RECOGNITION IN ITALY OF FILIATION ESTABLISHED ABROAD BY SURROGATE MOTHERHOOD, BETWEEN TRANSNATIONAL CONTINUITY OF PERSONAL *STATUS* AND PUBLIC POLICY*

IL RICONOSCIMENTO IN ITALIA DEL RAPPORTO DI FILIAZIONE COSTITUITO ALL'ESTERO TRAMITE MATERNITA' SURROGATA, TRA CONTINUITA' DELLO STATUS E ORDINE PUBBLICO

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Abstract: A recent judgment by the *Sezioni Unite* of the Italian *Corte di cassazione* has ruled on a highly sensible and controversial issue, concerning the compatibility with the Italian public policy of a foreign court order, establishing a bond of filiation between a child born by surrogacy and the intended father, materially the same sex spouse of the biological father, despite the absence of any genetical link. The *Sezioni Unite* declared that such a court order could not be recognized, as incompatible with the Italian public policy. In so deciding, they appeared to have taken a step back as compared to an earlier judgment delivered by the first civil chamber of the same *Corte di cassazione* in 2016, where a more favourable attitude had prevailed. As compared to the said earlier judgment, the *Sezioni Unite,* besides distinguishing the circumstances occurring in the two cases, provided a more flexible reading of the public policy exception in private international law, partly overruling the narrower reading provided in the earlier judgment, which had limited its scope to those principles concerning the protection of fundamental rights enshrined in international and European instruments, as well as in the Italian Constitution. In the conclusions it reaches, the judgment by the *Sezioni Unite* reveals a substantial alignment with the solution envisaged by the European Court of Human Rights in its Advisory Opinion of 10 April 2019, contemplating adoption by the intended, non-biological parent, as the avenue by which the right of the child to his private life with that parent might be enforced.

Keywords: *Status filiationis*, surrogate motherhood, public policy, recognition of personal and family status, Art. 8 ECHR.

Riassunto: Una recente sentenza delle Sezioni Unite della Corte di cassazione ha affrontato una questione molto delicata e controversa, costituita dalla riconoscibilità in Italia di un provvedimento

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giurisdizionale straniero costitutivo di un rapporto di filiazione tra un minore e il padre di intenzione – materialmente il coniuge dello stesso sesso del padre biologico – in assenza di alcun legame genetico. Nell'affermare che un tale provvedimento non può essere riconosciuto in quanto in contrasto con l'ordine pubblico, le Sezioni Unite sono parse compiere un passo indietro rispetto a una precedente pronuncia della I sezione civile della stessa Cassazione del 2016, nella quale aveva prevalso un approccio di maggiore apertura. Rispetto a tale precedente pronuncia, le Sezioni Unite, oltre a sottolineare le differenze tra le fattispecie che si presentavano nei due casi, hanno adottato una definizione maggiormente flessibile del limite dell'ordine pubblico nel diritto internazionale privato, del quale la precedente decisione della sezione semplice aveva dato una lettura eccessivamente restrittiva, limitandone la portata a quei soli principi internazionalmente condivisi in materia di tutela dei diritti fondamentali e a quegli ulteriori principi che trovano affermazione nella Costituzione italiana. Nelle conclusioni raggiunte, la pronuncia delle Sezioni Unite rivela un sostanziale allineamento con la posizione assunta dalla Corte europea dei diritti dell'uomo nel suo parere consultivo del 10 aprile 2019, facendo riferimento all'adozione del minore da parte del genitore d'intenzione privo di legami biologici, come la via attraverso la quale il diritto del minore alla sua vita privata con tale genitore può ricevere tutela.

Parole chiave: rapporto di filiazione, maternità surrogata, ordine pubblico, riconoscimento degli status personali e familiari, Art. 8 CEDU.

Summary: I. The recent judgment by the *Sezioni Unite* of the Italian Court of Cassation No. 12193/19 on the subject and the relevant legal framework under Italian law. II. The recognition of filiation established abroad by surrogate motherhood: the overcoming of the earlier favourable stance held by the *Prima Sezione civile* of the same court and the relevance of the biological links between the child and the intended parents. III. The pursuit of transnational continuity of *status filii* by the recognition of a foreign decision, or the registration in the civil status records of a birth certificate issued abroad, namely in a country allowing recourse to surrogate motherhood. IV. The ban on surrogate motherhood under Italian law No. 40/2004 and its impact on its compatibility with the Italian public policy: the uncertainties in the Italian case law and the clarification brought about by the *Sezioni Unite* of the Court of Cassation. V. Parallel developments in the case law of the European Court of Human Rights and its recent Advisory Opinion of 10 April 2019, issued pursuant to Protocol No. 16 to the ECHR. VI. Concluding remarks.

I. The recent judgment by the *Sezioni Unite* of the Italian Court of Cassation No. 12193/19 on the subject and the relevant legal framework under Italian law

1. A recent judgment by the *Sezioni unite civili* of the Italian court of cassation, filed on 8 May 2019, No. 12193 ([1]), provided a long-awaited clarification on a highly debated legal issue, capable of raising sensible ethical concerns, consisting of the recognition in Italy of a foreign court decision identifying a child, born by surrogate motherhood, as the son of the same-sex partner of his biological parent.

2. The question forming the subject of the said judgment is particularly controversial, since, on the one side, Italian law does not allow recourse to surrogate motherhood, admitting, as the law currently stands, only a recourse to medically assisted procreation techninques by couples of adults of different gender, married or cohabitating, and of potentially fertile age ([2]). On the other side, the Italian legislator,

[1] *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*.

[2] Law of 19 February 2004, No. 40, *Norme in materia di procreazione medicalmente assistita*, *Gazzetta Ufficiale*, 24 February 2004, No. 45, Art. 5. See, confirming the constitutionality of the requirements posed by the said law, Corte costituzionale, 9 April – 10 June 2014, No. 162, para. 6 of the grounds for judgment in point of law. See, recently, A. 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., p. 855 f.

upon adopting, by Law No. 76/2016, the long-awaited legislation concerning registered partnerships open to same-sex couples, though contemplating in respect of such partnerships a legal regime largely comparable to that applying to married heterosexual couples, excludes any extension to the parties to a registered partnership of the rules concerning filiation and adoption, as applicable to spouses. As particularly concerns adoption, the said law of 2016, in fact, limits itself to leave the existing rules unaffected ([3]). Accordingly, the Italian Parliament substantially left the way open to the avenue paved by the Italian courts in upholding an interpretation of the s. c. adoption in special cases, contemplated under Article 44 of Italian law No. 184/1983 ([4]), whereby a single might apply for the said form of adoption in respect of the child of his or her partner, even though this would not formally amount to a stepchild adoption properly intended ([5]).

