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Foreword

Maria Caterina Baruffi* and Laura Calafà**

This special issue of the journal *Papers di diritto europeo* collects the proceedings of the conference organized within the project «Identities on the move. Documents cross borders - DxB» (selected under the call for proposals «Action grants to support judicial cooperation in civil and criminal matters» – JUST-JCOO-AG-2020, co-funded by the European Union within the Justice Programme 2014-2020). The project is coordinated by the University of Verona and the Consortium is composed of the University of Graz, the Aristotle University of Thessaloniki, the European Association of Registrars (EVS) and the Italian Association of Civil Status Officers and Registrars (ANUSCA), at whose premises the final conference took place on 23 and 24 June 2022.

The final event has provided the opportunity to deepen the analysis of Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which was at the core of the research and scientific activities of the DxB project. The idea of focusing on this Regulation comes from the limited knowledge that both practitioners and citizens still have of it, despite its being a valuable instrument to bring people closer and make the European Union more integrated thanks to the simplification of administrative formalities. The issues related to the mutual recognition of public documents and their circulation across Member States are among the most important and urgent challenges in a globalized society. The aim of the project, then, is to raise awareness among registrars and legal practitioners and gain a more extensive expertise on how and to what extent the Regulation is actually applied in national practices, ultimately ensuring a better understanding of this tool.

Against this background, the conference's speakers contributed to give an extensive overview of this EU act in the context of national civil status systems, the free movement of persons and the Charter of fundamental rights of the European Union. Presentations also provided specific information regarding how the Regulation addresses the problematic aspects and deficiencies of the current legal framework, under both interpretative and operational perspectives.

The conference has been a truly international event that effectively encouraged the development of a concrete cooperation among the participants, i.e. scholars, registrars,

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public administrators, and practitioners from all over Europe. To all of them goes our gratitude for accepting to taking part in the DxB project as well as to the authors of this special issue. We are also thankful to Alexander Schuster for his input in managing the project and organizing the conference. Thus, the proceedings collected in the following pages represent both a final output and a starting point to further debates and exchange of views on the application of the Public Documents Regulation.

Lastly, the contents of all the papers, which are published in alphabetical order, are the sole responsibility of the respective authors and do not reflect the views of the European Commission.

«If you are a parent in one country, you are a parent in every country»: is it true for social parenthood?

Stefania Pia Perrino*

CONTENTS: 1. Defining the phenomenon. – 2. The declinations of the phenomenon. – 3. Social parenthood against the public policy. – 4. The recent ruling by the European Court of Justice. – 5. Conclusion.

1. Defining the phenomenon.

Parenthood is the legal relationship between a child and the child's parents: this notion of the parental *status* can be found in Recital 14 of Regulation (EU) 2016/1191[1]. A similar notion can be traced in the Presidential decree of 30 May 1989, no. 223[2], which provides the legal framework for the registry regulation of the resident population in Italy. In the Presidential decree, Art. 4 describes the concept of demographic resident family as the group of people connected by marriage, kinship, adoption, and affection, people who live together and stay in the same city.

In the above-mentioned sources there is no indication of the relevance of the genetic link or of the relevance of the use of ordinary methods of sexual reproduction for filiation. Differently, the Italian discipline dedicated to filiation – first of all the Civil Code – is characterized by a direct reference to filiation born during marriage, legitimate filiation, or to natural filiation, as biological filiation, identified by genetic links between parents and children, except for the provisions of the law on adoptions[3].

However, recently, EU citizens and even Italian citizens are establishing parenthood through consent or intended parent agreements, where allowed, without any genetic link with children, through artificial reproduction techniques or different kind of

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[1] Regulation (EU) 2016/1191 of the European Parliament and of the Council, of 6 July 2016, on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

[2] Presidential decree of 30 May 1989, no. 223, Approvazione del nuovo regolamento anagrafico della popolazione residente.

