Same-Sex Adoptions: The Italian Case

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Abstract

In the judgment discussed in this paper, the Court of Cassation endorsed a broad interpretation of Art 44, para 1, letter *d*), legge 4 May 1983 no 184, such as to allow 'adoption in special cases' to homosexual couples. The legal recognition of the parental relationship developed between the child and the partner of the biological parent is rooted in a constitutionally-oriented interpretation, which is not hindered by the silence of the legislature on the reform of civil unions (legge 20 May 2016 no 76), thereby ensuring the realisation of the child's right to have a family, regardless of preliminary assessments of the sexual orientation of the prospective adoptive parents.

I. Corte di Cassazione 22 June 2016 no 12962: The Facts

The judgment under consideration here was delivered by the Court of Cassation following a complex trial and is the first – and highly anticipated – ruling in matters of same-sex adoption.

The case concerns the application for adoption, in accordance with Art 44, para 1, letter *d*), legge 4 May 1983 no 184, by the social (or non-birth) mother of a minor born to a lesbian couple through medically assisted reproductive technology. Following a thorough examination of the situation (the judgment takes into account the social and psychological inquiry conducted by the local social services, as well as the hearing of the parents and the principal of the child's school), the juvenile court[1] at first instance pointed out that the child was born from a joint parental project of the two women, who had been living together for ten years, who were recorded in the municipal register of *de facto* unions and were also married in Spain, where the child was conceived. The designation of one of the two as the biological mother was exclusively based on grounds of age. Raised by the couple, the child – who was five years old at the time of the appeal – fully recognises the two women as her parents, calling them both 'Mum'. Hence, an investigation of the actual situation demonstrated the development of a solid relationship of maternal love and responsibility,

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[1] Tribunale per i Minorenni di Roma 30 July 2014 no 299, *La nuova giurisprudenza civile commentata*, I, 109 (2015), with note by J. Long, 'L'adozione in casi particolari del figlio del partner dello stesso sesso', and with note by N. Cipriani, 'La prima sentenza italiana a favore dell'adozione nelle famiglie omogenitoriali' *Diritto di famiglia e delle persone*, 174 (2015).

unaffected by the biological history and allowing for the child's mature and peaceful growth.

Based on these facts, the juvenile court determined that the legal recognition of an accomplished parental relationship is in the child's best interests, and therefore granted the application for adoption, following a broad interpretation of letter *d*) of Art 44, para 1, legge 4 May 1983 no 184. This finding was confirmed by both the Court of Appeal[2] and Court of Cassation on review.[3] The latter, in particular, offers a constitutionally-oriented interpretation of the so-called 'adoption in special cases', which it views as an instrument to protect the 'right to a family' which must be pursued regardless of any prejudicial assessment of the sexual orientation of the prospective adopters, but only on the basis of the suitability of the family to look after the child.

Furthermore, the decision is not only significant from a legal perspective but also has great political relevance. Settling a dispute at a time when Italy had no law on homosexual unions, the Court of Cassation issued the ruling just over a month after the promulgation of the so-called Cirinnà reform,[4] which recognised and regulated same-sex 'civil unions' for the first time in Italy. As is well-known, following a heated parliamentary battle, the legislature gave up on the regulation of adoption by same-sex couples, leaving a legal vacuum difficult to interpret. The decision of the Court of Cassation thus burst forcefully into the debate that accompanied the enactment of the reform, stimulating reflection on the fate of same-sex adoptions in Italy today.

II. Legal Conditions for the 'Special Adoption': On the 'Impossibility of Pre-Adoptive Placement'

As previously mentioned, the interpretation of the decision under review revolves around the normative parameter represented by Art 44, para 1, letter

[2] Corte d'Appello di Roma 23 December 2015, available at *www.articolo29.it*.

[3] Corte di Cassazione 22 June 2016 no 12962, *Foro italiano*, I, 2342 (2016). For a commentary, see G. Ferrando, 'Il problema dell'adozione del figlio del partner. Commento a prima lettura della sentenza della Corte di Cassazione n. 12962 del 2016' *La nuova giurisprudenza civile commentata*, I, 1213 (2016); G. Casaburi, 'L'adozione omogenitoriale e la Cassazione: il convitato di pietra' *Foro italiano*, 2360 (2016); P. Morozzo Della Rocca, 'Le adozioni in casi particolari ed il caso della *stepchild adoption*' *Corriere giuridico*, 1217 (2016); L. Attademo, 'La "*stepchild adoption*" omoparentale nel dettato dell'art. 44, comma 1, lett. d), L. n. 184/1983 e nella L. n. 218/1995' *Corriere giuridico*, 1224 (2016).

