I think that contemporary theories of legal argumentation have let aside the idea that the analysis of legal argumentations can show the judges' hidden ideological and political positions by resorting to traditional legal arguments. Just as an example, it may be interesting to analyze the justificatory function of argumentations contained in two decisions taken by two constitutional courts, in Italy and in Portugal, on the same question. Why constitutional courts and not, for example, a court of first instance? Constitutional judges, apparently, do not need to persuade anybody: there is no higher judicial authority, and their interpretation of constitutional text is definitive. For this reason, one can assume that strategic argumentation plays little role in the arguments justifying their verdicts. I hope I can show that this assumption may not, fully, reflect the reality.

Now, let us consider the examples: two decisions taken almost at the same time by two separate authorities in two different countries on the same matter, same-sex marriage. Also the judicial course is almost the same: same-sex couples applied for a marriage licence, and their application was refused, on the grounds that same-sex marriage is a violation of the Civil Code. Finally, the couples challenge the ban in court.

The Italian case

In the Italian case, in April 2009 the Tribunal of Venice sent the issue to the Constitutional Court, claiming a possible conflict between the Civil Code, which does not allow for same-sex marriage, and article 3 of the Italian Constitution, which forbids any kind of discrimination, and article 29, which is the article of the Italian Constitution concerning family. The Constitutional Court ruled on April 2010 that the statutory ban on same-sex marriage is not a violation of the Constitution[1].

In the grounds of the judgement, the Court briefly mentions art. 3 of the Constitution (which states that all citizens "are equal before the law, without consideration of sex, race, tongue, religion")[2], saying that this article does not prohibit any form of discrimination, but only unjustified or unnecessary or disproportionate discriminations[3]. So, the question is whether the ban of same-sex marriage is a justified discrimination. For this purpose, the Court begins by examining "for logical reasons"[4] (that are instead reasons based on the content of the article) article 29 of the Italian Constitution, which defines family as a

"natural society based on marriage"[5]. This definition is clearly gender-neutral, but the problem, obviously, is the qualification of the family as a "natural society". In order to clarify this qualification, the Court resorts to traditional legal arguments. In these cases, the main argument is obviously the naturalistic argument. Yet, this argument has become less effective in post-traditional and multi-ethic societies: for this reason, the Court resorts also to a psychological argument, saying that "with this expression, as one can deduce from the preliminary work of the constituent assembly, the constitutional legislator meant underline that the family has original rights, not derived from the authority of the State or of the legal order". As we can see, the naturalistic argument is still implicit, but the strategy of the Court is to hide this argument, which ultimately states the unnaturalness of same-sex marriage, by resorting to the intention of the legislator. It thus shifts the burden of proof to the "Constituent Fathers". This strategy comes out most clearly in the following lines. First of all, the Court states that a legal concept such as "family" cannot be "crystallized" ("cristallizzato"), say, entrenched in a stable definition once and for all (thus, the Court is apparently avoiding the naturalistic argument), but immediately thereafter it adds that one cannot push the interpretation of a statute to the point to distort the "nucleus" of the content of a norm, and cannot reframe the statute in a way which incorporates phenomena and problems that could not have been foreseen at the time of its promulgation[6]. Now, to say that a legal concept is not closed or "crystallized" is equal to saying that it can incorporate phenomena and problems not foreseen at the time of its promulgation. But we can leave this aside, for the moment. What it is clear is that the pivot of the argument is the definition of this "core" or "nucleus" of the legal statement that cannot be changed.

In order to make this definition more precise the judges resort again to the psychological argument, saying that «as one can deduce from the preliminary work of the constituent assembly, the problem of the same-sex marriage was completely ignored by the assembly, though the homosexual condition was not unknown». And again: «the constituent fathers, while writing the art. 29, made reference to an institution [the family] already shaped» in the civil code[7]. In other words: when the constituent assembly talked about "family" it made reference to heterosexual marriage because: a) by using the expression "natural society" they meant an institution pre-existent to the legal order (that is assumed to be the heterosexual marriage); b) during the session of the constituent assembly, nobody talked about homosexual marriage; c) in any case, while discussing this issue, the constituent fathers made reference to the civil code.

The first argument is obviously naturalistic, the second one presupposes the intentional silence of the legislator, the third one turns the discourse into an historic argument: "Because of the absence of references, we must deduce that the constituent fathers made an implicit reference to the civil code", which ban, de facto, homosexual marriage[8]. In order to strengthen this opinion, the Court uses finally the systematic argument, in this case the sedes materiae argument: the following article of the Constitution, which is art. 30, concerns filiation and its effects, this means that the family "as natural society" is the family that can potentially procreate biological children[9]. So, all included, the concept of "family" intended by the Constitution is the traditional one. And we come back to the naturalistic argument.