II. The recognition of filiation established abroad by surrogate motherhood: the overcoming of the earlier favourable stance held by the *Prima Sezione civile* of the same court and the relevance of the biological links between the child and the intended parents

3. The judgment delivered by the *Sezioni Unite* of the Italian Court of Cassation, in fact, excluded the recognition in Italy of a foreign court decision establishing filiation between a child and the same-sex spouse of his father, in a situation where the child was born through a surrogacy arrangement. As a consequence of that arrangement, no biological link whatsoever existed with the intended father, who, in the decision at stake, was identified as the second father of the child alongside the biological father. In so deciding, the *Sezioni Unite* appeared to have taken a step back as compared to the apparently more favourable stance held in an earlier judgment by the *prima sezione civile* of the same Court of cassation in 2016 ([6]). In the said earlier judgment, the first civil chamber of the Court of Cassation had affirmed the compatibility with Italian public policy of the registration in the Italian civil *status* records of a certificate of birth issued abroad, concerning a child who in such a certificate was identified as the son of two mothers. As noted by the *Sezioni Unite* in the more recent judgment under consideration, the case forming the subject of the said earlier decision, even though raising some common fundamental issues, presented some material differences as compared to the circumstances of the case coming for consideration in the more recent case. In the said earlier case, in fact, the child possessed biological links to both of the women identified in the foreign birth certificate as his mothers, with the one who provided the egg by which he was coinceived, and with the other who gave birth to him. It should be noted, incidentally, that such a peculiar constellation appears materially possible in those cases where two women claim to be recognized as mothers of the child, but clearly not in the opposite case, where two men wish to be recognized as fathers. The peculiar circumstances of the said earlier case had brought the first civil chamber of the Court of Cassation to hold that the case before it did not amount to a case of surrogate motherhood properly

[3] 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, Art. 1, para. 20, last sentence: "*resta fermo quanto previsto e consentito in materia di adozione dalle leggi vigenti*".

[4] Law of 4 May 1983, No. 184, *Diritto del minore a una famiglia*, *Gazzetta Ufficiale*, 17 May 1983, No. 133, Art. 44, para. 1, lit. *d*), concerning cases where the placing of the child under pre-adoption foster care proves impossible.

[5] 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 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 dicembre 2015, available at www.articolo29.it; see also F. 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. 453 ff., p. 458 f., 462 f.

[6] *Corte di cassazione* (*sezione I civile*), 21 June 2016, filed on 30 September 2016, No. 19599, *Procuratore generale della Repubblica presso la Corte d'appello di Torino*. See, for critical comments, O. 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., p. 171 ff.; F. 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 *Dialoghi con Ugo Villani*, Bari, Cacucci Editore, 2017, p. 1141 ff., p. 1145 ff.

intended, which would have been expressly forbidden pursuant to the above-mentioned law No. 40/2004, but, rather, to a *sui generis* case of heterologous insemination ([7]). This was so since, differently from cases of surrogate motherhood properly intended, in that case there was no involvement of a woman who donated her eggs or accepted to bear the child waiving her rights as mother of the child, something which, instead, happened in the more recent case before the *Sezioni Unite* ([8]).

III. The pursuit of transnational continuity of *status filii* by the recognition of a foreign decision, or the registration in the civil *status* records of a birth certificate issued abroad, namely in a country allowing recourse to surrogate motherhood

4. Notwithstanding the said differences between the two cases, both judgments under consideration addressed a common fundamental issue: the opportunity of granting or not granting transnational continuity to a personal *status* ([9]), namely filiation, acquired abroad in conformity with the local laws and regulations, in cases where such a *status* could not have been established in Italy. Namely, a fundamental obstacle to the possibility of establishing filiation in Italy in the circumstances of either case appeared to be posed, in the one case, by the express ban on operations of surrogate motherhood posed by law No. 40/2004 ([10]), and, in the other, by the narrow limits within which the same law allows a recourse to heterologous insemination, as well as by the fundamental rule contained in the Italian civil code whereby only the woman who gave birth to the child can be held as his mother ([11]).

5. From a private international law perspective, the issue of transnational continuity of the bond of filiation established abroad came for consideration in different terms in the two cases. In fact, in the case having come before the *Sezioni Unite* of the Court of Cassation, a decision had been delivered by a Canadian court, identifying the father of intention as second father of the child, alongside the biological father, who had been identified as the father of the child in an earlier court decision. The latter decision, giving effect to the surrogate motherhood arrangement, had declared that the woman who gave birth to him was not to be considered as the mother of the child. The issue was accordingly to be framed in terms of recognition of a foreign court decision, pursuant to the general rule under article 64 of the Italian law No. 218/1995, bearing the reform of the Italian system of private international law ([12]). In the specific circumstances of the case at hand, in fact, it appears doubtful whether the requirements posed by the special rule under Article 65 of the same law, concerning the recognition of foreign court decisions in matters of personal and familiy *status*, could be met. The latter rule requires, in fact, that the decision has been delivered, or produces effects, in the country whose law applies pursuant to the conflict of laws rules contained in the Italian statute on private international law (Law of 31 May 1995, No. 218) ([13]).

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[7] *Corte di cassazione*, 21 June 2016, No. 19599 (fn 6), para. 10 of the grounds for judgment. See, in this respect, O. Feraci (fn 6), p. 179 ff.; F. Marongiu Buonaiuti (fn 6), p. 1144 f.

[8] As noted, pointing to the differences between the two cases, by *Corte di cassazione* (*sezioni unite civili*), 6 November 2018, No. 12193 (fn 1), para. 13 of the grounds for judgment. See also, as concerns the impact on the legal framing of such cases of the technical means resorted to in performing this kind of operations, M. 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., p. 216 ff.

