# THE EVOLUTION OF THE POSITION OF ITALIAN CASE LAW CONCERNING PUBLIC POLICY IN TRANSNATIONAL FAMILY MATTERS, IN VIEW OF SOME RECENT JUDGMENT OF THE ITALIAN COURT OF CASSATION AND CONSTITUTIONAL COURT

# L'EVOLUZIONE DELL´ORIENTAMENTO DELLA GIURISPRUDENZA ITALIANA IN TEMA DI ORDINE PUBBLICO NELL DIRITTO INTERNAZIONALE PRIVATO DELLA FAMIGLIA, ALLA LUCE DI ALCUNE PRONUNCE RECENTI DELLA CORTE DI CASSAZIONE E DELLA CORTE CONSTITUZIONALE

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**Abstract:** The position held by the Italian case law concerning public policy in transnational family law matters has recently experienced some interesting developments, showing an enduring ambiguity between two different notions of public policy for the purposes of private international law, between a "truly international" conception of public policy, whereby it should be considered as purely limited to internationally shared legal principles, concerning especially the protection of fundamental rights, and a more traditional notion. According to the latter notion, public policy for the purposes of private international law shall be considered as embodying mostly national principles, identifying the fundamental attitude of the country at the relevant time, as reflected non only by its constitutional rules, but also by the rules embodied in domestic legislation, insofar as these translate into concrete rules the general principles embodied in the national constitution. Some recent judgments by the

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Italian Court of Cassation and Constitutional Court concerning topical issues of family law, with particular regard to surrogate motherhood, full adoption by same-sex couples, and repudiation, are particularly telling of this state of affairs. As the author proposes, the dichotomy between the said two notions of public policy for the purposes of private international law is likely to be overcome by suggesting a more flexible reading of the traditional notion, likely to encompass within its scope also those internationally shared legal principles concerning fundamental rights, embodied in the different notion mentioned above, with particular regard to the protection of the best interest of the child, as well as of gender equality.

**Keywords:** Public policy; private international law; family law; best interest of the child; gender equality.

**Riassunto:** L'orientamento della giurisprudenza italiana in tema di ordine pubblico in materia di diritto internazionale privato della famiglia ha visto in tempi recenti interessanti sviluppi, che dimostrano la persistenza di un'oscillazione tra due distinte nozioni di ordine pubblico nell'accezione internazionalprivatistica. Da una parte, una nozione di ordine pubblico "veramente internazionale", per la quale questo avrebbe per contenuto unicamente principi internazionalmente condivisi, specialmente in materia di protezione dei diritti umani. Dall'altra parte, la nozione tradizionale di ordine pubblico internazionale, come composta principalmente da principi nazionali, che identificano il fondamentale modo di porsi dell'ordinamento dello Stato in quel determinato momento storico, i quali si trovano riflessi non soltanto nella costituzione, bensì anche nelle norme di legge ordinaria, nella misura in cui queste traducono in regole concrete i principi generali enunciati a livello costituzionale. Alcune pronunce recenti della Corte di cassazione e della Corte costituzionale concernenti questioni particolarmente sensibili di diritto di famiglia, dalla maternità surrogata, all'adozione piena da parte di coppie omosessuali, al ripudio, appaiono particolarmente rivelatrici di questa situazione. Come proposto dall'autore, la contrapposizione tra le due nozioni di ordine pubblico per i fini del diritto internazionale privato si presta ad essere superata adottando una lettura più flessibile della visione tradizionale, nel senso di ricomprendervi anche quei principi internazionalmente condivisi che formano parte della visione "veramente internazionale" dell'ordine pubblico, con particolare riferimento alla protezione del superiore interesse del minore, nonché all'eguaglianza di genere.

**Parole chiave**: ordine pubblico; diritto internazionale privato; diritto di famiglia; superiore interesse del minore; eguaglianza di genere.

**Summary:** I. The clarification of the notion of public policy for the purposes of private international law brought about by the judgment of the *Sezioni unite civili* of the Court of Cassation No. 12193/19 concerning the recognition of a bond of filiation established abroad by having recourse to surrogate motherhood. II. The compatibility of the interpretation of the relevant rules adopted by the Court of Cassation with the Italian Constitution and the need for legislative action, in order to provide a suitable legal framework concerning the relationship between children born out of surrogacy and parents of intention: the best interest of the child as a priority in the balance between competing interests. III. The substantial loosening of the threshold concerning compatibility with public policy in respect of the recognition of full adoptions established abroad by same-sex couples, in cases not implying a recourse to surrogate motherhood. IV. A somewhat easier alignment between Italian public policy for the purposes of private international law and "truly international" public policy, concerning the recognition of unilateral repudiations. V. Concluding remarks.

## I. The clarification of the notion of public policy for the purposes of private international law brought about by the judgment of the *Sezioni unite civili* of the Court of Cassation No. 12193/19 concerning the recognition of a bond of filiation established abroad by having recourse to surrogate motherhood

**1.** Some recent judgments of the Italian Court of Cassation and of the Italian Constitutional

Court have contributed to an ongoing debate concerning the scope of the notion of public policy for the purposes of private international law, that is, as a limit either to the application of foreign law, or, more frequently, to the recognition of foreign judgments or of a legal relationship resulting from a foreign document or official act. Those judgments have specifically touched upon the critical issue of the recognition of family relationships established abroad pursuant to a foreign law, based on principles difficult to reconcile with those inspiring the regulation of family relationships in the *forum*[1].

**2.** A landmark in the said field has surely been set by a judgment by the *Sezioni unite civili* of the Court of cassation of 6 November 2018, filed on 8 May 2019, No. 12193, already commented upon in an earlier issue of these *Cuadernos*[2]. In that judgment, the Italian Court of Cassation had to decide on the compatibility with the Italian public policy of a foreign court decision, adopted in Canada, having declared a child the son of his parent of intention, namely the same-sex spouse of his biological father. The latter had made recourse to a surrogacy arrangement, whereby the child was born in Canada by a surrogate mother, using the genetic material of the biological father and of an unknown female donor. Accordingly, the child did not possess any biological link with his father of intention, while he had established a family relationship with both fathers, as they were identified by the Canadian court decision in question[3].

