of transgender confidence in family of origin, if they experienced practical signs of acceptance or a breakdown in their relationship with their families when they was open about their gender identity, or if they are feeling excluded from family.

Hate Crime

As mentioned in § 3.3, with *Law n. 97/2008* giving full civil, penal and trial protection to the victims of violence, San Marino influences the perception of safety of its citizens through mechanisms of protection and guarantee providing for the mobilization of the State Institutions. Therefore, victims of crime experienced regularly can report on transphobic hate crimes without fear.

According to official information of the media, court cases of San Marino, and an interview for this report with the Association LGBT of San Marino, no datum testifies the lack of confidence by victims (heterosexual, transgender or homosexual) towards the public Authorities, due to the belief that they will be inappropriately in interactions with members of the police and personnel of medical corps when they need their assistance.

Evidently, in San Marino these terrible facts did not occur.

¹³⁰ Tee N., Hegarty, P., 2006; cit. FRA, 2009c, p. 111.

With the same *Law n. 97/2008* and *Law n. 66/2008*, San Marino has extended its legal protection to the dignity of persons by sanctioning the explicit prohibition of racial, ethnic, religious and sexual discrimination and discrimination of gender (cit. § 3.3). In doing so, the strict enforcement of the laws here examined risks to fall within the defence of transgenderism, because they prohibit violence on the grounds of sexual belonging (that it emphasises the difference of gender assigned at birth), without doing any specific reference about the protection of “gender identity” or gender expression (that it leaves aside the real sexual identity).

But certainly, San Marino will never authorize any limitation depressing the liberty and the dignity of the person. However, a solution simple apparently should be an express articulation of sexual orientation and gender identity, in order to precise protection of transgender persons from discrimination and to legally treat differently than other persons of the same gender as the acquired identity.

Freedom of Assembly

In San Marino there are no any NGOs with a specific focus on transgender people.

San Marino has - as mentioned in this report - its national LGBT Association as the unique chance for lesbians, gays, bisexuals and transsexuals to multiply efforts, strengthen networks, co-ordinate campaigns, exchange best-practice and formulate political demands and strategies. This Association represents a tremendous support by the participants and for the groups.

Family issues

Those who marry after the transition have the possibility of proposing themselves as adoptive parents. According to Italian transsexual and transgender organisations¹³¹, however, prejudices in the assessment process undermine this possibility.

In San Marino, marriages in which at least one partner has submitted him/herself to a sex reassignment proceeding do not appear, neither have proposal of adoption by parent emerged.

Employment

¹³¹ Cfr. official site of Osservatorio Nazionale sull’Identità di Genere.

Generally, work is one of the main areas of distress for transgender. Frequently persons that do not want renounce to their identity's statement are forced to move their job because difficulties with labour context or they find themselves without work or they are released. For example, with regards to the Italian context C. Bertone (2008) cites research that show the high risk of transgender of being a victim of harassment at the workplace or being fired¹³². The great measure of the difficulty of transsexual persons in finding job is given by their appearance that does not fit with their documents. The exclusion from working place always forces transgender to seek in the circuit of prostitution the source of income. According to the Italian *Arcigay and Arcilesbica* (2008), it is relatively large the number of transgender persons (particularly transgender women) relegated to prostitution because the lack of access to the labour market, and the ban on prostitution in Italy further marginalizes transgender sex workers.

There is no data about complaints/cases of transgender persons in the Sammarinese's labour market because of their gender reassignment or gender identity. There are no reported cases of required use of gender inappropriate toilets at work, for inappropriate remarks or harassment, or physically assault. There are no cases of unemployment for reasons of gender identity, discrimination upon recruitment, no full-time job, discrimination in the area of pay, with regards to opportunities for career advancement, or the engagement in dangerous or illegal activities to survive.

Education

As already declared on this matter, there is no San Marino's data reporting females with a male identity or natal males with a female identity, or those that identify as intersexed, intergender androgynous, or hermaphrodite. In the same way, there are no notes of harassment or bullying at school experienced for transgender reasons.

In the schools of San Marino, educational materials and lectures as instrument to provide knowledge on transgender and LGB issues are not distributed.

Health

¹³² C. Bertone, 2008.

Qualitative sociological research on transsexual and transgender persons' living conditions has highlighted the many forms of social and economic distress which characterize the transition period before legal sex reassignment¹³³. This period can last several years or it can be a permanent status for those who do not want to undergo sex reassignment surgery. This waiting time can appear very long; but it allows to value attentively the difficulties to face and it permits to give successful to the most persistent individuals, i.e. those that are fully sure to subject themselves to the reassignment surgery.