[4] The reform is named after the member of the Italian Parliament who proposed it, ie the senator of the Democratic Party, Monica Cirinnà. The law is the legge 20 May 2016 no 76, published in the Gazzetta Ufficiale 21 May 2016. For a commentary, see E. Calò, *Le unioni civili in Italia* (Napoli: Edizioni Scientifiche Italiane, 2016), passim; G. Casaburi, 'Convivenze e unioni civili: una prima lettura della nuova legge', available at https://tinyurl.com/yddpbhzu (last visited 15 June 2017); M.R. Marella, 'Qualche notazione sugli effetti simbolici e redistributivi della legge Cirinnà' *Rivista critica del diritto privato*, 231 (2016); M.C. Venuti, 'La regolamentazione delle unioni civili tra persone dello stesso sesso e delle convivenze in Italia' *Politica del diritto*, 95 (2016).

d), legge 4 May 1983 no 184. The provision falls within the institution of adoption in special cases,[5] and enables the adoption of children for whom 'pre-adoptive placement' has proved to be impossible, even when the requirements for complete adoption are not met.

In recent years, the exact meaning to be attributed to such a condition has in fact been the subject of a lively jurisprudential debate, which the Court of Cassation sought to resolve.

A more dated orientation views the impossibility referred to in the provision in the same way as a mere *de facto* impossibility.[6] According to this interpretation, adoption may only be granted to children in a state of abandonment for whom, following the declaration of the child's adoptability, pre-adoptive placement proved to be impossible. In this view, the institution of incomplete adoption under Art 44, para 1, letter *d*) would only cover abandoned children (and, therefore, devoid of any emotional bond), whose particularly problematic conditions impede their placement with a family suitable (or willing) to welcome them. It is an interpretation of the norm which, clearly, does not allow for its application to

[5] The legal institution was in fact introduced by the legge 4 May 1983 no 184, in order to recognise the child's right to a family in special circumstances (Arts 44-57), where the conditions for complete adoption (Arts 6-21) are not met and, nevertheless, it is deemed appropriate to proceed with the adoption. The adoption in special cases is characterised not only by the less stringent nature of its requirements, but also by a more streamlined process and limited effects as compared to those arising from complete adoption (ie: the ties with the family of origin are not severed). On this issue, see M. Dogliotti and F. Astiggiano, 'L'adozione in casi particolari' *Vita Notarile*, 19 (2014); G. Ferrando, 'L'adozione in casi particolari: orientamenti innovativi, problemi, prospettive' *La nuova giurisprudenza civile commentata*, II, 679 (2012); G. Collura, 'L'adozione in casi particolari', in R. Lenti and M. Mantovani eds, *Filiazione*, II, in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2012), 951; E. Urso, 'L'adozione in casi particolari', in G. Ferrando ed, *Trattato Il nuovo diritto di famiglia*, III, *Filiazione e adozione* (Bologna: Zanichelli, 2007), 765; A. Giusti, 'L'adozione dei minori in casi particolari', in G. Bonilini and G. Cattaneo eds, *Trattato di diritto di famiglia* (Torino: UTET, 2007), III, 455; M. Dogliotti, 'L'adozione in casi particolari', in M. Bessone ed, *Trattato di diritto privato* (Torino: Giappichelli, 1999), IV, 397.

[6] In case law, this restrictive interpretation of Art 44, para 1, letter *d*), legge 4 May 1983 no 184 is supported by Tribunale per i Minorenni di Potenza 15 June 1984, *Diritto di famiglia e delle persone*, 1039 (1984); Tribunale di Roma 22 December 1992, *Giurisprudenza di Merito*, 924 (1993), with note by G. Manera, 'Ancora affidamenti "familiari" abusivi'; Corte d'Appello di Torino 9 June 1993, *Diritto di famiglia e delle persone*, 165 (1994); Tribunale per i Minorenni di Ancona 15 January 1998, *Giustizia civile*, I, 1711 (1998), with note by F. Picardi, 'L'adozione *ex* art. 44 l. n. 184 del 1983 e l'impossibilità di affidamento preadottivo: un possibile chiarimento della Consulta?'; Tribunale per i Minorenni del Piemonte e Valle d'Aosta 11 September 2015, *La nuova giurisprudenza civile commentata*, I, 205 (2016), with note by A. Nocco, 'L'adozione del figlio di convivente dello stesso sesso: due sentenze contro una lettura "eversiva" dell'art. 44, lett. d), l. n. 184/1983'; Tribunale per i Minorenni di Milano 17 October 2016 no 261, available at http://tinyurl.com/yd9ddd2x (last visited 15 June 2017), and Tribunale per i Minorenni di Milano 20 October 2016 no 268, available at http://tinyurl.com/y7wa8y5w (last visited 15 June 2017). In the literature, the same interpretation is supported by G. Miotto, '*Stepchild adoption* omoparentale ed interesse del minore' *Diritto Civile Contemporaneo*, 5 June 2015; C. Rusconi, 'L'adozione in casi particolari: aspetti problematici nel diritto vigente e prospettive di riforma' *Jus-online*, 14 (2015).

the case examined by the Court of Cassation, where the child is already in the care of the biological mother and, therefore, does not need any new family in which to be placed.

