

Same-sex couples rights: the role of supranational and national Courts in order to fill legal vacuum in the Italian legal framework

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1. Introduction

The paper focuses on the judiciary creation of law and dialogue between judges with reference to previous and subsequent case-law to the approval of Italian law n. 76/2017 (Cirinnà law), which recognizes same-sex partnerships and cohabitation relations¹.

Before the approval of law n. 76/2016, the Italian Constitutional Court and the European Court of Human Rights have played a key role in order to fill the legal vacuum: the Italian Constitutional Court invited twice the Parliament to ensure a legal recognition to same sex couple (C. Const. judgment n. 138/2010; C. Const. judgment n. 170/2014).

The European Court of Human Rights indeed, taking into consideration “that in Italy the need to recognize and protect such relationships has been given a high profile by the highest judicial authorities” (ECHR 2015 – *Oliari v. Italy* § 180), condemned Italy for violating Article 8 of the Convention.

The contribution aims to investigate: i) the impact of principles established by Courts on domestic case-law, taking into account that, because of the regulatory void, those principles have often been considered self-applying (Cass. 8097/2015); ii) the influence of Courts’ decisions on the provisions of law n° 76/2016; iii) the recent case-law admitting stepchild adoption by same-sex couples, even if law n. 76/2016 does not provide it.

2. The Italian Constitutional Court judgments n. 138 /2010 and n. 170/2014

In order to tackle the issue of the judiciary creation of law and dialogue between judges in relation to the protection of same sex couples’ rights, it is necessary to analyze two representative judgments of Italian Constitutional Court, judgments n. 138 /2010 and n. 170/2014.

¹ On the issue see M. D’Amico, *I diritti contesi. Problematiche attuali del costituzionalismo*, FrancoAngeli, 2016, p. 142 ss; M. D’Amico, *L’approvazione del Ddl Cirinnà fra riconoscimento dei diritti e scontro ideologico*, in www.federalismi.it, 2016.

The cases are relevant both for the impact they had on the national case-law and on the fundamental choices that characterizes law n. 76 of 2016, but also for the kind of decisions taken by the Courts².

Both judgments, in fact, constitutes those kind of decisions that the Italian constitutional Court takes in view of the legislator's inertia to protect fundamental rights. In this way there seems to be a "sort of collaboration" among the constitutional Court, the Parliament and judges³.

The n. 138/2010 case is a "monito" decision, i.e. a decision by which the Court, explicitly invites the legislators to fill a legal vacuum, considered detrimental to constitutional principles, though it rejects the matter because it is of Parliamentary competence⁴.

The judgement 170/2014 is a "additiva di principio" decision, i.e. a decision by which the Court declares the provision to be "unconstitutional insofar as they do not provide.." and establishes a principle that will have to inspire the legislator to fill the legal void⁵.

Before we analyze thoroughly the impact of these two judgments on the creation of law, it is important to describe them briefly.

In the n. 138/2010⁶ case the Court considered the provisions of the Civil Code governing marriage, following references from two Courts seized with applications from homosexual couples seeking recognition of their right to marry, refused by the civil registrar to publish notice of their intention to marry.

The question facing the Court in to understand if it is necessary to determine whether the constitutional principle requires the Court to strike down the contested legislation as unconstitutional, "extending the legislation governing civil marriage to homosexual couples in order to fill the gap resulting from the fact that Parliament has not considered the problem of homosexual marriage".

In view of the constitutional context, the Court marks a distinction between traditional marriage and civil partnership.

On the one hand, traditional marriage is regulated by Art. 29 of the Italian Constitution which claims that "The Republic recognizes the rights of the family as a natural association founded on marriage".

La Corte "crystallised" the concepts of family and marriage and affirms that "as it is clear from the *travaux preparatoires* of Constituent Assembly, the question of homosexual unions remained entirely unaddressed within the debate conducted

² A. Ruggeri, Questioni di diritto di famiglia tecniche decisorie nei giudizi di costituzionalità (a proposito della originale condizione dei soggetti transessuali e dei loro ex coniugi, secondo Corte cost. n. 170 del 2014), in www.giurcost.org, p. 3;

³ See R. Romboli, Giustizia costituzionale, Giappichelli, p.83.