[9] We may refer, for an overview of the problems inherent in the transnational continuity of personal and family *status* acquired abroad, to which we shall return more extensively *infra*, section 5, to F. Marongiu Buonaiuti, "La continuità internazionale delle situazioni giuridiche e la tutela dei diritti umani di natura sostanziale: strumenti e limiti", *Diritti umani e diritto internazionale*, 2016, p. 49 ff., as well as, lastly, to A. Davì, "Il riconoscimento delle situazioni giuridiche costituite all'estero nella prospettiva di una riforma del sistema italiano di diritto internazionale privato", *Rivista di diritto internazionale*, 2019, p. 319 ff.

[10] Law of 19 February 2004, No. 40, *Norme in materia di procreazione medicalmente assistita*, Art. 12, para. 2.

[11] Art. 269, para. 3, Italian Civil Code.

[12] See further, concerning the differences in the terms in which the issue of the transnational continuity of personal and family status is likely to arise depending on whether the status at hand had been acquired abroad by court decision rather than by other sorts of acts, such as certificates issued by the holders of civil *status* records, A. Davì (fn 9), p. 322 ff.

[13] See, concerning the complementarity of the special rule under Article 65 of law No. 218/1995 in respect of the general rule under Article 64 of the same law, *Corte di cassazione* (*sezione I civile*), 28 May 2004, No. 10378, noted by P. Picone,

6. In fact, in the circumstances of the case before the *Sezioni Unite* of the Court of Cassation, the children, born as a result of surrogate motherhood, were at the same time Italian and Canadian nationals, and in such cases Italian rules of conflict of laws grant prevalence to Italian law ([14]). The Court of Cassation did not venture to examine the further question of whether Article 65 of the said law could apply pursuant to the alternative reference made by Article 33 of the same law to the national law of either parent, in case such a law proved more favourable to the establishment of filiation. The Court also refrained from considering whether the rule under Article 66 of the same law, concerning the recognition of foreign court orders in matters of non-contentious jurisdiction could apply in the instant case. The latter rule, in fact, contemplates, as an alternative to the conflict-of-laws criterion adopted under Article 65, the traditional indirect jurisdiction rule contained under Article 64 of the law, whereby recognition is subject to the condition that the originating court exercised jurisdiction based on grounds comparable to those contemplated in the *forum* ([15]). Actually, in the case before the *Sezioni Unite* of the Court of Cassation, the recognition of the Canadian court decision was not disputed on grounds related to the jurisdiction of the originating court nor to the existence of a genuine connection between the case and the Canadian legal system, but on account of its assumed incompatibility with the Italian public policy, the latter being a ground for refusal of recognition of a foreign court decision common to the three rules under Articles 64, 65 ad 66 of the Italian statute on private international law ([16]).

7. In the case decided by the first civil chamber of the Court of Cassation in 2016, instead, no court decision came for consideration. In that case, the bound 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 Court of Appeal of Turin, whose decision had been appealed before the Court of Cassation, held Spanish law as applicable to the establishment of filiation in the circumstances of the case, since, whereas the 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 ([17]).

8. In this respect, it appears worth noting that Article 68 of the Italian statute on private international law, Law of 31 May 1995, No. 218, extends to deeds received by foreign public officials the same procedural regime concerning recognition and enforcement contemplated under Article 67 of the same statute in respect of foreign judgments. Nonetheless, the said rule is generally understood as referring to instruments of a private law nature like contracts, in the same sense as meant under Article

"Sulla complementarità tra gli art. 64 e 65 l. n. 218/95 di riforma del diritto internazionale privato, ai fini del riconoscimento in Italia di sentenze straniere", *Int'l Lis*, 2005, p. 124 ff.; accordingly, holding that for the purposes of recognition under Article 65 the general requirements for recognition of foreign judgments as contemplated under Article 64 would also apply, Id., "Sentenze straniere e norme italiane di conflitto", *Rivista di diritto internazionale*, 1997, p. 913 ff., p. 921 ff.; R. Baratta, *Scioglimento e invalidità del matrimonio nel diritto internazionale privato*, Milano, Giuffré Editore, 2004, p. 106 ff.; A. Davì, "La *Rivista* e gli studi di diritto internazionale privato in Italia nel dopoguerra", *Rivista di diritto internazionale*, 2007, p. 49, note 87; conversely, arguing, rather unpersuasively, that those further requirements would not apply, S. Bariatti, "Riflessioni sul riconoscimento delle sentenze civili e dei provvedimenti stranieri nel nuovo *ius commune* italiano", in Collisio legum. *Studi di diritto internazionale privato per Gerardo Broggini*, Milano, Giuffré Editore, 1997, p. 29 ff., p. 43 ff.

[14] See Art. 19, para. 2, law of 31 May 1995, No. 218. The judgment by the *Corte di cassazione* (*sezioni unite civili*), 6 November 2018, No. 12193 (fn 1), para. 1 of the grounds for judgment, while recalling Art. 65 of the same law, does not discuss the existence of the requirements for the application of that rule, since the point did not form the subject of the appeal before the court.

[15] See, generally, on the recognition of foreing court orders in matters of non-contentious jurisdiction pursuant to Art. 66 of law No. 218/1995, P. Picone, "Sentenze straniere …" (fn 13), p. 921 ff.; R. Baratta (fn 13), p. 106 ff.; F. Marongiu Buonaiuti (fn 9), p. 57 ff.

[16] See *infra*, section 4.

[17] See *Corte di cassazione* (*sezione I civile*), 21 June 2016, filed 30 September 2016, No. 19599/16 (fn 6), point 4 of the grounds concerning the facts of the case. In this respect, F. Marongiu Buonaiuti (fn 6), p. 1141 f.