[3] On the matter, see G. IORIO, *Corso di diritto privato*, IV ed., Torino, 2020, p. 1015.

adoptions. This new phenomenon – that is relevant both in EU and in extra EU countries – can be defined as social or intended parenthood[4].

Social parenthood – in a first approximation – can be intended as the relationship between the person assuming parental responsibility and the child, in the absence of a genetic, biological, and gestational contribution between the former and the latter.

The above-mentioned category[5] may include all forms of filiation resulting from the various types of adoption[6], the stepchild adoption[7], filiation resulting from heterologous or allogenic medically assisted procreation[8], filiation from surrogacy[9], filiation from *post mortem* procreation[10], adoption of embryos[11]; all whether in favor of

[4] A.R. FAVRETTO, C. SCIVOLETTO, *Genitorialità sociale affidataria e continuità dei legami affettivi*, in *Sociologia del Diritto*, 2020, 1, pp. 131-152; L. GIACOMELLI, *Tutela dei minori e pragmatismo dei giudici: verso il riconoscimento delle «nuove» forme di filiazione e genitorialità*, in *Osservatorio AIC*, 2018, no. 3, pp. 551-587, available online; A. GORGONI, *La filiazione*, Torino, 2018, p. 83.

[5] On the notion of social parent, see also T. AULETTA, *L'incidenza dell'interesse del minore nella costituzione o rimozione dello stato filiale*, in M. BIANCA (a cura di), *The best interest of the child*, Roma, 2021, pp. 523-610.

[6] C.M. BIANCA, *Diritto civile. La famiglia*, vol. 2.1, VI ed., Milano, 2017, p. 451 ff.; M. DOGLIOTTI, F. ASTIGGIANO, *Le adozioni. minori italiani e stranieri, maggiorenni*, Milano, 2014, p. 3 ff.; P. MOROZZO DELLA ROCCA, *L'adozione dei minori. Presupposti ed effetti*, in AA.VV., *Filiazione e adozione*, vol. III, in G. FERRANDO (diretto da), *Il nuovo diritto di famiglia*, Bologna, 2007, p. 616 ff.; L. LENTI, *L'adozione*, in G. COLLURA, L. LENTI, M. MANTOVANI (a cura di), *Filiazione*, vol. II, in P. ZATTI (diretto da), *Trattato di diritto di famiglia*, Milano, 2002, p. 575 ff.; M. DOGLIOTTI, *Genitorialità biologica, genitorialità sociale, segreto sulle origini dell'adottato*, in *Famiglia e diritto*, 1999, pp. 406-409.

[7] M.G. STANZIONE, *Filiazione e genitorialità: il problema del terzo genitore*, Torino, 2010, p. 111 ff.

[8] R. VILLANI, *La "nuova" procreazione medicalmente assistita*, in L. LENTI, M. MANTOVANI (a cura di), *Il nuovo diritto della filiazione*, vol. II, in P. ZATTI (diretto da), *Trattato di diritto di famiglia – Le riforme*, Milano, 2019, p. 281 ff.; AA.VV., *La fecondazione assistita. Riflessioni di otto grandi giuristi*, Milano, 2005, p. 15 ff.; M. DOGLIOTTI, *La legge sulla procreazione assistita: problemi vecchi e nuovi*, in *Famiglia e diritto*, 2004, pp. 117-121; ID., *Una prima pronuncia sulla procreazione assistita: tutte infondate le questioni di legittimità costituzionale?*, in *Famiglia e diritto*, 2004, pp. 384-386; F. SANTOSUOSSO, *La procreazione medicalmente assistita*, Milano, 2004, p. 3 ff.; L. LENTI, *La procreazione artificiale. Genoma della persona e attribuzione della paternità*, Padova, 1993, p. 277 ff.; A. TRABUCCHI, *Inseminazione artificiale (diritto civile)*, in *Novissimo Digesto Italiano*, 1962, pp. 732-741.

