



BRILL

## Case notes



# Adoption v. Surrogacy: New Perspectives on the Parental Projects of Same-Sex Couples

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### Abstract

In Italy all forms of surrogacy are forbidden, whether it be traditional or gestational, commercial or altruistic. Act n. 40 of 19/2/2004, entitled “Rules about medically-assisted reproduction”, introduces a prohibition on employing gametes from donors, and specifically incriminates not only intermediary agencies and clinics practising surrogacy, but also the intended parents and the surrogate mother too. Other penal consequences are provided by the Criminal Code about the registration of a birth certificate where parents are the intended ones, as provided by the *lex loci actus* (art. 567 of the Italian Criminal Code, concerning the false representation or concealment of status). Apart from the mentioned criminal problems, several aspects of private international law are involved. In the cases where national rules forbid the transcription of birth certificates for public policy reasons, specifically the prohibition of surrogacy, Italian Judges often seek solutions to enforce the status filiationis. In this case, the Italian Supreme Court intervenes in the debate, allowing the recognition of a foreign

adoption order related to a procedure of surrogate motherhood in favour of a same-sex couple. Focusing on the recent evolution of the notion of international public policy the Supreme Court affirms that the inherent adoptive parental status acquired by a homogenitorial couple is not contrary to international public policy, when the effects of the act from which this status derives are not incompatible with the limits that cannot be exceeded constituted by the founding principles of the relational choices between intended parents and child (Article 2 of the Constitution, Article 8 ECHR), by the Best interest of the child as codified in the Italian Law 219/2012, by the principle of non-discrimination, by the principle of solidarity that is the basis of social parenting. Splitting the problem of the surrogacy, underlying the adoption order to recognize in this case, and narrowing the public policy exception, is highly evident the risk to suggest to same-sex couples to realize their parental projects putting in place the surrogacy within the legal systems where contemporary it is possible to carry out the adoption of the child born as a result of this procedure.

### **Keywords**

adoption – surrogacy – best interest of the child – public policy – same-Sex parents – continuity of family status – New York Convention on the Rights of the Child – European Convention on Human Rights

### *Abstract of the decision*

The inherent status as adoptive parents acquired by a same-sex couple is not contrary to international public policy, provided that the effects of the order on which this status is based are not incompatible with the mandatory limits established by the founding principles governing the relationship between prospective parents and child (Article 2 of the Italian Constitution, Article 8 of the European Convention on Human Rights): the best interest of the child as codified in Italian Law 219/2012, the principle of non-discrimination, the principle of solidarity, which constitutes the basis for social parenting with reference to which the European Court of Human Rights has created a variety of models for adoptive parenting, which share the common aim of preserving affective and relational continuity when stabilised within the family relationship.

### *Key Passages from the Ruling\**

Para. 18.6. This judgment does not concern the consistency of a system that accepts differences in the treatment of children whose factual circumstances are entirely similar. On the contrary, its purpose is solely to review the compatibility with the principles of international public order of a foreign full adoption order establishing the status as parents of a male homosexual couple.

Para. 19. By way of conclusion, based on an examination of the most recent case law of the *Corte Costituzionale* and the *Corte di Cassazione*, it is not possible to find that the prerequisites for prospective parents' eligibility for full adoption laid down by Article 6 of Law No. 184 of 1983 and Article 1(20) of Law No. 76 of 2016 form part of the principles of international public order that may establish a limit to the recognition of the foreign order at issue in these proceedings. As noted in the sections immediately above, the prohibitions on access to medically assisted procreation, which likewise cannot be traced back to principles of international public order, are also of no consequence for the recognition exclusively of status as adoptive parents at issue in these proceedings. Within the legal order, principles derived from constitutional law coexist alongside those derived from the treaty law. The latter are clearly superior to and pre-eminent over the former, both in terms of their status as inviolable human rights as well as the scale on which they are endorsed, which is a defining feature of such rights.

Para. 19.1. These include first of all, as mentioned above, the principle of the child's best interest within decisions that impinge upon his or her rights to an identity and to emotional, relational and family stability as provided for under Article 24 of the Charter of Fundamental Rights of the European Union and Article 3 of the New York Convention on the Rights of the Child. These rights have become an integral part of the construction of the right to private and family life by the European Court of Human Rights (ECtHR), whilst also constituting the basis for the reform of Law No. 184 of 1983 by Law No. 149 of 2001 and the recent Law on Affective Continuity (No. 173 of 2015) as well as all of the various legislative provisions on parental responsibility and *status filiationis* (also according to Judgment No. 272 of 2017 of the *Corte Costituzionale*, cited above) as one of the most significant manifestations of Article 2 of the Constitution.