However, this orientation is opposed by another one – definitively endorsed by the Court of Cassation on review – in which the 'impossibility of pre-adoptive placement' may also have a legal nature. The provision would allow the adoption even in cases where the minor is not in a state of abandonment, as the child is already being taken care of. The absence of the state of abandonment would complement the lack of a legal condition required to initiate the complete adoption procedure, thus preventing pre-adoptive placement on a merely formal level. Clearly, such an interpretation extends the scope of application of this legal institution, thus covering the cases where the minor has a stable and healthy relationship with the biological parent, and formalising the social parental relationship with the parent's *partner* is in the child's best interests.[7]

The latter solution, supported by the Court of Cassation, is undoubtedly preferable. Not only it is consistent with the literal content of Art 44, para 1, letter *d*), legge 4 May 1983 no 184, but it also appears to be more compliant with the function of the legal institution of adoption and more attentive to the needs of protection of minors.

First, it must be noted that the term 'impossibility' has a general scope, such as to include both the *de facto* impossibility and the *de jure* impossibility of pre-adoptive placement.[8] However, the literal analysis cannot stop here. The provision contains, in fact, a further, even more significant point. The very first sentence of Art 44, para 1, legge 4 May 1983 no 184 specifies that adoption in special cases may be granted 'when the conditions established in paragraph 1 of Art 7 are not met'. In para 1, Art 7 identifies as a condition for complete adoption the declaration of the child's adoptability, which in turn entails the

[7] For an extensive interpretation of Art 44, para 1, letter *d*), legge 4 May 1983 no 184, allowing the adoption of the child by the social parent, ie different-sex partner of the biological parent, see: Tribunale per i Minorenni di Milano 28 March 2007, *Famiglia e minori*, 83 (2007); Corte d'Appello di Firenze-Sezione minorenni 4 October 2012, available at http://tinyurl.com/y839zb3b (last visited 15 June 2017). The same broad interpretation, but in favour of the same-sex partner of the biological parent, is supported by: Tribunale per i Minorenni di Roma 30 July 2014 n 1 above, confirmed by Corte d'Appello di Roma 23 December 2015, n 2 above; Tribunale per i Minorenni di Roma 22 October 2015, *Foro italiano*, I, 359 (2016), with note by G. Casaburi, 'Omosessuali, unioni civili e filiazione: una questione aperta'; Tribunale per i Minorenni di Roma 23 December 2015 and Tribunale per i Minorenni di Roma 30 December 2015, (both in) *La nuova giurisprudenza civile commentata*, I, 969 (2016), with note by M. Farina, 'Adozione in casi particolari, omogenitorialità e superiore interesse del minore'; Corte di Appello di Torino 27 May 2016, *Foro italiano*, I, 1933 (2016), with note by G. Casaburi, 'L'*Unbirthday* secondo il legislatore italiano: la «non» disciplina delle adozioni omogenitoriali nella l. 20 maggio 2016, n. 76'.

[8] The general nature of the term 'impossibility' has been highlighted most recently by A. Nocco, n 6 above, 205. Also see M. Winkler, 'Genitori non si nasce: una sentenza del Tribunale dei minorenni di Roma in materia di *second-parent adoption* all'interno di una realtà omogenitoriale' *giustiziacivile.com*, 13 November 2014, 10.

child's state of abandonment (referred to in the following Art 8, para 1). It follows that, in general, the adoption in special cases is independent of the ascertainment of the conditions established for complete adoption; in this sense, letter *d*) – as is admitted without challenge in the cases under letters *a*), *b*) and *c*) of the same Art 44 – must then be applicable also to children who are not in a state of abandonment but wish to get full recognition of the emotional relationship that binds them with their social parent.[9]

The soundness of this solution is furthermore confirmed by the rationale of the provision and, more generally, the interpretation of the institution of adoption in special cases in light of the whole system of family law. While expanding an exhaustive list, the cases set out in Art 44 are affected by the overall rationale of the legge 4 May 1983 no 184, which is well expressed in Art 57, no 2. The latter provision establishes an obligation for the court to determine whether the adoption is in 'the best interests of the child'. Of fundamental importance, this assessment is appropriately considered in case law as the 'interpretative key' of the institution of adoption in special cases and is confirmed by the very title of the legge 4 May 1983 no 184 (as modified by legge 28 March 2001 no 149), clearly indicating to the interpreter the perspective to adopt for an analysis of the content of the law, ie the 'right of the child to a family'.[10] Hence, it is the relationship between the parent and the child that plays a fundamental role.

The Court of Cassation appropriately emphasised the importance of the relationship between the child and the social mother for the harmonious and

[9] To support the hypothesis that a state of abandonment is not a necessary condition under Art 44, legge 4 May 1983 no 184, the Court of Cassation also referred to Art 11, para 1 of the same law. The provision establishes that, for a child orphaned of both parents and with no relatives within the fourth degree with whom the child has a meaningful relationship, the juvenile court must declare a state of adoptability, 'unless the conditions for adoption under Art 44 are fulfilled'. In the same sense, Tribunale per i Minorenni di Roma 23 December 2015 and Tribunale per i Minorenni di Roma 30 December 2015 n 7 above.