2699 of the Italian Civil Code, and does not appear likely to apply to the different case of acts formed by a foreign civil *status* official, having as their purpose to establish or certify the acquisition of personal or family *status* ([18]). The latter type of acts are subject to the rules set out under D.P.R. 3 November 2000, No. 396, governing the keeping of the Italian civil *status* records. These rules, presupposing the automatic recognition of such acts, provide for the circumstances in which they may be directly registered in the Italian civil *status* records, contemplating a different regime in respect of acts concerning the civil *status* of Italian nationals and of foreign nationals residents of Italy, subjecting in either case the registration of the said acts to the condition of their compatibility with the Italian public policy. The compliance with this condition shall be assessed directly by the civil *status* official requested to register the foreign act ([19]). This has a bearing also as concerns the procedural regime applicable in case of disputes concerning the registration of a foreign act in the Italian civil *status* records, which presupposes the lodging of an application with the civil court competent at first instance in respect of the district where the civil *status* office having refused the registration is located. Whereas, as concerns disputes related to the recognition and registration in the Italian civil *status* records of a foreign judgment or judicial order, reference shall be made to the procedure contemplated under Article 67 of the Italian statute on private international law, which presupposes an application to the appellate court territorially competent. The said difference finds an explanation in consideration of the absence, in the former case, of a judicial decision by the courts of the foreign country where the personal or family *status* at stake has been established ([20]).

IV. The ban on surrogate motherhood under Italian law No. 40/2004 and its impact on its compatibility with the Italian public policy: the uncertainties in the Italian case law and the clarification brought about by the *Sezioni Unite* of the Court of Cassation

9. Notwithstanding the said differences betwen those cases where the personal or family *status* to be recognized has been established abroad by means of a judicial decision rather than a certification issued by a civil *status* official, both sorts of cases are likely to raise similar problems of compatibility with the public policy of the country where recognition is sought. In this regard, it might be considered as sufficiently plain that a mere diversity of legislative solutions concerning a given issue might not, of itself, pose a problem of compatibility with public policy. In fact, should such an extensive interpretation of public policy be accepted, private international law rules would be deprived of their very purpose, consisting of achieving coordination between different legal systems, in order to ease the cross-border life of persons. At the same time, it appears equally unreasonable to presuppose an unconditionate opening of the national legal order to a coordination with foreign legal systems, in such terms as to admit without limitations the application of foreign law or, as in the cases under consideration in this paper, the recognition of foreign judicial decisions or the registration of acts formed by foreign officials in the domestic records of civil *status*, waiving any possibility to control their compatibility with the fundamental principles of the *forum*.

10. In this respect, the reductive reading of public policy given by the judgment by the first civil chamber of the *Corte di cassazione* recalled above appears questionable. In the said judgment, the

[18] See S. Bariatti, "Articolo 68", in F. Pocar (ed.), *Commentario del nuovo diritto internazionale privato*, Padova, CEDAM, 1996, p. 348 s.; A. Maresca, "Art. 68", in S. Bariatti (ed.), *Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato*, *Commentario*, *Le nuove leggi civili commentate*, 1996, p. 1485. See in this sense also the explanatory report on the bill of law providing for the reform of the Italian system of private international law, No. 1192, *sub* Art. 68, repr. in G. Gaja (ed.), *La riforma del diritto internazionale privato e processuale, Raccolta in ricordo di Edoardo Vitta*, Milano, Giuffré Editore, 1994, p. 445.

[19] D.P.R. 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 1197, n. 127*, *Gazzetta ufficiale*, 30 December 2000, No. 303 (*suppl. ord.*), Art. 18. See, concerning the legal framework preceding the reform introduced by D.P.R. No. 396/2000, R. Cafari Panico, *Lo stato civile ed il diritto internazionale privato*, Padova, CEDAM, 1992, p. 20 ff.; with regard to the current rules, F. Marongiu Buonaiuti (fn 9), p. 60 ff.

[20] See in this respect *Corte di cassazione* (*sezioni unite civili*), 6 November 2018, filed on 8 May 2019, No. 12193 (fn 1), para. 6 of the grounds for judgment.

Italian supreme court held that the material content of public policy should be limited to the fundamental principles concerning the protection of fundamental rights, as enshrined in the relevant international conventions and declarations, or, to say the least, in the Italian Constitution, thereby excluding any relevance, in defining the material content of the country's public policy, for principles enshrined in domestic legislation, unless embodying solutions dictated by the Constitution itself ([21]). Such a restrictive reading does not appear to reflect adequately the function of public policy in the field of private international law, as a tool aiming to preserve the internal harmony of the domestic legal order, facing the impact of foreign legal values irreconcilable with its inspiring principles ([22]).

11. The said restrictive reading of public policy, as adopted by the *Corte di cassazione* in the judgment by its first civil chamber recalled above, seems to reflect an assumption that made its way in the Italian literature on private international law, tending to envisage the existence, alongside the traditional notion of public policy in private international law as a tool intended to preserve the internal harmony of the domestic legal order – frequently styled as "international" public policy in order to distinguish it from a purely domestic notion of public policy as a mere limit to party autonomy ([23]) – of a parallel notion. Such a parallel notion of "international" public policy tended to identify as a justiication for a limitation to the opening of the domestic legal order to foreign legal values not the preservation of the fundamental legal principles inspiring the legal system of the *forum* in the relevant historical context, but the compliance with legal principles and values internationally shared and perceived as imperative ([24]).

12. The difference between the said two different conceptions of "international" public policy could not be more radical, considering that the former is to be construed having regard to legal principles which are distinctive of the domestic legal system concerned. These principles might find expression not only in constitutional provisions, but also in domestic legislation reflecting the fundamental standpoint of the legal system of the *forum* in that given historical context and in respect of the specific area of the law coming for consideration ([25]). This notion of public policy in private international law is clearly functional to the pursuit of the said objective of preserving the internal harmony of the national legal order, presupposing at the same time its autonomy and, at least up to a certain extent, diversity from foreign legal systems. Instead, the latter notion of public policy in private international law, which might be styled, in order to keep it more clearly distinct from the former, as "truly international" public policy ([26]), appears, on the one side, as more limited in scope, since, as consisting of principles internationally

[21] *Corte di cassazione* (*sezione I civile*), 21 June 2016, filed 30 September 2016, No. 19599, (fn 6). See, for critical remarks on the restrictive reading of the notion of public policy given by the court in that judgment, O. Feraci (fn 6), p. 171 ff.; F. Marongiu Buonaiuti (fn 6), p. 1142 ff.; see instead, for more favourable views, based on the prevalence of the best interest of the child, favoured by a restrictive interpretation of public policy as a limitation to the trasnational continuity of personal or family *status* acquired abroad, S. 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.; F. Salerno, "La costituzionalizzazione dell'ordine pubblico internazionale", *Rivista di diritto internazionale privato e processuale*, 2018, p. 259 ss., p. 277 ff.; A. Di Blase (fn 2), p. 853 ff.