**3.** As it is well known, Italian law concerning recourse to medically assisted procreation (Law No. 40 of 19 February 2004) allows recourse to such techniques only by heterosexual couples, married or cohabitating, both alive and of an age suitable for procreation, as a remedy to situations of infertility[4]. Recourse to the said techniques in situations other than those contemplated is expressly prohibited under Article 12 of the said law, a ban that is assisted by criminal sanctions for the offenders. The question whether the said ban is likely to operate as part of Italian public policy, in such terms as to preclude the recognition of a foreign court decision or the registration in the Italian civil *status* records of a foreign birth certificate identifying a child born out of surrogate motherhood as the son of same-sex parents had already formed the subject of an earlier judgment by the *Prima sezione civile* of the same Court of Cassation of 21 June 2016, filed on 30 September 2016, No. 19599[5]. The circumstances of the case having formed the subject of the said earlier judgment were somewhat different, since in that case the issue

[1] See generally on the said 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., "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.; 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.; 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.

[2] *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 F. Marongiu Buonaiuti, "Recognition in Italy of Filiation Established Abroad by Surrogate Motherhood, between Transnational Continuity of Personal *Status* and Public Policy", *Cuadernos de Derecho Transnacional*, Vol. 11, 2019, Nº 2, p. 294 ff.; also O. Feraci, "La nozione di ordine pubblico alla luce della sentenza della Corte di cassazione (sez. un. civ.), n. 12193/2019: tra «costituzionalizzazione attenuata» e bilanciamento con il principio del superiore interesse del minore", *Rivista di diritto internazionale*, 2019, p. 1137 ff.; F. Angelini, "L'ordine pubblico come strumento di compatibilità costituzionale o di legalità internazionale? Le S.U. della Corte di cassazione fanno punto sull'ordine pubblico internazionale e sul divieto di surrogazione di maternità. Riflessioni intorno alla sentenza n. 12193 del 2019 e non solo", *Osservatorio AIC*, 2020, p. 185 ff.; M. C. Baruffi, "Gli effetti della maternità surrogata al vaglio della Corte di cassazione italiana e di altre corti", *Rivista di diritto internazionale privato e processuale*, 2020, p. 290 ff.

[3] See, for a concise account of the facts of the case, F. Marongiu Buonaiuti (fn 2), p. 296 f.

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

[5] *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*.

concerned the registration in the Italian civil *status* records of a foreign birth certificate, identifying the child as the son of two mothers. In the peculiar circumstances of the said case, both mothers presented a biological link of some sort with the child, the one for having donated the female genetic material and the other for having given birth to the child. Conversely to the situation obtaining in the case having formed the subject of the later judgment of the *Sezioni unite civili*, the male genetic material had been provided by an unknown donor. Admittedly, the *Prima sezione civile* in its judgment of 2016 could argue that the case before it was not strictly speaking to be labelled as a case of surrogate motherhood, but, rather, as a case of *sui generis* heterologous insemination. Nonetheless, the distinction drawn by the Court of cassation in that case could not help avoiding the conclusion that the reproductive technique resorted to was incompatible with the restrictive rules contemplated under the said law No. 40/2004 and passible, if carried out in Italy, of criminal sanctions pursuant to Article 12 of that law[6].

**4.** In the said judgment of 2016, the *Prima sezione civile* of the Court of cassation had relied on a restrictive reading of public policy for the purposes of private international law, considering it as consisting just of those principles enshrined in international treaties concerning the protection of fundamental rights, likely to form part of a sort of "truly international" public policy (*ordine pubblico veramente internazionale*), or, at most, of principles set out in the national constitution[7]. By referring to a "truly international" notion of public policy, scholarly literature in the field of private international law meant in fact a notion of public policy composed not of principles likely to be considered as distinctive of the peculiar standpoint of a given national legal order, as would be inherent in the traditional function of public policy as a tool meant to safeguard the internal harmony of the *forum*'s legal system[8], but, rather, of internationally shared legal principles. Such a notion of public policy is capable, on the one side, of strengthening the compliance with those principles by the various national legal systems, but, on the other side, it is likely to limit the margin of autonomy left for every national legal system to preserve its own distinctive position on issues, such as those arising in the field of family law, which are likely to reflect different national traditions and conceptions of a social and ethical nature[9]. As noted, as a compromise between the said "truly international" conception of public policy and the more traditional one, the *Prima sezione civile* of the Court of Cassation in the said judgment of 2016 conceded that also national principles may be relied upon as forming part of the notion of public policy relevant for the purposes of private international law. Nonetheless, relying on a rather formalistic distinction, the Court admitted that only principles enshrined in the national constitution might concur with those resulting from international human rights treaties in shaping the content of the relevant notion of public policy, excluding that reliance may be placed for the same purposes on domestic rules other than those embo-

[6] See, concerning the said earlier judgment, 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.

[7] See, for critical remarks in respect of the said reductive assumption, O. Feraci (fn 6), p. 171 ff.; F. Marongiu Buonaiuti (fn 6), p. 1145 ff.; for more favourable views, see 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 4), p. 853 ff.

[8] See generally, concerning the function of public policy in private international law, 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.; G. Perlingieri, G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, Edizioni Scientifiche Italiane, 2019, p. 48 ff.

[9] See, with regard to the said notion, G. Barile (fn 8), p. 19 ff.; P. Benvenuti, *Comunità statale, comunità internazionale e ordine pubblico internazionale*, Milano, Giuffré Editore, 1977, p. 2 ff.; G. Contaldi (fn 8), p. 275.

died in the national constitution[10]. The Court relied in support of this assumption on an argument based on the fact that while the rules embodied in the national constitution, not less than those set out in international treaties in force for the country concerned, are capable of operating as a limit to the discretion of the legislature, other domestic rules not possessing a constitutional nature are open to revision by the national legislator without need for special procedures to be followed. The said argument, nonetheless, cannot be considered as persuasive, since one of the distinctive features of the notion of public policy for the purposes of private international law lies in its evolutionary nature, as a consequence of which in order for a legal principle whatsoever to be considered as part of the national public policy it cannot be considered as necessary for it to possess a somewhat immutable nature. Secondly, the argument relied upon by the *Prima sezione civile* in that respect seems to neglect the fact that not all national legal systems possess a rigid form of constitution, whose amendment is subject to more severe rules than those applying for the purposes of legal reform generally. In respect of those legal systems not possessing a rigid constitution in the sense just pointed out, the said argument related to the supposed stronger resisting capacity attributable to constitutional rules, as compared to other domestic rules not of a constitutional nature, is inevitably misplaced[11].