[10] In the same way, Art 315 *bis*, para 2, Italian Civil Code similarly addresses the right of the minor 'to grow up in a family'. The central role of the child's interests is also evidenced by other legislative measures. Of particular significance is the reform of the regulation of the custody of the child as a result of termination of the marital bond (legge 8 February 2006 no 54), as well as the reform which introduced the unique nature of the state of child (implemented by the legge 10 December 2012 no 219 and decreto legislativo 28 December 2013 no 154). The former has reversed the perspective in the relationship between parent and child, now regulated in accordance with the right of the minor to maintain a balanced and continuous relationship with each of the parents and receive care, upbringing and education from both parents (on this, see E. Quadri, 'L'affidamento del minore: profili generali' *Famiglia e diritto*, 653 (2001)); the latter has removed the difference between legitimate and natural children, thus giving rights to children as such, irrespective of the existence of a family based on marriage (see G. Ferrando, 'La nuova legge sulla filiazione. Profili sostanziali' *Corriere giuridico*, 525 (2013)). In the literature, the evolution of family law is addressed, among others, by G. Recinto, *La genitorialità. Dai genitori ai figli e ritorno* (Napoli: Edizioni Scientifiche Italiane, 2016), 11-104; R. Pane ed, *Nuove frontiere della famiglia. La riforma della filiazione* (Napoli: Edizioni Scientifiche Italiane, 2014), 9-28; L. Balestra, 'L'evoluzione del diritto di famiglia e le molteplici realtà affettive' *Rivista trimestrale di diritto e procedura civile*, 1105 (2010).

peaceful growth of the child herself. On this view, a rejection of the application for adoption would have surely resulted in a serious prejudice for the child, thus betraying the spirit of the law. The adoption order appears entirely appropriate because, in formalising an already existing affective situation, it grants the protection of a vulnerable subject – as is the minor – and satisfies interests worthy of protection. Ultimately, the interpretative solution of emancipating the conditions set out in letter *d*) of Art 44, para 1 from the necessity of a prior assessment of the child's state of abandonment is surely to be appreciated, since it distances itself from unreasonable and absurd outcomes, which are likely to subordinate the always 'prominent' interest of the child to the reasons of legal formalism.

III. Constitutionally Oriented Interpretation and New Family Models

The solution put forward by the Court of Cassation not only complies with the literal content and the overall rationale of the legge 4 May 1983 no 184, but also appears to be in line with constitutional and conventional principles.[11]

Precisely on adoption in special cases, a judgment of the Constitutional Court identified the *proprium* of Art 44, legge 4 May 1983 no 184 in its being governed by the 'absence of the conditions' set out in Art 7, para 1, of the same law, which governs complete adoption.[12] A new light is thus cast on the link between complete and special adoption. More specifically, the latter shall not be a container of a series of exceptional circumstances, to be interpreted strictly and not susceptible to more generous applications. By contrast, it constitutes a special institution, which allows for the realisation of the child's right to a 'family' with more limited effects than the complete adoption, but in cases in which the latter is not permitted. As seen above, the considerations identified by the Court of Cassation are entirely consistent with the findings provided by the Constitutional Court, because Art 44, para 1, letter *d*), legge 4 May 1983 no 184 is applied as an umbrella provision, also covering the case of adoption by the same-sex *partner*, whenever this is in the child's best interest.

But that is not all. The solution also appears to be the only one consistent with the principles of non-discrimination and respect for family life, constantly affirmed in constitutional and EU case law.[13]

[11] In this regard, as it is known, the interpreter must adopt, among the various possible interpretations, one that leads to a decision on the specific case that is most respectful of the constitutional principles and abandon the others. In this sense, see Corte Costituzionale 27 June 1986 no 151, *Foro italiano*, I, 29 (1987).

[12] Corte Costituzionale 7 October 1999 no 383, *Giurisprudenza costituzionale*, 2951 (1999). In the opposite way, Corte di Cassazione 27 September 2013 no 22292, *Guida al diritto*, 34 (2013) considers the conditions under Art 44, legge 4 May 1983 no 184 'mandatory and of strict interpretation'. In the literature, in line with the Constitutional Court, G. Ferrando, 'L'adozione' n 5 above, 682, sees in Art 44, legge 4 May 1983 no 184 a 'safety valve'.

[13] In the literature, the need for a constitutionally-oriented interpretation of adoption in

Having correctly identified the interests to be protected by the adoption order, the court arrives at a sensible and reasonable conclusion only if any discrimination between couples who are admitted or non-admitted to adoption occurs on the ground of their suitability to guarantee the child's healthy, balanced growth. In other words, the focus here is not on the horizontal relationship of the couple, more or less adhering to a preconceived 'model' of familiar union; on the contrary, it must be ignored completely in favour of the vertical relationship between the (social) parent and the child, in the belief that only an investigation of this type can ensure the desirable recognition of mature and virtuous emotional relationships for the child. Consequently, an interpretative solution prohibiting adoption in special cases only by virtue of the absence of a formal marriage, that is by virtue of the sexual orientation of the aspiring adoptive parent,[14] is likely to breach the principle of non-discrimination (under Art 3 Italian Constitution and Art 14 European Convention on Human Rights (ECHR)), as it bases the difference in treatment on criteria irrelevant to the child's best interest.