Para. 19.2. Secondly, they also include the principle of the equal treatment of all children, whether born within marriage, outside marriage, or adopted, the constitutional basis for which is Articles 3 and 31 of the Constitution, and which was reiterated by the recent reform of the law on filiation (Law No. 219

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\* The translation in English is by the author of the note.

of 2012; Legislative Decree No. 154 of 2013). In this regard it is necessary to note, specifically in relation to adoptive filiation (which is currently subdivided into full adoption and adoption in special circumstances), the changes made to Article 74 of the Civil Code. This Article now provides for one single undifferentiated bond of parentage resulting from status as a child, with the sole exception applicable in relation to the adoption of adults. It has thus given rise to doubts within the literature concerning the constitutionality of the retention within our legal system of different rules for different types of adoptive parentage.

Para. 19.3. The panorama of intangible principles governing protection for status as a child, a core defining feature of which is the objective of avoiding any discrimination within the legal rules establishing protection for children, is completed by the consideration that the current understanding of social parentage is more variegated than the appellant asserts in his argumentation. (...) An inevitable consequence of the strong promotion within the case law of the *Corte Costituzionale*, supranational courts and the *Corte di Cassazione* of a national legal regime governing eligibility for social parentage that is less restrictive and closer to the shared evolution of relational and parent-child models is that, in terms of the principles of international public order, the restriction limiting eligibility for full adoption to married heterosexual couples as laid down in Article 6 no longer applies (...). The marital bond provided for under Article 29 of the Constitution is the model of family relationship that, under the current state of national law, provides the highest level of legal protection. However, as far as parental status is concerned, above all following the reform of the law on filiation, it is no longer the sole model, or indeed the model deemed to be exclusively the most suited, for the birth and upbringing of children. Consequently, it must be concluded that it cannot constitute a limit on the recognition of the effects of an order recognising as adoptive parents a homosexual couple, who have moreover contracted marriage in the United States of America (US).

*Comment:*

**1 Preliminary Remarks**

In the decision under review, the *Corte di Cassazione* recognised an adoption order issued in the US by the Surrogate's Court of the State of New York (NY) to a couple (a US national and a US-Italian dual national) a few months after the birth of a child born to a surrogate mother, affirming that the foreign adoption order did not contrast with public policy. On 2 November 2009, a US national

and a US-Italian dual national adopted a child born in the US on 11 May 2009 to a surrogate mother. The couple married in 2013 according to the law of NY State. As provided under domestic law, the Surrogate's Court issued an adoption order after a procedure requiring the consent of the biological father and the biological mother of the child and a detailed investigation, as provided for under Social Services Law. The couple sought the recognition of the foreign adoption order before the *Corte d'Appello di Milano*. The *Corte d'Appello* held that the adoption order could be recognised, according to Articles 64, 65, 66 and 67 of Law No. 218/95 as it did not involve any violation of public policy, and in view of the fundamental best interest of the child in retaining the *status filiationis* acquired abroad, as provided for under Legislative Decree No. 154 of 28 December 2013. According to the *Corte d'Appello di Milano*, the focus had to lie on the child's best interest, setting aside the rule that only married couples of the opposite sex are eligible to adopt children. The *Sindaco di Sammarate* appealed against this order to the *Corte di Cassazione*, arguing first that it violated Article 6 of the Law No. 184/1983 on adoption on the grounds that only married couples are eligible to adopt. Secondly, it was claimed to violate Article 1 (20) of the Law No. 76/2016 on same-sex partnerships owing to the prohibition on adoption by couples in a same-sex partnership, and also in view of the principles developed within the Italian case law, according to which the only form of adoption open to same-sex couples is that provided for under Article 44 (d) of the Law No. 184/1983 in order to resolve, *inter alia*, problems arising in relation to surrogacy. The *Corte di Cassazione* rejected the appellant's request asserting that, under the current state of national law, as laid down by Article 29 of the Constitution, the marital bond is the model of family relationship that provides the highest level of legal protection. However, as far as parental status is concerned, following the reform of the law on filiation, it is no longer the sole model, or indeed the model deemed to be exclusively the most suited for the birth and upbringing of children. Consequently, it must be concluded that it cannot constitute a limit to the recognition of the effects of an order recognising as adoptive parents a homosexual couple, who have moreover contracted marriage in the USA.

