

RECOGNITION OF SAME-SEX MARRIAGES, OVERCOMING GENDER BARRIERS IN ITALY AND THE ITALIAN LAW N° 76/2016 ON CIVIL UNIONS. FIRST REMARKS

RICONOSCIMENTO DEI MATRIMONI OMOSESSUALI, SUPERAMENTO DELLE BARRIERE DI GENERE IN ITALIA E LEGGE N. 76/2016 SULLE UNIONI CIVILI. PRIME RIFLESSIONI

EVA DE GÖTZEN

*Dottore di ricerca in Diritto Internazionale - Ph.D International Law
Università degli Studi di Milano*

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Abstract: This contribution will focus on the relationship between the Italian legal system and same-sex couples. Firstly, certain key issues which have arisen so far in the context of cross-border same-sex couples under the former Italian legal system will be tackled in order to investigate how this system handled non-traditional family ties established abroad when lacking the relevant legal framework. Secondly, the brand new Italian law no. 76/2016 on same-sex civil unions and *de facto* cohabitants will be briefly addressed in order to verify whether this law effectively fits the overall aim to overcome gender barriers in family matters in Italy. Lastly, the new Italian conflicts-of-law rules devoted to cross-border civil unions will be considered in order to evaluate whether the serious drawbacks arising from a denied genderless continuity of family status granted abroad are effectively overcome.

Keywords: same-sex marriages, same-sex adoption, civil unions, continuity of family status, public policy.

Riassunto: Il presente contributo analizza i rapporti tra ordinamento italiano e coppie omosessuali. In primo luogo, saranno affrontati alcuni problemi sorti nell'ambito dell'ordinamento italiano in merito al trattamento delle coppie omosessuali con elementi d'internazionalità al fine di verificare come tale ordinamento abbia gestito i rapporti familiari non tradizionali sorti all'estero pur in difetto di una disciplina di riferimento. In secondo luogo, si analizzerà brevemente la recente legge n. 76/2016 sulle unioni civili e coabitazioni di fatto al fine di verificare se essa effettivamente consenta di superare le barriere di genere in Italia. Da ultimo, si esamineranno le nuove norme di conflitto italiane relative alle unioni civili transfrontaliere onde appurare se consentono di superare i problemi connessi al difetto di continuità in Italia di uno status personale acquisito all'estero.

Parole chiave: matrimoni omosessuali, adozione di coppie omosessuali, unioni civili, continuità di status familiari, ordine pubblico.

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I. Shortcomings of former situation. Same-sex relationships and related issues

1. Family law has undergone a radical change over the last twenty years¹.

2. On the one hand, due to an emerging consensus at the global level, over the recent decades several States legislated in favour of same-sex couples, thus granting legal recognition to these relationships. As a matter of fact, in a handful of countries, marriage has been opened to same-sex couples. In others, rules governing registered partnerships have been enacted, which by and large extend most provisions concerning marriage to these unions regardless of the sex of the partners. In other words, some countries offered same-sex couples a close copy of the marriage while others have opted for a less favourable regime. Since the abovementioned institutions differ one another in the final analysis, it is not going too far to say that same-sex registered partnerships actually do not always benefit from the same status as married couples.

3. On the other hand, same-sex marriage is still a very sensitive subject. As a matter of fact, albeit significant developments occurred in a number of countries towards greater openness and acceptance of same-sex couples, nonetheless a few States still deny legal recognition to same-sex relationships. In the majority of cases, marriage is not available to same-sex couples, by being required by national legal system that the intending spouses are of different sex. Likewise, same-sex couples may have no other means of safeguarding their relationship, by being prevented from entering into any other type of legally recognized relationship. As a result, rights, benefits or obligations are limited to different-sex married couples, while same-sex couples are denied any form of protection.

4. In addition, same-sex partners – who have formalized their relationship to some extent – may face legal uncertainties when crossing the borders and the relationship becomes subject to an alien legal system. Usually, if the homosexual relationship is identified under the national system concerned, the administrative authorities and the courts of the State addressed will presumptively recognize the foreign personal status arising from such a relationship, thus placing foreign same-sex couples and national married couples on an equal footing. Otherwise, if same-sex couples move to a State whose national legislation neither recognizes the status of the same-sex partners in relation to one another, or in relation to their (adopted) children, or third parties nor confers rights or obligations on same-sex relationships, issues may arise abroad concerning the validity or effects of this relationship or aspects thereof, thus being the cross-border continuity of the relevant legal situation severely undermined.²

5. For instance, over the past years same-sex couples were unable to marry under Italian law. Moreover, an alternative union allowing them to have their relationship recognised and protected under the former national legal system was lacking.³ In other words, the Italian law did not recognize in any meaningful way a same-sex living-together relationship outside marriage. Accordingly, same-sex couples could enter into neither a marriage nor another life partnership in Italy, so that their position in this country has remained uncertain for years. In such a context, the personal status arising from a same-sex marriage awarded abroad could not be identified under the Italian legal system, by lacking any rule concerning its automatic recognition. Therefore, over the past years such a foreign “unknown” legal situation has been denied any recognition in Italy, thus producing absolutely no legal effects in this country.

¹ D. GALLO, L. PALADINI, P. PUSTORINO, *Same-sex couples before national, supranational and international jurisdiction*, Berlin, 2014; K. BOELE-WOELKI, A. FUCHS, *Legal recognition of same-sex couples in Europe*, in *European family law series*, Antwerp, 2003.

² G. BIAGIONI, “On recognition of foreign same-sex marriages and partnerships”, in D. GALLO, L. PALADINI, P. PUSTORINO, *Same-sex couples before national, supranational and international jurisdiction* cit., p. 359-380. On this topic see also S.L. GOESSL, “From question of fact to question of law to question of private international law: the question whether a person is male, female, or ...?”, *Journal of private international law*, 2016, p. 261-280; J. BORG-BARTHET, “The Principled Imperative to Recognise Same-Sex Unions in the EU”, *Journal of private international law*, 2012, p. 359-388.

³ S. TONOLO, *Le unioni civili nel diritto internazionale privato*, Milano, 2007.

6. Troubles have equally arisen as regards children born abroad through surrogated motherhood or adopted in a foreign country, to be registered in Italy as the joint child of same-sex couples. Surrogacy is still banned from the Italian legal system while same-sex couples' adoption is currently prohibited in Italy.⁴ Therefore, it happened that a child raised within a same-sex union abroad has been prevented from establishing a legal parentage to one or both of the parents in Italy, while the related partners faced uncertainty regarding their parental rights as parents of a child to whom they may be not biologically related, thus being affected by the so-called limping relationships.

7. With a view of avoiding or, at least, reducing the harmful impact of the former situation, Italy has finally considered the possibility of providing same-sex couples with legal remedies aimed at addressing the troubles they face in their everyday life, thus passing the Italian Law no.76/2016 on same-sex civil unions and *de facto* cohabitants.⁵

8. This contribution will thus focus on the Italian legal system, addressing the former state of affairs, speculating about current developments and drawing related conclusions. To this end, by way of background, certain key issues which have arisen so far in the context of cross-border same-sex couples under the Italian legal system will be firstly tackled and the related solutions provided for by Italian case-law (also in light of the relevant ECtHR's precedents) will be discussed in order to investigate how this system handled non-traditional family ties established abroad when lacking the relevant legal framework. Secondly, the brand new Italian law no. 76/2016 on same-sex civil unions and *de facto* cohabitants will be briefly addressed, in order to assess whether, and to what extent, this law effectively fits the overall aim to overcome gender barriers in family matters in Italy. Lastly, the new Italian conflicts-of-law rules (Italian Decree no 7/2017) devoted to cross-border civil unions will be considered in order to evaluate whether this instrument effectively remedies the serious drawbacks arising from a denied genderless continuity of family status granted abroad, thus enhancing the recognition of non-traditional family ties in Italy.