Several decisions by the European Court of Human Rights¹³⁴ have established the principle that transgender-specific healthcare (i.e. healthcare directly related to the gender identity of a person) is a medical necessity and should be covered by health care plans in the same way as other medically necessary procedures.

San Marino has no law expressly regulating sex reassignment proceedings. The absence of rules on this matter can be explained with the scarce, when non-existent, relief of these facts in the judicial praxis of the Country. Should it be better to issue a specific legislative norm on this matter?

In San Marino, as elsewhere, the laws also originate from actual social needs, that in San Marino are not emerged at the present day. Actually, it should be superfluous to submit a parliamentary discussion on this thorny problem and subsequently spark a heated debate on this matter, when whoever wants to submit him/herself to this surgery can turn to the specialised structures of the surrounding territory and fall into the legal sphere of the Country in which these surgeries are physically made. Therefore, it appears unlikely that an immediate intervention by legislator to regulate the needs of transgender people would occur – just think that San Marino has not even provided for termination of pregnancy discipline.

With the lack of a specific Sammarinese discipline regulating sex reassignment proceedings, referring to *Law n. 43/1946* on the matter of order for registry-office and *Law n. 42/1955* on the matter of institution of the obligatory system of Social Welfare, it is evident that parties interested in obtaining a new identity card with the due personal data changes must make two requests to the Judicial Authority:

¹³³ C. Saraceno, 2003.

¹³⁴ Case of van Kück v. Germany, Application n. 35968/97, judgment of 12 June 2003. And case of L. v. Lithuania, Application n. 27527/03, judgment of 11 September 2007. See both cases at official site European Court of Human Rights.

- first, he/she must be authorised to have the required surgery. This judicial authorization allows the person to obtain this surgery in public hospitals free of charge. Since the hospital structure of San Marino does not execute such surgery, the subject must apply to fixed structures abroad so that the National Health Fund allows free treatment (*Art. 3, co. 2, Law n. 42/1955*), with the authority received by the family doctor (*Art. 4, co. 2, Law n. 42/1955*) subject to visa by public Social Welfare Institution (*I.S.S.*) of the Republic (*Art. 4, co. 3, Law n. 42/1955*). If there is no authorisation of a judge, nothing prevents the transsexual desirous to undergo this surgery to address foreign health structures, and consequently to fall into the jurisdiction of these Countries. In this case, the subject will be excluded from the free health service and the cover of the hospitalisation cost, including the numerous therapies for reassignment, falls on the transgender applicant. However, the induction to transgender people to turn to foreign hospital structures has the negative consequence that the transsexual does not feel to have the necessary assistance from the State to face a conscious choice, nor to have the appropriate treatment by health professionals (i.e. psychiatrists about transition) of the nation. As result, the transsexual could avoid doctors' visits as much as possible for fear of inappropriate behaviour or could prefer to escape national care at home. To live uncomfortably can also have the terrible consequences to consider and to attempt suicide at least;
- secondly, after surgery of sex reassignment, the transgender can ask for a judicial order which gives consent to change the details of sex and name in the records of the Registrar of Civil Status of San Marino, as requested by *Art. 15/99-103 of Law. n. 43/1946*.

Nor do sex reassignment proceeding appear in the Sammarinese legal system, to reenact the difficulties faced by transsgender persons. But according to COWI (2009), it is very difficult to collect Case-Law on this subject. It seems that:

- the lack of a judge's prior authorisation for surgery cannot preclude a subsequent recognition of the individual's right to sexual identity, if authorization could have been given in such a case¹³⁵;
- male to female reassignment is usually authorised only when the male has had complex surgery including orchidectomy, penectomy and vaginoplasty. If the person is not able (for example due to illness) or unwilling to undergo these complex procedures, he/she

¹³⁵ Italy, Court of Milano, October 5th, 2000; cit. *COWI*, 2009, p. 12.

cannot obtain the judicial order and the consequent sex reassignment, even if he/she takes prescribed sex hormones. In Italy, only in two cases the judge has ordered a sex reassignment after a simple orchidectomy; and only in one case did a judge order a sex reassignment without any operation, as the transsexual concerned was very ill and probably close to death¹³⁶;

- female to male change is usually authorised when the female has had surgery, including mastectomy and hysterectomy. By contrast, surgery for penile reconstruction is not requested because it is a very difficult operation, with a high failure rate.