**5.** It cannot, accordingly, be held as entirely surprising, nor as an unacceptable setback in the evolution of the Italian notion of public policy for the purposes of private international law, for the *Sezioni unite civili* of the Court of Cassation to have departed in their later judgment of 2019 from the assumption upheld by the *Prima sezione civile* of the same Court in the said judgment of 2016. In their judgment of 2019, in fact, the *Sezioni unite* have appropriately overcome the rather formal distinction, stressed by the *Prima sezione* in 2016, between domestic provisions of a constitutional nature and those not possessing a comparable nature, admitting that also domestic rules of a legislative nature may contribute to setting out the content of national public policy for the purposes of private international law, insofar as they may be considered as likely to implement, in respect of the particular sort of legal relationships concerned, the principles enshrined in the national constitution, in accordance with the legal, societal and ethical values prevailing at the relevant time. Accordingly, as the *Sezioni unite civili* held in their judgment of 2019, the rules contained in the said law No. 40 of 2004 prohibiting recourse to surrogate motherhood could well be considered as part of Italian public policy for the purposes of private international law, despite their not possessing a constitutional nature. This in consideration of the fact that those rules are intended to protect the fundamental values of human dignity, with particular regard to the surrogate mother's dignity, as well as of gender equality, prohibiting recourse to practices which entail a discrimination to the detriment of women. Alongside with the importance of the fundamental values whose respect is pursued at the same time by the rules contained in the said law of 2004 concerning medically assisted procreation, as well as by the Italian Constitution and the relevant human rights treaties, the *Sezioni unite civili* of the Court of Cassation have attributed relevance for the purposes of identifying those domestic rules which, albeit not possessing a constitutional nature, may be held as likely to contribute to setting out the scope of national public policy for the purposes of private international law, to the fact that their respect is enforced by providing for criminal sanctions for cases of non-compliance, as in the said case of Article 12 of law No. 40 of 2004. This fact might, in the Court of cassation's view, be considered as the expression of a particularly mandatory nature of the rules concerned, likely to reflect the presence of a general interest in their observance, so that it cannot be held as acceptable for such rules to be circumvented by applying rules of foreign law, or by recognizing or giving effect to a foreign judgment or other legal act inconsistent with them[12].

[10] This prompted F. Salerno (fn 7), p. 277 ff., to write of a "constitutionalization" (*costituzionalizzazione*) of public policy for the purposes of private international law.

[11] See already, for critical remarks concerning the notion of public policy adopted by the Italian Court of Cassation in the said judgment of 2016, F. Marongiu Buonaiuti (fn 6), p. 1145 ff.; see also O. Feraci (fn 6), p. 171 ff.

[12] See, with regard to the overcoming by the *Sezioni unite civili* of the Italian Court of Cassation in their judgment of 2019 of the more reductive reading of public policy for the purposes of private international law adopted by the *Prima sezione civile* in its ruling of 2016, F. Marongiu Buonaiuti (fn 2), p. 301 f.; see also O. Feraci (fn 2), p. 1141 ff.; F. Angelini (fn 2), p. 195 ff.; M. C. Baruffi (fn 2), p. 298 ff. See below, III, as concerns the relevance conferred by the *Sezioni unite civili* in their later

## II. The compatibility of the interpretation of the relevant rules adopted by the Court of Cassation with the Italian Constitution and the need for legislative action, in order to provide a suitable legal framework concerning the relationship between children born out of surrogacy and parents of intention: the best interest of the child as a priority in the balance between competing interests.

**6.** The assumption upheld by the *Sezioni unite civili* of the Court of Cassation, whereby the rules contained in the said law No. 40 of 2004 prohibiting recourse to surrogate motherhood would contribute to setting out the material content of Italian public policy for the purposes of private international law in such terms as to exclude the recognition in Italy of a foreign judgment identifying the same-sex spouse of the biological mother or father as a parent of the child born out of surrogacy abroad, has subsequently formed the subject of two parallel judgments of the Italian Constitutional Court, Nos 32 and 33 of 2021[13].

**7.** In the said judgments, the Constitutional Court, without being in a position to review the findings of the Court of Cassation as concerns the incompatibility with Italian public policy of a judgment of that kind, had to decide on the question of the compatibility with the Italian Constitution of the ensuing situation, whereby the child would find him or herself precluded from obtaining the legal recognition in Italy of the family bonds established abroad with his or her parent of intention. The Italian Constitutional Court had to deal with this issue in respect of two different constellations, concerning respectively, in the case having formed the subject of its judgment No. 32 of 2021, the case of a child having been registered abroad as the son of two mothers, and, in the other case having formed the subject of its judgment No. 33 of the same year, the case of a child having been registered abroad as the son of two men, similarly to the situation obtaining in the case having formed the subject of the *Sezioni unite* judgment of 2019[14]. In both cases, despite some slight differences in the line of reasoning, the Constitutional Court considered the question of compatibility with the Italian Constitution of the said rules of the law of 2004, No. 40, as interpreted by the Court of cassation in 2019, as inadmissible. The Court ultimately held that the choice of the proper legislative solution aimed to provide an adequate protection to the child's right to continuity of the family relationship established abroad with his or her parent of intention fell within the purview of the legislator's discretion, and accordingly declined its competence to interfere with it[15].

**8.** In both judgments the Constitutional Court nonetheless gave an important contribution to the development of its case law in respect of the issue laid before it, taking a significant step forward as compared to earlier judgments in which it had similarly refrained from intervening on a question deemed to belong to the province of the legislature. In fact, whereas in its earlier judgments the Court had considered the adoption of rules granting legal recognition to the family relationship established abroad between the child and his or her parent of intention as the subject of a political choice by the legislature, in respect of which the legislator could act unconstrained by bonds posed by the Italian Constitution[16], in its two judgments of

judgment of 31 March 2021, concerning the recognition of a full adoption by a same-sex couple, to the provision for criminal sanctions for cases of violation of the restrictive Italian rules concerning recourse to medically assisted procreation as revealing an especially mandatory nature of those rules, as compared to other provisions, such as those concerning access to full adoption, not featuring a comparable sanctioning regime.