As previously mentioned, the solution arrived at by the Court of Cassation complies with the Italian Constitution also with reference to Art 117, para 1, transposing Art 8 ECHR into the national law, on the right to respect for one's private and family life. In the consolidated interpretation of the law given by the Strasbourg Court, the protection of family ties is entirely independent of the existence of any formal legal relation.[15] Conversely, from a perspective that

special cases is supported by N. Cipriani, 'Appunti in tema di adozioni nelle famiglie omogenitoriali in Italia (in attesa del legislatore)' *giustiziacivile.com*, 2 February 2016, 9, who focuses more on letter *b*) than letter *d*) of Art 44, para 1, legge 4 May 1983 no 184.

[14] Abundant scientific literature has demonstrated that minors raised by same-sex couples do not show different levels of well-being compared with other children, raised by heterosexual couples. On this point, see the studies collected by the *Columbia Law School* and available at https://tinyurl.com/yavc68xs (last visited 15 June 2017). The idea 'that it might be detrimental to the balanced development of the child to live in a family centred on a homosexual couple' as the result of a 'mere prejudice' is also recognised in case law. Corte di Cassazione 11 January 2013 no 601, *La nuova giurisprudenza civile commentata*, I, 434 (2013), with note by C. Murgo, 'Affidamento del figlio naturale e convivenza omosessuale dell'affidatorio: l'interesse del minore come criterio esclusivo'. EU case law also followed the same line. See, particularly, Eur. Court H.R., *E.B.* v *Francia*, Judgment of 22 January 2008, *La nuova giurisprudenza civile commentata*, I, 672 (2008), with note by J. Long, 'I giudici di Strasburgo socchiudono le porte dell`adozione agli omosessuali', in which the court deemed it illegal to refuse the assessment of the suitability of the aspiring adoptive parent because of his homosexuality; also in matters of adoption, Eur. Court H.R., *X and Others* v *Austria*, Judgment no 19010/07 of 19 February 2013, available at http://tinyurl.com/yc8gubhy (last visited 15 June 2017), which deemed discriminatory and not respectful of the right to a family life the Austrian regulation, allowing the so-called step-child adoption only to cohabiting heterosexual couple and not to same-sex couples; finally, Eur. Court H.R., *Salgueiro da Silva Mouta* v *Portugal*, Judgment of 21 December 1999, available at http://tinyurl.com/yayvazz7 (last visited 15 June 2017), which considers contrary to conventional principles the revocation of the child's joint custody by reason of the discovery of the parent's homosexuality.

[15] The first judgment stating that protection of the 'family life' must be recognised regardless of the establishment of a 'legitimate' family is Eur. Court H.R., *Marckx* v *Belgium*, Judgment no 6833/74 of 13 June 1979, available at http://tinyurl.com/y8ymk9md (last visited 15 June

privileges the effectiveness of this protection, the factual situation becomes of primary importance, which alone justifies the duty of both the legislature and the interpreter to recognise as fully legal the emotional ties established between the social parent and the child.[16] EU case law, therefore, recognises the existence of a family pluralism, which also includes homosexual unions,[17] and implores respect for the emotional ties that support the development of the child, as a crucial component of the 'prominent interest' of the child.

Art 8 ECHR thus becomes a useful tool not only to ensure equal treatment of both heterosexuals and homosexual persons in the expression of their personality within the couple's relationship. More significantly, it ensures legal dignity to all those relations, including *de facto* ones, characterised by the existence of close and established ties; in that light, it provides a foundation for the rights of minors to see those ties legally respected and recognised. Of particular clarity

2017), which grants the protection under Art 8 ECHR of the relationship between a woman and her daughter, absent a male figure and a legal relation with the latter. In the literature, on the incidence of the case law concerning Art 8 ECHR, see F.D. Busnelli and M.C. Vitucci, 'Frantumi europei di famiglia' *Rivista di diritto civile*, 767 (2013).

[16] The main focus should, therefore, be placed on the personal and family relationships (worthy of protection pursuant to Art 2 Italian Constitution), rather than on the existence of a traditional family (nonetheless protected by Art 29 Italian Constitution). On this point, see Corte Costituzionale 18 July 1986 no 198, *Giurisprudenza italiana*, I, 1336 (1987), according to which 'the most appropriate solution to the particular conditions of the child' is to be found in 'concrete terms', and the court must 'always assess the strength of the emotional ties that have been established over time between the child and the family that is in fact raising him or her'. In the literature, see V. Roppo, 'La famiglia senza matrimonio. Diritto e non diritto nella fenomenologia delle libere unioni' *Rivista Trimestrale di Diritto e Procedura Civile*, 697 (1980); P. Perlingieri, 'La famiglia senza matrimonio tra l'irrilevanza giuridica e l'equiparazione alla famiglia legittima', in A. Falzea et al, *Una legislazione per la famiglia di fatto? Atti del Convegno di Roma Tor Vergata, 3 dicembre 1987* (Napoli: Edizioni Scientifiche Italiane, 1988), 238.