⁴ See G. Zagrebelsky, Giustizia costituzionale, Giappichelli, p. 137.

⁵ See G. Zagrebelsky, Giustizia costituzionale, Giappichelli, p. 137.

⁶ see M. D'Amico, Una decisione ambigua, in *Notizie di Politeia*, p. 85 ss.; R. Romboli, La sentenza 138/2010 della Corte costituzionale sul matrimonio omosessuale e le sue interpretazioni, in www.rivistaaic.it, 2011; A Pugiotta, Una lettura non reticente della sent. N. 138/2010: il monopolio eterosessuale del matrimonio", in www.forumdeiquadernocostituzionali.it, 2010.

within the Assembly, even though homosexuality was by no means unknown. Therefore, due to the lack of “different references, the inevitable conclusion is that they took account of the concept of marriage defined under the Civil Code which entered into force in 1942 and which (...) specified (and still specifies) that married couples must be comprised of persons of the opposite sex”.

On the other hand, the rights of homosexual couples are protected by Art. 2 of the Constitution, that provides “that the Republic recognizes and guarantees the inviolable rights of every person, both as an individual as well as in social groupings in which he or she expresses his or her personality”.

According to the Court, “this concept must also include homosexual unions, understood as the stable cohabitation of two individuals of the same sex, who are granted the fundamental right to live out their situation as a couple freely and to obtain legal recognition thereof along with the associated rights and duties, according to the time-scales, procedures and limits specified by the law”.

However, the Court finds that the aspiration to this recognition cannot solely be achieved by rendering homosexual unions equivalent to marriage.

In order to fulfill the purposes of Article 2, “it is for Parliament to determine – exercising its full discretion – the forms of guarantee and recognition for the aforementioned unions, whilst the Constitutional Court has the possibility to intervene in order to protect specific situations”.

Another call to the Parliament to fill legal vacuum in order to guarantee protection to partnerships different from traditional marriage has been sent out by the constitutional Court in n. 170/2014 judgments⁷.

In this case the Court concerns a proceeding brought by a married couples, who had been forced to divorce against their wishes by operation of law following the gender reassignment of one of the spouses.

The court referring to the principles of the judgments n. 138/2010 states that “the situation lies outwith the standard model of marriage – which can no longer continue as such as the prerequisite of heterosexuality is no longer fulfilled, which is essential for our legal order – but is also not simplistically comparable to a union of persons of the same sex, as this would be tantamount to negating on a legal level a previously shared life within which the couple has acquired reciprocal rights and obligations, some of which have constitutional relevance”.

The particular situation here involves, on the one hand, the state’s interest not to alter the heterosexual nature of marriage and on the other hand the interest of the couple to choose freely in relation to such a significant aspect of his or her personal identity.

⁷ F. Saitto, “L’incostituzionalità del ‘divorzio imposto’ tra rettificazione di sesso e tutela del ‘pregresso vissuto’ della coppia”, *ivi*, p. 2706 e ss., e di F. Biondi, “La sentenza additiva di principio sul c.d. divorzio ‘imposto’: un caso di accertamento, ma non di tutela, della violazione di un diritto”, in www.forumcostituzionale.it, 2014.

For these reasons the Court declare unconstitutional the provision at issue with reference to art. 2 of the Constitution which guarantee “the fundamental right to live out their situation as a couple freely”.

In view of the issue of the judiciary creation of law and dialogue between judges two excerpts of the 170/2014 judgment are significant.

Firstly, the Court specify that it is “to operate a *reductio ad legitimitatem* through a “manipulative” judgment, by which automatic divorce is replaced by divorce upon request, as this would be tantamount to enabling the continuation of the matrimonial bond between persons of the same sex, which would breach Article 29 of the Constitution”.