## 2 The Ban on Surrogate Motherhood Under Italian Law No. 40/2004 and its Effects on the Italian Case Law Regarding Public Policy

The Judgment under review concerned two much-debated issues, namely whether to allow the recognition of a foreign adoption order issued to a same-sex couple and whether this can be done in relation to a child born to a

surrogate mother. Italian law does not allow surrogate motherhood, admitting only the recourse to medically assisted procreation (MAP) techniques by married or cohabiting adult couples of the opposite sex, provided that they are of potentially fertile age.<sup>1</sup> Although Law No. 76/2016 on registered partnerships for same-sex couples establishes a legal regime for such partnerships, that is largely comparable to that applicable to married heterosexual couples, it does not extend to registered parties the rules on filiation and adoption as applicable to married couples. As regards specifically adoption, Law No. 76/2016 in fact leaves the existing rules unchanged.<sup>2</sup>

The reasoning followed by the *Sezioni Unite Civili della Corte di Cassazione* in recognising the foreign adoption order issued to a same-sex-couple is based essentially on the following reasons.

Firstly, the Court resolved any doubts concerning its jurisdiction and confirmed the applicability to the case of Articles 64, 65 and 66 of Law No. 218/95, as recalled by Article 41(1). In doing so, it excluded the jurisdiction of the *Tribunale dei Minorenni* on the assumption that the case under review did not concern international adoption and hence that the rules concerning this issue were not applicable: the applicants were US nationals resident in the US, who had adopted a child, also a US national, born in that country. Thus, since one of the applicants did not fulfil the conditions laid down by Article 29-bis (1) and (2) and Article 36(4) of Law No. 184/1983,<sup>3</sup> the rules on international adoption did not apply as that rule requires that both of the prospective adoptive parents must be Italians resident abroad, or alternatively foreign nationals resident in Italy. Consequently, the procedure applicable in the case was that provided for under Article 67 of Law No. 218/95.

Secondly, the Court focused on the recent evolution in the notion of public policy, and specifically the notion of international public policy,<sup>4</sup> as a tool aimed at preserving the internal harmony of the domestic legal order when

1 Art. 5 of the Law of 19 February 2004, No. 40, *Norme in materia di procreazione medicalmente assistita*, Gazzetta Ufficiale, 24 February 2004, No. 45, does not allow recourse to surrogate motherhood, admitting, as the law currently stands, only a recourse to MAP techniques by couples of adults of different gender, married or cohabitating, and of potentially fertile age. See DI BLASE, "Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato", *Rivista di diritto internazionale privato e processuale*, 2018, p. 839 ff.

2 Law of 20 May 2016, No. 76, *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*, Gazzetta Ufficiale, 21 May 2016, No. 118.

3 Law of 4 May 1983, No. 184, *Diritto del minore a una famiglia*, Gazzetta Ufficiale, 17 May 1983, No. 133.

4 *Corte di Cassazione (Sez. I civile)*, 21 June 2016, filed on 30 September 2016, No. 19599, *Procuratore generale della Repubblica presso la Corte d'appello di Torino*, *Rivista di diritto*

faced with the impact of foreign legal values that are irreconcilable with its inspiring principles. Modern systems of private international law had opened up the doors to foreign legal values (i.e. values typical of other legal systems), and, in this regard, scholarship has highlighted the need to apply the public policy exception only after evaluating the effects that would result from the application of the foreign adoption order.<sup>5</sup> In this case, the Court held that the need to review the compatibility of the foreign order with public policy, understood not as a consideration of its compliance with specific internal rules, but rather as a means to ensure protection for parental relationships, flowed from a fundamental right enshrined in the common framework outlined by the Italian Constitution, the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR). In this specific case, the assessment of the effects of the foreign order was carried out, the Court evaluating all the circumstances surrounding the order. The Court stressed that the foreign order had been adopted after “an investigation has been ordered and carried out and the written report of that investigation had been filed with the Court, as required under national law”. The consent to adoption of the biological parents of the children, as expressed within the foreign adoption procedure, is highlighted in the Judgment under review as a means of establishing that the foreign adoption order did not violate the Italian ban on surrogacy, or the restrictions imposed by Italian law on MAP in relation to same-sex couples, as the focus of the Court’s evaluation was the foreign order, and not the underlying circumstances.

