Hard Cases

A Tale of Two Fathers

Matteo Winkler and Kellen Trilha Schappo*

C'est étonnant comme la façon de
présenter les choses peut en fait les changer.
Valentina Mennesson

Abstract

This article comments on the judgment no 12193 rendered by the Sezioni Unite of the Corte di Cassazione on 8 May 2019, where the recognition and registration, in Italy, of a foreign parental order inscribing the nonbiological parent as the children's legal father were denied on the ground that they violated the prohibition of surrogacy under Italian law, which was considered to be of public policy. It scrutinises this judgment in two steps. First, it criticises the court's methodology in the construction of the notion of public policy both in general and with particular regard to the surrogacy ban. Second, it examines whether the best interests of the children involved were sufficiently taken account of, and it finds that they were not. It concludes that, contrary to what the law prescribes, this judgment failed to give voice to the children born via surrogacy abroad and living with parents of the same sex.

I. Introduction

This article comments on the judgment rendered by the *Sezioni Unite* of the *Corte di Cassazione* on 8 May 2019 concerning the legal status of children born via foreign surrogacy.[1] In this judgment, the *Sezioni Unite* denied the recognition and registration (*trascrizione*) of a foreign parental order inscribing the intentional parent, ie the one with no biological connection with the children, as the children's legal father in their birth certificate on the ground that such a recognition violated the domestic ban on surrogacy and therefore Italy's international public policy (*ordine pubblico*).

The importance of this judgment is twofold. First, in line with previous

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[1] See Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, available at www.dejure.it.

decisions of the same court, it recognised that there is no conflict between being a parent and being homosexual.[2] Second, it discussed in depth the role of the surrogacy ban in the construction of the public policy exception *vis-à-vis* the recognition of a foreign parental order, which is specifically the object of this article.[3]

After describing in detail the legal and factual background of the case (section II), this article builds on the judgment of the *Sezioni Unite* in two directions. On the one hand, it scrutinises the way the court construed the notion of public policy both in general and with particular regard to the surrogacy ban (section III.1). On the other hand, it criticises the relevance of the best interests of the children born via foreign surrogacy in the reasoning of the court (section III.2). It concludes that the court's reasoning is barely foolproof as it not only fails in several methodological respects, but also denies the children born via surrogacy their 'voice' in court.

II. Factual and Legal Background

1. The Procreative Project

Two Italian men decided to found a family. As pregnancy was obviously barred, at least for the moment,[4] they considered two options: adoption and

[2] This is not obvious as it appears to be. For decades, courts have denied gays and lesbians the right to be parents, for example by rejecting the petition for custody filed by a parent who came out after a relationship with a person of the opposite sex. Moreover, homosexuality is commonly used by the latter person to seek denial of custody for the former spouse or partner after he or she came out as a homosexual. For a discussion on the argument that '*Être homosexuel ou être parent, il faut choisir*', see M. Gross, *Idées reçues sur l'homoparentalité* (Paris: Le Cavalier Bleu, 2018), 41-56. The European Court of Human Rights (ECtHR) clarified in this regard that denying custody to a father on the sole ground of him being homosexual is a violation of the right not to be discriminated based on sexual orientation under Arts 8 and 14 of the European Convention on Human Rights (ECHR). See Eur. Court H.R, *Salgueiro da Silva Mouta* v *Portugal*, App no 33290/96, Judgment of 21 December 1999, ECHR 1999-IX. The same right exists in joint adoption: Eur. Court H.R., *E.B.* v *France*, App no 43546/02, Judgment of 22 January 2008, ECHR 2002-I. See P. Johnson, *Homosexuality and the European Court of Human Rights* (New York: Routledge, 2012), 131-134.

[3] Half of the judgment is actually dedicated to a different issue – the standing of both the city mayor and the *Ministero dell'Interno* as parties to the recognition proceedings. We will not engage in a discussion on this issue as it concerns the functioning of the civil status registry and has no impact, strictly speaking, on the private international law provisions that this article aims at discussing.

[4] The idea of a 'pregnant man' was already present in the classical world in myths like that of Dionysus, who was born from Zeus' thigh. See D.D. Leitao, *The Pregnant Male as Myth and Metaphor in Classical Greek Literature* (Cambridge: Cambridge University Press, 2012), 58-99. Discussions surpassed the myth in the 1980s, when reproductive technologies seemed to offer the concrete possibility of having pregnancy by men. Both the media and academic literature have debated, in particular, both the cases of trans women and cisgender men undergoing pregnancy through an uterus transplant and a parallel hormone treatment, some crucial aspects of

surrogacy abroad.[5] The former is statutorily barred in Italy, as the law on adoption of 1983 restricts the access to adoption to married couples[6] and same-sex couples cannot marry under today's Italian law.[7] An alternative could be to

which are addressed by A. Alghrani, *Regulating Assisted Reproductive Technologies* (Cambridge: Cambridge University Press, 2018), 220-265, especially 240-245.

[5] See M.M. Winkler, 'Same-Sex Families Across Borders', in D. Gallo, L. Paladini and P. Pustorino eds, *Same-Sex Couples before National, Supranational and International Jurisdictions* (Berlin: Springer, 2014), 381-396, especially 385-393. The alternative we use here is just for the sake of clarity as to the legal options available and in no case implies taking a position on 'procreative choices' or 'pro-choice' political stances. See T. Murphy, 'The Texture of Reproductive Choice: Law, Ethnography, and Reproductive Technologies', in T. Murphy ed, *New Technologies and Human Rights* (Oxford: Oxford University Press, 2009), 195-221, especially 202-213. The alternative between adoption and surrogacy raises the question of surrogacy as an option of last resort. Besides the case of a single person seeking the help of a surrogate mother to found a family, surrogacy is generally resorted to by opposite-sex couples with fertility issues and by same-sex couples. Although some commentators would prefer to restrict the access to surrogacy to the former, restricting the reproductive options to opposite-sex couples could be morally as well as legally questionable. Additionally, the argument according to which adoption, as it concerns children who have already been born, would reflect a couple's altruism while surrogacy would be a mere expression of the intentional parents' selfishness, is definitely questionable. In fact, this argument is usually made only for infertile couples, while the fertile couples' preference for natural procreation is not equally condemned. For a meaningful discussion on all these questions, see E. Jackson, *Regulating Reproduction. Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001), 293-295.

[6] In this specific regard, Art 6, para 1, legge 4 May 1983 no 184 (*Diritto del minore ad una famiglia*) provides that only couples who are married since at least three years can adopt a child. Scholars explain the rationale behind this provision by arguing that limiting adoption to married (heterosexual) families represents, among the different possible options available (adoption by single individuals or by unmarried couples), the optimal solution for the child. This solution, however, is far from being universally recognised, for globally speaking only fifteen countries restrict adoption to married couples only whereas at least a hundred countries allow single individuals to adopt. See the report of the ECOSOC, *Child Adoption: Trend and Policies* (New York: United Nations, 2009), 38-39. Additionally, some countries that limited adoption to couples of the opposite sex have recently changed their laws as a result of constitutional reviews. For example, in 2014 the Constitutional Court of Austria struck down Art 191(2) of the Austrian Civil Code and Art 8(4) of the Federal Act on Registered Partnership (*Eingetragene Partnerschaft-Gesetz*), which restricted joint adoption to opposite-sex couples, based on Arts 8 and 14 of the European Convention on Human Rights (ECHR) and the principle of equality. See Constitutional Court (Austria), 11 December 2014, G119-120/2014-12. Similarly, with a ruling of 2015 the Constitutional Court of Colombia declared some provisions regarding joint adoption unconstitutional to the extent that they did not include same-sex couples. The constitutional scrutiny concerned, in particular, Arts 64, 66 and 68 of the law no 1098 of 2006 (*Codigo de la infancia y la adolescencia*) regulating, respectively, the effects of joint adoption, consent to adoption and the conditions to adopt. The Court reasoned that such provisions contrasted with the best interest of the child as affirmed by Art 44 of the Constitution. The Court, on the other hand, made no reference to the principle of equality. See Constitutional Court (Colombia), 4 November 2015, C-683/15, available at https://tinyurl.com/yy5fb5kx (last visited 28 May 2019).

[7] Same-sex couples, however, can enter a civil partnership in Italy. See legge 20 May 2016 no 76, regulating registered partnerships between persons of the same sex and cohabiting couples (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*), on which see M. Winkler, 'Italy's Gentle Revolution: The New Law on Same-Sex Partnerships' 1 *Digest – National Italian American Bar Association Journal*, 22-31 (2017) and N. Cipriani, 'Unioni Civili: Same-Sex Partnerships Law in Italy' 3 *The Italian Law Journal*, 343,

obtain an adoption abroad and subsequently file with a domestic court for the recognition of the foreign adoption in Italy. In this case, however, the already mentioned law of 1983 requires the couple to have resided in the foreign country for at least two years, a condition that is barely possible to fulfill for Italian couples living in Italy on a permanent basis.[8]

The remaining option is then surrogacy. As Art 12, para 6, of legge 19 February 2004 no 40 on medically assisted procreation punishes surrogacy (*maternità surrogata*) with harsh criminal sanctions,[9] the two men opted for Ontario, Canada, one of the various 'surrogacy-friendly' jurisdictions that exist today in every continent.[10]

346-349 (2017). Legge no 76 of 2016 did not amend the provisions concerning adoption but, with a wording that sounds obscure, stated that the enhanced equality between civil partnership and marriage operates '(w)ithout prejudice of what is currently provided and allowed in respect of adoptions by existing laws'. On adoptions in legge no 76 of 2016 see E. de Gotzen, 'Recognition of Same-Sex Marriages, Overcoming Gender Barriers in Italy and the Italian Law No. 76 of 2016 on Civil Unions. First Remarks' *Cuadernos de derecho transnacional*, 194, 198-201 (2017).