II. Same-sex marriages in Italy before the Italian law no 76/2016

9. As previously mentioned, Italy came under these States which for a long time did not pass any substantive legislation about same-sex marriages. In such a context, once a same-sex couple lawfully married abroad sought for the recognition in Italy of their marriage - which reasonably implies the transcription of the foreign marriage certificate into the Italian civil register for the related updating - the validity of the foreign marital relationship has been deeply questioned by the Italian Civil Registrar. As a matter of fact, at this stage the national Registrar is expected to assess, by determining the applicable law in the individual case, firstly, whether the relevant personal status has been validly awarded abroad and, secondly, whether the registration of the foreign marriage is allowed under the Italian legal system in that the (effects of a) *status maritalis* awarded abroad overcomes any public policy exception.⁶

10. According to former Italian case-law, foreign same-sex marriages cannot be equated to a marriage in its traditional way under the Italian law due to the lack of the essential requirement of the

⁴ See Article 1(20), Italian Law n° 76/2016 (see below, paragraph 4), which does not allow for same-sex couples adoption. Otherwise, surrogated motherhood is explicitly prohibited by Article 12(6), Italian law n° 40/2004 of 19 February 2004 (the Medically Assisted Reproduction Act).

⁵ Law n° 76 of 20 May 2016, *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*, Italian Official Journal n° 118 of 21 May 2016, available in *Rivista di diritto internazionale privato e processuale*, 2016, p. 891 ff.

⁶ As a matter of fact, the Italian Presidential Decree no. 396 of 3 November 2000 (Simplification of Civil Status Act) provides that civil status records drawn up abroad cannot be entered into the Italian register if they are contrary to public order (section 18). See N. BOSCHIERO, "Les unions homosexuelles à l'épreuve du droit international privé italien", *Rivista di diritto internazionale*, 2007, p. 50 ss.; E. DE GÖTZEN, "Rainbow Families e Diritto Internazionale Privato: Conflitti di Norme e Conflitto di Valori nella Circolazione degli Status Personali", in C. CASONATO, A. SCHUSTER (eds.), *Rights on the move: rainbow families in Europe: proceedings of the conference: Trento, 16-17 October 2014*, 2014, p. 175.

difference in sex between the spouses. As a matter of fact, the domestic notion of marriage, to which both the Italian Constitution (Article 29) and the Italian Civil Code (Article 79 ff.) refer, covers only the traditional marital relationship between people of different sex. Moreover, the Italian substantive rules are not gender neutral in that they expressly refer to categories such as “husband” and “wife”. Therefore, since under (former) Italian law same-sex couples were not entitled to enter into a marriage in Italy, at first the Constitutional Court ruled that a foreign same-sex marriage lawfully entered into abroad should have been regarded as “*non-existent*” under the Italian legal system as well as contrary to Italian public policy.⁷ Consistently, the denied transcription in Italy of a foreign same-sex marriage certificate has been deemed as lawful by national lower courts.⁸ As a result, at the time same-sex partners could be lawfully married in the State of origin but they would not have been legally bound by any family ties in Italy. However, it cannot be denied that two people of the same-sex in a stable cohabitation can be regarded as a “social group” within the meaning of Article 2 of the Constitution, thus having the fundamental right to freely express their personality in a couple. Accordingly, the abovementioned finding of the Constitutional Court pointed out that there was a duty upon the Italian legislator to enact an *ad hoc* regime (not necessarily by granting same-sex couples access to marriage) aimed at providing same-sex partners with the legal protection their relationship deserves.⁹

11. In the meanwhile, in the *Schalk & Kopf* case, the Strasbourg Court stated that contracting States enjoy a wide margin of appreciation in granting protection to same-sex couple’s rights, since there is no positive obligation under the HR Convention to grant such couples access to marriage. Notwithstanding this, even cohabiting same-sex partners living in a stable *de facto* relationship falls within the notion of “family life” provided for by Article 8 ECHR. Therefore, same-sex couples should be regarded as being in a similar situation to different-sex couples as regards the legal recognition of their relationship to be granted.¹⁰

12. Following the ECtHR precedent, in an *obiter dictum* of judgment no. 4184/2012 - concerning two same-sex Italian citizens who got married in the Netherlands and who had challenged the refusal of Italian authorities to register their marriage in the Italian civil status record on the grounds of public policy exception - the Italian Supreme Court held that, albeit same-sex marriages could no longer be regarded either as “*non-existent*” under Italian legal system or contrary to the Italian public order, nonetheless the claimants had no right to register their marriage. As a matter of fact, by lacking an *ad hoc* regime devoted to same-sex relationships, the relationship at stake was regarded as being “*unsuitable to take effect under Italian law*”.¹¹ Therefore, the non-transcription of homosexual unions depended neither by their “non-existence” nor by their “invalidity” but by their inability to produce, as marriage records precisely, legal effects in the Italian system. In other words, such recognition, if at all possible, would have taken no effects in Italy without the appropriate legal framework having been enacted by the Italian Parliament. As a result, at this stage the partners were (still) in the unsatisfactory position of enjoying a certain status in the celebrating State but being nonetheless prevented from any family life in Italy albeit being entitled to it under the Italian Constitution (Article 2).

⁷ Italian Constitutional Court, 15 April 2010, judgment n° 138, in *Rivista di Diritto Internazionale Privato e Processuale*, 2010, p. 979.

⁸ See *ex multis* Tribunal of Latina, decree of 10 June 2005, *Rivista di Diritto Internazionale Privato e Processuale*, 2005, p. 1095.

⁹ See above, footnote no 7.

¹⁰ ECHR, *Schalk and Kopf v. Austria* (application n° 30141/04). Similarly, see *Gas and Dubois v. France* (application n° 25951/07) and *Hämäläinen v. Finland* (application n° 37359/09). In *Vallianatos and Others v. Greece* (applications n° 29381/09 and 32684/09), the ECHR found Greece violated the HR Convention by excluding same-sex couples from the national civil union regime, which opened civil unions to opposite-sex couples only, on which see D. RUDAN, “Unioni civili registrate e discriminazione fondata sull’orientamento sessuale: il caso Vallianatos”, *Diritti umani e diritto internazionale*, 2014, p. 232-236.

¹¹ Supreme Court, 15 March 2012, judgment n° 4184, *Rivista di Diritto Internazionale Privato e Processuale* 2012, p. 747. Similarly, Court of Appeal of Milan, 13 March - 6 November 2015, judgment n° 2286, available at <http://www.articolo29.it/wp-content/uploads/2015/11/Corte-Appello-Milano-trascrizione-matrimonio-stesso-sesso.pdf>.