[13] Respectively, *Corte costituzionale*, 28 January 2021, filed on 9 March 2021, No. 32, on a reference by *Tribunale di Padova*, Order of 9 December 2019, No. 79; *Corte costituzionale*, 28 January 2021, filed on 9 March 2021, No. 33, on a reference by *Corte di cassazione*, *sez. I civ.*, Order of 29 April 2020, No. 99. See, with regard to both judgments, E. Ardito, "Omogenitorialità: pieni diritti ai figli. Un duplice ultimatum della Corte costituzionale", *Ordine internazionale e diritti umani*, 2021, p. 509 ff.; G. Ferrando, "La Corte costituzionale riconosce il diritto dei figli di due mamme o di due papa ad avere due genitori", *Famiglia e diritto*, 2021, p. 704 ff.

[14] See, on the question concerning that case as referred to the Italian Constitutional Court, E. Ardito, "Lo *status filiationis* da maternità surrogata al vaglio della Corte costituzionale", *Ordine internazionale e diritti umani*, 2021, p. 239 ff.; G. Ferrando, "I diritti del bambino con due papà. La questione va alla Corte costituzionale", *Famiglia e diritto*, 2020, p. 685 ff.

[15] See, respectively, *Corte costituzionale*, 9 March 2021, No. 32, para. 2.4.1.4 of the grounds for judgment in law; No. 33, para. 5.9 of the grounds for judgment in law. See also E. Ardito (fn 13), p. 511 ff.; G. Ferrando (fn 13), p. 711 f.

[16] See, particularly, Corte costituzionale, 20 October 2020, filed on 4 November 2020, No. 230, on a reference by Tribunale

2021 the Court clarified that a positive duty arose from the relevant constitutional provisions for the legislature to act, adopting rules capable of providing an adequate protection to the child's right to continuity of the said family relationship[17]. In this respect, the Constitutional Court accepted that, as stated by the Court of Cassation in its *Sezioni unite* judgment of 2019, the form of protection of the said right to be afforded by the legislature might not necessarily consist of allowing the registration into the Italian civil *status* records of the foreign certificate of birth, or court decision, identifying the child as the son or daughter of the parent of intention, since it was a legitimate option for the legislator to exclude such a possibility. At the same time, the Court declared that the alternative solution envisaged by the Court of cassation in 2019, based on the existing law, could not be considered as satisfactory. The said alternative solution, consisting of the so-called adoption in special circumstances (*adozione in casi particolari*), contemplated under Article 44, para. 1, lit. *d*), of law No. 183 of 1984, embodying the Italian legislation on adoption, has been considered by the Italian Constitutional Court as unsatisfactory for the purposes of affording an adequate protection to the child's rights, since the sort of family relationship that could be established thereby with the parent of intention would not amount to an equivalent to a full adoption[18]. In fact, the so-called adoption in special circumstances, as contemplated under the said rule of Italian law on adoption, would not interrupt the child's bonds with his or her family of origin, that is, potentially, in a case of surrogate motherhood, with the surrogate mother, and would not establish family relationships between the child and the adoptive parent's relatives[19]. Allegedly, the alternative avenue to be considered by the legislature, even absent an express suggestion by the Court in this sense, would most likely consist in opening to parents of intention the avenue of full adoption, as the only alternative solution to admitting the establishment, or, rather, the recognition of a bond of filiation between the child and his or her parent of intention[20].

**9.** The two judgments Nos 32 and 33 of 2021 of the Italian Constitutional Court are noteworthy, not only in consideration of the stricter guidance provided to the legislature as concerns the result to be achieved in the exercise of its discretion in regulating the issue under consideration. The line of reasoning followed in the two judgments is also worth of consideration, as it bears some relevance also for the purposes of contributing to a closer identification of the relevant set of legal principles to be taken into consideration in assessing the appropriateness of the legislative solutions to be adopted. In fact, the Constitutional Court in both judgments has placed sensible reliance on the need to protect the best interest of the child, as opposed to its earlier judgments, where the Court's reasoning had appeared more focused on an assessment of the appropriateness of protecting the intended parents' aspiration to the achievement of their desire of parenthood, facing the legislature's discretion in finding the most suitable means by which such a desire might be realized, consistently with the relevant rules set out in the Italian Constitution[21]. The Italian Constitutional Court in its reasoning in both judgments of 2021 placed special emphasis on the need to protect the best interest of the child, an objective set out in the relevant international legal instruments to which Italy is a party, such as the 1989 UN Convention on the Rights of the Child, or read into them, as in the case of the European Convention on Human Rights, as well as, with regard to the domain in which EU law applies, the Charter of Fundamental Rights of the European Union, and, at the same time, inherent in the Italian Constitution. The reasoning followed by the Italian

di Venezia, Order of 3 April 2019, No. 108. See also M. Dogliotti, "Due madri e due padri: qualcosa di nuovo alla Corte costituzionale, ma la via dell'inammissibilità è l'unica percorribile?", *Famiglia e diritto*, 2021, p. 688 ff., p. 696 ff.

[17] See, respectively, *Corte costituzionale*, 9 March 2021, No. 32, para. 2.4.1.3 of the grounds for judgment in law; No. 33, paras 5.4-5.8 of the grounds for judgment in law. See also G. Ferrando (fn 13), p. 708 ff.; M. Dogliotti (fn 16), p. 698 ff.

[18] See, respectively, *Corte costituzionale*, 9 March 2021, No. 32, para. 2.4.1.3 of the grounds for judgment in law; No. 33, para. 5.8 of the grounds for judgment in law. See also E. Ardito (fn 13), p. 513 ff.: G. Ferrando (fn 13), p. 710 f.

[19] We may refer in this respect to F. Marongiu Buonaiuti, "Il riconoscimento delle adozioni da parte di coppie di persone dello stesso sesso: la Corte costituzionale "risponde" al Tribunale per i minorenni di Bologna", *Ordine internazionale e diritti umani*, 2016, p. 453 ff., p. 458 f., 467 f.