Thirdly, within the human rights system engaged by the public policy exception, the *Sezioni Unite Civili della Corte di Cassazione* outlined the fundamental

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internazionale privato e processuale, 2016, p. 813 ff.; *Corte di Cassazione (Sez. I civile)*, 15 June 2017, filed on 21 November 2017, No. 14878, *Rivista di diritto internazionale privato e processuale*, 2018, p. 408 ff.; *Corte di cassazione (Sezioni Unite)*, 8 May 2019, No. 12193, *Il Corriere giuridico*, 10/2019, p. 1110 ff. See: FERACI, “Ordine pubblico e riconoscimento in Italia dello status di figlio ‘nato da due madri’ all’estero: considerazioni critiche sulla sentenza della Corte di cassazione n. 19599/2016”, *Rivista di diritto internazionale*, 2017, p. 169 ff.; MARONGIU BUONAIUTI, “Il riconoscimento delle filiazione derivante da maternità surrogata – ovvero fecondazione eterologa sui generis – e la riscrittura del limite dell’ordine pubblico da parte della Corte di cassazione, o del diritto del minore ad avere due madri (e nessun padre)”, in E. Triggiani et al. (eds.), *Dialoghi con Ugo Villani*, Bari, 2017, p. 1141 ff.; BARUFFI, “Gli effetti della maternità surrogata al vaglio della Corte di Cassazione e altre corti”, *Rivista di diritto internazionale privato e processuale*, 2020, p. 290 ff.

5 On public policy in private international law, see generally, LAGARDE, *Recherches sur l’ordre public en droit international privé*, Paris, 1960; BADIALI, *Ordine pubblico e diritto straniero*, Milano, 1963, p. 4 ff.; CONDORELLI, *La funzione del riconoscimento di sentenze straniere*, Milano, 1967, p. 176 ff., p. 219 ff.; BARILE, *I principi fondamentali della comunità statale e il coordinamento tra sistemi (L’ordine pubblico internazionale)*, Padova, 1969, p. 53 ff., p. 77 ff.;



principle of the *best interest of the child*, considering the fundamental right to identity as proclaimed in the Italian Constitution and in a number of international treaties. Stepping back from the judgments issued by the ECtHR,<sup>6</sup> the Court underscored the variety of different adoptive parenting models, which share the aim of ensuring affective continuity within children's family relationships. More specifically, the Court recalled case No. 14007/2018 concerning the recognition of the cross-adoption of the children of two French women married in France and living in Italy, who gave birth to the children after undergoing MAP procedures and through cross-adoption (known as "stepchild adoption") had both become the parents of the children.<sup>7</sup>

### 3 The New Reading of Public Policy Exception Established by the *Sezioni Unite Civili della Corte di Cassazione*

The public policy exception is highlighted in a very original way in the ruling under discussion, considering the interplay between formal and substantive factors in this respect.

Recalling the case law of the ECtHR,<sup>8</sup> the *Corte di Cassazione* noted that the recognition of a foreign adoption order is not incompatible with public policy, even if that order has been issued to two men. This is because there is no fundamental principle of the Italian legal system that prohibits same sex couples from being parents, and also due to the marked evolution that now allows same-sex couples to foster or adopt a child jointly in many countries, or that

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HAMMJE, "Droits fondamentaux et ordre public", in *Revue critique de droit international privé*, 1997, pp. 1 – 3; BUCHER, "L'ordre public et le but social des lois en droit international privé", *RCADI*, 1993 (239), pp. 9 – 116; more recently, CONTALDI, "Ordine pubblico", in BARATTA (ed.), *Diritto internazionale privato, Dizionari del diritto privato promossi da Natalino Irti*, Milano, 2010, p. 273 ff.; PERLINGIERI, ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, p. 48 ff.

6 *S.H. v. Austria*, Application No. 57813/00, Judgment of 3 November 2011.