[17] In particular, Eur. Court H.R., *Schalk and Kopf* v *Austria*, Judgment of 24 June 2010, *La nuova giurisprudenza civile commentata*, I, 1137 (2010), with note by M. Winkler, 'Le famiglie omosessuali nuovamente alla prova della Corte di Strasburgo', in which 'the right to respect for one's private and family life guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms' requires 'the recognition of family status also to couples formed by people of the same sex'. In the same sense, Eur. Court H.R., *X and Others* v *Austria*, Judgment no 19010/07 of 19 February 2013, n 14 above; Eur. Court H.R., *Vallianatos and Others* v *Greece*, Judgment of 7 November 2013, *La nuova giurisprudenza civile commentata*, I, 693 (2014), with note by P. Pirrone, 'La Corte eur. dir. uomo sul caso *Vallianatos et autres* c. *Grèce*: «patti di vita comune» e discriminazione basata sull'orientamento sessuale'. Also the Constitutional Court has recently expanded the application of the concept of 'family life' beyond heterosexual couples: in this sense, Corte Costituzionale 10 June 2014 no 162, *Corriere giuridico*, 1062 (2014), with note by G. Ferrando, 'La riproduzione assistita di nuovo al vaglio della Corte costituzionale. Illegittimità del divieto di fecondazione «eterologa»', in matters of heterologous insemination, establishing that not only the children born naturally, but also those conceived through artificial insemination heterologous fall under the protection provided by Art 8 ECHR. In the literature, see G. Chiappetta, *Famiglie e minori nella leale collaborazione tra le corti* (Napoli: Edizioni Scientifiche Italiane, 2011), 11; F. Bilotta, 'Omogenitorialità, adozioni e affidamento famigliare' *Diritto di famiglia e delle persone*, 899 (2011); P. Passaglia, 'Matrimonio ed unioni omosessuali in Europa: una panoramica' *Foro italiano*, IV, 273 (2010); M. Porcelli, 'La famiglia al plurale' *Diritto di famiglia e delle persone*, 1250 (2014).

in this regard is the warning issued by the Court of Strasbourg to Italy in the seminal case *Paradiso*,[18] where the effective respect of the 'prominent interest of the child' requires the State to 'act in such a way so as to allow for the development of this relationship', whenever the existence of a familial relationship is ascertained.

The decision in question looks inspired exactly by these principles: at the centre of its reasoning, the Court of Cassation correctly considers the development of the child's personality within a peaceful and nurturing emotional context and promotes a modern and functional conception of the family, in which the protection of the vulnerable subject always prevails.

IV. Same-Sex Adoptions After Legge 20 May 2016 no 76: Has Nothing Changed?

What has changed in same-sex adoption after the entry into force of legge 20 May 2016 no 76, providing a new discipline of 'civil unions between same-sex persons' and 'cohabitations'?[19] In the judgment in question, the Court of Cassation is silent on this point, merely stating that the reform 'shall not apply, *ratione temporis* and absent transitional provisions, to cases such as that in question'.[20]

Therefore, at the moment the interpreter is left with the delicate task of investigating the possible impact of the recent legislative innovations on the case law analysed thus far. As briefly mentioned above, following a heated

[18] See Eur. Court H.R., *Paradiso and Campanelli* v *Italia*, Judgment no 25358/12 of 27 January 2015, *La nuova giurisprudenza civile commentata*, I, 834 (2015), with note by A. Schuster, 'Gestazione per altri e Conv. eur. dir. uomo: l'interesse del minore non deve mai essere un mezzo, ma sempre solo il fine del diritto', which censors, in a case of surrogacy, the choice of removing the child from the couple taking care of him (because it would be contrary to his best interest), even without a biological link between the child and the social parents. This first decision has been recently overruled by Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italia*, Judgment no 25358/12 of 24 January 2017, available at http://tinyurl.com/y8fyck7x (last visited 15 June 2017). The Court does not, however, decide in a way contrary to the reasoning developed in this paper. Indeed, the Great Chamber confirms that relations between an adult and a child, even 'in the absence of biological ties or a recognised legal tie' falls within 'the sphere of family life' (as protected by Art 8 ECHR). Nevertheless, with reference to the specific subject-matter of the ruling, the majority of judges composing the Great Chamber (eleven out of seventeen) reckon that the very little time spent by the child with the non-birth couple (just six months) shall not be considered sufficient to consolidate a familial relationship, protected by Art 8 ECHR. From a comparative law perspective, the Supreme Court of the United States 26 June 2015, *Foro italiano*, IV, 59 (2015), extends the benefits of marriage to homosexual couples by virtue of the protection of the children who would otherwise perceive their emotional context as inferior to that of traditional families and would be 'relegated through no fault of their own to a more difficult and uncertain family life'.