Secondly, the Court calls again for the legislator “to introduce an alternative arrangement (different from marriage) which enables the two spouses to avoid the passage from a situation in which they enjoy the utmost legal protection to one in which protection is absolutely uncertain”. The legislator “is called upon to comply with this task with the utmost dispatch in order to resolve the unconstitutionality of the legislation under examination due to the current lack of protection for the individual rights involved”.

3. The judgment n. 170/2014 of the Constitutional Court and the impact on the Court of Cassation case-law

The judgment n. 170/2014 presents utterly peculiar and puzzling features⁸.

In the first place, the provision, even if it is declared unconstitutional by judgment n. 170/2014 has been effective for a long time in the legal order.

The Court, in fact, declares that “Articles 2 and 4 of law no. 164 of 14 April 1982 (Provisions on the correction of the assigned gender) are unconstitutional insofar as they do not provide that the order reassigning the gender of one of the spouses, which causes the dissolution of the marriage or the cessation of the civil effects resulting from the transcription of the marriage, must in any case allow the maintenance of a relationship regulated by law, if both spouses so wish, under another form of registered partnership that grants adequate protection to the rights and obligations of the couple, in a manner to be specified by the legislator”.

At the same time, the Court states that it is the Parliament that has to introduce “another form of registered partnership that grants adequate protection to the rights and obligations of the couple”.

The Constitutional court seems to hint to the application of Articles 2 and 4 of law no. 164 of 14 April 1982 until the introduction of a legislative regulation of civil

⁸ See S. Catalano, Valutazione della rilevanza della questione di costituzionalità ed effetto della decisione della Corte sul giudizio a quo, in Atti del Convegno annuale del gruppo di Pisa, Milano 9 e 10 giugno 2017, https://www.gruppodipisa.it/images/convegni/2017_Convegno_Milano/Stefano_Catalano_Valutazione_della_rilevanza_della_questione_di_costituzionalita.pdf ;P. Veronesi, Un’anomala additiva di principio in materia di “divorzio imposto”: il “caso Bernaroli” nella sentenza n. 170 del 2014, in www.forumcostituzionale.it.

partnerships. This situation clearly harms the interest of the plaintiffs.⁹ This means that principles upheld by the Court are addressed to the Parliament, that is the only one who can fulfill the legal vacuum and not to judges¹⁰.

In fact, the judges, due to this legal void, are forced to apply the provision on compulsory divorced.¹¹

In order to protect constitutional rights, the legal literature propose two different solutions.

A first thesis denies the possibility to extent the protection of marriage to the divorced couple¹².

A second one, more audaciously, considers that, since the judge *a quo*, i.e. the Court of Cassation, could not convert the marriage into civil partnership, the marriage valid until the introduction of the regulation of civil partnership¹³.

The Court of Cassation, judge *a quo* of the judgments n. 170/2014, welcomed this latter thesis. The Court states that “the addittiva di principio decision produce the effects in accordance with art. 136 It. Const., comma 1” that established “when the Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision” .

Furthermore, the Court considers the principles of judgment 170/2014 “self-applying”. For this reason the Court doesn’t apply the provisions on compulsory marriage, but on the contrary, recognizes the conservation of marriage. According to the Court, the marriage, which constitutes the first homosexual marriage in Italy, would be valid until the introduction of a civil partnerships regulation (sez. I civile, 21 aprile 2015, n. 8097).

Although the Court of Cassation takes this decision due to the deserving reason to protect fundamental rights, the same Court clearly goes beyond his powers, determining a “creation of law”¹⁴.

⁹ C.P. Guarini, Tra “divorzio imposto” e “matrimonio a tempo” Osservazioni a margine delle sentenze n. 170 del 2014 della Corte costituzionale e 8097 del 2015 della Corte di cassazione, I sezione civile, in www.rivistaaic.it, n. 2, 2016.