[8] See Art 36, para 4, of legge no 184 of 1983, n 6 above, regulating the *special* proceedings for the recognition of foreign adoptions and requiring, to this end, that the Italian citizens seeking recognition 'demonstrate that, at the moment of the adoption order, they continually resided (in the foreign country) since at least two years'. This provision does not apply when the petitioners are foreigners, in which case the *ordinary* recognition proceedings under Art 41, para 1, legge 31 May 1995 no 218, n 16 below, applies. See in this regard Corte costituzionale 7 April 2016 no 76, *Rivista di diritto internazionale*, 949 (2016), concerning an American woman seeking the recognition of an adoption order issued by Multnomah County, Oregon, in respect of the child of her female spouse. The order had declared the child's full adoption and parental responsibility by the woman in conjunction with the child's biological mother. Ibid 950. The Court highlighted that, by requiring a residence connection with the foreign country, Art 36, para 4, aims at preventing Italian citizens from circumventing the adoption regime established by international and domestic law – a need that was absent from the case at issue. Ibid 957. See C.E. Tuo, 'The Italian Regime of Recognition of Intercountry Adoptions of Children in Light of the ECHR: What about Singles?' *Cuadernos de derecho transnactional*, 357 (2015).

[9] See Art 12, para 6, of legge 19 February 2004 no 40 (*Disposizioni in materia di procreazione medicalmente assistita*), punishing surrogacy with jail time from six months to two years and with a fine ranging from six hundred thousand to one million euro. According to I. Kriari and A. Valongo, 'International Issues regarding Surrogacy' 2(2) *The Italian Law Journal*, 331, 332-333 (2016), this prohibition is based on the protection of the dignity of the surrogate woman mandated by Art 2 of the Italian Constitution. On the criminal aspects of foreign surrogacy with specific regard to the declaration made by the intentional parents about the birth of the child see Corte di Cassazione 10 March 2016 no 13525, *Diritto penale e processo*, 1085 (2016). See also Corte Costituzionale 23 November 2017 no 272, available at www.cortecostituzionale.it.

[10] For a classification of jurisdictions as 'friendly', 'neutral' and 'anti-surrogacy' jurisdictions see K. Trimmings and P. Beaumont, *General Report on Surrogacy*, in K. Trimmings and P. Beaumont eds, *International Surrogacy Arrangements. Legal Regulation at the International Level* (Oxford: Hart Publishing, 2013), 439-549, especially 443-464; for an update see K. Trimmings and P. Beaumont, 'Parentage and Surrogacy in a European Perspective', in J.M. Scherpe ed, *The Present and Future of European Family Law* (Cheltenham: Edward Elgar Publishing, 2016), 231-283; C. Fenton-Glynn, 'Creating International Families: Private International Law and the Industry of Parenthood', in G. Douglas, M. Murch and V. Stephens eds, *International and National Perspectives on Child and Family Law. Essays in Honour of Nigel Lowe* (Cambridge: Intersentia, 2018), 167-178.

Surrogacy in Canada is regulated by the *Assisted Human Reproduction Act* of 2004 and is permitted insofar as the surrogate mother does not receive any compensation, not even a reimbursement.[11] The provinces regulate all the remaining aspects of surrogacy such as the surrogacy arrangements, which are for example prohibited in Quebec but allowed elsewhere, and the establishment of parenthood.[12] Regarding the latter issue, Ontario has no specific law, but the precedent *JR* v *LH* of 2002 is considered to provide a 'roadmap' for post-birth parental orders.[13]

In that regard, whereas the biological father obtained a first parental order from the Ontario Superior Court, the intentional father applied for a second parental order in a subsequent moment, presumably under Ontario's *Children Law Reform Act*, which allows 'any person having interest' to apply for a declaration of parentage within the child's first birthday.[14]

While the Civil Status Office (*Ufficio di stato civile*) ('CSO') of the Comune di Trento agreed to register the first birth certificate (the one reporting the biological father as the children's sole parent), it refused to amend the latter based on the second parental order, allegedly on the ground that 'under the current law, parents must be of different sex'.[15] The two men then decided to start proceedings in order to obtain recognition.

2. The Recognition Proceedings

The recognition and registration of foreign deeds is subject to the requirement that such deeds do not conflict with 'public policy' (*ordine pubblico*).[16] The petitioners presented two arguments in this regard. First, they argued that the circumstance that they were two parents of the same sex was immaterial for the well-being of their children. They recalled previous judgments of the *Corte di Cassazione* stating not only that growing up with two parents of the same sex is not detrimental to the children's mental and physical health, but also that consolidating the latter's legal kinship with both parents who are taking care of

[11] See *Assisted Human Reproduction Act*, SC. 2004 c 2, Arts 6(1) and 12(1), lett c. On this provision see S. Carsley, 'Reconceiving Quebec's Laws on Surrogate Motherhood' 96(1) *Canadian Bar Review*, 120, 125-129 (2018). For an in-depth analysis of the rationale behind these provisions, especially the argument of exploitation, see A. Cattapan, 'Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation' 29(3) *Canadian Journal of Law and Society*, 361 (2014).

[12] See Art 541 of the Civil Code of Quebec, declaring the 'absolute nullity' of the surrogacy arrangements. The problem of the establishment of parenthood, however, remains currently debated in this state. See I. Cote, J.-S. Sauve, 'Homopaternité, Gestation pour Autrui: No Man's Land?' *Revue Générale de Droit*, 27, 43 (2016).

[13] See *JR* v *LH*, OJ No 3998, para 29, [2002] OTC 764 (Ont. Sup. Ct.). On its function as a 'roadmap' see K. Busby, 'Of Surrogate Mother Born: Parentage Determination in Canada and Elsewhere' 25(2) *Canadian Journal of Women and the Law*, 284, 299 (2013).

[14] See Art 13(1) and (5) of Ontario's *Children Law Reform Act*, RSO 1990.

[15] See Corte d'Appello di Trento 23 February 2017, *Corriere giuridico*, 935-939 (2017).

[16] See Arts 65 and 67, legge 31 May 1995 no 218, 35 *International Legal Materials*, 765 (1996).

them was clearly in their best interest.[17]

Second, the petitioners argued that their children, as Canadian citizens, were entitled to maintain the family status they had acquired in Canada. This argument based on the cross-border continuity of personal and family status has been used quite successfully in courts as part of the child's best interest argument.[18] Continuity is also strictly connected with the intrinsic openness of the Italian system of private international law.[19]

The appellate court found that adding a second father to the children's birth certificates was not contrary to public policy and therefore ordered the CSO to amend their birth certificate accordingly.[20] This conclusion was mainly based on the judgment released by the first division (*Sezione prima*) of the *Corte di Cassazione* on 30 September 2016 (no 19599), which found that registering a foreign birth certificate indicating two women as a child's mothers was not contrary to public policy.[21] Although we will indulge over this judgment in a subsequent section, it is important to stress here that the appellate court referred to the notion of public policy delineated by the *Sezione prima* without distinguishing the related factual backgrounds, hence assimilating a case of female artificial procreation with that of a surrogacy. This point is crucial because, as we will see later in this article, the *Sezione prima* had been pretty clear in maintaining that the case pending before it was not a surrogacy.[22]

[17] The Supreme Court qualified as a 'prejudice' the fact of 'believing that it is harmful for the well-balanced development of a child to live in a family centred on a couple of the same sex'. Corte di Cassazione 11 January 2013 no 601, *Giurisprudenza italiana*, 1036 (2016) (further reference to Italian case law on this issue is provided n 24 below). The statement of the Supreme Court has served as a kernel of the argument in favour of the legal recognition of same-sex parents in courts and to oppose claims that growing up with two parents of the same sex is harmful for children. For a review of the academic literature in this regard see F. Ferrari, *La famiglia inattesa. I genitori omosessuali e i loro figli* (Udine: Mimesis, 2015), 147-168. While a large body of research have addressed children with two female parents, the literature on children growing up with two male parents has been covered only recently in Italy. See in this regard the remarkable research of N. Carone et al, 'Italian Gay Father Families Formed by Surrogacy: Parenting, Sigmatization, and Children's Psychological Adjustment' 54(10) *Developmental Psychology*, 1904, 1913-1914 (2018), concluding that 'it would be unrealistic to consider children born to same-sex parents through assisted reproduction at risk of developing psychological problems' and that it 'is empirically unfounded for policymakers to ban intended gay and lesbian parents from accessing fertility treatments and to deny gay father and lesbian mother families the same civil rights and social benefits granted to heterosexual parent families'.

[18] For an in-depth analysis of this problem in American federalism see A. Koppelman, *Same Sex, Different States. When Same-Sex Marriages Cross State Lines* (Ann Arbor: Sheridan Books, 2006), 72-73. See also Eur. Court H.R., *Wagner and J.M.W.L.* v *Luxembourg*, App no 76240/01, Judgment of 28 June 2007, para 110, available at www.hudoc.echr.coe.it.

[19] See C.E. Tuo, n 8 above, 366.

[20] Corte d'Appello di Trento 23 February 2017, n 15 above, which also addressed a procedural issue concerning the standing of the *Comune di Trento* and of *Ministero dell'Interno* to be parties in the proceedings.

[21] See Corte di Cassazione 30 September 2016 no 19599, *Il diritto di famiglia e delle persone*, I, 52 (2017).

[22] ibid 73-74.