Once the legal concept of family has been defined, as the judges did in their ruling, it is clear that this concept does not include same-sex marriage. For this reason, the discrimination between heterosexual and homosexual couples is not unjustified and, ultimately, the civil code articles are not unconstitutional on the basis of the article 3 of the Constitution, which only ban unjustified discrimination.

The Portuguese case

The Portuguese case is quite similar. A same-sex couple challenges the ban in court, saying that the ban discriminates on the basis of sex and sexual orientation, and that discrimination on the basis of sex is banned by the 1976 constitution. Moreover, in 2004 a constitutional amendment explicitly protected sexual orientation from discrimination[10]. In May 2007 the Court rejected the couple's claim[11]. The couple then appealed to the Portuguese Constitutional Court (Tribunal Constitucional). Similar is the judicial course, similar is the conclusion: the Tribunal Constitucional received the case in July 2007 and, in July 2009, decided that the constitution does not demand the recognition of same-sex marriage. Also the arguments used by Portuguese constitutional judges are quite similar. The plaintiffs based their claim on the alleged unconstitutionality of article 1577 of the Civil Codes (that clearly states: "two persons of different sex")[12], but the Tribunal Constitucional, due to the fact that art. 36 of the Portuguese Constitution gives an ambiguously gender-neutral definition of marriage[13], ultimately decides to interpret the Constitution in the light of the Civil Code. The argument, roughly speaking, is that the Constitution only says "family",

generically, because it accepts implicitly the concept of family stated in the Civil Code. In order to strengthen this argument, which could appear unusual, the Portuguese Tribunal Constitutional resorts to the systematic argument, underlying the consonance between two different sections (the Constitution and the Civil Code) of the Portuguese legal system. In order to do this, they need something more: they need what we could call a "coherentist interpretation", which can be obtained using the historical argument[14], the systematic a coherentia argument[15] or, more generically, a restrictive interpretative attitude as expressed by the brocard (legal maxim) ubi lex voluit, dixit; ubi noluit tacuit ("when the law wanted to regulate the matter, it did regulate the matter; when it did not want to regulate the matter, it remained silent"), a principle used in order to limit an excessively expansive interpretation that can go beyond the intention of the legislator[16].

As we can see, the two examples are analogous to each other. The main difference (which should not be underestimated) is that the Portuguese Constitution does not make reference to the family as a "natural society". Actually, it does not specify how the concept of "family" should be understood. Using systematic arguments, the Portuguese Constitutional Court ultimately decided to interpret the Constitution on the light of the Civil Code, which explicitly declares that the marriage is a relationship between a man and a woman. This could seem surprising, especially if we consider that the Portuguese Civil Code was drafted before the current Portuguese Constitution. Therefore, what the Court wanted to do in this case was, obviously, to transfer the responsibility of any decision to the Parliament.

Conclusions

The argumentative tools used by both constitutional courts are almost the same and they are neither surprising nor unusual. The use of arguments such as the systematic argument, the historical argument, the psychological argument, and the appeal to the (both chronological and topographical) coherence of the legal system, are part of a strategy to emphasize the consistency of the latter, even where there is no such consistency. In the Portuguese example, this kind of strategy has been the core of the Court's strategy. In the Italian example, due to the constitutional definition of "family" as "natural society", the Court decides to resort to the naturalistic argument. However, the use of the naturalistic argument, which has been more common over the past decades, is now ancillary because of

its lack of persuasiveness. For this reason the Court chooses, perhaps unconsciously, to cloak this argument about the "natural family" into one about the coherence of the legal system.

One of the standing results of modern theory on legal argumentation is that we have to differentiate between at least two levels of argumentation. On the lower level, a judicial decision is justified by reference to an existing legal statement. But it is possible that, in a given case, no applicable rule exists, or that several rules exist, which support, however, different decisions, or even that the interpretation of an existing rule, which is in principle applicable to the case, is unclear. In these situations, we are compelled to progress to a second level of justification. On this level we have to justify which rule, or which interpretation of a rule, should be applied.[17] At the first level, logical deduction is sufficient: judges do actually reason deductively. At the second level the question could be basically, from an argumentative point of view, persuading the audience about the correctness of an interpretation. For this reason, the second level is basically rhetorical, in the sense that strategic argumentation plays here a central role. In the two examples mentioned above, arguments are rhetorically balanced in order to persuade of the validity of the interpretation, while hiding political choices or ideological preferences by means of an appeal to the coherence of the legal system or to the "naturalness" of a social institution.

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[1] Corte Costituzionale, Sentenza n. 138/210

[2] "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions".