¹⁰ Iden, Il matrimonio “a tempo” del transessuale: una soluzione obbligata e... impossibile?, cit., p. 311 e s.; F. Biondi, Lo scioglimento del matrimonio del transessuale: una sentenza addittiva di principio sul c.d. divorzio “imposto”, cit., p. 668; C.P. Guarini, Tra “divorzio imposto” e “matrimonio a tempo”. Osservazioni a margine delle sentenze n. 170 del 2014 della Corte costituzionale e 8097 del 2015 della Corte di cassazione, I sezione civile, cit., n. 2, p. 20 e ss.

¹¹ R. Romboli, La legittimità costituzionale del “divorzio imposto”, cit., p. 2685; F. Biondi, Lo scioglimento del matrimonio del transessuale: una sentenza addittiva di principio sul c.d. divorzio “imposto”, cit., p. 669.

¹² P. Veronesi, Un’anomala addittiva di principio in materia di “divorzio imposto”, cit., p. 14 e s.

¹³ B. Pezzini, A prima lettura (la sent. 170/2014 sul divorzio imposto), in www.articolo29.it, p. 4 e s. Nello stesso senso G. Brunelli, Quando la Corte costituzionale smarrisce la funzione di giudice dei diritti: la sentenza n. 170 del 2014 sul c.d. “divorzio imposto”, in www.articolo29.it, p. 1 e s.; A. D’Aloia, Lo scioglimento del matrimonio del transessuale: una incostituzionalità “per mancanza di alternative”, in Quaderni costituzionali, 2014, p. 673 e ss. (spec. p. 675); P. Bianchi, Lo scioglimento del matrimonio del transessuale: divorzio “imposto”, incostituzionale ma non troppo, ivi, p. 671.

¹⁴ R. Romboli, La legittimità costituzionale del “divorzio imposto”, cit., p. 2685; C. Panzera, Il discutibile seguito giudiziario dell’addittiva di principio sul “divorzio imposto”, cit., p. 6 e ss.

4. The European Court of human Rights: the *Oliari v Italy* Case

The dialogue among courts about same sex couples' rights was not limited to national judges, but it also involved the European Court of Human Rights, in the case *Oliari v Italia*¹⁵ (2015), that condemned Italy for the violation of Article 8 ECHR, due to the lack of protection for same sex couples in the Italian legal framework.

The plaintiff were the same that appealed to Italian Constitutional Court, in the judgment n. 138/2010, which did not revealed any violation of European Convention of Human Rights principles..

In order to face the case, the Court recalls the principles stated by previous case-law (in particular *Schalk e Kopf v Austria*¹⁶) with reference to the Articles 12 and 8 of the Convention.

In detail, with reference to the Article 12, the Court states again that it “cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples”.

Indeed, with reference to Article 8, “while the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights to family life”

Therefore, we want to focus on a couple of aspects.

At first, the decision's effect on the Italian legislator. The Court states in facts that “adopt measures designed to secure respect for private or family life even in the sphere of the relations of individuals between themselves” (159). As a consequence, in a few months the Parliament approved the law 76 of 2016

At second, it is important to underline the reconstruction, made in the judgment, of the Italian context, characterized by the enduring inertia of Italian legislator and by the attempts of judges to fill the gap of protection.

On the one hand, the Court “notes that in Italy the need to recognize and protect such relationships has been given a high profile by the highest judicial authorities, including the Constitutional Court and the Court of Cassation. Reference is made particularly to the judgment of the Constitutional Court no. 138/10 in the first two applicants' case, the findings of which were reiterated in a series of subsequent judgments in the following years. In such cases, the Constitutional Court, notably and repeatedly called for a juridical recognition of the relevant rights and duties of

¹⁵ CtEdu *Oliari v Italia* (2015) . See C. Nardocci, “Dai moniti del Giudice costituzionale alla condanna della Corte europea dei diritti dell'uomo. Brevi note a commento della sentenza *Oliari e altri c. Italia*”, in www.forumcostituzionale.it, 2015; M. Parisi., Verso una tutela nazionale e sovranazionale delle unioni (matrimoniali e civili) tra persone dello stesso sesso? Riflessioni a margine del caso *Oliari e altri* contro Italia, in www.statoechiese.it, 2016; G. Zago, A victory for Italian same-sex couples, a victory for European homosexuals? A commentary on *Oliari v Italy*, in www.articolo29.it, 2015.