7 *Corte di Cassazione (Sez. I civile)*, 13 April 2008, filed 31 May 2008, Ordinanza No. 14007, *Sindaco del Comune di (omissis), Sindaco del Comune di (omissis) v. L.D.G., H.R.L. A.R.* In the case the *Corte d'Appello di Napoli* allowed the recognition of the foreign adoption acts according to Article 67 of the Law No. 218/95, and the *Corte di Cassazione* confirmed this solution stating the necessity of registration of this act according to the *Decreto del Presidente della Repubblica*, 3 November 2000, No. 396, *Regolamento per la revisione e semplificazione dell'ordinamento dello stato civile, a norma dell'art. 2, comma 12, della legge 15 maggio 197, No. 127*, *Gazzetta ufficiale*, 30 December 2000, No. 303 (*suppl. ord.*). See: CAMPIGLIO, "La genitorialità nelle coppie same-sex: un banco di prova per il diritto internazionale privato italiano e l'ordinamento di stato civile", *Famiglia e diritto*, 2017, p. 566 ff.

8 *Menesson v. France*, Application No. 65942/11, Judgment of 26 June 2014, and *Labassee v. France*, Application No. 65941/11, Judgment of 26 June 2014; Advisory Opinion 10 April 2019,



allows women in lesbian relationships to have children by medically assisted insemination, and/or that provides for joint parental status and/or responsibilities if a child is born to a woman in a lesbian relationship.

The Court's reasoning also appears to be based on the fundamental role of the "social reality" of the ensuing relationship<sup>9</sup> – or the nature of the interests at stake.<sup>10</sup> This is in spite of the fact that the case law referred to the ECtHR seems reluctant to state whether the right to respect for private and family life, enshrined in Article 8 of the ECHR, entails a right to the recognition of parentage established abroad in cases involving surrogacy and to identify the principles required to develop continuity of family status. In fact, within the reasoning of the ECtHR, the mechanism for recognising the right for private life of children born by surrogacy does not involve the recognition of the principle of continuity of family status but rather the adoption by the prospective, non-biological parent.

The solution now reached by the *Corte di Cassazione* in the judgment under review represents one small step forward along the difficult path towards reconciliation with family *status* derived from new technologies.<sup>11</sup>

In the judgment under review, the *Sezioni Unite Civili della Corte di Cassazione* overcame the problems associated with the adoption order's

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No. P16-2018-001. On this issue, see also: *Foulon e Bouwet v. France*, Application No. 9063/14, Judgment of 21 July 2016; *Laborie v. France*, Application No. 44024/13, Judgment of 19 January 2017; *Paradiso e Campanelli v. Italy*, Application No. 25358/12, Judgment of 24 January 2017. See: GERVASI, "The European Court of Human Rights and Technological Development: The Issue of the Continuity of the Family Status Established Abroad Through Recourse to Surrogate Motherhood", *Diritti umani e diritto internazionale*, 2018, p. 213 ff.

9 As outlined in the case law of the ECtHR, e.g. *Mennesson v. France*, cit. *supra* note 8, para. 80 (emphasis added).

10 As stated by the ECtHR in *Genovese v. Malta*, Application No. 53124/09, Judgment of 11 October 2011, para. 33 (emphasis added), recalling the *best interest of the child* in relation to the right to personal identity.

11 In recent decades, uncertainty has arisen in this field in some States, as a result of a combination of changing family patterns and advances in medical science. This has given rise to a number of legal developments across Countries, including the law on parentage. States' approaches to issues such as paternity disestablishment (in the light of DNA testing), assisted reproductive technology and surrogacy arrangements have varied greatly, depending on the State's cultural, political and social environment. As a result, there is – as yet – no international consensus on how to establish and contest legal parentage in these new circumstances. See BYCHKOV GREEN, "Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflict of Laws", Selected Works of Berkeley Electronic Press, 2008; STEPHENSON, "Reproductive Outsourcing to India: WTO Obligations in the Absence of US National legislation", *Journal of World Trade*, 2009, p. 189 ff.; TRIMMINGS, BEAUMONT, "International Surrogacy Arrangements: An Urgent Need for Legal regulation at the International Level", *Journal Private International Law*, 2011, p. 627 ff.; FEUILLET-LIGER, ORFALI, CALLUS (eds.), *Who is My Genetic Parent?*

potential contrast with public policy owing to the involvement of a surrogate parent in three ways.