13. Then, as a follow-up to judgment no 138/2010, in its judgment no 170/2014 concerning “forced divorce” following gender reassignment of one of the spouses, the Constitutional Court, in affirming the on-going same-sex marriages’ inability to produce legal effects under the Italian legal system, repeatedly upheld the need to ensure protection for same sex-unions and to avoid discriminatory treatment, thus urging the Italian legislator to provide same-sex couples with relevant rights and duties in order to overcome the (unconstitutional) legal vacuum causing a lack of protection of their union.¹²

14. Eventually, the Supreme Court, in its judgment no 2400/2015, concluded that – albeit same-sex unions should be provided with the level of protection of their private and family life to which they are entitled under Article 2 of the Italian Constitution – the blanket exclusion of same-sex couples from marriage, which was at the time opened to opposite-sex couples only, did not amount to a violation of fundamental rights since *de facto* same-sex couples are not in a comparable situation with unmarried opposite-sex couples.¹³

15. On completion of the above, in the *Oliari and Others* case, whereby same-sex Italian couples complained about the refusal by the Italian Civil Registrar to register their marriage contracted abroad, the Strasbourg Court found that (at the date of the analysis of the Court) Italy violated same-sex couples’ right to respect for private and family life by not providing them with any means of legally safeguarding their relationship to which they are constitutionally entitled, thus leaving them in a limbo.¹⁴ As a matter of fact, it has been assessed that under the Italian legal system same-sex couples were not only unable to marry but also they had no access to any specific legal framework (governing, for instance, civil unions or registered partnerships) providing them with the recognition of their status and guaranteeing them certain rights which a couple in a stable and committed relationship deserves, thus being affected by an irreconcilable conflict between the social reality, since partners lived their relationship openly in Italy, and the law, which gave them no official recognition within the territory. It goes without saying that the *Oliari* case has been an important step towards the pursuit of legal recognition of same-sex couples. In fact, starting from this leading case contracting States have been expected to accord appropriate legal recognition to the union of same-sex partners within their legal system. Therefore, there was no matter that the unsatisfactory Italian situation should have been redressed on the basis of the *Oliari* case. We will see later how Italy dealt with this matter.

III. Same-sex couple’s parenthood in Italy before the Italian law no 76/2016

16. As pointed out before, several issues had particularly occurred also in relation to adoption by (a single person within) a same-sex couple.

17. Same-sex couple’s adoption was not allowed under Italian law. As a result, over the past years same-sex couples resorted to adoption abroad, thus being automatically treated there as legal parents of the child concerned. However, once the adoptive parent(s) took the child to Italy and sought for the updating of the relevant civil status registry, the validity of the *status filiationis* awarded abroad has been widely questioned by the Italian Civil Registrars, since these kinships amounts to a violation of the Italian public policy.¹⁵ Therefore, the issue at the heart of the majority of these cases was the refusal to

¹² Constitutional Court, 11 June 2014, judgment no°170, *Famiglia e Diritto*, 2014, p. 861.

¹³ Supreme Court, 9 February 2015, judgment n° 2400, *Corriere Giur.*, 2015, p. 909.

¹⁴ ECHR, *Oliari and Others v. Italy* (application n° 18766/11 and 36030/11), on which see D. RUDAN, “L’obbligo di disporre il riconoscimento giuridico delle coppie dello stesso sesso: il caso Oliari e altri c. Italia”, *Rivista di diritto internazionale*, 2016 p. 190-198. See also *Chapin and Charpentier v. France* (application n° 40183/07).

¹⁵ On this issue see O. LOPES PEGNA, “Effetti in Italia della adozione co-parentale pronunciata all’estero: vecchie e nuove questioni”, *Rivista di diritto internazionale privato e processuale*, 2016, p. 725 ss.; G. FERRANDO, “Le Unioni civili: la situazione in Italia”, *Giur. It.*, 2016, p. 1171 ss.; C. RAGNI, “Il riconoscimento in Italia dell’adozione del figlio della partner del medesimo sesso alla luce della recente prassi delle corti italiane”, *Genius*, 2015, p. 226 ff.; G. ROSSOLILLO, “Spunti in tema di riconoscimento di adozioni omoparentali nell’ordinamento italiano”, *Cuadernos de Derecho Transnacional*, 2014, p. 245 ff.; E. DE GÖTZEN, “Child’s civil status, birth certificates’ effects and the free movement of public documents: grasp all, lose all?,” *Genius* 2016/01, p. 64-67.

register the particulars of a birth certificate drawn up abroad in undisputed compliance with the law of the issuing country but which nonetheless amounted to a violation of the Italian public policy for several reasons, thus the continuity of the *status filiationis* being significantly affected.

18. At first, the Juvenile Court of Brescia refused to recognize an adoption order issued in the US in favour of a same-sex couple lawfully married in the US on grounds of public policy.¹⁶

19. However, the second parent adoption by a “single” woman (unmarried under the Italian legal system but who had lawfully entered into a same-sex marriage abroad) was later pronounced under Articles 44(d) and 7, Italian law no 184/83 (“*Disciplina dell’adozione e dell’affidamento dei minori*”) – regardless of the applicant’s sex – by the Juvenile Court of Rome.¹⁷ In the case at stake, a same-sex female couple travelled to Spain to use assisted reproduction techniques that were forbidden in Italy and one of the partners was the “mother” of the child under Italian law. Since it has been assessed that both the same-sex partners had contributed to the child’s education and wellbeing, allowing her to grow up in a caring and stable environment, the applicant has been allowed to adopt the biological child of her partner (so-called “*Adozione in casi particolari*”, i.e. a kind of simple adoption which does not sever the ties between the child and her/his original family, but creates an additional legal parenthood) so as to safeguard both the child’s (born abroad through heterologous artificial procreation) best interest and the *de facto* bonds already existing between the child and the partner not biologically related to her. It is clear that a different outcome would have implied a denial of the *de facto* parenthood between the child and her non-biological mother, thus affecting the minor’s life and social identity. This ruling has been undeniably a novelty. Firstly, it opened to step-parent adoption in Italy, thus strengthening the position of “social” parents within the society. Secondly, it opened the possibility of adoption by a single homosexual by merely applying the existing legislation, which neither distinguishes between married and unmarried parents nor discriminates against the sexual orientation of the applicant.

20. The Italian Supreme Court has recently uphold the approach followed by the former landmark decision, by confirming the possibility for the non-biological parent to adopt, under Article 44 of Italian law no 184/83, the companion’s child within an homosexual couple. More precisely, it has been ruled that a child born abroad through assisted reproduction techniques within a same-sex female couple could be adopted in Italy by the woman who had not given birth to that child since there is no valid reason to exclude both the stable emotional bonds created and developed between an adult and a child in situations other than the classic situation of kinship and the cohabitation the child has had with the “social” parent.¹⁸

21. Similarly, in the *X. and Others* case, the Strasbourg Court stated that, under Article 14 taken in conjunction with Article 8 of the ECHR, same-sex unmarried couples should be regarded as being in a comparable situation with unmarried opposite-sex couples in respect of second-parent adoption in cases whereby this is possible for unmarried opposite-sex couples only.¹⁹

¹⁶ Minors Court of Brescia, 26 September 2006, n° 2, available at Pluris online.