[20] See, particularly, *Corte costituzionale*, 9 March 2021, No. 32, para. 2.4.1.4; No. 33, para. 5.7 of the grounds for judgment in law, where the Court ventured into anticipating the prospective solutions likely to be considered by the Italian legislature.

[21] See, respectively, *Corte costituzionale*, 9 March 2021, No. 32, paras 2.4.1.1 – 2.4.1.2 of the grounds for judgment in law; No. 33, paras 5.3 – 5.4 of the grounds for judgment in law. See also E. Ardito (fn 13), p. 513 ff.; M. Dogliotti (fn 16), p. 698 f., 700 ff.; G. Ferrando (fn 13), p. 708 ff.

Constitutional Court is inevitably likely to have an impact on the further development of Italian case law concerning public policy in family law matters for the purposes of private international law. In fact, the further steps likely to be taken in that respect both by the Italian Court of Cassation and by lower courts shall inevitably reflect the stance taken by the Constitutional Court in these two judgments of 2021, where the need to protect the best interest of the child has been placed at the forefront of the principles and values to be relied upon in deciding on the compatibility with Italian public policy of foreign judgments and other foreign public acts in comparable cases[22].

## III. The substantial loosening of the threshold concerning compatibility with public policy in respect of the recognition of full adoptions established abroad by same-sex couples, in cases not implying a recourse to surrogate motherhood.

**10.** The impact of the two recent judgments by the Italian Constitutional Court considered above on the further development of the Italian case law concerning public policy in the domain of family law has very soon appeared in a recent judgment by the *Sezioni unite civili* of the Court of Cassation of 12 January 2021, filed on 31 March 2021, No. 9006. In that judgment, the *Sezioni unite*, while formally declaring their intention to maintain their reading of the notion of public policy for the purposes of private international law upheld in their earlier judgment of 2019 – as composed at the same time by internationally shared legal principles and by those principles more strictly inherent in the legal system of the *forum*, thereby including not only those principles expressly stated in the Italian Constitution, but also those finding their expression in ordinary legislation – actually seem to have moved a step forward in the direction pointed out by the Italian Constitutional Court[23].

**11.** In fact, in this more recent judgment the Court of Cassation seems to have placed at the forefront of the values to be considered in deciding on the compatibility with Italian public policy of a foreign court order establishing a full adoption of a child by a same-sex couple the protection of the best interest of the child himself, as promoted by the international instruments referred to already by the Italian Constitutional Court. The Court, accordingly, upheld the position that the compliance with those principles should, as a matter of principle, take priority on the need of ensuring consistency with the fundamental choices of an ethical, even more than strictly legal, nature inspiring certain legislative solutions, such as those embodied in the Italian legislation on adoption, limiting access to full adoption just to married couples. In following this line of reasoning, the Court of Cassation paid extensive regard to the evolution of the case law of the Italian Constitutional Court, which actually never so far denied the compatibility with the Italian Constitution of the legislative choice to reserve full adoption for married couples, thereby intending heterosexual couples[24].

**12.** The Court of Cassation could obviously not neglect the fact that the Italian legislation concerning registered partnerships (*unioni civili*) finally adopted in 2016 contemplates the access of same-sex couples just to that form of legal relationship, and not to marriage, providing at the same time

[22] See, for critical remarks concerning the solution ultimately adopted by the Italian Constitutional Court, considering the difficulty for the legislature to act on such a sensible and debated topic, M. Dogliotti (fn 16), p. 703; see also, pointing to the role courts, including the Constitutional Court itself, may have pending an action by the legislature, E. Ardito (fn 13), p. 515 f.; G. Ferrando (fn 13), p. 711 ff.

[23] Se, with regard to the said recent judgment of the Sezioni unite civili of the Italian Court of Cassation, L. Giacomelli, "L'adozione piena da parte della coppia dello stesso sesso avvenuta all'estero è compatibile con l'ordine pubblico internazionale: gli equilibrismi della Cassazione tra inerzia del legislatore, moniti costituzionali ed esigenze di tutela omogenea dei figli", *Questione Giustizia*, 22 April 2021, p. 1 ff.; S. Tonolo, "Adoption v. Surrogacy: New Perspectives on the Parental Projects of Same-Sex Couples", *Italian Review of International and Comparative Law*, No. 1/2021, p. 132 ff.

[24] See particularly Corte costituzionale, 24 February 2016, filed on 7 April 2016, No. 76, where the Court actually seemed to have avoided addressing squarely the question, limiting itself to declare the question inadmissible, as a consequence of an error by the referring court in characterizing the case before it as a case of international adoption for the purposes of Article 36, para. 4, of the Italian legislation on adoption (Law No. 184/1983). See F. Marongiu Buonaiuti (fn 19), p. 454 ff.

for a so-called downgrading recognition as registered partnerships of marriages contracted abroad by same-sex spouses of whom one at least is an Italian national[25]. As it is well known, the same legislation, while providing for parties to registered partnerships a legal regime which is broadly analogous to that of spouses, expressly refrained from extending to the parties of such a relationship the rights in terms of access to filiation and to adoption, which the pre-existing Italian legislation grants to spouses. The new legislation concerning registered partnerships actually clarified that, as concerns adoption, it did not intend to alter the framework set out under the pre-existing legislation[26], thereby meaning that access to full adoption should remain precluded to the parties to a registered partnership, leaving nonetheless open the option, paved by a consistent line of case law, for the same-sex partner of a parent of the child to adopt him or her by having recourse to the already mentioned mechanism of the adoption in special circumstances, pursuant to Article 44, para. 1, lit. *d*), of the Italian law of 1984 on adoption[27], as contemplated also, in respect of children born out of surrogate motherhood, by the Court of cassation in its *Sezioni unite* judgment of 2019[28].