[19] See n 4 above.

[20] Corte di Cassazione 22 June 2016 no 12962 n 3 above, point 4.2.5. See G. Ferrando, 'Il problema' n 3 above, 1217.

political debate, the Cirinnà draft law has seen the 'removal' of the original Art 5, which would have amended Art 44, para 1, letter *b*), legge 4 May 1983 no 184, also allowing incomplete adoption to civil partners.[21] Needless to say, had the amendment resisted the stormy parliamentary process, the grounds for the case law dispute discussed above would have been swept away (at least with regard to civil unions). Conversely, the legislative silence – which conceals a clear political intention, rather than an oversight, ultimately to avoid addressing the issue of homosexual parenting – paves the way to the suggestion that the advent of the Cirinnà reform marks the sunset of the now-consolidated progressive orientation in case law. In other words, the absence of an explicit introduction of step-child adoption seems to show the opposition of the Italian legislature to such an institution and, therefore, prevents interpretive solutions surreptitiously taking into account the (intentionally) wasted opportunity of the reform.

On a more careful reading of the text of the law, though, the issue of same-sex adoption turns out not to be entirely neglected, but it rather receives some consideration.

The reference is found in para 20 of the single art of legge no 76/2016. The first sentence of the provision, in order to ensure 'effectiveness' to the protection afforded to same-sex couples in a civil union and dispel any doubts of the law's unconstitutionality, reads as follows:

> 'The provisions relating to marriage and the provisions containing the words "spouse", "spouses" or similar terms, wherever found in the laws, in the acts having the force of law, regulations and administrative measures and collective agreements, shall also apply to both parties of a civil union between persons of the same sex'.

The norm thus establishes a rule of terminological equivalence, seeking to prevent the risk that, in matters not specifically addressed by the reform, the partners of civil unions be subject to a less favourable treatment than that accorded to persons united by marriage.[22]

[21] So read Art 5: 'In Art 44, para 1, letter *b*), legge 4 May 1983, no 184, after the word "spouse", the following shall be added: "or the partner of the same-sex civil union"; and after the words "and of the other spouse" the following shall be added: "or of the other partner of the same-sex civil union" '.

[22] In this respect, the legge no 76 of 2016 marks a step forward, as compared to both constitutional case-law and the trend of the judgments of the Court of Cassation. Corte Costituzionale 15 April 2010 no 138, *Famiglia, persone e successioni*, 179 (2011), with note by F.R. Fantetti, 'Il principio di non discriminazione ed il riconoscimento giuridico del matrimonio tra persone dello stesso sesso', made it clear that homosexual marriage is a social union pursuant to Art 2 Italian Constitution, entitled to 'the fundamental right to live freely as a couple, and obtaining – in the time, manner and within the limits established by law – legal recognition and the related rights and duties'. Further, this right should not necessarily be achieved through equivalence of homosexual unions with marriage, as it is the task of the legislator to 'identify the types of guarantees and recognition for these unions, the Constitutional Court reserving the opportunity

The commendable anti-discrimination ambition is however diluted in the following sentence, which creates two exceptions to the equivalence rule: it shall not apply 'to the provisions of the Civil Code not expressly referred to in this law, nor to the requirements of legge 4 May 1983 no 184'. Focusing exclusively on the last part, the exception it contains clearly aims to prevent the provisions of the law on adoptions, where the existence of a formal marriage is the condition for application, from being applied extensively to civil unions.

The stubborn closure of the second sentence is mitigated by a third, concluding clause, which 'preserves the provisions and permissions in matters of adoption in current regulations'.

The assessment of the impact of legge no 76/2016 on the debated issue of the access by same-sex couples to adoption clearly relates to the interpretation of para 20 above and its three constituent parts. In particular, the combined provisions of the first and second sentences prevent civil union partners from obtaining both complete adoption pursuant to Art 6, and incomplete adoption, within the limits of letter *b*), Art 44, para 1, legge 4 May 1983 no 184 (as both provisions contain the fateful word 'spouse'). As to the first effect, while the choice made can be certainly criticised, it must be admitted that nothing changes as compared to the past: the clear wording of Art 6, legge 4 May 1983 no 184, in fact, has clearly prevented – not just recently – the access of homosexual couples to joint adoption. The same cannot be said with reference to Art 44, para 1, letter *b*), the interpretation of which is seemingly affected by the reform. It must be noted that part of the literature has in fact relied on a 'progressive' and constitutionally-oriented interpretation of the provision, so as to allow incomplete adoption also to same-sex families.[23] The recent innovation of sanctioning the non-equivalence between 'civil union' and 'marriage' for adoption purposes seems to be aimed at excluding (definitively) a similar interpretive solution, thus leaving open only the possibility of referring the matter to the Constitutional Court.[24]