[9] A. GORGONI, *La filiazione*, cit., p. 81 ff.; I. CORTI, *La maternità per sostituzione*, in S. CANESTRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (a cura di), *Il governo del corpo*, in S. RODOTÀ, P. ZATTI (diretto da), *Trattato di Biodiritto*, Milano, 2011, pp. 1479-1494; EAD., *La maternità per sostituzione*, Milano, 2000; P. GIUNTI, Per te tamen haberem…*Modelli antichi e moderni tra maternità biologica e maternità sociale*, in R. FIORI (a cura di), *Modelli teorici e metodologici nella storia del diritto privato*, Napoli, 2011, pp. 243-276; M. SESTA, *Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?*, in *Nuova giurisprudenza civile commentata*, 2000, II, pp. 203-213; P. ZATTI, *Maternità e surrogazione*, in *Nuova giurisprudenza civile commentata*, 2000, II, pp. 193-202.

[10] R. GIOVAGNOLI, *I contrasti del diritto civile*, Torino, 2020, p. 6 ff.; A. FIGONE, *Fecondazione omologa post mortem: nell'atto di nascita la paternità in capo al padre defunto*, in *ilFamiliarista*, 20 November 2019, available online; G. CASSANO, *Diritto di procreare e diritto del figlio alla doppia figura genitoriale nella inseminazione artificiale post mortem*, in *Famiglia e diritto*, 1999, pp. 384-393; G. BALDINI, *Ricognizione dei profili problematici in tema di fecondazione artificiale* post mortem, in *Rassegna di diritto civile*, 1995, pp. 725-745.

[11] In the general area of embryo sharing, see L. FRITH, E. BLYTH, S. LUI, *Family building using embryo adoption: relationships and contact arrangements between provider and recipient families-a mixed-methods study*, in *Human Reproduction*, 2017, pp. 1092-1099; L. FRITH, E. BLYTH, *They can't have my embryo: the ethics of conditional embryo donation*, in *Bioethics*, 2013, pp. 317-324; L. FRITH, E. BLYTH,

female or male same-sex couples or different sex couples, even singles or in favor of one of the pair which does not share a gene pool with the child.

As can be seen from the broad definition offered, scholars can isolate two constituent components, relevant to the category. The first, identified as the positive prerequisite, relates to the assumption of the office of parental responsibility as a conscious and responsible choice by the parent. There is a clear reference to Art. 1 of the Italian abortion law[12]: Italy «guarantees the right to conscious and responsible procreation».

The second, identified in the negative prerequisite, relates to the lack or irrelevance of the same genetic or biological heritage between both parents and the child born or the lack of a gestation carried out by one of the parents for the birth of the child. The pregnancy can be carried out by a woman who differs from the one who wishes to carry out the family project and assume parental responsibility or the pregnancy can be carried out by her partner in a same-sex couple. The second case identifies as the so-called ROPA method, an acronym that means Reception of Oocytes from Partner[13]: in a same sex couple, one of the women can donate her oocytes to fertilize them with third parties' donated gametes and transfer the resulting embryo in her partner's uterus.

Alternatively, or additionally, there may be no shared genetic heritage, because asexual procreation is used, and the couple uses gametes or oocytes that belong to donors outside the couple. Furthermore, a social relationship may be established at the end of a procedure for the adoption of a child, aimed at ascertaining the requirements laid down by law. Filiation can be achieved even after the death of one of the patients of assisted procreation treatments: apart from the presumptions and provisions contained in the Civil Code, a legal relationship of filiation is established with the prematurely deceased parent, when the mother decides to carry out assisted procreation. In such a case there may be a genetic link with the father, or it may be missing, giving rise to a hypothesis of social parenthood.

The expression «social parenthood» refers to parenthood and not to filiation, as the Italian legislature frequently does: the nomenclature is adopted to emphasize the positive

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M.S. PAUL, R. BERGER, *Conditional embryo relinquishment: choosing to relinquish embryos for family-building through a Christian embryo 'adoption' programme*, in *Human Reproduction*, 2011, pp. 3327-3338; R.O. SAMANI, M.R.R. MOALEM, S.T. MERGHATI, L. ALIZADEH, *Debate in embryo donation: embryo donation or both-gamete donation?*, in *Reproductive BioMedicine Online*, 2009, pp. 29-33, available *online*.