Additionally, the appellate court adhered to the petitioners' argument that the lack of cross-border recognition of their legal kinship with both fathers was prejudicial to the children. It observed, indeed, that such a lack of recognition caused 'an evident harm' to the latter in preventing the nonbiological father from being legally responsible for the children's well-being.[23]

Finally, the appellate court rejected the government's claim that the nonbiological father could resort to the second parent adoption (*adozione in casi particolari*) in order to legally consolidate his kinship with the children. It must be reminded, in this respect, that the second parent adoption is available since 2014 to all intentional parents of children, both in opposite-sex and same-sex families, under Art 44, para 1, letter *d*) of the law of 1983 on adoption.[24] The court observed, however, that the concrete availability of this remedy has been challenged by certain courts and therefore the access to it is 'not so uncontroversial as it appears to be'.[25]

3. The Judgment of the *Sezioni Unite*

The case landed in the *Sezioni Unite*, a nine-judge panel representing the entire court, on the ground that the questions submitted to the court entailed 'extremely delicate and relevant legal issues'.[26] Besides these merely procedural aspects, the *Sezioni Unite* engaged in a continuity-and-change dynamic with the judgment of *Sezione prima*.

[23] Corte d'Appello di Trento 23 February 2017, n 15 above, 938.

[24] Second parent adoption was first made available in the context of same-sex families by a judgment of the Tribunale per i minorenni di Roma 30 June 2014, *Nuova giurisprudenza civile commentata*, I, 109 (2015), affirmed by Corte d'Appello di Roma 23 December 2015, unreported. The statutory basis of such a remedy, which is considered residual in the domestic adoption system, laid on Art 44, para 1, letter *d*) of legge no 184 of 1983, n 6 above, which states that a person can adopt a child 'in the event of an ascertained impossibility of preadoption placement'. The main contribution of the reported judgment of the Tribunale di Roma was to affirm that the requirement of the impossibility of preadoption placement (*impossibilità di preaffidamento adottivo*) was to be intended not simply as a *factual* impossibility, but also as a *legal* one, meaning that the fact for same-sex couples of not having access to marriage was not an obstacle for accessing second parent adoption. In 2016, the Supreme Court ratified the conclusions reached by the Tribunale di Roma. See Corte di Cassazione 30 June 2016 no 12962, *Nuova giurisprudenza civile commentata*, I, 1213-1219 (2016).

[25] Corte d'Appello di Trento 23 February 2017, n 15 above, 939. As a matter of fact, domestic courts disagree on the main point of the *legal* impossibility of preadoption placement as the requirement for the access to second parent adoption by the nonbiological parent of a child. See for example Tribunale per i minorenni di Milano 17 October 2016, unreported; Tribunale per i minorenni di Torino 9 and 11 September 2015, reversed by Corte d'Appello di Torino 27 May 2016, *Nuova giurisprudenza civile commentata*, 205 (2016).

[26] Corte di Cassazione 22 February 2018 no 4382, *Famiglia e diritto*, 837 (2018), para 7. As a matter of procedure, the Sezioni unite can be seised in the event of a 'difformity' between individual sections regarding the same legal question and, additionally, when the petition 'presents a question of utmost importance'. Art 374, para 2, of the Code of Civil Procedure.

a) Continuity with Precedents

A first point on which both the *Sezioni Unite* and the judgment no 19599/2016 agreed was the old-fashioned theoretical distinction between the so-called 'domestic' and 'international' public policy. According to this distinction, the concept of domestic public policy (*ordine pubblico interno*) refers to those mandatory provisions of domestic law that set a limit to private autonomy, for example by prohibiting certain contractual terms, whereas the international public policy (*ordine pubblico internazionale*) represents a general limit to the effects of foreign laws that is for courts to determine on a case-by-case basis.[27]

The two judgments also agreed on acknowledging that, together with the bunch of fundamental rights recognised at the supranational level, the Constitution represents a first layer of principles and provisions that are relevant for the notion of international public policy. Hence the notion encompassed 'the ensemble of *fundamental principles* that characterise the national legal system in a certain moment'.[28]

Finally, both cases concerned the implementation of a procreative project within a couple of the same sex with one partner only being genetically linked with the children involved, a circumstance that triggered private and family life considerations under Art 8 of the European Convention on Human Rights (ECHR). It is worth recalling now that in *Mennesson* v *France* and *Labassee* v *France*, both decided in 2014, the European Court of Human Rights (ECtHR) has stated that all children born from surrogacy have a right to identity which requires the recognition of the legal kinship with the parent they are biologically connected to.[29]

b) Departure from Precedents

The *Sezioni Unite* and the *Sezione prima* disagreed in two respects. First, as resumed in Table I below, the *Sezioni Unite* distinguished the factual

[27] Based on this distinction, 'there is no coincidence between the mandatory provisions of the Italian legal system and the principles of public policy that limit the application of a foreign law'. Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, n 1 above, 25-27. For a recent analysis see G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 48-78; O. Feraci, *L'ordine pubblico nel diritto dell'Unione Europea* (Milano: Giuffrè, 2012), 27-31.

[28] See Corte di Cassazione 4 May 2007 no 10215 (regarding discretional termination of a labour contract), available at www.dejure.it; Corte di Cassazione 11 November 2000 no 14462 (regarding divorce), available at www.dejure.it. Moreover, see Corte d'Appello di Napoli 13 March 2015, *Foro italiano*, I, 297 (2016), for which 'the concept of (international) public policy embodies the 'fundamental principles' that characterise the Italian legal order, including the principles of sovranational origin and, in particular, those arising from the European Convention on Human Rights' (the case concerned the recognition of a same-sex marriage entered into in France).

[29] See Eur. Court H.R., *Mennesson* v *France*, App no 65192/11, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it and *Labassee* v *France*, App no 65941/11, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it.

background of its own case from that of 2016 in terms of 'division of procreative labour'.[30]

Table I. – Differences of factual background in judgment no 19599/2016 compared to that of *Sezioni Unite*.

	Sezione Prima **(judgment no 19599/2016)**	***Sezioni Unite*** **(judgment no 12193/2019)**
Technique	Medically assisted procreation	Gestational surrogacy
Content of the deed	A foreign birth certificate mentioning two women as the child mothers	A foreign birth certificate mentioning as the father one man with no biological link with the children
Individuals involved	The egg-supplier (the genetic mother = *the spouse*) The sperm supplier (anonymous donor) The gestational carrier (*the other spouse*)	The egg-supplier (the genetic mother ǂ the partner) The sperm supplier (*the father*) The gestational carrier (surrogate) The father's partner (*the intentional father*)

In this regard, the female couple giving birth to the child in Spain resorted to no external contribution except that of the anonymous sperm donor, whereas the gay couple received two external contributions – from the egg donor and the gestational carrier, which remained excluded from the result of the process. Moreover, in the latter case the intentional parent offered no genetic contribution to the process.[31] The *Sezioni Unite* reproached the lower court of not having considered these crucial differences.

Second, as indicated in Table II, the *Sezioni Unite* criticised the notion of public policy that was delineated by appellate court on the basis of the judgment of *Sezione prima* by differentiating the role played by both supranational law and domestic statutes.

[30] This term is employed by J.H. Déchaux, 'The Challenges of the New Reproductive Technologies: How Kinship Enters Politics', in Brigitte Feuillet-Liger, Thérese Callus and Kristina Orfali eds, *Reproductive Technology and Changing Perceptions of Parenthood around the World* (Bruxelles: Bruylant, 2014), 311-332, 316.

[31] This obviously does not mean that the intentional father's contribution to the procreative project is irrelevant. Indeed, research shows that in the context of same-sex families intentional parents play an essential role in the representation and construction of parenting, and that children got attached to both fathers during their childhood. See N. Carone. R. Baiocco, V. Lingiardi, K. Kerns, 'Child Attachment Security in Gay Father Surrogacy Families: Parents as Safe Havens and Secure Bases during Middle Childhood' 1 *Attachment & Human Development*, 1 (2019).

Table II. – Differences regarding the notion of public policy.

Source	Court of Appeals	*Sezioni Unite* no 12193 of 2019
Supranational law	ECHR, Charter of Fundamental Rights, EU Treaties	Conventions and international and supranational sources
Statutes	Constitutionally mandated and constitutionally bound statutes	Statutes 'permeated' of fundamental principles

The most appalling change concerned the definition of public policy regarding the Constitution as 'the ensemble of supreme and/or fundamental principles of our Constitution (…) that cannot be subverted by the legislator'.[32] In this way, the Court limited the public policy review of foreign laws to 'constitutionally mandated laws' (*leggi costituzionalmente necessarie*) – laws that the Parliament is commanded to pass by the Constitution – and 'constitutionally bound laws' (*leggi a contenuto costituzionalmente vincolato*) – laws whose content is expressly fixed by the Constitution. The key to understand this notion of international public policy is embedded in the constitutional notion of legislative discretion.

The *Sezioni Unite* departed from this definition and stated that international public policy also embraces statutory provisions that 'incarnate' the above mentioned principles. The surrogacy ban is 'certainly' one of these 'constitutionally mandated laws' and, as a result, the petitioners cannot benefit from the judgment no 19599/2016.

III. Comment

1. The Confirmation of the Public Policy Exception as an Obstacle to the Recognition of a Legal Kinship Resulting from Surrogacy

International surrogacy agreements have become a concrete possibility for infertile couples willing to hire a third woman to carry and deliver a child on their behalf. Surrogacy is indeed a matter in which national regulations widely differ:[33] from very liberal solutions, to a limited practice and even its total prohibition, as it is the case in Italy under the legge no 40 of 2004.[34] Intended

[32] Corte di Cassazione 30 September 2016 no 19599, n 21 above, 63.
[33] For an overview, see K. Trimmings and P. Beaumont, *General Report* n 10 above.
[34] Art 12, para 6, of legge no 40 of 2004, n 9 above.

parents might hence compare the risks and costs involving surrogacy in each one of these scenarios, and finally decide to have their child in another country – because it is simpler, because it is less expensive, or simply because the practice is illegal in their State of origin.