¹⁷ Minors Court of Rome, 30 July 2014, n° 299 available at <http://www.articolo29.it/adozione-in-casi-particolari-second-parent-adoptionmerito/> and 22 October 2015, n° 291, available at <http://www.articolo29.it/2015/stepchild-adoption-nuova-conferma-dal-tribunale-minori-di-roma>. The former has been affirmed by Court of Appeal of Rome, 23 December 2015, available at <http://www.articolo29.it/2015/ladozione-da-parte-della-comadre-e-nellinteresse-della-minore-conferma-anche-dai-giudici-dappello>; Court of Appeal of Turin, 27 May 2016, available at <http://www.articolo29.it/2016/dalla-corte-dappello-di-torino-nuova-conferma-alla-stepchild-adoption-per-le-famiglie-arcobaleno/>. As regards adoption pronounced in favour of two “fathers”, see Minors Court of Rome, 23 December 2015 - 21 March 2016, available at <http://www.altalex.com/documents/news/2016/05/16/figlio-di-due-padri-stepchild-adoption-dinanzi-al-tribunale-di-roma>.

¹⁸ Supreme Court, 22 June 2016, n° 12962 available at <http://www.articolo29.it/2016/la-vittoria-dei-bambini-arcobaleno/>. *Contra*, Minors Court of Milan, 17 October 2016, n° 261 available at <http://www.articolo29.it/2017/ancora-in-tema-di-interpretazione-dellart-44-delle-legge-sulle-adozioni-nota-a-trib-minorenni-di-milano-17-ottobre-2016-n-261/>, which refused a broad interpretation of Article 44(d), Italian law no 184/83 aimed at encompassing even *de facto* family bonds. This finding has been overruled by Court of Appeal of Milan, 9 February 2017, available at <http://www.articolo29.it/2017/anche-da-milano-dopo-la-cassazione-roma-e-torino-semaforo-verde-per-ladozione-coparentale/>.

¹⁹ ECHR, *X. and Others v Austria* (application n° 19010/07), in which the key issue was that same-sex couples were dif-

22. Consistently, a stepchild adoption order validly conferred abroad, in favour of a same-sex couple lawfully married there, has been then recognised by the Italian courts, thus granting the upmost priority to the child's best interest.²⁰ As a matter of fact, it is in principle and *a priori* equally good for a child to have two parents of the same sex or having two parents of different sex and the child's best interest must overcome any public policy exception.

23. Moreover, filiation established abroad through medically assisted procreation has been more recently fully recognized in Italy, in order to safeguard the *de facto* family-tie's stability and the identity of the child established abroad.²¹ Furthermore, the birth certificates of twins born in the US through gestational surrogacy that had been resorted there by a same-sex male couple took finally effect in Italy. The issue at the heart of this case was that the same-sex male applicant's seminal fluid had been used for the two embryos to be implanted in the surrogate mother's womb. As a consequence, each child was biologically bonded with one of the intended parents. Albeit the same-sex partners' behavior was clearly in breach of the ban on the use of assisted reproductive technology (A.R.T.) of a heterologous type laid down by section 4 of Law no. 40 of 19 February 2004, nonetheless the Court of Appeal of Milan allowed the entry of the two documents in the Italian civil status register. As a matter of fact, the seized Court took into account both the fact that the parent-child relationships had been lawfully established under American law (pursuant to Article 33, Italian law no. 218/95) and that each of the parents was also the child's biological father. Given the importance of biological parentage as a component of each individual's identity, which must prevail over any public policy exception, the twins' identity cannot be affected by the refused recognition of the legal relationship established with the couple who had the surrogacy treatment stemmed only because this treatment is prohibited in Italy. This leads the Court to conclude that it was against the best interests of the twins to deprive them of the legal ties which, by mirroring the biological bonds established with each intended father, are fundamental in defining their own identity.²² More recently, the Court of Appeal of Trento, which was expected to decide whether, despite the domestic prohibition of surrogacy under Law no. 40 of 2004 on medical assisted procreation, a foreign judgment granting legal parenthood to the non-biological parent of twins born abroad as

ferentiated from both unmarried and married opposite-sex couples in respect of stepchild adoption. Previous cases concerned discrimination in adoption by single individuals (cases *Fretté v France*, application n° 36515/97 and *E.B. v France*, application n° 43546/02) and discrimination between opposite-sex un-married couples and same-sex couples concerning adoption (*Gas and Dubois v France*, application n° 25951/07).

²⁰ Court of Appeal of Milan, 16 October 2015 n° 2543, available at <http://www.articolo29.it/2015/la-corte-dappello-di-milano-dispone-la-trascrizione-di-una-adozione-piena-da-parte-della-mamma-sociale>; Court of Appeal of Naples, 30 March -5 April 2016, which applied Articles 41, 65 and 66 of the Italian law no 218/95 in order to recognise foreign stepchild adoption orders, available at <http://www.articolo29.it/2016/la-corte-dappello-di-napoli-ordina-la-trascrizione-di-due-adozione-legittimante-del-figlio-del-coniuge-omosessuale/>.

²¹ Supreme Court, 21 June 2016, no 19599, available at <http://www.articolo29.it/2016/le-vie-dellamore-sono-infinitela-corte-di-cassazione-e-la-trascrizione-dellatto-di-nascita-straniero-con-due-genitori-dello-stesso-sesso/> and by Tribunal of Naples, 11.11-6.12.2016, available at <http://www.articolo29.it/2016/il-tribunale-di-napoli-ordina-la-trascrizione-di-un-atto-di-nascita-straniero-con-due-madri/>. Similarly, the ECtHR's held that contracting States are expected to legally acknowledge "de facto family bonds" existing between the applicants and the child that originated abroad even though surrogacy is domestically prohibited or not regulated, considering that a contradiction between the legal and social reality may undermine the child's identity within the addressed State's society (cases *Menesson v France*, application n° 65942/11; *Labassee v France*, application n° 65941/11; *Paradiso and Campanelli v Italy*, application n° 25358/12). See C. CAMPIGLIO, "Valori fondamentali dell'ordinamento interno e scelte di cura transfrontaliere", *Rivista di Diritto Internazionale Privato e Processuale*, 2016, p. 371 ff.; A. L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ, "Gestión por sustitución y Derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derechos Humanos", *Cuadernos de Derecho Transnacional*, 2015, p.45 ss.; O. FERACI, "Maternità surrogata conclusa all'estero e Convenzione europea dei diritti dell'uomo: riflessioni a margine della sentenza *Paradiso e Campanelli c. Italia*", *Cuadernos de Derecho Transnacional*, 2015, p. 420; A. VETTOREL, "International Surrogacy Arrangements: Recent Developments and Ongoing Problems", *Rivista di diritto internazionale privato e processuale*, 2015, p. 523 ff. However, on 24 January 2017 the Grand Chambre of the ECtHR (Application n° 25358/12, *Paradiso and Campanelli v Italy*) has stated that if a legal parent-child relationship established abroad, which follows a gestational surrogacy arrangement, gives rise only to a non-genetic parenthood, the related birth certificate cannot be validated in view of the entry into the Italian Civil Registry since it amounts to a violation of the Italian law (paragraph 215).