[12] Law 22 May 1978, no. 194, Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza.

[13] In case law, see Italian Constitutional Court, judgment of 23 October 2019, no. 221 and Italian Court of Cassation, section I, judgment of 30 September 2016, no. 19599; S. STEFANELLI, *Procreazione medicalmente assistita e maternità surrogata: limiti nazionali e diritti fondamentali*, Milano, 2021, p. 133 ff.; EAD., *Non è incostituzionale il divieto di accesso alla procreazione medicalmente assistita per le coppie omosessuali femminili*, in *ilFamiliarista*, 5 February 2020; C. TRIPODINA, *Controrordine: la determinazione di avere un figlio (se delle coppie omosessuali) non è "incoercibile". La Corte costituzionale allo specchio della fecondazione eterologa*, in *Giurisprudenza costituzionale*, 2019, pp. 2622-2633.

and voluntarist component, from which the assumption of the office of parental responsibility over the child derives. Moreover, the term is influenced by the experience of other legal systems, where the discipline is devoted to parenting and not to filiation. The term is influenced by the European regulation on the protection of freedom of movement and residence, such as Regulation (EU) 2016/1191 on public documents.

Social parenthood differs from the forms of filiation known from the Civil Code not only in name: more precisely, it differs from natural filiation, the principle of *favor veritatis* is not the guiding principle of the discipline; unlike legitimate filiation, marriage is not relevant, except as a subjective requirement for access to the institutions from which social parenthood derives.

The identification of the arising category, that is different in terms of foundation, structure, and discipline, however, does not aim at circumventing the general interpretative canon, pursuant to Art. 315 of the Civil Code, according to which «all children have the same legal *status*», but aims at reaffirming the principle in question.

In addition to the noun, the adjective used in the syntagma is also relevant and the phenomenon can be defined by the expression «social parenting» for several reasons. First, the expression evokes the different but close term «social formation». The adjective reminds the interpreter of the progressive evolution of the family phenomenon: from a society legally protected by Art. 29 of the Italian Constitution, since it is founded on the marital bond, we have come to rethink the family as a concept with variable geometry[14], including social formations that are increasingly important, even of not equally protected by law, according to Arts. 2-3 of the Italian Constitution[15]. The two phenomena – parenthood and formations – necessarily intersect, often the first phenomenon underlies the second and the related developments occurred, so that the analysis of social parenthood requires the jurist to consider this intersection.

The second reason is more immediately understandable: the case law[16] and scholars[17] have begun to mention the expression «social parent» to indicate the phenomenon in its various declinations, to include cases in which the adult assumes the parental responsibility or on an established and continuous socio-affective relationship or on the reconstruction of relationships. An authoritative doctrinaire voice[18], commenting on the European pronouncements that have dealt with the subject, does not exclude that

[14] F.D. BUSNELLI, *La famiglia e l'arcipelago familiare*, in *Rivista di diritto civile*, 2002, 1, pp. 509-529. See also V. SCALISI, *Le stagioni della famiglia nel diritto dall'Unità d'Italia a oggi. Parte seconda, "Pluralizzazione" e "riconoscimento" anche in prospettiva europea*, in *Rivista di diritto civile*, 2013, pp. 1287-1318.

[15] On the matter, see G. IORIO, *Corso di diritto privato*, cit., p. 1075 ff.

[16] Tribunal of Palermo, section I, decree of 6 April 2015, in *Corriere giuridico*, 2015, pp. 1549-1555.

[17] A. GORGONI, *La filiazione*, cit., p. 89.

[18] V. SCALISI, *Il superiore interesse del minore ovvero il fatto come diritto*, in *Rivista di diritto civile*, 2018, pp. 405-434.

in all these cases, regardless of biological or genetic ties, it is the superior interest of the child[19] to base the actual filiation relationship completely independent of any correlative biological parenthood.