[22] See generally, concerning the function of public policy in private international law, from among the extensive Italian literature on the subject, G. Badiali, *Ordine pubblico e diritto straniero*, Milano, Giuffré Editore, 1963, p. 4 ff.; L. Condorelli, *La funzione del riconoscimento di sentenze straniere*, Milano, Giuffré Editore, 1967, p. 176 f., 219 ff.; G. Barile, *I principi fondamentali della comunità statale e il coordinamento tra sistemi (L'ordine pubblico internazionale)*, Padova, CEDAM, 1969, p. 53 ff., 77 ff.; more recently, G. Contaldi, "Ordine pubblico", in R. Baratta (ed.), *Diritto internazionale privato*, *Dizionari del diritto privato promossi da Natalino Irti*, Milano, Giuffré Editore, 2010, p. 273 ff.; lastly, G. Perlingieri, G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, Edizioni Scientifiche Italiane, 2019, p. 48 ff.

[23] See, with regard to this notion of "international" public policy, among others, G. Badiali (fn 22), p. 4 ff.; N. Palaia, *L'ordine pubblico "internazionale"*, Padova, CEDAM, 1974, p. 14 ff., the latter criticizing the traditional distinction of the said notion from that of purely domestic public policy.

[24] See, with regard to the said different notion, G. Barile (fn 22), p. 19 ff.; P. Benvenuti, *Comunità statale, comunità internazionale e ordine pubblico internazionale*, Milano, Giuffré Editore, 1977, p. 2 ff.

[25] See, instead, for an overcoming of the said traditional notion of "international" public policy in favour of a "truly international" notion of public policy, essentially based on internationally shared principles, *Corte di cassazione* (*sezione I civile*), 21 June 2016, filed 30 September 2016, No. 19599 (fn 6), para. 7 of the grounds for judgment. See in this respect O. Feraci (fn 6), p. 172 f.

[26] See, *e. g.*, G. Contaldi (fn 22), p. 275, styling it as "*veramente internazionale*".

held as imperative, it is hardly likely to extend beyond those principles concerning the fundamental rights of the human being in respect of which a sufficiently widespread perception might be found as concerns their imperative nature ([27]). On the other side, the said "truly international" notion of public policy appears to pursue a function that does not fall in line with the traditional function of public policy in private international law, that is, as noted, with the preservation of the internal harmony of the legal system of the *forum*, appearing instead aimed to the protection of internationally shared legal values. Ultimately, whereas the traditional notion of public policy in the field of private international law presupposes the plurality and, at least up to a certain extent, diversity of national legal systems, the latter notion tends to reduce the margin left for the autonomy of national legal systems, presupposing their sharing of common values and not giving particular weight to features peculiar of each national legal system, insofar as they do not reflect the said internationally shared legal principles ([28]).

13. As opposed to the said perspective, which tends to drive excessively the existing legal framework towards a supposed and not necessarily desirable omology between national legal systems in respect of issues revealing, instead, the persistence of differences in the legal traditions, it appears inevitable to admit the persistence of distinct national notions of public policy for the purposes of private international law. The diversity between national legal traditions, in fact, is likely to appear particularly difficult to overcome in respect of issues presenting significant ethical implications, such as that examined in the present paper, in respect of which it would be unlikely to deny the persisting viability of the traditional notion of "international" public policy, intended as a tool for safeguarding the internal harmony of the domestic legal system. At the same time, it should not be neglected that on the current reality of the national legal systems and, accordingly, on their respective notions of public policy, a growing and undeniable influence is being exercised by the same sort of international legal principles and rules that in the legal literature had been identified as part of the said "truly international" public policy ([29]).

14. Right from this different and more balanced perspective moved the more recent ruling by the *Sezioni Unite* of the *Corte di cassazione* referred to above. In that judgment, the Italian Supreme Court, even though admitting the importance of limiting the material scope of the domestic notion of public policy in an effort of achieving a broader opening of the domestic legal order to a coordination with foregn legal systems, stressed the importance not to limit the content of that notion to the sole principles to be found in international conventions and declarations concerning the fundamental rights of the human being, or expressly stated in the Italian Constitution. In this respect, the *Sezioni Unite* of

[27] See, *e. g.*, in this respect *Corte di cassazione* (*sezioni unite civili*), 8 January 1981, No. 189, *Rivista di diritto internazionale privato e processuale*, 1981, p. 787 ff., p. 790, on which G. Contaldi (fn 22), p. 276. The same approach appears followed by *Corte di cassazione* (*sezione I civile*), 21 June 2016, filed 30 September 2016, No. 19599 (fn 6), para. 7 of the grounds for judgment, revelaing an approach tending to a levelling of the standards of protection of fundamental rights and, accordingly, to a limitation of the scope left for a margin of appreciation by national legal systems. See in this respect F. Marongiu Buonaiuti (fn 6), p. 1143 f.

[28] It should be noted that a shortcoming inherent in the "truly international" notion of public policy had bee identified already by G. Barile (fn 22), p. 77 ff., in the variety of the modes in which national legal systems adapt themselves to international legal rules and principles; see also N. Palaia (fn 23), p. 17 f., stressing the need to balance the observance and promotion of internationally shared legal values with the preservation of qualifying aspects of the national legal systems; see further G. Contaldi (fn 22), p. 276 f., noting that the very idea of a "truly international" public policy, besides being difficult to conceive of, due to the variety of the forms in which internationally shared leagl systems are applied in the national legal systems, is at odds with the methodology of private international law, that presupposes the plurality and diversity of national legal sytems; from the French legal literature see M. Forteau, "L'ordre public «transnational» ou «réellement international»", *Journal du droit international*, 2011, p. 3 ff., p. 10 ff., noting that, rather than the uprise of a notion of public policy likely to be considered as «*véritablement international*», the current scenario reveals a growing internationalization of public policy as traditionally intended, due to the growing influence on its content of international legal principles and rules.