Issues such as the one at stake in the judgment no 12193 of 2019 appear when the situation enters in contact with the country of origin of the intended parents, who require the recognition of the legal kinship between them and the child born of surrogacy.[35] The kinds of reactions towards these requests, again, vary from a country to another. It ranges from a full recognition to tolerating a *de facto* family life without recognising its legal effects, and in some countries it can materially deprive the intended parents from the possibility of living in their home State with the child (by denying citizenship or by taking the child away in order to entrust her to another family).[36]

As far as it concerns the refusal of recognition of the legal kinship linking the child to the intended parents, some decisions could invoke not only public policy exception, but also *fraude à la loi* (evasion from law), insofar as by going abroad to have access to surrogacy, the intended parents willingly avoided the application of mandatory laws.[37] The main technique used, however, remains the public policy exception, as far as it can justify the refusal of recognition without characterising all the requirements of *fraude à la loi*.

Public policy is a fundamental technique in conflict of laws. In order to benefit from the continuity, the predictability and the harmony of solutions that characterise private international law, it is fundamental to respect the threshold fixed by a State to its own tolerance towards other legal systems. Three elements of international public policy are central to the analysis of the judgment no 12193 of 2019: its 'content', its difference from other techniques and its implementation, which necessarily entails a concrete assessment of an eventual lack of conformity.

a) The Content of Public Policy: Limiting a State's Tolerance Towards Norms and Decisions Coming from Other States

In order to verify the compatibility between a foreign ruling and public policy requirements, the Italian judge refers to 'the ensemble of fundamental principles

[35] These effects do not, thus, immediately concern the surrogacy agreement, since intended parents are not requiring anything related to the performance of the agreement by their counterparties. Of course the children would not be in this world without the service offered by the surrogate, but the petitioners in the recognition proceedings are not asking for the enforcement of an illicit agreement or the application of foreign law on surrogacy. Rather, the foreign ruling whose recognition is sought relates to the new legal kinship among the parties – family law effects of the surrogacy agreement that are somehow linked, but remain distinct from it.

[36] For decisions in this sense, see Corte di Cassazione 26 September 2014 no 24001, *Foro italiano*, I, 3408 (2014) and Eur. Court H.R., *Paradiso and Campanelli* v *Italy*, App no 25358/12, Judgment of 24 January 2017, *Recueil Dalloz*, 897 (2017).

[37] On this question, see below.

that characterise the national legal system in a certain moment'.[38] The diametrically opposed views of the 2019 *Sezioni Unite* and 2016 *Sezione prima* rulings regarding the extent of the public policy control illustrate how difficult circumscribing this definition can be.

But is it necessary and useful to identify a list of principles constituting international public policy? There is something misleading in limiting the public policy exception to (more or less) fundamental norms to which a rule or decision coming from another legal system should comply in order to be received in the forum.

First of all, this list is open to constant mutability. Under the appearance of some predictable set of principles to which judges might refer, the definition can actually be borrowed and adapted to the solution the panel intents to reach. If there is a feeling that the foreign norm should not be admitted, then these principles (or the 'certain time' taken into consideration to delineate them) will appear in a way that forbids any reception. If, on the other hand, the panel intends to adopt a opener position regarding a particular matter, even departing from previous case law, than the definition will be called to evolve. There is no legal certainty in assimilating (international) public policy to a crystallised list of principles. On the contrary, it only provides the illusion of an abstract appreciation in decisions that involve sensible issues and where the role played by the judge is necessarily critical.

Public policy should instead be taken for what it is. The cornerstone of a discipline that welcomes foreign norms, while imposing limits on their tolerance. The appreciation of such limits involves not only a list of norms and principles, but rather, as the Italian judge invokes himself, values, norms, principles and practices deeply woven within the legal system, which characterise its own essence. In order to be rejected, a norm should be shocking, incompatible with this core.

Such evaluation shall necessarily take place concretely. It is indeed the situation at hand that shall collide with the legal system's core, not the law under which it was created. The Italian law on private international law refers to the contrariety of the *effects* of a rule (Art 16) or decision (Art 64) to public policy.[39] For example, a foreign law admitting marriage at the age of fourteen shall be deemed contrary to public policy in many jurisdictions. However, if this same law is applicable to a thirty-years-old couple, its effects will not trigger a reaction, since it would be a marriage as any other. Reviewing the content of foreign norms and controlling the law applied by the foreign judge would not be consistent with the principles of private international law, and would deprive its

[38] See n 28 above.

[39] See legge no 218 of 1995 n 16 above, Art 16, para 1: 'No foreign law shall be applied whose effects are incompatible with public policy (*ordre public*)' and Art 64, para 1: 'A judgement rendered by a foreign authority shall be recognized in Italy without requiring any further proceedings if: (…) *g*) the provisions of the judgement do not conflict with the requirements of public policy (*ordre public*)'.

techniques of most of their interest in terms of coexistence among different legal systems.

In this sense, the cosmopolitan standpoint adopted by the *Prima sezione* in the 2016 ruling is not sheltered from criticism. On the contrary – in a liberal effort to enlarge the scope of international public policy (in the direction of the so-called '*ordre public véritablement international*')[40] – the judges added unnecessary complexity to the technique, opening the way for imprecisions that could later justify the reassessment of public policy as a stricter obstacle for recognition.

By taking the public policy exception for what it is – a limit to be assessed by confronting the effects of the norm whose reception is sought to the legal system's core – and applying it concretely, the *Sezione prima* would have been able to reach the same results without distorting the method. The criticism addressed to this solution by the ruling of the *Sezioni Unite* is hence not in itself improper. Judges can apply the public policy exception taking inspiration from previous case law but still as it is: a technique closely related to the concrete situation. The effort to list a series of principles that are necessarily encompassed by international public policy, while providing the (unnecessary?) illusion of a neutral and abstract decision-making, actually dangerously converts the subjective role of the judge into a creative delimitation of the tolerance towards foreign norms, crystallised in rules that do not match with the spirit of the public policy exception.

So the cosmopolitan effort of looking *above* for the inspiration of public policy is not consistent with the purpose of delimiting the openness towards foreign legal systems. On the contrary, a truly liberal move would simply consist in cutting this wall shorter, in the sense of desensitising the legal system and welcoming with less obstacles norms coming from abroad. Such a move can clearly be observed in rulings involving international commercial law,[41] and in particular arbitration[42] (a matter in which vulnerable parties might claim some extra protection from their home State, and are on the contrary deprived of

[40] In the sense of a public policy that transcends national legal systems and is proper to international relations – also called transnational public policy. An account of this approach and its practice is given by Pierre Lalive as soon as 1986 ('Ordre public transnational ou rééllement international at arbitrage international' *Revue de l'Arbitrage*, 329 (1986)), and is diffused, mainly, in the area of international arbitration (which can be seen as constituting a legal system on its own: see particularly E. Gaillard, 'Aspects philosophiques de l'arbitrage international' *Recueil des cours de l'Academie de droit international de la Haye*, 49 (2008)).

[41] See for instance C. Seraglini, 'L'affaire Thalès et le non-usage immodéré de l'exception d'ordre public (ou les dérèglements de la déréglementation)' 295 *Gazette du Palais*, 5 (2005); E. Loquin, 'Le contrôle du seul "caractère flagrant, effectif et concret" de la violation de l'ordre public international par la sentence' *Revue trimestrielle de droit commercial*, 518 (2008).

[42] A liberal move on the public policy exception in commercial matters can be illustrated by the abandonment of exequatur proceedings in the Brussels 1 *bis* regulation, in the generous case law involving *exequatur* of arbitral awards under the New York Convention and even the limited conditions imposed by the Rome 1 Regulation to depart from the applicable law according to its provisions.

resourceful tools against big players in international litigation).[43] However, in matters that historically raise more awareness of the forum, such as personal status and family law, such a delimitation can have the opposite effect. Indeed, as the evolution of the case law here analysed illustrates, more conservative judges can take the same reasoning to a parochial delimitation of the content of international public policy, then raising an obstacle to recognition that is harder to deconstruct in future rulings.

b) International Public Policy and Other Private International Law Techniques

International public policy is not the only method tribunals can raise when opposing the effects of a surrogacy realised abroad. In France, cases involving international surrogacy have initially been tackled under the lens of the *fraude à la loi* exception. According to this technique, effects will not be given to a foreign rule or decision as far as the parties artificially made their application possible. The classic case regards a French princess who, willing to divorce in a time when it was not allowed by French law, took the German citizenship in order to have German law applicable under French private international law norms. To avoid this application, the judge raised the fact that the manipulation of the connecting factor was an obstacle to the reception of the foreign norm.[44] More recent cases involving repudiations deal with husbands seising foreign tribunals in order to repudiate their wives under the application of a more friendly regime.[45] In this case the *fraude* does not aim at avoiding a law (through the manipulation of the connecting factor) but rather a judgment. In Italy, however, the legge no 218/1995 does not provide for this technique,[46] and also in France judges shifted their argument in surrogacy cases to public policy. *Fraude à la loi* is indeed a declining technique, due to its complexity as well as the possibility of achieving the same purpose (a refusal of recognition or the

[43] Particularly regarding consumers arbitration and the matter of access to justice, as well as international litigation involving multinationals and individuals harmed by their activities.

[44] Cour de Cassation 18 May 1878, *Princesse de Bauffremont* v *Prince de Bauffremont*, *Clunet - Journal de droit international*, 505 (1878).

[45] See for instance Cour de Cassation 30 September 2009 no 08-16.141, *Clunet - Journal de droit international*, 13 (2010) and, more recently, Cour de Cassation 20 June 2012 no 11-30.120, *Bulletin*, I, 137 (2012).