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

[3] Corte Costituzionale, Sentenza n. 138/210, 3, Considerato in diritto

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[4] 9, Considerato in diritto

[5] “The Republic recognises the rights of the family as a natural society founded on marriage.

Marriage is based on the moral and legal equality of the spouses within the limits laid down by law to guarantee the unity of the family”.

[6] 9, Considerato in diritto: “è vero che i concetti di famiglia e di matrimonio non si possono ritenere “cristallizzati” con riferimento all’epoca in cui la Costituzione entrò in vigore, perché sono dotati della duttilità propria dei princìpi costituzionali e, quindi, vanno interpretati tenendo conto non soltanto delle trasformazioni dell’ordinamento, ma anche dell’evoluzione della società e dei costumi. Detta interpretazione, però, non può spingersi fino al punto d’incidere sul nucleo della norma, modificandola in modo tale da includere in essa fenomeni e problematiche non considerati in alcun modo quando fu emanata”.

[7] 9, Considerato in diritto: “come risulta dai citati lavori preparatori, la questione delle unioni omosessuali rimase del tutto estranea al dibattito svoltosi in sede di Assemblea, benché la condizione omosessuale non fosse certo sconosciuta. I costituenti, elaborando l’art. 29 Cost., discussero di un istituto che aveva una precisa conformazione ed un’articolata disciplina nell’ordinamento civile”..

[8] 9, Considerato in diritto: “in assenza di diversi riferimenti, è inevitabile concludere che essi tennero presente la nozione di matrimonio definita dal codice civile entrato in vigore nel 1942, che, come sopra si è visto, stabiliva (e tuttora stabilisce) che i coniugi dovessero essere persone di sesso diverso”.

[9] 9. Considerato in diritto, “Non è casuale, del resto, che la Carta costituzionale, dopo aver trattato del matrimonio, abbia ritenuto necessario occuparsi della tutela dei figli (art. 30), assicurando parità di trattamento anche a quelli nati fuori dal matrimonio, sia pur compatibilmente con i membri della famiglia legittima. La giusta e doverosa tutela, garantita ai figli naturali, nulla toglie al rilievo costituzionale attribuito alla famiglia legittima ed alla (potenziale) finalità procreativa del matrimonio che vale a differenziarlo dall’unione omosessuale”.

[10] Constitution of the Portuguese Republic, art. 13, 2: “No one shall be privileged, favoured, prejudiced, deprived of any right or exemptedm from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation”..

[11] Tribunal da Relação de Lisboa, acórdão 6284/2006-8, 15/02/2007

[12] Art. 1577 (“Noção de casamento”): “Casamento é o contrato celebrado entre duas pessoas de sexo diferente que pretendem constituir família mediante uma plena comunhão de vida, nos termos das disposições deste Código” (corsivo mio); art. 1628 (“Casamentos inexistentes”), comma e): “É juridicamente inexistente […] o casamento contraído por duas pessoas do mesmo sexo”.

[13] Constitution of the Portuguese Republic, art. 13, 1 (“Everyone shall possess the right to found a family and to marry on terms of full equality”) and 3 (“Spouses shall possess equal rights and duties in relation to their civil and political capacity and to the maintenance and education of their children”).

[14] A recepção constitucional do conceito histórico de casamento como união entre duas pessoas de sexo diferente radicado intersubjectivamente na comunidade como instituição não permite retirar da Constituição um reconhecimento directo e obrigatório dos casamentos entre pessoas do mesmo sexo. (cfr. Gomes Canotilho e Vital Moreira, Constituição da República Portuguesa Anotada, vol. I, 4.ª edição, Coimbra, 2007, pág. 362).

[15] Mas a circunstância de a Constituição, no já citado n.º 1 do seu artigo 36.º, se referir expressamente ao casamento sem o definir, revela que não pretende pôr em causa o conceito comum, radicado na comunidade e recebido na lei civil, configurado como um «contrato celebrado entre duas pessoas de sexo diferente». Argomento sistemático-concettualistico (dogmatico).

[16] Na verdade, se o legislador constitucional pretendesse introduzir uma alteração da configuração legal do casamento, impondo ao legislador ordinário a obrigação de legislar no sentido de passar a ser permitido a sua celebração por pessoas do mesmo sexo, certamente que o teria afirmado explicitamente, sem se limitar a legitimar o conceito configurado pela

lei civil; e não lhe faltaram ocasiões para esse efeito, ao longo das revisões constitucionais subsequentes.

[17] A. Soeteman, Deduction in Law, in F.H. van Eemeren (ed.), Argumentation: Analysis and Practices, Walter de Gruyter, Berlin-New York, 1987, p. 102.