²² Court of Appeal of Milan, decree of 28 December 2016, available at <http://www.articolo29.it/2017/passodopo-passo-il-diritto-si-avvicina-alla-vita-la-corte-dappello-di-milano-ordina-la-trascrizione-dellatto-di-nascita-di-due-gemelli-nati-grazie-alla-gestazione-per-altri/>.

a result of a surrogacy arrangement could have been recognized in Italy under Article 67, Italian law 218/95, argued that: (i) the public policy exception has to be interpreted extensively: accordingly, a mere difference of legislation did not imply a violation of domestic public policy while only the contradiction between the foreign judgment and the fundamental values of domestic law (notably, fundamental rights) is intolerable; (ii) the continuity of the *status filiationis* lawfully acquired abroad should be ensured (see Article 33, Italian law no 218/95 and Article 8(1) of the UN Convention on the rights of the child), so as to safeguard one's identity within domestic society; (iii) albeit surrogacy is prohibited in Italy, a child could not be held responsible for the circumstances of his or her conception. Therefore, the Court stated that the lack of any biological bond between the twins and the social parent is, in itself, not sufficient to deny the sought recognition of the foreign judgment, since the willingness to assume parental responsibilities for the child should prevail over the domestic determination of parenthood.²³

24. Finally, it has been recognised a foreign judgment allowing adoption by a same-sex male couple of a foreign child needing adoptive placement.²⁴

25. For the sake of completeness, it is worth adding that the failure by the State addressed to recognize the parental status of a child lawfully adopted abroad, even if on grounds of public policy, may amount to a violation of the rights to family life of both the child and the parents under the HR Convention.²⁵ As a matter of fact, the non-recognition of the civil status established abroad of a child raised within a same-sex union prevents the child from establishing a legal parentage to one or both of the parents in the addressed State, who would thus have different status in different States.²⁶ Clearly, the Italian trend is aimed at avoiding this drawback.

IV. The Italian law no. 76/2016 on civil union and *de facto* cohabitations. An overview

26. The concept of “family” has thus seen a twofold widening development over the past few years. On the one hand, it has been held that same-sex *de facto* couples deserve legal protection, not necessarily by being granted access to marriage. On the other hand, it has been stated that *de facto* family ties between same-sex parents and child should prevail over the lack of any biological bond between them.

27. The pressure from the abovementioned broad understanding of what is a “family” led Italy to finally take due account of the existence of serious and stable genderless relationships other than marriage. As a result, the brand new Italian law no. 76/2016 introduces two new forms of living arrangements governed by law, i.e. same-sex civil unions and genderless *de facto* cohabitations, as forms of partnerships alternative to marriage.²⁷

28. More precisely, the new law entails legal recognition of same-sex couples by granting them the right to enter into civil unions recognized by the State (Article 1(2-35)). The term “civil union” refers to a form of cohabitation outside marriage, which requires the fulfillment of certain formalities for its validity – namely, the registration into public registry – so as to be considered as a legal social formation

²³ Court of Appeal of Trento, order of 23 February 2017, available at <http://www.articolo29.it/2017/dua-padri-i-loro-figli-la-corte-dappello-di-trento-riconosce-per-la-prima-volta-il-legame-tra-i-figli-e-il-padre-non-genetico/>.

²⁴ Minor Court of Florence, decree of 7 March 2017, available at <http://www.articolo29.it/2017/una-vera-e-propria-famiglia-da-firenze-un-nuovo-passo-avanti-per-il-riconoscimento-dellomogenitorialita/>

²⁵ ECtHR, *Wagner and J.M.W.L. v Luxembourg* (application n° 76240/01); *Negrepointis-Giannisis v Greece* (application n° 56759/08). See C. TUO, “Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali”, *Rivista di Diritto Internazionale Privato e Processuale*, 2014, p. 43 ff.; P. FRANZINA, “Some Remarks on the Relevance of Article 8 ECHR to the Recognition of Family Status Judicially Created Abroad”, *Diritti umani e diritto internazionale*, 2011, p. 609 ff.

²⁶ R. BARATTA, “Recognition of foreign personal and family status: a rights based perspective”, *Rivista di Diritto Internazionale Privato e Processuale*, 2016, p. 413 ff., spec. 434-441.

²⁷ P. SCHLESINGER, “La legge sulle unioni civili e la disciplina delle convivenze”, *Famiglia e Diritto*, 2016, p. 845 ff.; G. VILLA, “La gatta frettolosa e i contratti di convivenza”, *Il Corriere Giuridico*, 2016, p. 1189 ff.

different from marriage. Under the new institution, same-sex couples are conferred slightly the full set of rights and duties of the partners towards each other, which have been borrowed from the institution of marriage. Namely, the new law envisages pension rights for surviving partners and gives same-sex civil partners the same inheritance rights as married spouses. Moreover, partners in a same-sex civil union are required to provide mutual moral and material assistance. Finally, persons so joined are expected to mutually contribute to common needs. At last, same-sex civil unions can benefit from protection orders similar to those provided for by Articles 342bis-ter of the Italian Code of Civil Procedure. Moreover, partners so joined are equated to members of traditional families for succession purposes.

29. Albeit the new law refers to several articles of the Italian Civil Code concerning marriage, to be tailored to same-sex civil unions, thus making this union very similar to marriage (an equivalence clause is set forth by Article 1(20)), actually there are some grey areas which distinguishes same-sex partnerships from marriages. For instance, there is no obligation to publish the banns before the constitution of the union before a Registrar, which means less bureaucracy. In addition, there is no separation period for a couple which decides to split: the partners need merely to state their intentions before the Registrar, apparently without pre-divorce separation, and after three months they can file for divorce, thus reducing costs and time. Finally, same-sex couples can opt to take a common surname throughout the union, while under Italian marriage law this opportunity is not allowed.

30. At first glance, civil unions seem to be governed by a more modern and simpler (substantive) regime. However, it cannot be overlooked that the new Italian law falls short of granting full equality to same-sex couples. First of all, Italy does not recognize same-sex marriages. Therefore, same-sex couples benefit from a weaker tool of formalisation. Moreover, the new law fails to give an official name to members of a civil union, who are not referred to as “spouses” or “husbands and wives”. Therefore, the social identity of same-sex partner is not characterized by the law.²⁸ Furthermore, partners are not required to be faithful. Actually, the absence of this obligation means avoiding blame as well as claims for compensation as a result of infidelity. Finally, partners in a same-sex civil union are prevented from adopting their stepchildren: Italian adoption rules (the Italian law n. 184/1983) expressly does not apply to same-sex civil unions (Article 1(20)). This is true even though the biological child of one of the partners is involved and the other partner assumed a parental role towards her/his. As a result, a same-sex civil union is comparable to marriage in (nearly) everything but (above all) name and parental rights. Nonetheless, Article 1(20) of the Italian law no 70/2016 expressly provides that “*What is foreseen and allowed by current applicable rules in adoption matters is still valid*” (“*Resta fermo quanto previsto e consentito in materia di adozione dalle norme vigenti*”). Although the wording of this sentence is not that clear, this provision is expected to safeguard the abovementioned developments in Italian case-law as regards same-sex step-child adoption (see above, paragraph III), in order to further protect *de facto* parenthood.