[29] See, for a sensibly more balanced reading of the notion of public policy in private international law, even though in respect of an issue, consisting of the recognition in Italy of a US judgment awarding punitive damages, not involving comparably sensible fundamental rights issues, *Corte di cassazione* (*sezioni unite civili*), 5 July 2017, No. 16601, *Rivista di diritto internazionale*, 2017, p. 1305 ff., noted O. Vanin, "L'incidenza dei diritti fondamentali in materia penale sulla ricostruzione dell'ordine pubblico internazionale: il caso del riconoscimento delle decisioni straniere attributive di *punitive damages*", *Ibid.*, p. 1190 ff.

the *Corte di cassazione*, even though carefully refraining from expressly overruling the earlier *dictum* of the first civil chamber in its judgment of 2016 recalled above, rectified the excessively restrictive notion of public policy upheld in that decision by stating that for the purposes of determining the material content of the notion of public policy for the purposes of private international law regard must be had also to the rules contained under domestic legislation. The latter, as the court held, must be intended as implementing the principles eshrined in the Italian Constitution in defining the concrete terms in which those principles are applied in the regulation of each legal institution ([30]).

15. Applying this different and more articulated conception of public policy to the specific case of the recognition of filiation established abroad by having recourse to surrogate motherhood, the *Sezioni Unite* of the *Corte di cassazione* stated that the choice made by the Italian legislator in posing a ban on surrogate motherhood under Article 12 of Law No. 40/2004, coupled with criminal sanctions for cases of violation, must be considered expression of the concrete terms in which, at present, the Italian legal system guarantees respect for human dignity. The Italian Supreme Court did not refrain from considering that, in this specific context, the respect for human dignity, enforced by the ban posed on surrogate motherhood, needs to be balanced against other interests also deserving protection, such as the right of the child to respect for his private and, allegedly, family life, that would require the granting of continuity to the *status filiationis* acquired abroad. Nonetheless, the court considered that the choice as to the proper balance to be struck between these two conflicting interests in this case was expressly made by the Italian legislator, granting prevalence to the criterion of genetical and biological identity of the child over the supposed self-determination of the intended parents, who had recourse to a practice forbidden under Italian law ([31]).

16. The Italian supreme court did not refrain in its judgment from considering the alternative modes in which the Italian legal system would allow to satisfy the conflicting interest that appeared likely to be compromised as a consequence of the denial of recognition of a foreign court decision establishing a personal *status* acquired abroad in violation of rules to be considered as part of the public policy of the *forum*. In this respect, the court identified the opportunity disclosed by the aready mentioned extensive interpretation of the s. c. adoption in special cases prevailing in the Italian case law as the avenue through which the bond of filiation established abroad between the child and the intended father might find continuity in the Italian legal system ([32]).

V. Parallel developments in the case law of the European Court of Human Rights and its recent Advisory Opinion of 10 April 2019, issued pursuant to Protocol No. 16 to the ECHR

17. The solution adopted by the *Sezioni Unite* of the *Corte di cassazione* in the judgment under consideration, besides being inspired to a more prudent balancing of the need to grant continuity to personal and family *status* acquired abroad with the preservation of the inspiring principles of Italian law in respect of a question appearing as highly sensible from an ethical perspective, appears also in line with the similar sort of balancing made in respect of comparable issues by the European Court of Human Rights. This substantial alignment of the Italian case law to that of the European Court is revealed particularly, as noted, by the effort made by the *Corte di cassazione* to find alternative avenues through which the conflicting interest might be satisfied. In general terms, if the transnational continuity of personal or family *status* acquired abroad is to be intended as instrumental to the protection of the right to private and family life afforded by Article 8, para. 1, of the European Convention on Human Rights, the fact for a Contracting State to the Convention to oppose its public policy as a ground for denying such a continuity to the *status* in question is likely to imply a limitation to the enjoyment of that right

[30] *Corte di cassazione* (*sezioni unite civili*), 6 November 2018, filed 8 May 2019, No. 12193 (fn 1), para. 12.2 of the grounds for judgment.

[31] *Ibid.*, para. 13.2 of the grounds for judgment.

[32] *Ibid.*, with regard to Art. 44, para. 1, lit. *d*), Law of 4 May 1983, No. 184, in the extensive interpretation referred to above (fn 4-5 and accompanying text), as confirmed, lastly, by *Corte di cassazione* (*sezione I civile*), 22 June 2016, No. 12962.

([33]). In this respect, it shall be kept in mind that the right to personal and family life as protected under Article 8 of the European Convention is a right which may suffer limitations. These are subject to the usual requirements which the Convention poses in respect of the limitations acceptable as concerns the enjoyment also of other rights having a comparable *status* in its system, whereby such limitations shall be established by law, shall be necessary for the pursuit of a goal to be considered as worth of protection in a democratic society, and shall be proportionate to an effective attainment of the goal pursued ([34]).

18. With particular regard to the limitations that to the enjoyment of the right to private and family life might derive from a denial of recognition of filiation established abroad by having recourse to practices of surrogate motherhood forbidden in the Contracting State where recognition is sought, the case law of the European Court reveals a prudent attitude, open to leave to the Contracting States a reasonable margin of appreciation, as it generally tends to do concerning issues in respect of which an insufficient *consensus* exists among them as concerns the solutions adopted in domestic legal systems. Particularly, in its well known judgments in the parallel cases of *Labassée v. France* and *Mennesson v. France*, the European Court has fond a violation by France of Article 8 of the European Convention. The court held the violation as due to the denial by the French authorities to register in the civil *status* records the certificates of birth of the children of the two couples issued in the United States, a denial based on the fact of the couples having had recourse to practices of surrogate motherhood that were forbidden under French law. Actually, the violation found by the European Court in both cases related to the children's right to private life, since, as a consequence of the said decisions by the French authorities, they were prevented from exercising their right to personal identity as children of the intended parents, as stated in the certificates of birth issued in the United States, whereas, in both cases, a real biological link existed only as between the children and the respective fathers ([35]). In both cases, the European Court did not held, instead, the intended parents' right to family life to have been violated, since the denial to recognize the children born by surrogacy as sons, in each of the two cases, of both intended parents did not materially prevent them to entertain a *de facto* family life with the respective children ([36]).