Finally, the European Report on Human Artificial Insemination of the Council of Europe adheres to the principle of social paternity in principle no. 14.2[20].

However, social parenthood phenomenon is not illustrated in any code, law, or discipline of positive law[21]: this is a category which has emerged in recent years, and which is dealt with by jurisprudence and scholars on «case by case» basis. Different scholars use different names, such as intended parenthood, or *de facto* parenthood, in the same country and even through the European Union there is not a common framework nor a common syllabus on the matter.

2. The declinations of the phenomenon.

The different hypotheses of social parenthood are partly regulated by the legislator: for instance, with law of 4 May 1983, no. 184[22], concerning adoptions, or with law of 19 February 2004, no. 40[23], concerning assisted procreation, in the Italian legal system[24].

For different aspects, jurisprudence allows new cases of social parenthood to emerge, implementing the «potential normativity»[25] through the hermeneutics of constitutional precepts and of the law applied to the concrete case. This has happened – for example – with the declaration of constitutional illegitimacy of the ban on heterologous procreation, which has made possible the use of fertilization through gametes and oocytes of donors, which are third parties to the couple[26].

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[19] M. BIANCA (a cura di), *The best interest of the child*, Roma, 2021, available *online*; G. LANEVE, *La tutela degli interessi del minore nel rapporto genitori-figli a quarant'anni dalla sentenza Corte cost. n. 11 del 1981*, in *Studium Iuris*, 2021, pp. 1332-1341; E. LAMARQUE, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale*, Milano, 2016, p. 150 ff.

[20] Report on Human Artificial Procreation. Principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), 1989, available *online*.

[21] On the matter, T. AULETTA, *L'incidenza dell'interesse del minore nella costituzione o rimozione dello stato filiale*, cit., p. 557. The author affirms that only some cases of social parenthood are regulated by law, such as adoptions and medically assisted procreation, while others are *de facto* situations that are not regulated by law but arise in cases where an adult is exercising parental responsibility as a member of the spouse's or cohabiting partner's family. About the different cases, see para. 2 in this paper.

[22] Law of 4 May 1983, no. 184, Diritto del minore ad una famiglia.

[23] Law of 19 February 2004, no. 40, Norme in materia di procreazione medicalmente assistita.

[24] R. VILLANI, *La "nuova" procreazione medicalmente assistita*, cit., p. 329; C. CAMPIGLIO, *La procreazione medicalmente assistita nel quadro internazionale e transnazionale*, in S. CANESTRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (a cura di), *Il governo del corpo*, cit., pp. 1497-1516.

[25] P. GROSSI, *Ritorno al diritto*, Bari, 2015, p. 33 ff.; ID., *Il diritto civile italiano alle soglie del terzo millennio (una pos-fazione)*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 2010, pp. 465-487.

[26] Italian Constitutional Court, judgment of 10 June 2014, no. 162, commented by U. SALANITRO, *I requisiti soggettivi per la procreazione assistita: limiti ai diritti fondamentali e ruolo dell'interprete*, in *La nuova giurisprudenza civile commentata*, 2016, pp. 1360-1367; V. CARBONE, *Sterilità della coppia. Fecondazione eterologa anche in Italia*, in *Famiglia e Diritto*, 2014, pp. 761-770; G. CASABURI, *Requiem*

Jurisprudence[27], again, identified the internal coherence between the regulatory provisions through an interpretation compatible with the Constitution, as in the case of *post mortem* fertilization. Notwithstanding its general ban, the Courts have allowed the use of cryopreserved embryos or frozen gametes by the wife even after the death of her husband. To allow the procedures, the jurisprudence has brought back in the paradigm of Law no. 40/2004, and attributed the parenthood to the husband, deceased before the implantation and conception, despite the administrative sanction provided for artificial insemination techniques to couples whose members are not both living. The reason can be traced in the peculiar informed consent in assisted reproduction procedures: after the fertilization of the oocyte, there is no space for withdrawal of consent; even if the embryo is not yet formed the death arrived before the withdraw of the consent; the consent provided during the life is still an authorization for the procedure to be completed; the artificial reproduction is a unique cycle and not a compound of various medical treatments.