31. The new law also governs the financial aspects of cohabiting persons, whether same-sex or opposite-sex, *de facto* living in a stable relationship (Article 1(36-65)). More precisely, it regulates *inter alia* assistance in the event of illness or incapacity, rent contracts and maintenance obligations in case of cessation of the cohabitation. Accordingly, albeit not married, cohabiting persons are nonetheless entitled to claim for maintenance in the event of separation. In this respect, the new law foresees the cohabitation agreement (“*contratto di convivenza*”), which is a private deed limited to property regime, with a specific form provided for by the law (Article 1(50) ff.). Albeit it cannot be considered as giving full protection to a stable committed relationship, this specific agreement can be used to set out all arrangements for funding the necessities of living together, even vis-à-vis children, thus reasonably playing a role even in planning conditions of a possible subsequent breaking up.

²⁸ Under the Italian Decree n° 5/2017 of 19 January 2017, same-sex partners are generally referred to as “party to the civil union”, to be completed by Italian Decree of 27 February 2017 on the entry of civil unions into the Italian registry.

V. The Italian Decree no 7/2017 on PIL rules and civil unions. First remarks

32. In order to amend the Italian legal system according to the recent substantial developments, a bill concerning a separated regime on specific private international law rules devoted to foreign same-sex marriages and same-sex civil unions amending Italian law no. 218/95 has been recently passed.²⁹

33. Under the Italian recent approach, civil unions are to be equated with family relations. However, as set out above, marriage has not been opened to same-sex couples. Therefore, it would have gone too far considering a same-sex union equal to a marriage for private international law purposes. Moreover, no endorsement at all has been achieved in relation to the application of the traditional conflicts-of-law rules devoted to family situations, namely to marriage, to civil unions. As a result, these unions are to be subject to specific rules which are nonetheless intended to mirror, *mutatis mutandis* and to various degrees, conflict-of-laws rules concerning “traditional” marriages.

34. Firstly and foremost, consistently with the finding of the Italian Supreme Court in judgment no 4184/2012, a foreign same-sex marriage validly concluded abroad by Italian citizens shall be equated to a civil union governed by the Italian law (Article 32bis). In other words, the existence of a same-sex marital status lawfully established abroad between Italian citizens should not be contested any longer in Italy, but such a marriage, instead of being recognized as (and equated to) an Italian “traditional” marriage, shall be “downgraded” into a life partnership governed by the Italian law, thus being entered into a registered partnership’s registry in Italy. It cannot be overlooked that the “double-characterization” of the same-sex relationship under the Italian legal system (*lex fori*) may entail a limitation of the effects the relationship is expected to produce under the *lex loci celebrationis* (*lex causae*). As pointed out, same-sex marriages entered into abroad by Italian same-sex couples – which on closer inspection may be a purely national situation except for the *locus celebrationis* – shall be mandatorily governed by the (substantive) Italian law no 76/2016, so as to avoid same-sex marriage tourism. Therefore, same-sex Italian partners, who settle in Italy after entering into a marriage abroad, may be bound by a family tie which has effects different than those provided for by the law of the *locus celebrationis*. In any case, they lose the marital status granted abroad since the *lex loci celebrationis* will play no role in governing their relationship.

35. Secondly, access to cross-border civil union should be governed by the national law of each partner when establishing a civil union, in Italy and abroad (Article 32ter(1)) (except for purely national unions under Article 32quinques, as set out below). Moreover, if one of the partners’ nationalities belongs to a State whose law does not allow same-sex civil unions, this law will be ignored while the Italian law will apply instead. Accordingly, the proposed conflicts-of-law rule opens the way for foreigners to enter into a civil union in Italy even though they have no chance to establish such a union under their national law. Anyhow, the additional requirements imposed by the Italian legislator in relation to access to civil union (under Article 1, parag. 4, Italian law no 76/2016 - rules governing the formal requirements of marriage which have been made applicable to same-sex unions) are expressly characterized as overriding mandatory rules. Article 32ter(2) governs the *nulla osta* needed to establish a civil union in Italy, as provided for by the Italian law no 76/2016. Finally, the formal validity of a civil union should be governed by the law of the establishing place (*lex loci registrationis*) or, alternatively, by the national law of at least one of the partner or, alternatively, by the law of the country of common residence at the establishing moment, complying with the *favor validitatis* principle (Article 32ter(3)).

36. Thirdly, the property regime and personal relation of same-sex civil union having cross-border implication should be in principle ruled by the law of the State under whose law the union was

²⁹ Italian Decree n° 7 of 19 January 2017, n. 7, amending the Italian law n° 218/1995 of PIL rules (Official Journal n° 22 of 27 January 2017). For first comments see the forum available at <https://crossborder.live/2017/01/16/forum-la-disciplina-internazionale-privatistica-italiana-delle-unioni-civili5/> and comments published in the second issue of Genius, available at <http://www.articolo29.it/wp-content/uploads/2017/03/genius-2016-02.pdf>.

created (Article 32ter(4)). As a matter of fact, the prevailing view in relation to the effects of a civil union is to subject these effects to the law of the country where the union has been established, by favouring the connection between the partners and the country where they had their union registered or otherwise formalized (*lex loci registrationis*). As a result, the Italian legislator has opted for a solution whereby access to a legal status and effects of the status concerned are governed by different rules. Notwithstanding this, the adoption of *lex loci registrationis* principle should guarantee the recognition of foreign partnerships. As a matter of fact, the *lex loci registrationis* rule is expected to work both as a conflicts-of-law rule and as a recognition rule since foreign partnerships can take automatically effects in Italy as provided for by the law of the State where the civil union has been established. Additionally, Article 32ter(4) leaves (limited) room for party autonomy so as to determine the law applicable to the property consequences of the registered partnership. This solution should be already in compliance with Regulation no 2016/1104 concerning matters arising from the property consequences of registered partnerships (which will be applicable as of 29 January 2019 only by EU Member States which have declared their wish to participate to the enhanced cooperation and which are, accordingly, bound by it).³⁰ Lastly, it should not be forgotten that the *lex loci registrationis* is in any case replaced by the Italian law if the same-sex civil union is purely national (see Article 32quinques).

37. Additionally, maintenance obligations of same-sex partners should be governed by Regulation no 4/2009,³¹ more precisely by the Hague Protocol 2007 on the law applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity (Article 32ter(5) taken in conjunction with new Article 45). Even though the scope of the maintenance Regulation is apparently quite broad, it is not specified whether same-sex marriages or same-sex partnerships fall within it. On the one hand, if these relationships are to be considered different from family relationships, the application of the Hague Protocol should be prevented. On the other hand, if these relationships are to be considered as family relationships, the Hague Protocol should be applicable.³² Albeit the EU instrument at stake does not take a firm and open stance on whether it applies to same-sex relationships, thus apparently being not applicable *proprio vigore* to civil unions, nonetheless the Italian legislator expressly widened the scope of the Hague Protocol so as to encompass even relationships different from traditional marriage (i.e. same-sex civil unions).