**13.** Ultimately, the *Sezioni unite* of the Court of cassation in their latest judgment of 2021 appeared somewhat like walking on a tightrope, between their declared intention to confirm their earlier judgment of 2019 affirming the incompatibility with Italian public policy of a foreign judgment establishing a bond of filiation out of surrogate motherhood, while at the same time maintaining the fundamental assumption inspiring that judgment, –whereby for the purposes of establishing the material content of public policy regard shall be paid also to the rules embodied in domestic legislation not of a constitutional nature–, and their attempt to promote an overcoming of the constraints posed by such legislation, which may be likely to appear not attuned to the current regulatory needs posed by the evolution of the society[29]. The compromise solution ultimately found by the Court to the dilemma before it appears based on a decision to confer primacy to the protection of the best interest of the child as a goal set by the relevant international legal instruments, along the way paved by the Italian Constitutional Court in its two parallel judgments of 2021 examined above, thereby allowing a more limited room for domestic legislation to preclude the transnational continuity of the family relationship the child had acquired abroad. In order to achieve the said goal, the *Sezioni unite* have placed special, when not excessive, emphasis on the distinctive features of the case before them as compared to that having formed the subject of their earlier judgment of 2019[30]. Accordingly, the Court reached the conclusion, inevitably controversial, that whereas the ban on surrogate motherhood posed by the Italian legislation on medically assisted procreation presents a public policy nature, as suggested by the provision of criminal sanctions for cases of violation, the limitation of full adoption to married couples, which is not accompanied by a comparable sanctioning regime, does not present such a nature, or, at least, not in those terms in which public policy is meant for the purposes of private international law, that is, in cases such as that before the court, as a limit to the recognition of a foreign judgment or other public act establishing or certifying the existence

[25] See the new Article 32-*bis* of Law No. 218/1995, bearing the reform of the Italian system of private international law, as introduced pursuant to Legislative Decree No. 7/2017, providing for private international law rules concerning registered partnerships, based on Article 1, para. 28, lit. b), Law No. 76/2016. See, among others, G. Biagioni, "Unioni *same-sex* e diritto internazionale privato: il nuovo quadro normativo dopo il d. lgs. n. 7/2017", *Rivista di diritto internazionale*, 2017, p. 496 ff., p. 498 f.; C. Campiglio, "La disciplina delle unioni civili transnazionali e dei matrimoni esteri tra persone dello stesso sesso", *Rivista di diritto internazionale privato e processuale*, 2017, p. 33 ff., p. 41 ff.; O. Lopes Pegna, "Effetti dei matrimoni *same-sex* contratti all'estero dopo il «riordino» delle norme italiane di diritto internazionale privato", *Rivista di diritto internazionale*, 2017, p. 527 ff., p. 533 ff.

[26] Article 1, para. 20, Law No. 76/2016, introducing the institution of registered partnerships in the Italian legal system, reads as follows in the relevant part: «Resta fermo quanto previsto e consentito in materia di adozione dalle norme vigenti».

[27] See, with regard to the extensive case law of Italian lower courts admitting a recourse to the said mechanism, F. Marongiu Buonaiuti (fn 19), p. 458 ff., 462 ff.

[28] *Corte di cassazione*, *Sezioni unite civili*, 6 November 2018, filed 8 May 2019, No. 12193 (fn 2), para. 13.2 of the grounds for judgment.

[29] See particularly para. 16.1 of the grounds for judgment; for critical remarks concerning the limited consistency of the reasoning of the *Sezioni unite civili* of the Court of cassation in this case, L. Giacomelli (fn 23), p. 2 ff.; S. Tonolo (fn 23), p. 144 f.

[30] See particularly paras 10.6, 15.3 of the grounds for judgment.

of a legal relationship established abroad pursuant to foreign law[31]. Finally, the *Sezioni unite* of the Court of Cassation have taken a step forward towards the opening of the Italian legal system to new forms of family relationships, which so far the Italian Constitutional Court had considered it to fall within the responsibility of the legislature to take. The significant step taken by the *Sezioni unite* cannot escape a self-evident critical remark: by allowing to acquire abroad and have then recognized a legal situation that, as Italian law now stands, cannot be established in the *forum*, their judgment contains an unwelcome invitation to system shopping and to a form of adoptive tourism, when not of a procreative one[32].

## IV. A somewhat easier alignment between Italian public policy for the purposes of private international law and "truly international" public policy, concerning the recognition of unilateral repudiations

**14.** A different field where the said confrontation between the two different notions of public policy for the purposes of private international law pointed out above has engaged the Italian Court of Cassation recently is that of the recognition of unilateral repudiations confirmed by court decisions adopted in countries whose legal system is inspired to Islamic law[33]. Actually, in this field, as a difference from those considered above, a reconciliation between the so-called "truly international" notion of public policy and the more traditional notion of public policy for the purposes of private international law, as mostly embodying national principles, is probably easier to pursue, at least as far as European countries like Italy are concerned. In fact, while repudiation might contribute in general terms to the same goal of protecting the right to dissolve the bond of marriage, which is generally pursued by other institutions more frequently present in non-Islamic countries, such as divorce or marriage annulment, the modes in which it pursues the goal concerned raises inevitable problems of compatibility at the same time with internationally shared principles on the protection of fundamental rights and with national principles, normally of a constitutional nature, prohibiting discrimination against women and guaranteeing fair trial, even without calling into question the specific terms in which marriage dissolution is regulated in the domestic legislation of the country concerned[34].

**15.** Notwithstanding the fact that in such a case it would have allegedly been difficult to reach different results in terms of reconcilability of unilateral repudiations with public policy depending on the relevant notion concretely referred to, the Court of cassation in two recent decisions of its *Prima sezione civile* has demonstrated an enduring oscillation between the said two different notions of public policy for the purposes of private international law. In fact, in its earlier judgment of 7 August 2020, No. 16804, the Italian Court of Cassation has clearly referred to the traditional notion of public policy for the purposes of private international law, as upheld in its *Sezioni unite* judgment of 2019 recalled above, whereby the said notion shall encompass not only those principles enshrined in the national Constitution and in human rights treaties, but also the rules contained in national legislation, insofar as they implement those principles in the concrete regulation of the matter at hand[35]. In this respect, the Court of Cassation noted that a unilateral repudiation confirmed by a judge in the form contemplated by the law in force in

[31] See particularly para. 17 of the grounds for judgment, referring to an earlier judgment of 2018, No. 14007, where the Court of Cassation, sitting as simple chamber, had affirmed the compatibility with Italian public policy of a French judgment establishing a cross-adoption by two women married in France and residing in Italy, with regard to their respective biological sons.