First of all, it detached the adoption order from the underlying surrogacy, applying an extremely narrow concept of public policy very similar to that developed by the *Corte di Cassazione* in 2016.<sup>12</sup> According to this view, public policy is construed as a narrow limit and is restricted to principles relating to the protection of fundamental rights enshrined in the Italian Constitution as well as in international treaties and EU law.<sup>13</sup> The renewed reference to this notion is rather surprising following the ruling by the *Sezioni Unite Civili della Corte di Cassazione* that overruled the different notion of public policy in 2019,<sup>14</sup> holding that a foreign order establishing a bond of filiation between a child born by surrogacy and the putative father (the same-sex spouse of the biological father) could not be considered to be incompatible with public policy as codified not only in the Italian Constitution or in international treaties, but also in the national rules concerning MAP in Italy.<sup>15</sup>

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*Donor Anonymity and Assisted Reproduction – A Cross-cultural Perspective*, Bruxelles, 2011; CAMPIGLIO, “Il diritto all’identità personale del figlio nato all’estero da madre surrogata (ovvero, la lenta agonia dell’ordine pubblico)”, *La nuova giurisprudenza civile commentata*, 2014, p. 1132 ff.

- 12 *Corte di Cassazione (Sez. I civile)*, 21 June 2016, filed on 30 September 2016, No. 19599, cit. *supra* note 4. However, in this case, the bond of filiation between the child and the two women, claiming to be recognized for the purposes of the Italian civil *status* records as his mothers, resulted from a certificate of birth delivered by a Spanish official in accordance with the rules of Spanish law. The *Corte d’Appello di Torino*, whose decision had been appealed before the *Corte di Cassazione*, held Spanish law as applicable to the establishment of filiation in the circumstances of the case, since, whereas the two supposed mothers were Italian and Spanish nationals respectively, the child was born by the Spanish woman and was, accordingly, to be considered as a Spanish national himself. At the same time, since, pursuant to Spanish law, applicable pursuant to Article 33 of the Italian Law No. 218/1995 mentioned above, the child was to be considered as the son of both women, he possessed Italian nationality as well, something which justified the registration of the Spanish birth certificate in the Italian civil status records.
- 13 This view is supported by several scholars, see: TONOLO, “L’evoluzione dei rapporti di filiazione e la riconoscibilità dello status da essi derivante tra ordine pubblico e superiore interesse del minore”, *Rivista di diritto internazionale*, 2017, p. 1070 ff., p. 1090 f.; SALERNO, “La costituzionalizzazione dell’ordine pubblico internazionale”, *Rivista di diritto internazionale privato e processuale*, 2018, p. 259 ff., p. 277 ff.
- 14 *Corte di Cassazione (Sezioni Unite Civili)*, 6 November 2018, filed 8 May 2019, No. 12193, *Procuratore generale presso la Corte d’appello di Trento, Ministero dell’Interno e Sindaco di Trento*. See on this Judgment: MARONGIU BUONAIUTI, “The recognition in Italy of filiation established abroad by surrogate motherhood, between transnational continuity of personal status and public policy”, *Cuadernos de Derecho Transnacional*, 2019, pp. 294 – 305.
- 15 For a different reading of the notion of public policy on a different topic: *Corte di Cassazione (Sezioni Unite Civili)*, 5 July 2017, No. 16601, *Rivista di diritto internazionale*, 2017, p. 1305 ff., VANIN, “L’incidenza dei diritti fondamentali in materia penale sulla ricostruzione dell’ordine