¹⁶ CtEdu, *Schalk e Kopf v Austria* (2010), 30141/04. See C. Ragni, La tutela delle coppie omosessuali nella recente giurisprudenza della Corte europea dei Diritti umani: il caso *Shalk e Kopf*, in *diritti umani e diritto internazionale*, 2010, p. 639 ss.

homosexual unions, a measure which could only be put in place by Parliament” (180).

In a context in which the Courts try to protect the rights “case by case”, the inertia of the legislator has an impact on the “coherence of administrative and legal practices within the domestic system”, that must be regarded as an important factor in the assessment carried out under Article 8 (172).

The Court does not analyze only the Italian context from a legal point of view, but the Court makes some considerations on the cultural context as well: in Italy there is “a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory” (161-173).

This argument is again confirmed: “The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection”(181).

5. The impact of national and supranational case-law on the law 76 of 2016

The law 76 of 2016 has been approved by the Parliament after a long and troubled path, as an outcome of a long legal procedure.

The law has been approved on 25 February 2016. It is composed by a single Article, being approved by means vote of confidence¹⁷.

With regards to the law’s content, it envisages two different forms of discipline: the one for homosexual civil partnership, the other for relations of cohabitation. Focusing on the civil partnership discipline, the law allows two adult same-sex people to join in a civil partnership by means of a declaration in front of the civil officer.

The rights and duties discipline of civil partnership is compared to the regulation of marriage stated by the Civil code, except the duty of loyalty¹⁸ and the right to adopt. Moreover, the law intervenes on the hampering causes and to the dissolution of the partnership¹⁹.

In addition to the law content, it is important to underline the impact of national and supranational case-law on the fundamental choices of the law 76 of 2016, which for the first time introduce a organic regulation of homosexual union and relation of cohabitation.

The majority of legal scholars affirms that, on the one hand, the text of the “Cirinnà law” is a response to the claim of European Court of Human rights (case *Oliari v Italy*), to provide some form of protection to same-sex couples²⁰.

¹⁷ See <http://www.senato.it/leg/17/BGT/Schede/Ddliter/46550.htm>

¹⁸ E. Falletti, Quando l’assenza è più forte di una presenza: lo stralcio del dovere di fedeltà tra matrimonio e unione civile, in *Genius*, 2/2016 .

¹⁹ With regard to the law’s content see M. Gattuso, Cosa c’è nella legge sulle unioni civili: una prima guida, in *Genius*, 2/2016; G. Casaburi, La costituzione dell’unione civile tra persone dello stesso sesso, *ivi*, 2/2016.

²⁰ M. Winkler, Il piombo e l’oro: riflessioni sul caso *Oliari c. Italia*, *ivi*, 2/2016.

On the other hand, legal literature notices that the background choices of the law and the key elements of the law 76 of 2016 seem to have been written “to response to controversial principles established by Italian Constitutional Court in the judgment n. 138/2010 and n. 170/2014, which reserves marriage, as consecrate by Article 29 of the Italian constitution, exclusively to heterosexual couples”²¹.

In particular, constitutional case-law seems to have influenced some key choices about the general structure of the law, the civil partnership definition and some more specific aspects.

First, about the law general structure, it is necessary to point out that many proposal were submitted to the Italian Parliament. They can be divided in two categories: some of them aimed to extend the right to marry also to homosexual couples; others focused on the introduction of others forms of protections, as civil partnerships. In this last category it is possible to distinguished proposal that reserve civil partnership to homosexual couple and those which are addressed also to heterosexual couples²².

The proposal (A.S. n. 2081), which lead to the approval of law 76 of 2016, falls in this last category, providing a clear distinction between the regulation of homosexual civil union and the regulation of relation of cohabitation.