Similar considerations apply to the adoption of the child of the same-sex partner: the institution has not been regulated in the Law of 20 May 2016, no. 76[28], however, jurisprudence has given legal importance to the factual, significant, and stable relationship between partner and child of the other partner, operating an evolutionary interpretation of Art. 44(1)(d) of the Law no. 184/1983. In accordance with the new exegetical approach, the applicative presupposition of the impossibility of pre-adoptive fostering, provided for by the law, is to be understood as a *de facto* impossibility and also legal impossibility: the ascertained impossibility of pre-adoptive fostering, therefore, does not depend only on the declared state of abandonment, but also on a legal impediment to the pre-adoptive fostering of the child, determined by the absence of the state of abandonment, which allows to give importance to the above-mentioned factual situation.

Finally, there are cases of social parenthood which are positively recognized abroad while in Italy are expressly prohibited. These cases of social parenthood, in Italy, are often subject to administrative or even criminal sanctions, hindered by public policy limits. In these cases, public policy also prevents the recognition of the foreign act or measure in

(gioiosa) per il divieto di fecondazione eterologa: l'agonia della l. 40/04, in *Il Foro Italiano*, 2014, I, cc. 2343-2344; L. D'AVACK, *Cade il divieto all'eterologa, ma la tecnica procreativa resta un percorso tutto da regolamentare*, in *Il Diritto di famiglia e delle persone*, 2014, pp. 1005-1017; G. FERRANDO, *Autonomia delle persone e intervento pubblico nella riproduzione assistita. Illegittimo il divieto di fecondazione eterologa*, in *La nuova giurisprudenza civile commentata*, 2014, pp. 393-408.

[27] Italian Court of Cassation, section I, judgment of 15 May 2019, no. 13000; Tribunal of Lecce, judgment of 24 June 2019, no. 2190, commented by D. GIUNCHEDI, *L'impianto intrauterino degli embrioni dopo il decesso del marito*, in *Giustiziacivile.com*, 10 December 2019.

[28] Law of 20 May 2016, no. 76, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze.

accordance with the rules of private international law, so the social filiation and parenthood cannot be fully recognized and protected.

Examples of this sub-category are the filiation by surrogacy, forbidden by Art. 12(6) of the Law no. 40/2004 and the «adoption of abandoned embryos» or embryo-adoption[29], which is not allowed in Italy, while is legal in other countries, as snowflake adoptions. The second is not an actual adoption of minor, snowflakes adoption involves embryos. More precisely, when the embryos are cryopreserved and abandoned by the patient who paid for their formation and the specialization of the cells, the cells can be transferred to third parties to give them the chance to give birth through an artificial reproduction cycle where the new patients are not genetically linked to the embryo received.

So, this assumption brings scholars to the question: «If you are a parent in one country, you are a parent in every country»[30], as recently stated, is it true for social parenthood? More precisely: is it true for forbidden social parenthood already established abroad?

3. Social parenthood against the public policy.

As mentioned before, there are cases in which the filiation and the parenthood statuses are formed in other countries, that can be defined as liberal countries, where the statuses are descripted in statutes and codes. However, the same statuses can be precluded, forbidden, and even sanctioned in other more conservative countries. This situation may occur, frequently in the bio-law area of study, when people and specifically social families exercise their rights of circulation on the EU territory and determine a comparison between the countries which adhere to the British way or to the French way[31]. The latter group is considered more conservative in the legislation on parenthood and on the new medical procedures which can help to form families; the first group is considered by scholars more liberal on the matter.