[46] Italian private international law does not clearly provide for a specific mechanism of *fraude à la loi*, but the evasion can be considered broadly under Art 1344 of the Italian civil code and through the principle *fraus omnia corrumpit*. Without presenting this methodological distinction, a thesis draws upon the various manifestations of fraud at the national and international level: S. Falletta, *La frode alla legge nel diritto interno e nel diritto internazionale privato* (Fisciano: Università degli Studi di Salerno, 2014), 147-165. Italian decisions, even when considering the evasion, place it under the umbrella of public policy in order to justify a refusal of recognition. See for example O. Lopes Pegna, 'Riforma della filiazione e diritto internazionale privato' *Rivista di diritto internazionale*, 394 (2014).

non application of foreign law) through the public policy exception.[47] The mere attempt to avoid the application of the *lex fori* shall not hence preclude the recognition of the effects of the situation resulting from the application of foreign law.

On the other hand, when applying the public policy exception, the ruling of the *Sezioni Unite* invokes the violation of the law prohibiting surrogacy as a 'public policy principle'. This solution, which borrows from previous case law on the same issue,[48] is based on the fact that the ban on surrogacy safeguards 'fundamental values, such as the surrogate's human dignity and the adoption regime'. By lifting Art 12, para 6, of the legge no 40/2004 at the level of 'fundamental value', the Italian judge does not however properly characterise the conditions for an obstacle in the name of international public policy, since it focuses on its hypothetical content rather then the concrete appreciation that should be at the heart of the public policy control – what is, as discussed above, in contrast with the spirit of the technique and of the whole private international law discipline.

Rather, by invoking norms that should be seen as *components* of international public policy, the judge proceeds to a control of the conformity to overriding mandatory rules of the forum, which can be assimilated within the international public policy exception.[49] These rules apply necessarily whenever a situation falls within their scope. In the case at stake, the prohibition of surrogacy, as a public law norm, has necessarily a territorial application – while always applying to facts taking place within the forum, it cannot expand its scope to activities localised outside its boundaries. On the other hand, the adoption regime is a private law norm that can have a role to play in the private international law technique, by stepping out when foreign law is applicable or by applying to transborder facts as far as the characteristics of a situation make it applicable. Concretely, however, adoption was not a question. The intended parents did not evade from norms that should in any case apply since they were not contemplating

[47] Since *fraude à la loi* obeys to different criteria, it remains however useful when the forum cannot assess the incompatibility between the situation and public policy.

[48] Corte di Cassazione 11 November 2014 no 24001, *Foro italiano*, I, 3408 (2014).

[49] That's the conclusion reached by the International Law Association in its New Delhi resolution of 2002: P. Mayer, 'Recommandation de l'association de droit international sur le recours a l'ordre public en tant que motif de refus de reconnaissance ou d'exécution des sentences arbitrales internationales' *Reveu de l'Arbitrage*, 1061-1068 (2002). See also P. Mayer, 'L'étendue du contrôle, par le juge étatique, de la conformité des sentences arbitrales aux lois de police', in J.-P. Ancel et al eds, *Vers des nouveaux équilibres entre ordres juridiques: mélanges en l'honneur d'Hélène Gaudemet-Tallon* (Paris: Dalloz, 2008), 459-477; on a narrower approach on overriding mandatory provisions (lois de police) that could be concerned by this control, see L.G. Radicati di Brozolo, 'Arbitrage commercial international et lois de police: Considérations sur les conflits de juridictions dans le commerce international' *Recueil des Cours de l'Académie de Droit International de La Haye*, 1-501, especially 341, § 54 (2005). For an overview, K. Trilha Schappo, *Les angles morts d'un monde juridiquement hétérogène: essai sur l'exercice stratégique de la volonté en droit international privé* (Paris: IEP Paris, 2016), 122.

an adoption. Certainly, the decision of taking part in a surrogacy abroad was also due to the fact that adoption is foreclosed in the case of a same-sex couple. The judge would in this case assimilate surrogacy and adoption as analogous means to build a family, which is questionable.[50] In any case, a public policy exception based upon the application of overriding mandatory provisions is not free from any balancing with competing principles, such as the best interests of the child.

c) The Concrete Appreciation of the Conformity to International Public Policy also Contemplates Balancing the Different Interests at Stake

A rigid approach on a necessarily concrete technique can be at the origin of blind spots involving the protection of vulnerable interests.[51] This is the case for children involved in surrogacy-related litigation in different States of the world.[52] From a technical point of view, the public policy exception copes badly with the automatic and neutral architecture of the savignian tradition inspiring private international law regimes around the world. It constitutes an ultimate defence of the legal system against foreign rules and decisions incompatible with its essence. As such, its intervention is necessarily concrete, flexible and adaptable from case to case, since it is by definition an obstacle to the principles of harmony, coordination and cooperation upon which the whole private international law discipline is based.

Applying the public policy exception concretely involves (as the text of the legge no 218/1995 and other private international law norms around the world suggest) assessing the conformity of the *effects* the reception of the foreign norm entails. The judge should appreciate these effects regarding public interests but also regarding the private interests at stake. In cases involving surrogacy, these interests are: the collective repulsion of surrogacy techniques (entrenched in the constitutional protection of the human being's dignity); the interests of the intended parents and their will to constitute a family; the interests of a child born in spite of her will and abandoned by the natural mother in a foreign State.

The interests of the intended parents, although legitimate according to the Italian Constitutional Court,[53] lose pertinence when the means used to reach

[50] See on this alternative, n 6 above.

[51] Disregarding the rights of the child in order to avoid the recognition of any effects of an international surrogacy can trigger the ECHR – this kind of decision is indeed at the heart of surrogacy-related proceedings in front of the ECtHR.

[52] Similar solutions are found in States where surrogacy is prohibited, such as France, Spain, Germany and Japan.

[53] Corte costituzionale 10 June 2014 no 162, available at www.cortecostituzionale.it: 'the determination of having a child, which concerns the most intimate and intangible aspect of the human being, is incoercible, as far as it does not harm other constitutional values'.

their goal went bluntly against public policy norms of their home State. Although these individuals (in spite of being a same-sex couple or not) have a right under Art 8 of the ECHR to the protection of their private and family life, this protection cannot shield them against the reaction of a State whose law has been willingly evaded.

The collective interests enshrined in a State's legislation prohibiting surrogacy do not necessarily amount to an international public policy obstacle to recognition. As it has been lengthily discussed and explained (with a certain consensus) in literature and case law (although practical applications can vary), national and international public policy are very distinct. While national public policy consists of those norms individuals cannot deviate from, international public policy presents the limits to the reception of norms coming from other legal systems. It is sometimes presented as a subset of national public policy, but as we discussed above, viewing it through these lens (as sets of norms requiring compliance) is misleading. In spite of their similar denomination, the technique beneath national and international public policy is not the same. Differently from national public policy (under the shape of mandatory norms), international public policy cannot be approached as a list of norms with which parties shall always comply. It must be evaluated after hypothetically applying the foreign norm and observing its effects. Do they collide with the legal system's fabric, which is woven with its principles, culture, practices and (also) norms? Are these effects shocking? Is it impossible to amalgamate this situation within the legal system? In the affirmative, the legal system will have to limit its openness towards foreign norms, because their effects would be intolerable. On the contrary, if the effects of the reception of a legal norm can mingle within this fabric, nothing should oppose their recognition. One should keep in mind that private international law in its most traditional roots is about the protection of individual interests through continuous and harmonised solutions. Hindering this goal should be justified within its own logics, otherwise the regime as a whole becomes meaningless.

In this sense, judges dealing with the recognition of the effects of surrogacy proceedings realised abroad are faced with a family and a child. The formers claim they are the parents of the latter. They present on their behalf a foreign ruling certifying this legal kinship. The mere existence of same-sex couples is not anymore a matter raising public policy concerns under Italian law.[54] In what would the reception of this family within the Italian legal system be shocking? In what are its effects different from similar familiar arrangements resulting from an adoption[55] or other procreative technologies?[56]

[54] See Corte di Cassazione 11 gennaio 2013 no 601, n 17 above.

[55] The possibility for the non biological parent to adopt the child has been presented as a condition to preserve her rights under Art 8 ECHR by a recent advisory opinion of the Strasbourg Court: Eur. Court H.R., Advisory opinion of 10 April 2019 (Request no P16-2018-001). The *Sezioni Unite* also considered this possibility when denying recognition of the Canadian ruling. On the possibility to properly safeguard the child's rights through adoption, see below.

Judges and commentators insisting on the rejection of any recognition to these families invoke the fact that admitting to give effect to their legal kinship would encourage other intended parents to take the same path. But is the refusal of recognition discouraging intended parents to realise a surrogacy abroad? Is it enough to sacrifice the interests of the child in the name of some hypothetical deterrent effect that is hardly visible in practice?

The incompatibility between the legal kinship resulting from a surrogacy and the Italian legal system is also presented as resulting from the constitutional protection of the dignity of the human being, that in this case concerns the surrogate. However, it is impossible to achieve a proper protection of surrogates in third States. First of all, a neat refusal of *any* kind of surrogacy ignores the various different regulatory models that exist for the practice – and the different levels of protection available. Concretely, the situation of a surrogate in India or in Ukraine is not the same as a surrogate in California or in Canada.[57] One could also consider whether the couples had access to commercial surrogacy, or whether on the contrary if the surrogate took part in the construction of their family for free. The capacity of these women to decide by themselves is not the same in these different scenarios, but as far as their will is free and unbound, the philosophy of private international law would require a legal system to respect and trust the foreign legislator. An abstract 'protection' of the foreign surrogate that ignores the concrete conditions in which the child was born is not productive. On the contrary, distinguishing each case might be at the origin of a virtuous turn towards States in which surrogacy is better framed (and surrogates, better protected), if it could ensure intended parents that the legal kinship resulting from the practice might be more easily recognised. As it is, children's interests are sacrificed in the name of a hypothetical unattainable goal. If the objective is to guarantee that the human dignity of surrogates is safeguarded, States should think about methods to frame reproductive tourism as such, through cooperation and common norms,[58] before the judge has to face the *fait accompli*.