[32] See S. Tonolo (fn 23), p. 144 f., noting that the avenue opened by this judgment may imply a concealed encouragement to have recourse to surrogate motherhood in countries allowing the adoption of children born out of that practice.

[33] See, respectively, Corte di cassazione, sezione I civile, 16 July 2020, filed on 7 August 2020, No. 16804; Corte di cassazione, sezione I civile, Order of 22 June 2020, filed on 14 August 2020, No. 17170.

[34] See, with regard to the issue as addressed in the two decisions under consideration, F. D'Amario, "L'ordine pubblico internazionale nella recente giurisprudenza di legittimità in materia di riconoscimento di decisioni di ripudio", *Ordine internazionale e diritti umani*, 2021, p. 499 ff.; F. Pesce, "La Corte di cassazione ritorna sul tema del riconoscimento del ripudio islamico", *Cuadernos de derecho transnacional*, Vol. 13, 2021, No. 1, p. 552 ff.; C. E. Tuo, "Divorzio-ripudio islamico, riconoscimento automatico e ordine pubblico", *Il Corriere giuridico*, 2021, p. 488 ff.

[35] See, particularly, para. 2.3 of the grounds for judgment in that case.

the Palestinian territories could not be considered as compatible with Italian public policy. This both on account of its irreconcilability with the basic principle of equality between spouses, not less than with the principle of fair trial presupposing the adversarial nature of court proceedings, as set out at the same time by international human rights treaties in force for Italy and by the Italian Constitution, and on account of the absence of any control by the judge having confirmed the unilateral repudiation as concerns the irrecoverable cessation of the communion of life between the spouses. The latter, rather, figures as a fundamental prerequisite for the dissolution of the bond of marriage under Italian law, lying at the basis of the Italian legislation on divorce, without figuring at the same time in the Italian Constitution, nor in relevant international treaties to which Italy is a party[36].

**16.** In a later order by the same *Prima sezione civile* of 14 August 2020, No. 17170, concerning the recognition in Italy of an Iranian court decision confirming a unilateral repudiation, in terms broadly comparable to those obtaining in the earlier judgment considered above, despite some differences in the regulation of repudiation under Iranian law as compared to the law applicable in the Palestinian territories, the Court of Cassation, while apparently following the same line of reasoning based on the traditional notion of public policy for the purposes of private international law, materially seemed to confer greater relevance to the elements of incompatibility of the decision concerned with principles enshrined in international human rights treaties, as well as in the Italian Constitution, concerning essentially fair trial and, particularly, the *audiatur et altera pars* principle[37]. The Court in the latter order, albeit more concisely motivated as compared to the earlier judgment considered above, seemed in fact to confer less relevance to the elements of irreconcilability with the provisions of Italian law regulating marriage dissolution, recalling in this respect the earlier judgment by the same *Prima sezione civile* of 2016, No. 19599, where the Court of cassation, as we have noted above with regard to surrogate motherhood, gave a narrower reading of the notion of public policy for the purposes of private international law, tending to exclude for these purposes the relevance of the concrete terms in which the fundamental principles enshrined in human rights treaties or in the national Constitution are implemented in domestic legislation[38]. Nonetheless, the difference which may be detected in the line of reasoning followed by the Court of cassation in the latter order as compared to its earlier judgment of 7 August 2020 might be accounted for considering that in the case at hand, not differently from the substantially analogous one having formed the subject of the said earlier judgment concerning the same matter, the presence of clear elements of irreconcilability of the foreign court decision concerned with fundamental principles, enshrined both in international human rights treaties of which Italy is a party and in the Italian Constitution, made it for the Court substantially superfluous to embark on a further enquiry as to its compatibility with the further principles inspiring Italian legislation concerning marriage dissolution[39].

## V. Concluding remarks

**17.** The recent developments of Italian case law discussed above concerning the notion of public policy to be relied upon for the purposes of private international law in family law matters seem to confirm the persistence of a confrontation between the two different notions of public policy pointed

[36] See in this respect para. 2.8 of the grounds for judgment in the case. For a strong criticism of the reasoning followed by the Court of cassation, particularly insofar as it gave the impression of placing particular emphasis on the distinctive features of unilateral repudiation as contemplated under Palestinian law, rather than on the effects which the decision to be recognized would have produced in the Italian legal system, as would have been more consistent with the logic inspiring the role of public policy as a ground for the denial of recognition of foreign judgments, F. Pesce (fn 34), p. 556 ff.

[37] See, particularly, para. 5 of the grounds for judgment in this second case.

[38] See para. 8 of the grounds for judgment, where the said judgment of the same *Prima sezione civile* of the Court of cassation of 2016, No. 19599, is expressly referred to.

[39] Cf., contending that, based on an assessment of the specific circumstances of the individual case, the conclusion whereby the recognition of the foreign decision confirming a unilateral repudiation would be incompatible with Italian public policy might not be unescapable, appearing it likely that in certain circumstances the recognition of such a decision might correspond also to the interests of the wife, who might not be interested in preserving the bond of marriage, F. Pesce (fn 34), p. 562 ff.

out above. On the one side, the "truly international" notion of public policy, as composed by internationally shared principles, essentially concerning the protection of fundamental rights, a notion which is also styled as "promotional" public policy, in consideration of its being aimed to promote the largest possible observance of those rights by overcoming the limitations to their enjoyment likely to be posed by restrictive domestic rules. On the other side, the traditional notion of public policy, referred to the fundamental principles of every national legal system, and thereby frequently styled as "defensive" public policy[40]. In its recent judgments considered above, the Italian Court of Cassation has ultimately not abandoned the traditional notion of public policy, which inevitably reflects the *datum* of the persistent autonomy and difference between national legal systems and their inspiring conceptions, particularly in a sensible area like that of family law. At the same time, the Court has tended to underline the relevance of internationally shared principles, as inevitably likely to permeate the notion of public policy inherent in every national legal system[41].