When a family is formed in a liberal legal system through the medical or legal procedures above described, as in Greece or Spain, some problems of status recognition may occur when the family moves in a conservative system, as in Italy or Germany. When people circulate, they bring their statuses and when they move and live in other countries they seek recognition, but it happens to meet an obstacle in the public policy of a French way legal system. This situation arises also and more often when the circulation is

[29] K.D. KATZ, *Snowflake adoptions and orphan embryos: the legal implications of embryo donation*, in *Wis Womens Law Journal*, 2003, pp. 179-231.

[30] The quote is from Ursula von der Leyen, President of the European Commission, in her address of the State of the Union in September 2020.

[31] The classification can be attributed to F.D. BUSNELLI, E. PALMERINI, *Clonazione*, in *Digesto delle discipline privatistiche*, 2000, vol. 7, p. 73.

exercised outside the EU territory, for example circulating from United States or Canada to Italy or Germany.

For example, social parenthood can be found in the case of the abovementioned snowflakes adoption[32].

The adoption law cannot be applied by analogy to embryo-adoption, because the object of transfer is a peculiar, it is a specialized cell not a minor, even if protected by law. The adoption law contains a discipline of strict interpretation, and the embryo adoption needs a specific legal framework[33], considering the different territorial jurisdiction of the deciding court, the different subjective requirements for access, the different modalities of execution, the different disciplines between Italian regions and the transfer of the burden of payment of cryopreservation costs to new patients[34].

The mentioned procedure is frequent in the United States, but it is forbidden in some of the French way countries, such as Italy, where the transfer, even free of charge, of reproductive cells is prohibited and sanctioned by law. In Italy, patients can abandon their cells and embryos, but they cannot decide the destination of the cells, which must be transferred to the National Biobank under the control of the Ministry of Health. When a social family is formed in the US by embryo-adoption, is the social parenthood eligible for recognition? Social parenthood in this case cannot be constituted in Italy and when the snowflake adoption is finalized abroad, the legal foreign *status* meets a public policy obstacle in the laws which sanction the transfer of embryos outside the cases admitted[35].

Filiation through surrogacy is another case in which the notion of parent has not changed and has not been elaborated in a shared and coordinated way among legal systems, leading to confusion and gaps in family protection. Surrogacy constitutes another case of forbidden social parenthood, for both patients who want to become parents.

Surrogacy is a medical procedure that is carried out with the implantation of an embryo in the uterus of a person other than the one who will assume parental responsibility for the child and, more generally, in the uterus of a person other than those who intend to pursue the family project[36]. The procedure can also be characterized by using an oocyte from the pregnant woman, fertilized, and then implanted in the uterus. In

[32] On the matter, see J. MILLBANK, A. STUHMCKE, I. KARPIN, *Embryo donation and understanding of kinship: the impact of law and policy*, in *Human Reproduction*, 2017, pp. 133-138, available online.

[33] F.D. BUSNELLI, *Cosa resta della Legge 40? Il paradosso della soggettività del concepito*, in *Rivista di diritto civile*, 2011, pp. 459-476, at p. 467 ff.; D. CARUSI, *In vita, «in vitro», in potenza. Verso una donazione dell'embrione soprannumerario?*, in *Rivista critica del diritto privato*, 2010, pp. 333-340, at p. 340.

[34] S.P. PERRINO, *Embrio-adozioni: a brave new world?*, in *Giustiziacivile.com*, 1 February 2021, p. 4.

[35] S.P. PERRINO, *Embrio-adozioni: a brave new world?*, cit., p. 10.

[36] On the role of the third party or third parent, see E. AL MUREDEN, *Il diritto del minore alla bigenitorialità ed il ruolo del terzo genitore nella prospettiva della famiglia ricomposta*, in M. BIANCA (a cura di), *The best interest of the child*, cit., pp. 269-284.

the first case, we discuss biological surrogacy, in the second case, maternal biological surrogacy[37].

A variety of labels are attributed to this medical procedure: surrogacy, surrogate motherhood, uterus by rent, and, in its most descriptive sense, gestation for others.