Finally, situations such as the one at stake in the ruling of the *Sezioni Unite* raise concerns regarding the interests of the child (or children) whose legal kinship with the intended parents is contended. These children are the fruit of a practice necessarily culminating in their abandonment by the surrogate mother. Besides their intended parents, they have no other family. When recognition is denied, these children simply fall short of rights towards adults that should be responsible for raising them and offering the material conditions for life. Judges turning a blind

[56] Corte di Cassazione no 30 September 2016 no 19599, n 21 above.

[57] See, for example, on the situation in India: K. Desai, 'India's Surrogate Mothers are Risking their Lives. They Urgently Need Protection' *The Guardian*, 5 June 2012, available at https://tinyurl.com/apfpjcy (last visited 28 May 2019).

[58] A model of cooperation in international surrogacy is already under discussion at The Hague Conference on Private International Law (see the work on https://tinyurl.com/y64pfovg (last visited 28 May 2019)). On this kind of regulatory effort, see C. Fenton-Glynn, n 10 above.

eye to these family arrangements (that will not cease to exist, as acknowledged in all recent case law) are depriving these children rights to claim maintenance, to take part in a succession, to benefit from the visits of an intended parent strained after a break up with the genetic father. It is hardly arguable that children are better off in these conditions, or that the above-mentioned goals can justify such treatment. If a legal system is convinced that this family situation is unsuitable, it should take the consequences of this choice and trust the child to another family through adoption. But even in this case, the European Court of Human Rights made clear that it would be incompatible with Art 8 of the ECHR if one of the intended parents is also the genetic father of the child. And whenever it might not be the case (even after a medical error, eventually), it is difficult to surely assess that such a solution would be the most suitable for the child, taking into account the length of the procedure and the age at which this child would finally have a stable family life.

The interests of the child, while being less safeguarded than collective interests or even the interests of the surrogate (at least in theory), are the ones whose protection shall be guaranteed according to international conventional norms to which Italy is bound. So not only these interests should be taken into account when assessing the concrete compatibility of a situation to international public policy, their protection should be paramount as it is mandated by norms hierarchically superior to Italian domestic law (and henceforth private international law). This proportionality check is however not the main concern to the *Sezioni Unite*. On the contrary: it is trusted by the judges to the legislator, when drafting national norms on the matter. Thus from a concrete public policy check, the judge arrives to an abstract balancing of the different interests at stake, to the detriment of children's rights.

In its *avis consultatif* issued on 10 April 2019, the ECtHR affirmed that States are not bound to recognise foreign birth certificates resulting from surrogacy, but that children should be afforded with means to have a link with the intended parent that is not also the genetic father.[59] In Italy, the regime of secondparent adoption (*adozione in casi particolari*) will fulfil this role. It cannot, however, afford the same protection to children's rights, as it will be discussed below. So the concrete appreciation of public policy does not sufficiently consider the interests of the child, which in these cases are sacrificed in an unbalanced safeguard of

[59] Whose legal kinship should always be recognised in the name of the child's respect to family and private life, particularly regarding the right to having an identity (v. Eur. Court H.R., *Mennesson* v *France*, n 29 above). On a reflection for new family law solutions in order to displace the center of the debate on surrogacy from the child's condition, see A. Chaigneau, 'Pour un droit du lien: le débat sur la gestation pour autrui comme catalyseur d'un droit de la filiation renouvelé' *Revue trimestrielle de droit civil*, 263 (2016). On how existing regimes (in this case, for international adoptions) can inspire a new framework for international surrogacy, see S. Mohapatra, 'Adopting an international convention on surrogacy – a lesson from inter country adoption' 13 *Loyola University Chicago International Law Review*, 25 (2015).

objectives that exist in theory, but are unattainable in practice.

2. The Role of the Best Interest of the Child, or the Lack Thereof

a) Methodological Remarks

One of the clearest element of discontinuity between the judgment of *Sezione Prima* and that of *Sezioni Unite* concerns the consideration given to the best interests of the children involved. Whereas for the former those interests dictated the outcome of the case (the recognition of the Spanish birth certificate indicating the two mothers as the child's legal parents), for the latter they cannot be prioritised over the surrogacy ban, resulting in the nonrecognition of the children's legal kinship with the intentional father.

It must be recalled, at the outset, that the taking account of such interests is binding for domestic courts under Art 3, para 1, of the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989 and entered into force on 2 September 1990, which so reads:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[60]

Although the indeterminacy of the child's best interests has been traditionally believed to generate 'anxieties and dilemmas'[61] and lead to unpredictability,[62] national and supranational courts, with the assistance of the UN Committee on the Rights of the Child, have developed a toolbox of hermeneutic devices aimed at disarming the uncertainty resulting from this provision.

In particular, the UN Committee's *General Comment No 14* has clarified that the best interests should be construed as a child's substantive right, an

[60] Art 3, para 1, of the Convention on the Rights of the Child, adopted in New York on 20 November 1989 and entered into force on 2 September 1990. See S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1999) 85-99.

[61] J. Eekelaar and J. Tobin, 'Article 3. The Best Interests of the Child', in J. Tobin ed, *The UN Convention on the Rights of the Child* (Oxford: Oxford University Press, 2019), 73-107, 76.

[62] On this criticism see E.E. Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities', in E.E. Sutherland and L.A. Barnes-Macfarlane, *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (Cambridge: Cambridge University Press, 2016), 21-50, 37-38. See also T. Kaime, *The Convention on the Rights of the Child* (Groningen: Europa Law Publishing, 2011), 104-105, describing the best interests of the child 'as a rather nebulous and ill-defined standard that opens a plethora of considerations and priorities'. For a discussion see S. Parker, 'The Best Interests of the Child – Principles and Problems', in P. Alston ed, *The Best Interests of the Child. Reconciling Culture and Human Rights* (Oxford: Clarendon Press, 1994), 26-41, 29.

interpretative principle and a rule of procedure.[63] First, children have a *substantive right* to have their interests 'assessed and be taken as a primary consideration'.[64] This obviously does not mean that their interests should prevail at all times – as well as having one's own day in court does not imply winning the case. Second, to qualify the best interests as an *interpretative principle* means, in a plurality of options, to choose the alternative that best suits the child's interests.[65] Third, as a *rule of procedure* the best interests rule requires the decision-maker to show that the child's interests, 'including psychological and physical well-being and legal, social and economic interests', have been taken into account.[66]

Oxford law professor John Eekelaar drew an interesting and yet problematic distinction in the application of the best interests rule between 'decisions that are directly about children and decisions that affect children indirectly'.[67] The sense of this distinction is that, whereas the former decisions seek 'the best outcome for the child', in the latter

> 'the focus of the decision-maker should be on reaching the best solution for the issue to be decided rather than on what outcome would be best for the child'.[68]

Behind this distinction lies the fear that the best interests rule may actually result, in some circumstances, in a *subversion* of the rule of law. This is particularly evident in the scholarly debate regarding cross-border surrogacy, in which context anti-surrogacy legislation is often opposed to and prioritised over the best interests rule. In support of this argument it has been affirmed that the

> '(b)est interests (rule) is not a trump card, a grundnorm, a high level principle (, but) a statutory rule that needs to be interpreted consistently

[63] See for example *General Comment No 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (Art 3, para 1)*, CRC/C/GC/14 (2013), para 6, intending the best interests as 'a threefold concept' comprising of 'a substantive right (…), a fundamental interpretative principle and (…) a rule of procedure'. For a commentary of this comment see U. Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?', in E.E. Sutherland and L.A. Barnes-Macfarlane eds, n 62 above, 51-66, 56-59.

[64] *General Comment No 14*, n 63 above, para 6(a);

[65] See J. Eekelaar and J. Tobin, n 61 above.

[66] U. Kilkelly, n 63 above, 61.

[67] J. Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' 23 *International Journal of Children's Rights*, 3 (2015) and 'Two Dimensions of the Best Interests Principle: Decisions about Children and Decisions Affecting Children', in E.E. Sutherland and L.A. Barnes-Macfarlane eds, n 62 above, 99-111, 99. Eekelaar draws this distinction based, *inter alia*, on the above mentioned *General Comment No 14* n 63 above, para 19, regarding the definition of the word 'concerning' contained in Art 3(1) of the New York Convention based on whether the decision affect 'a child, children as a group or children in general' directly rather than indirectly.

[68] J. Eekelaar, 'Two Dimentions' n 67 above, 100.

with other – equally valid – statutory rules'.[69]

In domestic judicial practice, this approach is clearly reflected, for instance, in the judgment released by the Spanish Tribunal Supremo in 2013 in a case involving two children born from a gay couple via surrogacy in California, which emphasised the danger that

> '(t)he indiscriminate invocation of the "interest of the child" would serve (…) to make a clean slate of any violation of other legal rights taken into consideration by the national and international legal system'.[70]

This argument is clearly functional to the nonrecognition of the child's legal kinship with the intentional parent.

There are plenty of reasons for disagreeing with this argument. First, it is important to stress that the best interests rule is a truly binding provisions for domestic courts and not, as it has been claimed, 'an aspiration and a guide to state action'.[71] Indeed, this rule is so pervasive that even professor Eekelaar has been forced to recognise that

> 'if the "best" ' solution to the issue in question is considered to have a sufficiently detrimental effect on the child's interests, it may need to be modified or even abandoned'.[72]

Second, courts cannot relegate themselves as simple legislators' agents, but are required to take an action, as Art 3 of the New York Convention prescribes, that puts the child's interests above all others. There is nothing intimately subversive in weighting some interests over the others if this operation is commanded by a bunch of international law provisions. As an English family court ruled in 2008 in the famous case *Re X and Y (Foreign Surrogacy)*, regarding a twin couple that the conflict of English and Ukraine law had made stateless and parentless, trumping the legislative policy for the sake of the interests of the children involved 'is both humane and intellectually coherent', as

> 'the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned)'.[73]

[69] K.M. Norrie, 'Surrogacy in the United Kingdom: An Inappropriate Application of the Welfare Principle', in E.E. Sutherland and L.A. Barnes-Macfarlane eds, n 62 above, 165-179, 178.