**18.** This is particularly evident with regard to the latest judgment by the *Sezioni unite civili* of the Italian Court of Cassation of 31 March 2021 concerning the recognition of a full adoption by a same-sex couple established abroad. As we have noted, in fact, the Court of cassation in this judgment relied on the need to protect the best interest of the child, as stated namely in the UN Convention on the rights of the child and, at European level, in the Charter of Fundamental Rights of the European Union[42]. This in order to set aside the relevance, as part of Italian public policy, of the rule embodied in the Italian legislation on adoption reserving full adoption for married couples, thereby meaning heterosexual couples, as impliedly confirmed by the more recently adopted legislation on registered partnerships. In that judgment, the *Sezioni unite civili* of the Italian Court of Cassation have in fact taken a significant step, admitting that the need to ensure respect for internationally shared principles, likely to be considered as part of a "truly international" public policy, might justify, in cases where the recognition of a family relationship legitimately established abroad is at stake, a departure from the principles inspiring Italian legislation in respect of the matter at hand[43].

**19.** In this respect, it might be questioned why, ultimately, such a step could be taken as concerns the recognition of a full adoption by a same-sex couple and not as concerns the recognition of a bond of filiation established abroad out of an operation of surrogate motherhood in the absence of genetic bonds between the child and the intended parent[44]. As we have noted, the *Sezioni unite* as concerns this issue have looked like walking on a tightrope between evolution and confirmation[45], recalling the grounds relied upon in their earlier judgment of 2019 in respect of this issue in order to maintain the assumption that surrogate motherhood conveys an attempt to fundamental values, essentially with regard to human dignity as concerns the risk of exploitation suffered by surrogate mothers, and to the right to personal identity of the child born out of such a technique, which are protected also by the relevant international human rights treaties, including the ECHR[46]. In fact, as the Italian Court of Cassation had noted already

[40] See, with regard to the said distinction between a "promotional" and a "defensive" function of public policy, depending on the conception relied upon, F. Angelini (fn 2), p. 189 ff.

[41] See, with particular regard to the approach adopted by the Sezioni Unite of the Italian Court of Cassation in its judgment No. 12193/2019 concerning the recognition of a bond of filiation established by having recourse to surrogate motherhood abroad, O. Feraci (fn 2), p. 1141 ff.

[42] It shall be noted, incidentally, that the reference made by the Court of cassation to the EU Charter of Fundamental Rights is inappropriate in respect of the case before it, which concerned the recognition of a third country judgment, an issue not governed by EU law, in respect of which, accordingly, the rules of the Charter did not apply.

[43] See particularly paras 17-17.1 of the judgment by the Sezioni Unite of the Italian Court of Cassation No. 9006/2021 (above, III).

[44] See S. Tonolo (fn 23), p. 8 f., noting the rather unpersuasive insistence by the Court of Cassation on the distinction between the two cases.

[45] L. Giacomelli (fn 23) in the title of his comment to the said judgment uses the expression «gli equilibrismi della Cassazione» to describe the oscillation that can be detected in the reasoning of the Court of Cassation.

[46] See particularly para. 17.1 of judgment No. 9006/2021.

in its *Sezioni unite* judgment of 2019[47], the European Court of Human Rights has constantly upheld the legitimacy of a refusal to allow the recognition of a bond of filiation arising out of an operation of surrogate motherhood in the absence of any biological link between the child and the intended parent. As mentioned, this is subject to the condition that an alternative form of recognition of the family relationship arisen between the child and the intended parent is provided, in such terms as to allow a timely and effective protection of the child's right to continuity of the family relationship at stake[48]. As we have noted, the *Sezioni unite* in their judgment of 2021 have pointed, rather controversially, to the fact that the rules contained in the Italian legislation on medically assisted procreation posing a ban on operations of surrogate motherhood contemplate criminal sanctions for cases of breach, something which does not occur in respect of cases where the prerequisites for a full adoption are eluded[49]. This rather simplistic argument, nonetheless, is not entirely persuasive, not appearing it as a prerequisite in order for a rule to possess a public policy nature for the purposes of private international law the fact of its being accompanied by a criminal sanction for cases of breach[50].

**20.** Moving then to the last cited judgments by the *Prima sezione civile* of the Italian Court of Cassation concerning the recognition of foreign unilateral repudiations, these, as mentioned, raised less concerns in terms of balancing between internationally shared legal principles concerning the protection of fundamental rights – embodying a form of so-called "truly international" public policy – and principles which are distinctive of the fundamental attitude of the legal system of the *forum* at the relevant time – as would come for consideration under the traditional notion of public policy for the purposes of private international law. In fact, both sets of principles coincide in banning violations of the principle of gender equality, as well as of the fundamental principle of fair trial guaranteeing the adversarial nature of court proceedings[51]. Still, the Italian Court of Cassation, rather disappointingly, –considering in particular that the two decisions were delivered by the same chamber, the *Prima sezione civile*, of the Court, albeit in a different composition, within a few weeks from one another–, showed an oscillation concerning the further relevance of differences between the distinctive features of a unilateral repudiation, or, rather, a court decision confirming it, and the prerequisites for marriage dissolution lying at the core of Italian law on divorce. As it has been noted already in earlier comments to those two judgments by the Italian Court of Cassation, probably the examination carried out by the Court in both cases, and particularly in its judgment of 7 August 2020, No. 16804, ought to have focused more on the specific circumstances of the individual cases, rather than on an abstract consideration of the form of repudiation applied in each of those cases, in order to more concretely appreciate the effects of its recognition on the rights of the wife in the individual case, or on those of any children, capable of being balanced against the gender equality and fair trial considerations making the recognition of those decisions inescapably contrary to Italian public policy[52].

[47] See particularly para. 13.3 of judgment No. 12193/2019.

[48] See especially 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, and, later, *D. v. France*, Judgment of 16 July 2020, Application No. 11288/18, paras 50 ff.

[49] See particularly para. 20.2 of judgment No. 9006/2021.

[50] See, criticizing the excessive reliance placed by the Court on this aspect in order to substantiate its decision to reach a different conclusion in terms of compatibility with public policy, L. Giacomelli (fn 23), p. 2 ff.; S. Tonolo (fn 23), p. 8 f.

[51] See above, IV.

[52] See F. Pesce (fn 34), p. 556 ff.; C. E. Tuo (fn. 34), p. 498.