19. In the subsequent judgment of a simple Chamber in the case of *Paradiso and Campanelli v. Italy*, the European Court of Human Rights appeared to take a further step, since, after having declared inadmissible the requests submitted by the intended parents on behalf of the child, it affirmed the violation of the right of the couple who had recourse to surrogate motherhood to their family life ([37]). The violation found by the European Court was not due to the denial by the Italian authorities of the

[33] See generally on this issue, among others, R. Baratta, "La reconnaissance internationale des situations juridiques personnelles et familiales", *Recueil des cours de l'Académie de droit international de la Haye*, Vol. 348, 2010, p. 253 ff., p. 398 ff.; A. Davì, *Le renvoi en droit international privé contemporain*, *Ibid.*, Vol. 352, 2012, p. 9 ff., p. 439 ff.; Id. (fn 9), p. 355 ff.; F. Marongiu Buonaiuti (fn 9), p. 70 ff.; F. Salerno, "The Identity and Continuity of Personal Status in Contemporary Private International Law", *Recueil des cours de l'Académie de droit international de la Haye*, Vol. 395, 2019, p. 21 ff., p. 32 ff., 57 f.

[34] See generally, concerning the limitations which the right to private and family life might suffer pursuant to Article 8, para. 2, ECHR, European Court of Human Rights, Judgment of 19 September 2000, *Gnahoré v. France*, Application No. 40031/98, para. 50; Judgment of 10 April 2012, *Pontes v. Portugal*, Application No. 19554/09, para. 74. See D. J. Harris, M. O'Boyle, E. Bates, C. Buckley, *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights*, 2nd edn, Oxford, OUP, 2009, p. 397 ff.; B. Rainey, E. Wicks, C. Ovey, *Jacobs, White and Ovey, The European Convention on Human Rights*, 7th edn, Oxford, OUP, 2017, p. 340 ff.; W. A, Schabas, *The European Convention on Human Rights. A Commentary*, Oxford, OUP, 2015, p. 401 ff.

[35] European Court of Human Rights, Judgment of 26 June 2014, *Labassée v. France*, Application No. 65941/11, para. 75 ff.; Judgment of 26 June 2014, *Mennesson v. France*, Application No. 65192/11, para. 96 ff.

[36] European Court of Human Rights, Judgment of 26 June 2014, *Labassée v. France* (fn 35), para 66 ff.; Judgment of 26 June 2014, *Mennesson v. France* (fn 35), para. 87 ff. See, among others, H. Fulchiron, C. Bidaud-Garon, "Reconnaissance ou reconstruction? À propos de la filiation des enfants nés par GPA, au lendemain des arrêts *Labassée*, *Mennesson* et *Campanelli-Paradiso* de la Cour européenne des droits de l'homme", *Revue critique de droit international privé*, 2015, p. 1 ff., p. 3 ff.; S. Tonolo, "Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo", *Diritti umani e diritto internazionale*, 2015, p. 202 ff., p. 204 ff.; A. Vettorel, "International Surrogacy Arrangements: Recent Developments and Ongoing Problems", *Rivista di diritto internazionale privato e processuale*, 2015, p. 522 ff., p. 532 ff.; R. Baratta, "Diritti fondamentali e riconoscimento dello *status filii* in casi di maternità surrogata: la primazia degli interessi del minore", *Diritti umani e diritto internazionale*, 2016, p. 309 ff., p. 317 ff.

[37] European Court of Human Rights, Judgment of 27 gennaio 2015, *Paradiso and Campanelli v. Italy*, Application No. 25358/12, para. 51 ff.

registration in the Italian civil *status* records of the birth certificate delivered in Russia, pursuant to which the child appeared as son of the two intended parents ([38]), in a case where, differently from the *Labassée* and *Mennesson* cases mentioned above, he did not possess biological links to any of them. This appeared to justify of itself the denial of registration of the Russian birth certificate, since the child could not be considered as the son of the intended parentes from the perspective of Italian law, applicable in the instant case to the establishment of filiation under Article 33 of the Italian statute on private international law ([39]). Instead, the violation of Article 8 of the European Convention was held as due to the subsequent decisions adopted by the Italian courts to remove the child from the intended parents and to place him under foster care with a supporting family. At the same time, the simple Chamber of the European Court considered that regard was to be had to the prevailing interest of the minor and to the affective bonds which he had developed in the meantime with the supporting family, and, accordingly it, held that the finding of the violation did not entitle in the circumstances of the case the intended parents to obtain the return of the child ([40]). In fact, the applicants were only awarded equitable satisfaction ([41]).

20. The judgment by the simple Chamber in *Paradiso and Campanelli v. Italy* was subsequently overturned by the Grand Chamber of the European Court in its judgment of 24 January 2017. In the latter judgment a somewhat narrower approach prevailed, pointing to the absence, in the instant case, of any biological link between the child and either of the intended parents. In consideration of the said circumstances, the Grand Chamber considered the general insterest by Italy to secure enforcement of its rules prohibiting recourse to surrogate motherhood as likely to prevail over the interest of the couple to fulfil their parental aspirations, and, accordingly, to preserve the bond they had created with the child. In fact, the Grand Chamber attributed weight, in the balancing of the competing interests, to the fact that such a bond had been created fictitiously and in breach of the Italian rules concerning medically assisted procreation, as well as of the rules concerning international adoption. The latter rules were in fact pointed to as providing the lawful means by which the intended parents could have established a bond of filiation with the child absent any biological link between the latter and any of them ([42]).