[70] Tribunal Supremo 6 February 2014 no 853/2013, *Revue critique de droit international privé*, 531 (2014), paras 4.7-4.8.

[71] K.M. Norrie, n 69 above, 179.

[72] J. Eekalaar, 'The Role of the Best Interests Principles', n 67 above, 5.

[73] *In re X and Y (Foreign Surrogacy)*, [2008] EWHC 3030 (Fam), para 24. The court therefore considered that '[t]he difficulty is that it is almost impossible to imagine a set of

Third, it is worth recalling that, while 'primary' does not certainly mean 'absolute', even when in the court's view other interests may abstractly displace the child's interests, Art 3 still 'imposes an onerous burden on a decision-maker to justify any interference on the basis of evidence rather than speculation and assumption'.[74] This enhanced reasoning requirement is the direct result of ther binding character of the best interests rule.

Finally, we should not forget that, although both provisions require to prioritise the child's interests over all others, the standard set by Art 8 of the ECHR is higher than that of Art 3 of the New York Convention, materialising in a 'robust' judicial protection.[75] As the ECtHR has stated on multiple occasions, ultimately in its advisory opinion of 10 April 2019, 'whenever the situation of a child is in issue, the best interests of that child are paramount', thus imposing an analysis *in concreto* which looks at the 'practical reality' of *that child* and not a that of other children or of children in general.[76]

Despite this overwhelming criticisms, professor Eekelaar's distinction remains useful to examine the assessment of the *Sezioni Unite* about the children's best interests. As seen earlier, the *Sezioni Unite* have relegated these interests to the very last part of its ruling, stating that they not only 'are deemed to wane in the event of surrogacy', but can be properly implemented via the secondparent adoption. We will challenge both assumptions separately.

b) The Child's Best Interests and Public Policy

The first assumption made by the *Sezioni Unite* is that the surrogacy ban contained in Art 12, para 6, of Italian legge no 40/2004 trumps the child's best interest. By this conclusion, the *Sezioni Unite* displayed not a judgment about the children involved, but a judgment affecting children in general, departing from

circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order'. The case concerned an English opposite-sex couple who resorted to surrogacy in Ukraine and subsequently asked for a parental order to the English court under section 30(7) of the *Human Fertilisation and Embryology Act 1990*. This provision subjected the issuing of the parental order to the condition that nothing had been paid to the surrogate except 'for expenses reasonably incurred'. The couple, however, had paid the surrogate a lump-sum of 25.000 euro at the children's birth, giving rise to a clear case of commercial surrogacy against which, as the court said, 'there is a wholly valid public policy justification lying behind Section 30(7)'. Ibid, para 20. The combination of the Ukraine law – for which the children involved were legally the children of the English couple though born in Ukraine, hence foreigners to Ukraine law – and the above mentioned prohibition of commercial surrogacy sanctioned by English law made the children stateless and parentless. See E. Walmsley, 'Commentary on *Re X and Y (Foreign Surrogacy)*' in E. Stalford, K. Hollingsworth and S. Gilmore eds, *Rewriting Children's Rights Judgments* (London: Hart Publishing, 2017), 89-104, 93.

[74] J. Eekelaar and J. Tobin, n 61 above, 97.

[75] C. Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford: Hart Publishing, 2017), 147.

[76] See Advisory opinion of 10 April 2019, paras 38 and 52, n 55 above.

the practical reality of children born via foreign surrogacy who will continue living with the intentional parents notwithstanding. We find this conclusion inconsistent with the need for an evaluation *in concreto* that is prescribed by the law.

The public policy exception interacts with the best interests rule not only as one of the 'principles and rules' that compose the the public policy exception, but also as a counter-limitation (*controlimite*) to the public policy exception, meaning that, if the nonrecognition infringes upon certain children's interests, public policy cannot operate and recognition is therefore the correct solution.[77]

The *Sezioni Unite* assumed that the best interests rule was a public policy provision in the former sense, which must nonetheless be balanced against the surrogacy ban. This was also the position of the Spanish *Tribunal Supremo* in the case of 2013 mentioned earlier, which weighted the children's interest to the recognition of the foreign birth certificate listing the two male petitioners as the legal fathers against other values such as

> 'the respect for the dignity and the moral integrity of the surrogate woman, the avoidance of the exploitation of the state of need in which young women may be found in poverty and the prevention of the commodification of pregnancy and kinship'.[78]

In searching 'the solution that least harms the children', the *Tribunal Supremo* stressed 'the dignity of the children not to be transformed into an object of commercial traffic'.[79] In so doing, however, it transformed the 'best interest of the child' in the 'least interest of the child', as the narrative of dignity that the Tribunal engaged with is the result of a 'prejudice'.[80]

Following this line of criticism, the *Sezioni Unite* could be reproached for having completely ignored the multiple harm to the children resulting from the nonrecognition of the foreign parental order. To begin with, from a general viewpoint, it is hard to understand how the perpetuation of the invisibility of the

[77] This was the position of the Corte d'Appello di Trento 23 February 2017, n 15 above, which considered that 'the lack of recognition of the kinship with the (parent-partner) would result in an evident prejudice for the children, whose rights would not be recognised in Italy with regard of (the parent-partner); nor would such a prejudice be excluded by the possibility, for the children, to enforce these rights against the other parent, thus preventing (the parent-partners) to exercise the parental liability toward them; the children would then be also prejudiced in that they loose the family identity that has been legitimately acquired in (Canada), as the family relationship with (the parent-partner) established there has no relevance here'. Among scholars see G. Rossolillo, 'Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo' *Diritti umani diritto internazionale*, 202, 207 (2015). Against this characterisation see G. Perlingieri and G. Zarra, n 27 above, 88-90.

[78] Tribunal Supremo 6 February 2014 no 853/2013, paras 4.7-4.8, n 70 above.

[79] ibid para 4.8.

[80] A. Calvo Caravaca and J. Carrascosa Gonzáles, 'Comentario de la sentencia del Tribunal Supremo de 6 de febrero de 2014 (247/2014)', *Comentarios a las sentencias de unificación de doctrina: civil y mercantil*, 395-410, 402 (2016).

intentional father could be in the interests of the children involved.[81] More specifically, the nonrecognition impacts the child's interests: (i) not to live in a situation of legal uncertainty about parentage;[82] (ii) to access the citizenship of the intended father;[83] (iii) to stay in the intended father's country of residence;[84] (iv) to inherit under his estate;[85] (v) to preserve the relationship with him in case of family disruption or death of the biological father;[86] (vi) to enforce support obligations against the quitting father. Despite the fact that each of these interests represent a violation of the child's right to identity and private life,[87]

[81] On the problem of the 'invisibility' of the parent-partner in American family law see M.H. Weiner, *A Parent-Partner Status for American Family Law* (New York: Cambridge University Press, 2015), 32-61.

[82] On this point, the European Court of Human Rights observed that, '(w)hile it is true that a legal parent-child relationship with the (intentional parents) is acknowledged by the French courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system. In other words, although aware that the children have been identified in another country as the children of the (intentional parents), France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity within French society.' Eur. Court H.R., *Mennesson* v *France* n 29 above, para 96; similarly Eur. Court H.R., *Labassee* v *France* n 29 above, para 75. The distinction between acknowledgement and recognition of a foreing status is to be understood with regard to the argument raised by the French government that the interference with the petitioners' family life was limited to the civil-status document and did not extent to all other aspects of such a life. See Eur. Court H.R., *Mennesson* v *France* n 29 above, para 71 and Eur. Court H.R., *Labassee v France* n 29 above, para 71.

[83] In the case before the *Sezioni Unite*, the problem did not arise as the legal kinship with the biological father had been recognized with no difficulties, resulting in the children acquiring the father's Italian citizenship (in addition to that of Canada's). Italian citizenship is acquired as a result of the simple legal kinship (*iure sanguinis*) according to Arts 1, para 1, letter *a*) and 2, para 1, of legge 5 February 1992 no 91. In general, the uncertainty about the children's citizenship 'is liable to have negative repercussions on the definition of their personal identity'. Eur. Court H.R., *Mennesson* v *France* n 29 above, para 97; similarly Eur. Court H.R., *Labassee* v *France*, n 29 above, para 76. On 25 January 2013, the French Ministry of Justice had issued a circular entitling children born abroad via surrogacy to apply for French citizenship certificates based on the foreign birth certificates provided that one of the parents was French. The Conseil d'Etat rejected a motion for annulment of this circular. See Conseil d'Etat 12 December 2014 no 367324, *Association Juristes pour l'enfance et autres*, available on *Dalloz*. On a more general stance, although the ECHR contains no provision regarding citizenship, the European Court of Human Rights has found that citizenship, insofar as it impacts an individual's social identity, can be brought within the scope of Art 8. See Eur Court H.R., *Genovese* v *Malta*, App no 53124/09, Judgment of 11 October 2011, para 33, available at www.hudoc.echr.coe.it.

[84] Under Italian law, the residence of a child is jointly determined by the parents. However, if one of the parents the child live with is not legally recognised, the other can take the decision to move to another country unilaterally, thus disrupting the life of the child and his/her environment.

[85] The inheritance rights of the child depend on whether the intended parent has expressly designated such a child as a legatee, with actual inheritance being submitted to a tax duty as per a third party. See Eur. Court H.R., *Mennesson* v *France*, n 29 above, para 98; Eur. Court H.R., *Labassee* v *France*, n 29 above, para 77.

[86] For a dramatic example of litigation following the disruption of a female couple and a child intrastate abduction see M.M. Winkler, n 5 above, 386-387.