38. As further amendment, in addition to the general fora provided for by Article 3 and 9, Italian law no 218/95, one more forum is foreseen in relation to the dissolution, invalidity or annulment of cross-border civil union ties if one partner is Italian or the union has been created in Italy (Article 32quarter). As it is well known, no definition of the term “marriage” is provided for by the Brussels IIa Regulation (not even in the proposal of the Brussels IIa Recast³³). Therefore, it is still debated whether this EU uniform instrument applies to same-sex marriages. It is instead clear that there is no room for application of the Brussels IIa Regulation when the court is seized for a petition concerning same-sex partnerships.³⁴ Notwithstanding this, under the new rule Italian same-sex partners lawfully married abroad (to be regarded as an Italian civil union) and/or Italian same-sex partners joined abroad by a foreign partnership and/or same-sex partners joined in Italy by a registered partnership not purely national can apply before

³⁰ Council Regulation (EU) no. 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ 183 of 8 July 2016. It is worth pointing out that this Regulation neither obliges a Member State whose law does not have the institution of registered partnership to provide for it in its national law (Recital 17) nor require a Member State to recognise a registered partnership concluded in another Member State.

³¹ Regulation (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 7 of 10 January 2009.

³² See A. BONOMI, “The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations”, *Yearbook of Private International Law*, 2008, 333-357, spec. 339.

³³ Proposal for a regulation of the Council on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016)411 of 30 June 2016.

³⁴ See the EP Study “Recasting the Brussels IIa Regulation”, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU\(2016\)571383_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571383/IPOL_STU(2016)571383_EN.pdf)

an Italian court only to have the dissolution/invalidity/annulment of the partnership declared. By contrast, Italian courts still have no jurisdiction over the rights deriving from the dissolution of a foreign same-sex marriage.³⁵ As per the applicable law, the dissolution of a cross-border civil union shall be expressly governed by Regulation No 1259/2010 (so-called Rome III Regulation) (Article 32quater(2)). Generally speaking, this Regulation is expected to apply only to claims aimed at dissolving or loosening matrimonial ties (“divorce and legal separation”, see Article 1(1) Rome III Regulation), thus in principle excluding from its scope the dissolution of partnerships – regardless of whether they join a same-sex couple or not – in cases whereby such unions cannot be equated with matrimonial relationship under domestic rules.³⁶ Albeit same-sex civil unions are different from marriage under the new Italian law no. 76/2016 (see above, paragraph IV), nonetheless the Italian legislator opted to treat the dissolution of civil unions as wedlock dissolution, thus making these unions benefit from the EU enhanced cooperation by widening the Rome III Regulation’s scope.

39. Finally, a same-sex civil union or other similar family pattern (“*altro istituto analogo*”) established abroad by same-sex Italian citizens habitually resident in Italy is automatically valid in Italy but its effects shall be equal to a civil union under the Italian law (Article 32quinques). Similarly to same-sex marriages entered into abroad by Italian citizens, a purely national civil union except for the place of registration is subject to the (substantive) Italian law, so as to avoid same-sex civil union tourism. Accordingly, it is not possible for partners residing in Italy to move abroad to enter into a civil union there in order to circumvent the Italian law naturally applicable to the relationship.

40. As previously mentioned, same-sex civil unions can benefit from protection orders against domestic violence which are provided for by Article 342-ter of the Italian Civil Code (Article 1(14), Italian law no 76/2016) and which should, as such, freely circulate across the EU under Regulation (EU) No. 606/2013.³⁷ Moreover, by virtue of the equivalence clause set forth by the Italian substantive rules, the succession of the partners joined in a cross-border civil union should be reasonably ruled by Regulation EU no 650/2012.³⁸

41. As regards cross-border *de facto* cohabitations, a specific conflicts-of-law rule has been adopted as well. Under Article 30bis of Italian law n. 215/1995, as amended by Italian law no 76/2016, cohabitating agreements are governed by the law of nationality of either of the contracting parties. If a common nationality lacks, Article 30bis provides for the application of the law of the common habitual residence. However, other rules, both at national and international levels, that govern double and more citizenships, may play in any case a role.³⁹

³⁵ A. FUCHS, “Registered partnership, same-sex marriage and children: crossing borders”, *Rivista di Diritto Internazionale Privato e Processuale*, 2016, p. 452-454.

³⁶ P. FRANZINA, “The law applicable to divorce and legal separation under Regulation (EU) no 1259/2010 of 20 December 2010”, *Cuadernos de Derecho Transnacional*, 2011, p. 101-102; I. VIARENGO, “Il regolamento UE sulla legge applicabile alla separazione e al divorzio e il ruolo della volontà delle parti”, *Rivista di diritto internazionale privato e processuale*, 2011, p. 608-609; J. CARRASCOSA GONZALES, F. SEATZU, “Normas de competencia judicial internacional en la propuesta de Reglamento “Roma III”, *Rivista di diritto internazionale privato e processuale*, 2009, p. 570-571.

³⁷ Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181 of 29 June 2013, p. 4, applicable as of 11 January 2015, on which see A. DUTTA, “Cross-border protection measures in the European Union”, *Journal of private international law*, 2016, p. 169-184; D. PORCHERON, “Le principe de reconnaissance mutuelle au service des victimes de violences: règlement (UE) no. 606/2013 du Parlement européen et du Conseil du 12 juin 2013 relatif à la reconnaissance mutuelle des mesures de protection en matière civile”, *Revue critique de droit international privé*, 2016, p. 267-283; M. BOGDAN, “Some reflections on the scope of application of the EU Regulation No. 606/2013 on Mutual Recognition of Protection Measures in Civil Matters”, *Yearbook of private international law*, 2016, p. 405-410; E. DE GÖTZEN, Protection orders across Europe: first remarks on Regulation No. 606/2013, in K. BOELE-WOELKI, N. DETHLOFF, W. GEPHART (eds.), *Family law and culture in Europe*, 2014, p. 277-289.

³⁸ Regulation (EU) no 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201 of 27 July 2012.

³⁹ E. BALLARINO, I. PRETELLI, *Diritto Internazionale Privato Italiano*, 8th ed., Padova, 2016, p. 194-196.

VI. Cross-border same-sex couples and the on-going legal vacuum. Possible solutions

42. Firstly and foremost, unlike the former bill, the passed law does not address the issue concerning the recognition of same-sex marriages entered into abroad by an Italian citizen and a citizen of a different nationality or by two same-sex foreigners who settled in Italy at a later stage. A foreign same-sex marriage cannot be dealt with as a marriage in Italy. Moreover, as the new law stands, it is thus doubtful whether this kind of marriages can be downgraded into an Italian partnership. Apparently, a legal vacuum is left in this regard. However, a recent judgment by the Court of Appeal of Naples – delivered before the adoption of the Italian law no 76/2016 – may help in overcoming this hurdle. The case heard by the Court dealt with same-sex French female partners (one of which was Italian) who entered into a marriage in France (a State which, at that time, had already opened up marriage to same-sex spouses), under the French law. Then, the couple sought for the recognition of the same-sex marriage in Italy, after being relocated in Italy. According to the finding of the Court, since the same-sex marriage celebrated in France has been lawfully entered into there under the *lex loci celebrationis* (see Article 28, Italian law no. 218/95), the marital status accordingly acquired by the same-sex partners shall be deemed as valid and binding in Italy, regardless of the fact that under the Italian legal system, at the time of the dispute, marriage was reserved for opposite-sex couples only. As a matter of fact, it could not be forgotten that States are expected to automatically recognize the consequences of a foreign legal situations. Accordingly, the effects, which a personal/family status validly created in a State produces in the country of origin, should be in principle extended to other States without being questioned. Likewise, the State addressed should grant the same status or a status as similar as possible to the one validly constituted in the State of origin, even though the law designated by its conflict-of-laws rules would lead to a denial of recognition. Moreover, consistently with the judgment of the Italian Supreme Court no 4184/2012, the Court of Appeal affirmed that the gender identity and sexual orientation of the members of a couple does not contradict the public order (neither national nor international) any longer. Therefore, due to the fact that the public policy exception cannot play any role in this regard, a same-sex marriage validly entered into abroad by foreigners can now be entered into the Italian Civil Register. The matter is now covered by Italian law.⁴⁰ It flows from the above that a same-sex marriage purely national except for the *locus celebrationis* cannot be recognised as such in Italy (see above, paragraph V), while a foreign same-sex married couple, which falls outside the scope of the new Italian PIL rules, apparently does not lose the *status maritalis* validly conferred abroad. In fact, according to the recent case-law, this marriage can be entered into the Italian Civil Registry with its own *nomen iuris* and it can be governed by the law applicable under the Italian conflicts-of-law rules.