Such a structure is consistent with the advice of the Constitutional Court²³, that had stated before that: “the recognition of homosexual couples rights – which necessarily postulates legislation of a general nature, aimed at regulating the rights and duties of the members of the couple – cannot solely be achieved by rendering homosexual unions equivalent to marriage. It is sufficient in this regard to examine “the choices and solutions adopted by numerous countries which have introduced (..) different forms of protection ranging from the general equivalence between such unions and marriage, through to a clear distinction from marriage in terms of their effects” (It. C. Const. judgment n. 138/2010).

Secondly, the principles affirmed in the judgment n. 138/2010 and judgment n. 170/2010 seems to have clear consequences on the definition of civil union.

The Courts , in facts, distinguished the traditional family, that is called “primary social formation”, safeguarded by Article 29 of the Italian Constitution, from the homosexual civil partnerships, defined as “social formations” different from the marriage and protected by Article 2 of the Constitution.

In order to keep the traditional marriage separated from civil partnerships, the law n. 76 of 2016 defines, in the Article 1 the same-sex civil partnership “as a specific social formation, according to the Articles 2 and 3 of the Constitution”.

Thirdly, with the approval of law n. 76/2010, the legislator welcomes the call made by the Constitutional Court in judgment n. 170/2014. The law indeed

²¹ See M. D’Amico, L’approvazione del Ddl Cirinnà, cit., p. 5.

²² See M. D’Amico, I diritti contesi, cit., p. 169.

²³ See M. D’Amico, Audizione presso la Commissione Giustizia del Senato della Repubblica, 14/01/2015, in Osservatorio Italiano dei costituzionalisti, 2015.

establishes at the paragraph 27 that after a sex change, whether partners decide not to dissolve their marriage, this is automatically turned up into a same-sex civil partnership.

Lastly, it is interesting to analyze the impact of the recent case-law admitting stepchild adoption by same-sex couples, even if the law 76 of 2016 doesn't provide it.

6. The recent case-law on stepchild adoption: a creation of law?

The original proposal²⁴ of the law n. 76 of 2016 provided the stepchild adoption, that allows the adoption partner's child even if the two partners are homosexuals (art. 5).

This provision seems to be coherent with national case-law, that admitted stepchild adoption also in favor to homosexual couples, according Article 44 lett. d) of the law on adoption, law 184 of 1984.

In fact, this provision allows adoption, also outside the adoptability cases permitted by the law, "when the pre-adoption placement is impossible".

According to the national case-law Article 44, part 1, lett. d) extends the possibility of adoption in all cases that can not be classified in the options provided, by law in order to protect the best interests of the child²⁵.

In the first place, two decision of the Court of Rome are relevant (Court of Rome, 30 June of 2014 and Court of Rome, 22 October 2015)²⁶.

In particular, with judgment of 30 July 2014, the Court legitimates the adoption of the homosexual partner' son, basing its decision on Article 44, par. 1, let. d) of the law 184 of 1983, which – according to the Court – "responds to the legislator intention to consolidate the relationship between minors and parents or people who take care of him". A different interpretation "would violate the *ratio legis*, the constitutional contest and the principles of the European Convention of Human rights".

Similarly, it is necessary to outline a 16 October 2016 decision of Milan's Court of Appeal. In this case, the Court of Appeal recognized the validity of an adoption certificate, with which an Italian women had adopted in Spain her partners' daughter, born with a PMA proceedings.

The Milan's Court legitimates stepchild adoption invoking the best interests of the child. From this principle "derives the impossibility for the judge to consider, in contrast with public order, a foreigner certificate that allows the adoption of the child of the partner, even if the couple in question is a same-sex couple". The main argument of the Court focuses on the necessity to guarantee the fundamental right of the minor "to keep the affective and material relation with its parents, who for

²⁴ On the issue see M. D'Amico, Audizione, cit., 2015.

²⁵ See J. LONG, L'adozione in casi particolari del figlio del partner dello stesso sesso, in La nuova giurisprudenza civile commentata, 2015, pp. 117 ss. .

²⁶ The texts of judgments related on stepchild adoption are published on <http://www.articolo29.it/>

many years have exercised the parental responsibility” (Milan Court of Appeals, 16 October 2016).