The site of Association LGBT of San Marino provides information within the LGBT community (cfr. § 3.11) and it dedicates space to aspects of transgender health care and to a guide of hormone therapies and treatment.

Sport

No data are available about the experience of transgender people in sports activities of San Marino, for example the presence of transsexuals engaged in sport or transsexual athletes banned from competition sports.

Interview with Officer of the Secretariat of State for Sport - Dott. A. Renzi - confirms the absence of participation by transgenders, gays, lesbians or bisexuals in sports activities than the rest of people.

Media

To report in a representative way the transgender arguments could form their community as a reality and it could represent one first but very important step to cultural transformation favourable to social integration of various subjects. Negative representations of transgender people's lives suggest an unrealistic view of their attitudes and to show them as martyrs or disempowered victims of violence over-emphasising them as diverse community, with implication on cohesion of community.

In order to orientate the sensitivity of public opinion San Marino prohibits divulgation of discriminating messages by the communication craft, through *Art. 3 of Law n. 97/2008* on the matter of prevention and repression of violence against women and of gender (cit. § 3.11).

¹³⁶ Italy, Court of Roma, October 18th, 1997; cit. *COWI*, 2009, p. 13.

By contrast, as already mentioned in § 3.11 the Sammarinese information has dedicated scarce spaces to information on the individual and social conditions of transgender and LGB.

A great role is having the strong potentialities given by the Sammarinese press and the site of Association LGBT of San Marino (cit. § 3.4 – 3.11): on one hand, transgender and LGB communities have found a space to communicate freely and to express their rights; on the other hand, public opinion finds information to cast in this unknown world.

Asylum issues

It is here confirmed that already said in the asylum issues area § 3.12, i.e. there is no evidence of whether transgender people have been successful in gaining asylum in San Marino.

Although pass practice shows that each refugee has access to the local community and support with regard to health, working and generally social structures, the lack of cases of asylum to transgender persons make it impossible to know whether transgender persons in asylum procedure will be able to have their healthcare needs covered such as with access to hormones.

Multiple discrimination

In the Sammarinese cultural backgrounds as heterosexist there is not experience of transphobia towards transgender people with disabilities, elderlies or belonging to ethnic minority.

CONCLUSIONS

The Republic of San Marino dedicates itself actively to condemnation of human rights' violation on grounds of sexual orientation and gender identity both with its adhesion to the program dated 21 June 2006, concerning the fulfillment of the Recommendation *Rec. (2002) 5* of 30 April 2002 of the *Council of Europe*, on the matter of violence against women and of gender, and with the recent signature of the Declaration of the *United Nations General Assembly* dated 18 December 2008, on condemn of situations of sexual discrimination.

Through these initiatives, the Republic of San Marino shows its traditional sensibility to protection of human rights, considered the bases of democracy and pre-qualifications to consolidation of an area of liberty, safety and justice; and, in this way, San Marino sustains the objectives expressed by the *Council of Europe* to which it adheres.

In order to analyse the individual freedoms and the fundamental rights safeguarded and promoted by legislation and institutions of San Marino in favour of people of different identity (that is the individual conviction to be male or female) and of different sexual orientation (physical and affective attraction for the opposite-sex membri, for the same-sex membri or both), the present report has exposed a recognition on social and legal aspects pertaining to the condition LGBT.

For such purpose, single areas have been considered on the matter of rights and equal opportunities: the attitudes towards LGBT persons, crimes for hate and for aversion, freedom of reunion and expression, employment, family issues, educational system, health services, religious institution towards LGBT issues, sporting activity, media, institute of asylum protection, multiple discrimination, transphobia and discrimination for reasons of gender identity. These are variables that the *European Union Agency for Fundamental Rights* (FRA) has held as more meaningful to reassume the forms of discrimination against LGBT people.

It is not useless to specify that human rights cannot be separate with artifice in areas, because fundamental rights are indivisible and interdependent. Nevertheless, it needs to identify the recurrence and the tendency to the periodic reappear in the State of problems on human rights, considering every possible mechanism of protection at national and International level.