Secondly, the Court assumed that any prohibition of the parental projects of same-sex couples cannot override the best interest of the child, as was outlined by the *Corte Costituzionale* in its interpretative ruling concerning Article 263 of the Civil Code, along with the stated need that the biological parent may decline to recognise the biological child in cases involving both heterosexual fertilisation as well as surrogacy, balancing the *favor veritatis* against the overriding interest of the child.<sup>16</sup> This assumption was founded, in the judgment under review, on an interesting interpretation of the case law of the *Corte Costituzionale*. The *Sezioni Unite Civili della Corte di Cassazione* held that Law no. 76/2016 does not provide for the extension to the parties to a registered partnership of the rules concerning filiation and adoption, as applicable to spouses. However, the *Sezioni Unite Civili della Corte di Cassazione* held that Article 20, which provides that Law No. 76/2016 is without prejudice to the existing rules on adoption, cannot now be construed as a ban on adoption by same-sex couples, even where the adopted child was born to a surrogate mother. It reached this conclusion in the light of the evolution in the case law of the *Corte Costituzionale*,<sup>17</sup> pointing for instance to the reasoning underlying judgment No. 221/2019.<sup>18</sup> Although the *Corte Costituzionale* held in this case that Article 5 of Law No. 40/2004, which reserves eligibility for MAP to sterile heterosexual couples, attributing it a therapeutic purpose, cannot be considered as a source of any unjustified unequal treatment of same-sex couples as the circumstances of the latter are not comparable with those of the former (recalling the interpretation of Article 8 and Article 14 of the ECHR), the *Sezioni Unite Civili della Corte di Cassazione* pointed to the suggestion made by the *Corte Costituzionale* that this Law “may be open to some different interpretation, in view of the evolution of the social assessment of the phenomenon concerned”,<sup>19</sup> arguing that Law No. 40/2004 cannot establish a mandatory prohibition on the recognition of the adoption order under review in this case. In a similar way, the *Sezioni Unite Civili della Corte di Cassazione* recalled Judgment No. 237/2019 of the *Corte Costituzionale*,<sup>20</sup> concerning the

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pubblico internazionale: il caso del riconoscimento delle decisioni straniere attributive di punitive damages”, *Rivista di diritto internazionale*, p. 1190 ff.

16 *Corte Costituzionale*, 18 December 2017, No. 272, *Foro italiano*, 2019, 21 ff., Casaburi, “Le azioni di stato alla prova della Consulta. La verità non va quasi mai sopravvalutata”.

17 *Corte di Cassazione (Sezioni Unite Civili)*, 6 March 2021, filed 31 March 2021, No. 9006, para. 18 ff. (emphasis added).

18 *Corte Costituzionale*, 23 October 2019, No. 221, *Corriere Giuridico*, 2019, p. 1460 ff.

19 *Ibid.*, para. 13.2 (emphasis added).

20 *Corte Costituzionale*, 15 November 2019, No. 237, *Famiglia e Diritto*, 2020, p. 325 ff.

registration of a foreign birth certificate required by a same-sex couple in order to assert that the principles laid down by the Law No. 76/2016 – even though entirely consistent with Article 3 of the Italian Constitution – are not fundamental principles because they are rooted in a political view that is not universally shared. The same reasoning was discerned by the *Sezioni Unite Civili della Corte di Cassazione* within judgment No. 230/2020 of the *Corte Costituzionale*<sup>21</sup> in order to affirm that the ban on the parental projects of same-sex couples provided for under Law No. 40/2004 is not a “founding principle”.<sup>22</sup>

Thirdly, the Court considered the aspect of the fundamental rights of the child, whose very existence is a consequence of the implementation of the right to parenthood. The centrality of the child is, moreover, also consistent with the recent Italian reform of the law on filiation,<sup>23</sup> which introduces the principle of continuity of *status*, thereby highlighting the child’s interest in maintaining a regular personal relationship and direct contact with both parents, which is generally required under international treaties and European law. In cases involving the recognition of a foreign birth certificate, continuity of *status* of the child must be assured, subject only to the public policy exception represented by the Italian ban on surrogacy,<sup>24</sup> also because such cases usually involve a long-term parental relationship, whereas the registration of a national birth certificate is dependent upon the biological ties between the child and its parents, in keeping with a “different normative paradigm”.<sup>25</sup> In these cases, the *Sezioni Unite Civili della Corte di Cassazione* recalled the institute of “adoption in special circumstances” provided for under Article 44 of Italian Law No. 184/1983, whereby an individual may apply for this form of adoption in respect of the child of his or her partner, even though this would not formally amount to stepchild adoption *stricto sensu*.<sup>26</sup>

21 *Corte Costituzionale*, 20 October 2020 – 4 November 2020, No. 230

22 *Corte di Cassazione (Sezioni Unite Civili)*, 6 March 2021, filed 31 March 2021, No. 9006, cit. *supra* note 17, para. 18.4 (emphasis added).

23 *Decreto Legislativo* 28 December 2013 n. 154 *Revisione delle disposizioni vigenti in materia di filiazione a norma dell'art. 2 della l. 10 dicembre 2012 n. 219*, *Gazzetta Ufficiale* 8 January 2014 No. 5; LOPES PEGNA, “Riforma della filiazione e diritto internazionale privato”, *Rivista di diritto internazionale*, 2014, pp. 394–418; CAMPIGLIO, “La filiazione e le nuove norme di diritto internazionale privato”, in LENTI, MANTOVANI (eds.), *Trattato di diritto di famiglia. Le riforme (diretto da Paolo Zatti)*, vol. II. “Il nuovo diritto della filiazione”, Milano, 2018, pp. 351–372.