On the other hand, the third, conclusive sentence of para 20 examined above is of the utmost relevance, as it clearly refers to the provisions of the legge

to intervene for the protection of specific circumstances (...). In relation to specific cases, indeed, there may arise the need for equal treatment of married couples and homosexual couples, which this Court may ensure through the control of reasonableness'. This opinion was confirmed by Corte di Cassazione 9 February 2015 no 2400, *Corriere giuridico*, 909 (2015), with note by G. Ferrando, 'Matrimonio *same-sex*: Corte di Cassazione e giudici di merito a confronto'. The equivalence clause contained in the legge no 76 of 2016 realises the equivalence between civil unions and marriages (with the exception of the provisions in matters of adoption), preventing case-specific adaptations under Art 3 Italian Constitution. In the literature, G. Casaburi, 'Convivenze' n 4 above, emphasises the wide scope of applicability of the equivalence clause.

[23] The attempt was made by N. Cipriani, 'Appunti' n 13 above, 9; Id, 'La prima sentenza italiana' n 1 above, 174.

[24] Even N. Cipriani, 'Appunti' n 13 above, 9, believes that, where it is impossible to promote a constitutionally-oriented interpretation of Art 44, para 1, letter *b*), legge 4 May 1983 no 184, the only alternative is to refer the matter to the Constitutional Court.

4 May 1983 no 184, which applies notwithstanding the existence of a marital relationship. As we have seen previously, this is the case of Art 44, para 1, letter *d*), examined by the Court of Cassation, whose prerequisite consists in the sole 'impossibility of pre-adoptive placement' and applies, by express provision of Art 44, para 3 of the same law, 'not only to spouses, but also to those who are not married'. The exception which concludes Art 1, para 20, legge no 76 of 2016 thus does not leave any doubt about the possibility that the extensive interpretation of Art 44, para 1, letter *d*), legge 4 May 1983 no 184 endorsed in the judgment can be fully welcomed in the new normative environment, thus remaining the only instrument available also to same-sex couples (even those that are not in a civil union) to obtain the legal recognition of their social parenthood in favour of the other partner's child.

Yet, there is more. The provision of the reform may provide input for further reflection. Particularly, in preserving the 'provisions' and 'permissions' in matters of adoption, it appears that the legislature intended to mention the provisions in which the word 'spouse' is absent, not only and not so much for their literal wording – as such specification would be redundant – but especially for their normative scope, as it results from the continuous hermeneutic efforts of the most recent case-law.[25] Indeed, the juxtaposition of the nouns 'provisions' and 'permissions' does not appear to result in hendiadys (both bizarre and unnecessary). Rather, it has the specific purpose of preventing the exclusion of the provisions in matters of adoption from the rule of equivalence from having a negative effect on the interpretive paths that led to the formation of the current law in action, which is more careful than the *jus positum* to both the needs of protection of children and non-discriminatory treatment of same-sex couples.[26]

Therefore, it seems possible to argue that the silence of the legge no 76 of 2016 not only fails to affect a progressive interpretation of Art 44, para 1, letter *d*), legge 4 May 1983 no 184, that guarantees access to incomplete adoption (also) to the homosexual partner, but also legitimises in a definitive manner the interpretive solution endorsed by the Court of Cassation. It being understood that, in doing so, the case-law orientation analysed here can (and must) apply to

[25] See A. Schillaci, 'Un buco nel cuore. L'adozione coparentale dopo il voto del Senato', available at https://tinyurl.com/y7lhgxbn (last visited 15 June 2017); G. Casaburi, 'Convivenze' n 4 above, which defines the severability clause under Art 1, para 20, third sentence, legge no 76 of 2016 as a 'non-closure', which reappraises the exclusion of the provisions in matters of adoption from the rule of equivalence in the previous sentence.

[26] M. Bianca, 'Le unioni civili e il matrimonio: due modelli a confronto' 2 *giudicedonna.it*, 9 (2016), is very critical of the wording of this provision, which she considers 'incomprehensible' and 'contrary to the previous sentence', even assuming that the severability of the third sentence of para 20 conceals 'the intention of the legislator (…) to preserve the judicial practice allowing adoption in special cases' to homosexual couples. G. Casaburi, 'L'adozione omogenitoriale' n 3 above, 2360 sees the provision as 'alluring', in that it 'invites (or, at least, does not forbid) the case law to follow a road already travelled by the Tribunale per i Minorenni di Roma (…) in recognising special adoption in favour of the homosexual partner of the child's parent'.

the homosexual partner, regardless of the existence of a formal civil union,[27] and only based on an accurate assessment of the adoptive order being compliant with the best interests of the child.

In conclusion, it is thus reasonable to hope that the interests of children raised by homosexual couples will be increasingly recognised formally by the courts. Given the failure of the legislature to define a responsible position, the courts – particularly the Court of Cassation – are inevitably left with the task of selecting the interests to protect and ensure the compliance of the system with constitutional and conventional principles.

[27] Otherwise, the formalistic approach, inconsiderate of the needs of protection of children and dangerously prone to feed hateful discrimination between first- and second-rate homosexual couples, would once again return.