43. Secondly, a civil union entered into (abroad) by opposite-sex couples is an on-going unknown family tie under Italian law. Therefore, neither this kind of relationship nor its recognition is addressed by the new law.⁴¹ Anyhow, since it is clear from the case-law of the Court of Justice and the Strasbourg Court that (Member/Contracting) States are expected to give effect to civil status situations lawfully established in others, regardless of the applicable law, it is reasonable to assume that opposite-sex partnership established abroad can be put on an equal footing as same-sex civil unions, thus enjoying the same legal protection provided for by the new Italian law.⁴²

VII. The genderless continuity of family status granted abroad. Easier said than done?

44. Over the past years the basic question to be addressed by the Italian legal system was whether and to what extent same-sex relationships should have been granted legal protection.

⁴⁰ Supreme Court, 31 January 2017, judgment n° 2487, available at CED Cassazione.

⁴¹ On this issue see M. MELCHER, “(Mutual) Recognition of Registered Relationships via EU Private International Law”, *Journal of private international law*, 2013, p. 149-170.

⁴² See comments of F. Pesce and S. Marino available at <https://crossborder.live/2017/01/16/forum-la-disciplina-internazionale-privatistica-italiana-delle-unioni-civili5/>

45. As a matter of fact, the pressure from the Strasbourg Court's broad understanding of what is "family life" gave rise to new trends all over the EU concerning the government of non-traditional family patterns. Moreover, international norms (among which EU law) have been repeatedly called upon to support claims for cross-border recognition of new family-ties and related status. Therefore, an emerging consensus towards legal recognition of same-sex couples has rapidly developed across the EU over the past decade.

46. Conversely, the former Italian legal system displayed a prolonged failure to implement the fundamental right of same-sex unions. As a matter of fact, considering on an equal footing a traditional marital family and a stable homosexual relationship would have meant that all the rights applicable to married couples would also have been applied to the latter, including those related to parental issues, thus allowing same-sex couples both to marry and to found a family in Italy. Likewise, medically assisted procreation for female couples and surrogacy for male couples should have been accepted in Italy, thus extending parental rights to same-sex partners by considering the step-parent as a member of the stepchild's family. However, such an outcome would have clearly run contrary to the Italian tradition. As a consequence, same-sex partners had been for years unable to consolidate their relationship in Italy. But a complete denial of same-sex couples' personal/family status could not have been tolerated any longer. Time thus called for a remedy.

47. By tailoring the relevant domestic legal framework, the newly adopted Italian law no 76/2016 aims at addressing same-sex partners' legitimate expectations by introducing a new legal institution which grants same-sex couples a form of legal protection outside of marriage. More precisely, Italian same-sex couples have now been provided with an alternative tool of legally safeguarding their personal relationship, which confers them not only a specific official legal personal/family status within the society but also the core rights which same-sex couples are internationally and constitutionally entitled to. This brand new specific legal framework is undeniably a great victory for homosexual couples. As a matter of fact, there is no more discriminatory national attitude against same-sex couples and they benefit from the right to live their relationship on a (nearly) equal basis as opposite-sex couples. Accordingly, the landscape of family law in Italy has been in the end profoundly changed.

48. Additionally, as more and more States have introduced some forms of legal recognition for same-sex couples, the new Italian law increases substantially the possibility for foreign homosexual unions to freely circulate in Italy. As a matter of fact, same-sex couples can now seek (to some extent) for the recognition in Italy of their unions lawfully entered into abroad, thus avoiding (in the majority of cases) limping relationships. In this respect, the new Regulation (EU) no 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012⁴³ should play a relevant role. This EU tool exempts public documents issued in civil status matters only from the attainment of all administrative formalities related to their authentication (legalisation, apostille) in view of their "presentation" in other Member States, whereas other formalities (concerning certified copies and certified translations) are simplified and multilingual standard forms has been introduced. By reducing practical difficulties in producing cross-border evidence of certain legal facts, the new EU instrument is expected to facilitate the use of public documents related to personal status across the EU, when entitlement to legal protection is sought by EU citizens after moving abroad. However, this tool does not require a Member State to recognise the effects of a personal and/or familial status established under the law of another Member State. As a consequence, if the status concerned is unknown under the legal system of the Member State addressed, the new Regulation cannot itself avoid the denial of any legal effects abroad.

⁴³ A. VETTOREL, "EU Regulation no. 2016/1191 and the circulation of public documents between EU Member States and third countries", *Cuadernos de Derecho Transnacional*, pp. 342-351; E. DE GÖTZEN, "La propuesta de Reglamento relativa a la libre circulación de documentos públicos en la Unión Europea: ¿es el camino a seguir para mejorar la vida de los ciudadanos? (The Proposal for a Regulation Concerning the Free Movement of Public Documents Throughout the EU: is it the Way Forward to Facilitate Citizens' Life?)", *Anuario Español de Derecho Internacional Privado* 2014-2015, pp. 417-445.

49. Albeit the new Italian law is a helpful tool for bridging the gap between current family law and the social reality of rainbow families, it cannot be denied that it does not exhaustively address the mutated social needs. As a matter of fact, under this law same-sex unions enjoy *grosso modo* the same rights and duties different-sex married couples are entitled to. In other words, they do not benefit from all advantages reserved to the latter. On closer inspection, firstly, same-sex registered couples do not have the same status as different-sex married couples and same-sex civil unions are not equal to marriage. Accordingly, a foreign same-sex marriage (entered into abroad by two Italian citizens) will be downgraded into an Italian civil union, thus benefiting from rights different than the ones in the State of origin. Secondly, same-sex partners and different-sex partners do not benefit from similar rights when it comes to parentage. Therefore, Italian courts are expected to safeguard the best interest of the weakest member of the family, namely children, in case of same-sex parenthood established abroad. Finally, it cannot be overlooked that the newly adopted Italian conflicts-of-law rules are still affected by several legal vacuum (namely, recognition of same-sex marriages entered into abroad by foreign citizens and recognition of foreign different-sex partnerships), which are far from being settled.

50. The foregoing analysis leads to conclude that all the issues, which have not been faced properly by the recent national initiative, will be inevitably matters for the next family law reform in Italy to address, so as to effectively guarantee also in this country the genderless continuity of family status granted abroad.