24 *Corte di Cassazione (Sezioni Unite Civili)*, 6 March 2021, filed 31 March 2021, No. 9006, cit. *supra* note 17, para. 18.5 (emphasis added).

25 *Ibid.*

26 See *Corte Costituzionale*, 30 September – 7 October 1999, No. 383; 29 July 2005, No. 347 (order), and, from among an extensive case law of civil courts, *Tribunale per i minorenni*

#### 4 Concluding Remarks

Finally, the *Sezioni Unite Civili della Corte di Cassazione* held that the “panorama of intangible principles governing protection for status as a child, a core defining feature of which is the objective of avoiding any discrimination within the legal rules establishing protection for children, is completed by the consideration that the current understanding of social parentage is more variegated than the appellant asserts in his argumentation. [...] An inevitable consequence of the strong promotion within the case law of the *Corte Costituzionale*, supranational courts and the *Corte di Cassazione* of a national legal regime governing eligibility for social parentage that is less restrictive and closer to the shared evolution of relational and parent-child models is that, in terms of the principles of international public order, the restriction limiting eligibility for full adoption to married heterosexual couples as laid down in Article 6 no longer applies [...]. The marital bond provided for under Article 29 of the Constitution is the model of family relationship that, under the current state of national law, provides the highest level of legal protection. However, as far as parental status is concerned, above all following the reform of the law on filiation, it is no longer the sole model, or indeed the model deemed to be exclusively the most suited, for the birth and upbringing of children. Consequently, it must be concluded that it cannot constitute a limit on the recognition of the effects of an order recognising as adoptive parents a homosexual couple, who have moreover contracted marriage in the United States”.<sup>27</sup>

Many problems may arise from the reasoning underlying this judgment, all of which can be essentially related to the argument that a distinction should be drawn between surrogacy and foreign adoption in order to recognise the resulting effects, which could otherwise never arise under Italian law, even

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*di Bologna*, 17 April 2013, Procedure No. 186/2011 A; *Tribunale per i minorenni di Roma*, 30 July 2014, Procedure No. 429/14 V.G.; 22 September 2015, No. 4580; *Corte d'appello di Roma*, 20 October 2015, filed on 23 December 2015, available at: <www.articolo29.it>; see also MARONGIU BUONAIUTI, “Il riconoscimento delle adozioni da parte di coppie di persone dello stesso sesso al vaglio della Corte costituzionale”, *Ordine internazionale e diritti umani*, 2014, p. 1135 ff., p. 1140; ID., *Il riconoscimento delle adozioni da parte di coppie di persone dello stesso sesso: la Corte costituzionale “risponde” al Tribunale per i minorenni di Bologna*, *ibid.*, 2016, p. 462 f.; TONOLO, “*Status filiationis* da maternità surrogata e adozione da parte del genitore “intenzionale”: i limiti nella formula dell’adattamento”, *Rivista di diritto internazionale*, 2019, p. 1151 ff.

<sup>27</sup> *Corte di Cassazione (Sezioni Unite Civili)*, 6 March 2021, filed 31 March 2021, No. 9006, cit. *supra* note 17, para. 19 (emphasis added).

though they are consistent with the fundamental requirement to protect *status filiationis* established abroad.

It is particularly clear that, by separating the issue of surrogacy and focusing on the adoption order the recognition of which has been sought, and also by narrowing the public policy exception, there is a risk that same-sex couples may be encouraged to realise their plans to become parents by having recourse to surrogacy within legal systems in which it is currently possible to adopt a child born as a result of this procedure. A consequence of this will be that the economic circumstances of the prospective parents will become increasingly relevant for their plans to become parents, unless different interpretative solutions that pay greater heed to the principle of equality are identified. Furthermore, the implementation of the principle of the *best interest of the child*, which should be given greater consideration on all levels, may become uncertain and give rise to potential discrimination between children (those born by surrogacy in countries that allow adoption compared to those born in countries that do not), even if it is invoked in order to define the public policy exception.