In November 2014 the Appeal Court of Bologna raised a constitutional question before the Italian Constitutional Court in relation to the stepchild adoption. Specifically, the Bologna Court has to decide on the transcription of the certificate of a stepchild adoption (Article 35 and 36 of the law n. 184 of 1983).

At that time the discussion in Parliament around the “Cirinnà law” was getting worse, due also to contrasting ideological position around stepchild adoption issues. In this situation the judgment of the Court was highly awaited, but the Court decided not to address the merit of the question and declared the question inadmissible, basing her decision on procedural reasons (It. C. Const. ord n. 76/2016).

The day after the decision of the Constitutional Court, the Italian Parliament eliminate Article 5, the draft law’s article that prescribes stepchild adoption and the law was approved without this provision. The stepchild adoption, in fact, represented during the discussion the ideological means by which some of deputies tried to block the approval of the law²⁷.

In view of the decision of the Parliament and the lack of rules, both that allowing and preventing the stepchild adoption, the legal scholars were wondering whether judges would keep legitimating the stepchild adoption²⁸.

A first answer has come from the Court of Cassation, which only a few months after the strong political stance of the Parliament, legitimated the stepchild adoption by a same-sex couple (Court of Cassation 12962, 26 May 2016)²⁹.

The Court focuses the decision on the Article 44, par. 1, lett. d) law n. 184 of 1983, which aims to recognize from a legal point of view affective and stable relations with minors, characterized by duty of care, duty of assistance and education, as well as parental duty.

The *ratio* of art. 44, par. 1, lett. d) is to consolidate existing relations and to avoid the continuation of relations without an adequate legal status. The Court states that the impossibility of preadoptive placement must be understood as a legal impossibility and not only a material impossibility. From this interpretative solution it emerges inevitably that the art 44 lett d) has to be extended also to homosexual couple, in accordance to the principle of non discrimination between homosexual and heterosexual couples; principle clearly affirmed by the CtECHR with reference to homosexual adoption (Corte Edu, X e altri c. Austria).

The Court of Cassation’s judgment paved the way to the legitimation of stepchild adoption by judges, despite the silence of the legislator.

²⁷ M. D’Amico, Lo scontro ideologico, cit., p. 8.

²⁸ M. D’Amico, ibidem, p. 10.

²⁹ See M. Gattuso, La vittoria dei bambini arcobaleno, in Genius, www.articolo29.it, 2016; I. Massa Pinto, unione omosessuale e adozione: chi decide?, in www.associazioneitalianadeicostituzionalisti.it, n. 4/2016.

On the lines of the Court of Cassation's judgment, the Turin Court of Appeal reaffirms the principles affirmed by the Court of Cassation and legitimates the stepchild adoption. In fact, the Court claims that the Article 44 lett. d) can be applied also when there is a legal impossibility (Turin Court of Appeal, 27 May 2016).

Also the Milan Court of Appeal reformed the decision of the Court of first instance - which rejected the request of stepchild adoption - in force of principles affirmed by Court of Cassation (Milan Court of Appeal, 9 February 2017).

The Milan Court of Appeal's decision is particularly relevant to the topic at issue because the judge, in order to admit stepchild adoption, clarified the connection between the legislative choice of non regulating stepchild adoption and the recent decisions of judges.

In fact, the Court affirms that "on the one hand the legislator decided to extrapolate from the final text of the law the provision prescribing stepchild adoption, but on the other hand the same legislator sought to make clear that adoption's provisions remain in force, as provided by the law".

In this provisions are included also, "the principles affirmed by the judges and by the evolution of case-law, as indicated by the Court of Cassation (12962/16)". According to the referral Court from the "Cirinnà law doesn't emerge the intent of the legislator to mark out the interpretative borders of the adoption provided by art. 44 lett. d), but the opposite intention emerges, as demonstrated by the recent case-law following the approval of the law n. 76 of 2016" (Milan Court of Appeal, 9 February 2017).