21. The importance of the presence of biological links between the child and one at least of the intended parents, as well as the availability of alternative avenues through which a bond of filiation might be established absent those links, with particilar regard to adoption, appear central also in the reasoning followed by the European Court in its recent opinion of 10 April 2019 ([43]), handed down, for the first

[38] In this respect, actually, the application had been declared inadmissible by the European Court, since the intended parents failed to demonstrate prior exhaustion of domestic remedies. In fact, they had refrained from further appealing before the *Corte di cassazione* the judgment by the appellate court that confirmed the correctness of the decision by the civil *status* official to deny registration of the Russian birth certificate in the circumstances of the case. See *Ibid.*, para. 62.

[39] *Ibid.*, para. 77, where the European Court considered incidentally as reasonable the decision adopted by the Italian courts in the sense of considering necessary, following a report by the Italian consular post in Moscow as to the falsehood of the data reported in the birth certificate delivered by the Russian authorities, a new assessment of the requirements for the establishment of filiation under Italian law, as applicable pursuant to Article 33, Law of 31 May 1995, No. 218.

[40] *Ibid.*, para. 88.

[41] See, with regard to the judgment by the simple Chamber of the European Court, H. Fulchiron, C. Bidaud-Garon (fn 36), p. 6 f.; S. Tonolo (fn 36), p. 208 f.; A. Vettorel (fn 36), p. 536 ff.; R. Baratta (fn 36), p. 323 f.; see also I. Pretelli, "Les défis posés au droit international privé par la reproduction technologiquement assistée", *Revue critique de droit international privé*, 2015, p. 559 ff., with regard to a judgment by the *Corte di cassazione* (*sezione I civile*), 11 November 2014, No. 24001, where, in circumstances similar to those occurring in the case of *Paradiso and Campanelli v. Italy*, the Italian Supreme Court dismissed an appeal against the appellate court decision having declared the child available for adoption after having denied registration in the Italian civil *status* records, as incompatible with the Italian public policy, of a foreign birth certificate identifying the child himself, born by surrogacy, as son of the intended parents absent any biological link to any of them.

[42] European Court of Human Rights (Grand Chamber), Judgment of 24 January 2017, *Paradiso and Campanelli v. Italy*, Application No. 25358/12, para. 131 ff., 185 ff. See, among others, L. Lorenzini, "Gestation pour autrui: entre ordre public et intérêt supérieur de l'enfant. – Analyse de droit comparé (droit français et droit italien) au regard de la position de la CEDH", *Journal du droit international*, 2017, p. 831 ff., p. 837 ff.; S. Tonolo (fn 21), p. 1078 ff., M. Gervasi (fn 8), p. 220, 224 f.

[43] European Court of Human Rights, Advisory Opinion of 10 April 2019, concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Request No. P16-2018-001.

time after the entry into force of Protocol No. 16 to the European Convention, on a request by the French *Cour de cassation* concerning the follow-up of the case of *Mennesson v. France* considered above ([44]). In a case where, as noted, differently from the circumstances occurring in the case of *Paradiso and Campanelli v. Italy*, the children possessed a biological link to the father, but not to the intended mother, the French supreme court was posing the question as to how the right of the children to their private life as sons of both intended parents should be enforced. In fact, as a consequence of later developments of French case law after the judgment by the European Court in that case was handed down, the registration of a foreign birth certificate identifying, in case of recourse to a gestational surrogacy, the children as sons of the biological father would have been admissible. Nonetheless, the registration of such an act would have remained precluded insofar as it established a comparable bond of filiation with the intended mother, absent any biological link between the children and the latter ([45]).

22. The European Court based itself in its advisory opinion on a comparative law analysis, showing that at present the majority of the Contracting Parties to the European Convention forbid a recourse to practices of surrogate motherhood, which are so far allowed just in a limited number of Contracting States. In a legal framework that does not allow the establishment of a sufficient *consensus* as among the Contracting States to the European Convention concerning the recognition of a bond of filiation established abroad by having recourse to such practices, the European Court affirmed that the Contracting States should be afforded a broad margin of appreciation as to the choice of the forms in which the right of the child to enjoy his private life with both of the intended parents shall be enforced in circumstances comparable to those of the case having formed the subject of the request before it ([46]). Accordingly, the European Court considered in its opinion that alternative forms as compared to the registration of a foreign birth certificate shall be considered as admissible in such cases, with particilar regard to the possibility for the intended, non-biological parent to establish a bond of filiation with the child by adoption, provided that the relevant procedure contemplated by the law of the Contracting State concerned might be achieved promptly and effectively, in accordance with the child's best interests ([47]).

VI. Concluding remarks

23. The advisory opinion delivered by the European Court on 10 April 2019, handed down just one month ahead of the filing of the judgment by the *Sezioni Unite* of the Italian *Corte di cassazione* referred to above, is clearly not mentioned in the latter judgment. In fact, it has been handed down some months after the hearing at the closing of which the Italian Supreme Court appears to have decided on the case before it. At the same time, it is hard not to note the substantial alignment of the conclusions reached by the two courts. On the one side, the solution adopted by the *Sezioni Unite* might appear, as compared to the more open-minded approach revealed by the earlier judgment by the first civil chamber of the same Court of 2016 referred to above ([48]), as excessively prudent and conservative. On the other side, there appears to be no reason why, in respect of such a delicate issue involving fundamental values such as the respect for human dignity, as well as calling into question the enforcement of the mandatory rules adopted by the Italian legislator, the Italian Supreme Court should have taken a step further in a direction where the European Court of Human Rights has itself given a clear sign of prudence. Ultimately, the further steps that in such a delicate field are likely to be taken are a matter to be left, as far as the Italian legal system is concerned, to the legislator. On the latter, in fact, lies the responsibility of establishing, in accordance with the Italian Constitution as well as with the obligations deriving from international and European rules, particularly as concers the protection of fundamental rights, what shall in general terms be allowed and provided for in the Italian legal system.

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[44] European Court of Human Rights, Judgment of 26 June 2014, *Mennesson v. France*, Application No. 65192/11 (fn 35 and accompanying text).

[45] European Court of Human Rights, Advisory Opinion of 10 April 2019 (fn 43), para. 14.

[46] *Ibid.*, para. 51.

[47] *Ibid.*, para. 55.

[48] *Corte di cassazione* (*sezione I civile*), 21 June 2016, filed on 30 September 2016, No. 19599 (fn. 6).