In examining the Sammarinese legal system it has been underlined that today, under *Art. 1* of *Law n. 59/1974*, better known as *Declaration of the Rights of the citizens and of fundamental principles of the Sammarinese legal system*, San Marino takes in automatic way the International accords on theme of human rights and freedoms. The quite negligible consequence that derives is that the International accords on theme of human rights has to consider applicable in any case from San Marino, even if it has not subscribed them. In addition, their inapplicably contravenes clearly the fundamental principles of the legal system on the matter of equality in front of law, proclaimed by *Art. 4, first paragraph*, of the solemn *Law n. 59/1974*. All the same, on theme of safeguard of rights parity toward LGBT people, San Marino is a part forced to actively employ itself so that possible difficulties contrary to fundamental rights are removed, also with lack of specific normative in such way.

The protection of fundamental rights doesn't consist entirely to follow normative prescriptions, but it goes beyond the single laws and it consists especially in making really accessible to holder the content of inviolable human rights. This premised, the present report has underlined the important role performed by the national Authorities to provide for a general prohibition of all forms of discrimination and for the respect and protection of such rights. Precisely, the State offers services of assistance aimed to the needs those persons that live with difficulty their homosexuality or transexuality, so that they learn to accept their identity in a complete way. Moreover, the State gives psychological support to parents that live with worry the sexual and identity development by their child in infancy and adolescence. Besides, this analysis has regarded to measures of protection of fundamental rights that San Marino develops at International and national levels, to apply them also in case it is the same State that violates the fundamental rights or it respects them in an inadequate way. The *College Guarantor*, the *Commission for the Equal Opportunities* and the appeal to the *European Court on the Human Rights* are the mechanisms of protection and guarantee of Constitutional rights recognised from San Marino to its citizens. Among these, the *College Guarantor* of the constitutionality of laws, having to pronounce itself on conformity of the norms to fundamental principles of the legal system (*Art. 16* of *Law n. 59/1974*), is obliged to hold as inescapable fact its interpretative choice in an evolutionary sense, with consideration of the preface of *Law n. 59/1974* on *Declaration of the Rights* that guarantees, as the fundamental principle of Sammarinese legal system, the continuity of the life of State and its institutions, belonging to the continental European tradition,

but also with regards to its *Art. 1* concerning the International conventions on theme of human rights and freedoms. However, it must be specify that in this search, the *College Guarantor* cannot deny the peculiarities of the Sammarinese State, a small *enclave* with its own history, tied up to a centuries-old tradition, because the foundations training its physics existence would come to miss or, to be more exact, those conditions by which San Marino identify itself like a public subject entirely particular and that it wants to be recognised within the International Community for what indeed it can represent¹³⁷.

Then, it has been considered that national institute for the equal opportunities is constantly bound to introduce the necessary guarantees to achievement of equality, particularly on the non-discrimination profile and the improvement of diversities.

Through the appeal to the *European Court of the human rights* it is realized a double guarantee for those who believe to be injured from his/her State of a right sanctioned by International rules on theme of personal rights: a domestic procedure is provided by the judicial system and an external procedure is provided by the *European Convention*.

Although San Marino has not a situation of social emergency, because there is no notice in its territory of racist ideas campaigning or hate for reasons of sexual orientation or gender identity, anyway the Republic has endowed itself with law (*Law n. 66/2008*) setting up a standard suitable to repress episodes of racial and sexual discrimination, homophobia, bullying at schools, that could happen in the future. And by *Law n. 97/2008*, San Marino grants direct protection against violence of gender, therefore men, women and LGBT. It has been underlined the fundamental role developed by National Authorities to guarantee that no individual suffers discriminations of any kinds; and that the protection of the rights, of the minorities also, constitutes the Sammarinese political care and the base of the public Authority.

The content regarding to freedoms of reunion and expression has shown the will of the Government to spread to public opinion the knowledge on LGBT issues and to favour integration of diversities. The presence of the equal opportunities institute within the Government is able to promote the social inclusion and freedom of expression of LGBT people and generally of all different identity.

With the area related to the institution of health service (*I.S.S.*) it is appeared that in San Marino the HIV is not considered as ill and that Medical Corp constantly adjourned is able to

¹³⁷ Cit. L. Lonfernini, 2006, p. 205-206.

face in a professionalism manner the specific demands of LGBT people. The connection among the existing sanitary structures resolves the particular needs of healthcare of LGBT people, homosexuals with disability or elderly. Consequently to the lack of recognition of “next of kin” status among same-sex partners, in case of illness LGBT person has to confide to efficiency of the sanitary personnel to assist his/her own partner in hospital in intensive department.