[87] See Advisory opinion of 10 April 2019, n 55 above, para 40; A. Calvo Caravaca and J.

the *Sezioni Unite* balanced none of these interests against the surrogacy ban.

Finally, the arguments developed in support of the prevalence of the surrogacy ban *vis-à-vis* the best interests rule are centred exclusively on the parents' conduct, as the multiple references to the procreative project and, to a lessen extent, to the dignity of the surrogate demonstrate.

This point was addressed by the German Federal Supreme Court (*Bundesgerichtshof*, BGH) in a case of 2014 regarding the recognition of a parental order issued in favour of the two intentional fathers in California.[88] After considering that the general preventive function of the surrogacy ban does not necessarily materialise in a principle of international public policy, the BGH observed that the child was simply the result of the circumvention of such a ban and therefore cannot be held responsible for it.[89] Moreover, insofar as the surrogate mother acted voluntarily – both by undertaking the surrogacy and waiving her parental rights – and her parental rights were terminated lawfully, her human dignity cannot be said to be violated.[90] Concerning the dignity of the child, the BGH observed very briefly that it cannot be violated because the child owns his/her own existence to the surrogacy arrangement.[91]

Compared to the *Sezioni Unite*, the BGH deconstructed the arguments in support of the surrogacy ban and reviewed them against the best interests of the child involved in the case. We find this being the essence of the hermeneutic operation commanded by Art 3 of the New York Convention. By contrast, the *Sezioni Unite* refused to engage in such an operation by taking a decision not *in concreto*, but as affecting children in general and relegating its own role as that of a mere executor of legislative intent. Finally, this decision was made having in mind the behaviour of the intentional parents and not the needs of the children involved. In fact, it is extremely naïve to claim that gay couples wishing to have children will surrender any attempt to resort to foreign surrogacy after realising that their children's kinship with their intentional fathers will not be legally recognised. As Sylvie Mennesson commented, 'the fear of the police has never stopped them'.[92]

c) The Child's Best Interests and the Secondparent Adoption

For the *Sezioni Unite*, the court's obligation to take account of the best interests of the child was fulfilled by allowing the parents to access the

Carrascosa Gonzáles, n 80 above, 405-406.

[88] Bundesgerichtshof 10 December 2014 no XII ZB 463/13, *Deutsche Notar-Zeitschrift*, 296 (2015).

[89] ibid paras 45-46.

[90] ibid paras 39, 41.

[91] For a criticism see S.L. Gössl, 'The Recognition of a "Judgment of Paternity" in a Case of Cross-Border Surrogacy under German Law. Commentary to BGH, 10 December 2014, AZ. XII ZB 463/13' *Cuadernos de derecho transnacional*, 448, 461-462 (2015).

[92] Eur. Court H.R., *Mennesson* v *France*, n 29 above.

secondparent adoption (*adozione in casi particolari*). In contrast to this view, we argue that the recognition of a full legal kinship between the children and the two fathers offered a better protection to the integrity of the family compared to the secondparent adoption. Academic research has demonstrated in this regard that the freestanding status of the intentional father is detrimental to both the children and the father himself, undermining the former's legal security and the latter's self-esteem.[93] However, the ability of the secondparent adoption to correct this problem by fully ensuring the children's well-being is very limited.[94]

First, the sole individual entitled to file for secondparent adoption is the intentional father, whether or not into a civil partnership, whereas neither the child nor the biological father has standing in this regard.[95] Therefore, whereas in the event of a fully recognised legal kinship the children could claim material support through the biological parent acting on their behalf, the freestanding intentional father could quit the family at any time and bear no support obligation toward the child.

In turn, this point raises the spectre of discrimination. Compare a child born of two women with a child born of two men through surrogacy. As a result of the judgment of *Sezioni Unite*, the former child has two parents whereas the latter has just one, at least for the first years of his/her life and until the intentional father has obtained a secondparent adoption. Because for any child it is a pure luck to be born within a couple of women rather than within a couple of men, the different legal treatment resulting from the judgment of *Sezioni Unite* entails a discrimination based on the sex and the sexual orientation of the parents, which is prohibited.[96] By making children born via foreign surrogacy 'new phantoms', the *Sezioni Unite* reinforced an idea of illegitimacy that has been espunged by Italian law since almost a decade.[97]

Furthermore, under Italian law the secondparent adoption does not consolidate a full legal relationship with the family of the intentional father. This flaw is the

[93] See F. Ferrari, n 17 above, 77.

[94] In this specific regard, Art 3(2) of the New York Convention of 1989 on the Rights of the Child states engages States Parties to 'ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents and shall take all appropriate legislative and administrative measures'.

[95] In Italian judicial practice, the fact that the child's parents are in a civil partnership – or in a foreign same-sex marriage, for what it matters – is not a condition to access the secondparent adoption, but a circumstance that reinforces the court's finding of the stability of the family.

[96] See Art 2(1) of the New York Convention, prescribing that children are not discriminated within the jurisdiction of the States Parties based on their parents' 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.

[97] In fact, '(t)he resort to surrogacy abroad subjects these families to legal disabilities that recall the disadvantageous treatment of children born out of wedlock received under what are now considered discriminatory legal regimes that violate human rights norms'. R.F. Storrow, 'The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy' 20(3) *Journal of Gender, Social Policy & the Law*, 561, 568 (2012).

result of a provision of the law on adoption that fills the gaps of the secondparent adoption regime by referring to the provisions on adult adoption contained in the Civil Code.[98] Courts have acknowledged in this regard that full adoption ensures 'a bunch of rights which is broader and more beneficial than that of (the secondparent adoption)'[99] and that such a regime 'exposes itself to constitutional scrutiny'.[100]

Finally, not all Italian courts are actually open to grant secondparent adoption to same-sex couples. As we noted above, the Court of Appeals of Trento had addressed this point and concluded for the insufficiency of the secondparent adoption to realise the children's interest to their full extent. The *Sezioni Unite*, however, spoke as if secondparent adoption is a reality in Italian law – which is not. In this regard, in its advisory opinion of 10 April 2019 the ECtHR has stated that access to secondparent adoption in the context of children born via foreign surrogacy must be *effective* – thus enabling the relationship to be recognised – and *sufficiently rapid* so that the child is not kept for a lengthy period in a position of legal uncertainty about its identity regarding the relationship with his/her intentional parent.[101] With couples queing outside courtrooms for two-three years before obtaining a first instance decision on the adoption of their children, this judicial practice hardly could be said to fulfil these parameters.

IV. Conclusions

The judgment of the *Sezioni Unite* will certanly divide the commentators on the question of its departure from the previous case law of the *Sezione Prima* in matters related to the offspring of same-sex couples. While some will likely identify a fundamental difference between the case of a couple of women having a baby through assisted reproductive technologies and a couple of men resorting to surrogacy, others will see in the decision of the court a conservative turn willingly distinguishing itself from previous liberal decisions.

After presenting the specific factual and legal background of the case, we analysed its two main aspects – the public policy control and the role played by the child's best interest – in order to reach a mixed conclusion. Although indeed the facts of the case differ from those of the 2016 *Sezione Prima* decision on the

[98] See Art 54 of legge no 184/1983, which refers to Art 300, para 2, of the Civil Code, stating that '(The) adoption does not result in a civil relationship between the adopted and the relatives of the adoptee'.

[99] Corte d'Appello di Milano 1 December 2015, *Il diritto di famiglia e delle persone*, 155 (2016), which recognised the adoption order of a child by her intentional mother issued by a Spanish court. The couple had resorted to the CSO of Milan, which however had refused to register the adoption order on the ground of the nonexistence, in Italian law, of a secondparent adoption with full legitimacy effects. The Corte d'Appello, as we said, rejected this conclusion, seeing no obstacles to the recognition.

[100] Tribunale per i Minorenni di Firenze 8 March 2017, available on the portal www.articolo29.it.

[101] Advisory Opinion 10 April 2019, para 54, n 55 above.

point that it involved the participation of a surrogate, the decision of the *Sezioni Unite* also distinguishes itself in more conservative methodological choices.

On the one hand, the scope of international public policy is extended towards norms of national law, which had been set aside by the 2016 ruling when assessing the reach of the exception. The technique used in both rulings is however misleading as far as it is articulated around the identification of a content proper to international public policy. While it can provide an idea of predictability through a neutral and abstract determination of the exception, in practice the panel can also mould this same definition, leading to a solution more difficult to challenge in future litigation. Besides, a reasoning centred on the content of international public policy loses sight of its implementation, which should in any case be *in concreto*. It is indeed the compatibility between the effects of the foreign norm and the legal system's legal core that should be determined through the public policy control, and not an abstract examination of the intent of the national legislator. From this point of view it is questionable whether the exception has been opposed to a situation whose effects concretely contrast with the legal system's core. The solution fails, moreover, to achieve the objectives that it pursues, while insufficiently considering the best interests of the child.

More particularly, regarding this issue, we chose professor Eekelaar's methodological approach to guide our analysis. The *Sezioni Unite* incorporated the question among the elements of the international public policy control, which failed in concretely considering the negative impact of the lack of recognition on the situation of the children. Moreover, the court suggested that these interests will be ensured through secondparent adoption – adjusting somehow the solution to the freshly issued ECtHR advisory opinion according to the children's rights under Art 8 of the ECHR would be safeguarded as far as the legal kinship with the intentional intended parent could be ensured through other means such as the secondparent adoption.

Under the current state of Italian law, however, the requirements listed by the ECtHR (an effective and sufficiently rapid solution) remain unfulfilled, insofar as it does not arise clearly from the tribunals' practice that secondparent adoption would be conceded to same-sex couples, while not conferring a protection that is comparable to the recognition of the legal kinship established by the foreign legal system. The *Sezioni Unite* left the 'voice' of the children born via surrogacy abroad basically unheard, leaving this issue open to further litigation in the future.