Lastly, it seems to be interesting to report the decision of the Trento Court (Court of Trento, 23 February 2017), that recognizes a foreign certificate that established a parental relationship between two minors, born through surrogacy arrangement, and their non-biological father.

The Court considers the certificate effective in the Italian legal system in order to protect the best interests of the child. In this purpose the Court, referring to Court of Cassation's case-law, establishes the minor's right, regardless of procreation techniques, as a fundamental element of the right to personal identity".

This decision even if it concerns the problem of the transcription of a foreign legal act, which is different from the issue of stepchild adoption, involves one of the main arguments discussed by the Parliament, during the approval of law n. 76 of 2016³⁰. In fact, the *travaux préparatoire* show that one of the reasons that conduct to the elimination of stepchild adoption from the text was the connection between the stepchild adoption and surrogacy.

³⁰ See A. Schillaci, Le unioni civili in Senato: diritto parlamentare e lotta per il riconoscimento, in *Genius*, 2/2016.

In other words, according to many deputies, the introduction of stepchild adoption could have led to proceed to surrogacy, which is prohibited by penal law in the Italian legal system³¹.

In conclusion, despite the legal gap, the judges are “creating law” on the issue related to adoption by homosexual couples. This situation risks to impact on the coherence of administrative and legal practices within the domestic system, as affirmed by the European Court of human rights in relation to homosexual couples’ rights (Caso Oliari)”.

7. Conclusions

The evolution of case-law prior and after the approval of Cirinnà law³² in Italy provides us several insights to reflect on the on the judiciary creation of law and dialogue between judges and between judges and the legislator.

The first insight refers to the ways in which the Italian Constitutional Court intervened to respect the sphere of competence of the legislator, without give up to its role of guaranteeing the constitutional principles.

As seen above, the Court in view of the legislator inertia with regards to same-sex couples’ rights, uses two kinds of decision: “monito” decision and e “addittiva di principio” decision.

Both this kinds of decisions are addressed to the legislator, who is in charge to fill the legal void that violate the fundamental rights.

However, waiting for the legislator’s action, we can see how judges were the early adopters of Courts decisions, determining cases of creation of law.

In fact, the case-law subsequent to the judgment n. 170/2014 is emblematic: the Court of Cassation has translated principles affirmed by Italian constitutional Court, that were explicitly address to legislator, declaring them self applying”.

Secondly, many common judges actively recognized and protected same-sex couples rights, designing in this way a set of principles, used in many case to fill the legal vacuum. This is demonstrated by the case-law on the stepchild adoption, in which the judges remained indifferent to the choice of Parliament, keeping in admitting “case by case” the stepchild adoption.

This activism of those judges, on the one hand, is surely worthy. On the other hand, this jurisprudential pluralism can have negative impact on legal certainty and principle of equality. In other words, the homosexual couples’ rights are at the mercy of different sensitivities of judges.

Thirdly, the dialog among judges took place also at international level.

From this point of view it is interesting to notice that both judgments of Italian Constitutional court have declared inadmissible questions related to Article 117 Const. and to principles of European Convention of Human rights.

³¹ See M. D’Amico, *Lo scontro ideologico*, cit., p. 11.

³² L. Pedullà, *Il percorso giurisprudenziale sul riconoscimento delle c.d. "unioni civili"*, in www.associazioneitalianadeicostituzionalisti, 2/2016.

On the contrary, the European Court of Human rights considered the lack of regulation in relation to same sex couples' rights a violation of Article 8 of the Convention.

While the Italian Constitutional Court seems to be willing to solve the question only from the point of view of national law, the European Court of Human rights pays full attention to the Italian situation, retracing the evolution of Italian case-law. The Italian legislator, for its part, seems to answer more quickly to Strasbourg Court decision, than to the invitation of the national Constitutional Court.

In conclusion, we can say that when politics is not able to provide answers to social needs, judges, both national and supranational, intervene in order to provide concrete solutions and to protect the fundamental rights. The case related to the protection of the fundamental rights "to live freely the partnership status" (It. C. const. judgment n. 138/2010) represents an example of creation of law and dialogue between judges.