On the educational matter, in absence in the schools of San Marino of a specific discipline on the thematic LGBT, the formation course called *curricolo “Nuovi Saperi”* predisposed by the Sammarinese school institution has shown notable implicit potentialities. The purpose of the *curricolo* is to promote forms of dialogue and integration among different culture of people. Naturally, it includes the sexual education. The Sammarinese educational system is a reality involving a multiplicity of actions engaging several partners: public (teachers, hospital and sanitary units, public bodies), private civil institutions (associations, groups, movements), University and families.

The sports discipline is object of specific national dispositions and of numerous European and International accords. Such approach shows the considerable importance that San Marino recognises to the role of the sport as tool of correct and well-balanced development of psycho-physical intellectual moral social well-being, in all stages of life. Furthermore to obtain this objective, the State commits itself to contrast every form of abuse in sport, for example doping, and to prevent any display that could degenerate to acts of violence. In this perspective, San Marino does not leave the sports activity to private individual, but it is a sphere to which the public powers participate, too, with encouraging its execution to everybody. At the present day the discipline on the matter of sport has legislative revision pending that will provide to favour a great involvement of LGBT people in the sports activities.

As regarding to the access of employment, it has been underlined that, despite numerous legislative texts are in vigor enacting the full parity of juridical and economic treatment of workers without distinctions of gender, always the mere normative datum doesn’t result able to assure the total elimination of phenomena of discrimination in access to employment toward LGBT persons, besides toward women. The datum is brought us by the Association LGBT of San Marino.

On the family institute, also with the lack of regulation of the union among same-sex partners in San Marino, it can be admissible as principle the validity of the so-called “accords of

cohabitation”, they are conventions that partners can stipulate in order to regulate the property aspects of their affective relationship. Nevertheless, it is a decisely insufficient discipline since the accord among partners can exclusively concern the available property rights: so many profiles still stay excluded, among which, remarkable, those connected to some property relations, while terms related to tightly personal aspects that commonly faced cohabitants of opposite sex cannot be protected.

From a summary recognition of the real situation of San Marino, it emerges that a possible application of regulation on the legal cohabitation between homosexuals would not find favorable acceptance at the present day. This attitude of opposition towards homosexual unions cannot be considered as homophobia, instaed it is founded upon the risk to go over the content of the social pact that governs the affective relationships.

And then being considered that, even taking note that many Countries have proceeded to the formalization of homosexual unions and to them legal equalization to matrimony, how it is possible to reconcile a rule on protection of same-sex partnership with the natural law that always meaning the procreation as the sexual union of a man and a woman, guaranteeing survival of human kind and the transmission of life?

The media coverage on LGBT issues is rather scarce. Few spaces are still dedicated to information on individual and social condition of transgender and LGB. Nevertheless, in the last years communicative potentialities are increased by the Sammarinese press and by the web of the LGBT NGO of San Marino.

With regards to the discipline on the matter of asylum protection, San Marino has reconfirmed its International care in favour of the rights. And it comes into its tradition to grant hospitality and protection of which it has always shown generosity, also at cost of serious risks of its political existence. Besides, the concession of asylum by San Marino is unusual because it must consider its real territorial and economic dimensions, that would be upset against a sudden increase of population.

The context strongly traditionalist, in prevalence Catholic religious, characterizing the Republic, will not favour the issues of LGBT people. But it is not here discussing what it is permissible and instead not allowed. San Marino always proved to be generous for the rights. And at the same time, it cannot escape from the traditional symbols of its society, that moreover they are well present in its Constitution and that the institutions have the duty to make to apply.

And that LGBT persons have the duty to respect, also. What that primarily matter is that San Marino realises the object of a full laicity, conscious, that constitutes the tool regulating the pacific cohabitation, that exalts the differences and it doesn't hide them, and that it places itself in a cultural and social way present for centuries in the Republic. As always, it will be the permanent dialectics among the differences of the society that will realise – also at the cost of vivacious disorders and clashes of opinions – a cohabitation that can be defined really democratic because it will be the result completed by the differences compared in the Sammarinese society.

It is sure that beyond the most or less express murmuring, however dramatic, accidents of aggression have never taken place. It is diffused the awareness that LGBT subjects are not considered as social disabled persons, they are not a weak group to protect, they are not affected of illness, they are not invalid, they are not inferior. It is sure that in San Marino LGBT person doesn't suffer a restriction of the social state, therefore there is not the refusal for who feels different. In San Marino, the social phobia for the different individual doesn't subsist and nobody would dare him/herself to criticize the other people's sexual habits.

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