The gestation for others can be altruistic, free, but also commercial and even professional[38]. Despite this, in the Italian system this medical procedure is always prohibited, sanctioned by Law no. 40/2004, according to Art. 12(6), «in any form»[39].

Many elements of the criminal offence are not clear, such as the relevant procedures for the crime legal scheme and the relevant authors of the criminal offence. Furthermore, it is unclear if the crime can punish surrogacy committed by Italian citizens abroad[40].

To extend the punishment of the crime, a consistent number of bills and draft of laws have been tabled in the Italian Parliament, with a view to repressing the phenomenon of procreative tourism aimed at achieving surrogacy by Italian citizens, even abroad, and to identify ways in which civil officers can report and denounce the offence to the Public Prosecutor[41].

This paper does not deal with the appropriateness or arguments in support or against such a ban but is concerned with the hypotheses that have engaged and continue to engage jurisprudence and doctrine in the last decade. The thought runs to the surrogacy

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[37] A. GORGONI, *La filiazione*, cit., p. 81 ff.; I. CORTI, *La maternità per sostituzione*, in S. CANESTRARI, G. FERRANDO, C.M. MAZZONI, S. RODOTÀ, P. ZATTI (a cura di), *Il governo del corpo*, cit.; EAD., *La maternità per sostituzione*, cit.; P. GIUNTI, Per te tamen haberem, cit.; M. SESTA, *Norme imperative, ordine pubblico e buon costume*, cit.; P. ZATTI, *Maternità e surrogazione*, cit.

[38] E. CAPULLI, *Gestazione per altri: corpi riproduttivi tra biocapitale e biodiritto*, in *BioLaw Journal*, 2021, no. 1, pp. 119-137, available *online*; E. JACKSON, J. MILLBANK, I. KARPIN, A. STUHMCKE, *Learning From Cross-Border Reproduction*, in *Medical law review*, 2017, pp. 23-46, available *online*; C. CHINI, *Maternità surrogate: nodi critici tra logica del dono e preminente interesse del minore*, in *BioLaw Journal*, 2016, no. 1, pp. 173-187, available *online*; E. JACKSON, *UK Law and International Commercial Surrogacy: the very antithesis of sensible*, in *Journal of medical law and ethics*, 2016, no. 4, pp. 197-214; EAD., *Selling babies? The legal and ethical implications of surrogacy*, in *Women: a cultural review*, 1996, pp. 250-258.

[39] On the different surrogacy agreement see G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Napoli, 2019, *passim*; for a different approach between altruistic and commercial surrogacy see B. PEZZINI, *Nascere da un corpo di donna: un inquadramento costituzionalmente orientato dall'analisi di genere della gravidanza per altri*, in *Costituzionalismo.it*, 2017, II, pp. 183-245, at p. 201, available *online*.

[40] M. PELISSERO, *Surrogazione di maternità: la pretesa di un diritto punitivo universale. Osservazioni sulle proposte di legge n. 2599 (Carfagna) e 306 (Meloni), Camera dei deputati*, in *Sistema Penale*, 29 June 2021, available *online*; A. VALLINI, *Procreazione medicalmente assistita (diritto penale)*, in *Enciclopedia del diritto*, Annali IX, 2016, pp. 696-724; ID., *Illecito concepimento e valore del concepito. Statuto punitivo della procreazione, principi, prassi*, Torino, 2012, p. 98 ff.; F. MANTOVANI, *Umanità e razionalità del diritto penale*, Padova, 2008, pp. 1464-1473.

[41] S.519, Modifica alla legge 19 febbraio 2004, n. 40, in materia di reato di surrogazione di maternità commesso all'estero; S.201, Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano; C.2599, Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano; C.306, Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano.

performed abroad, in accordance with foreign law, at the end of which the parents of the child born – according to foreign law – request the recognition of the *status filiationis* in Italy, even if without genetic, biological, and gestational ties[42]. Once back in Italy, it is possible to predict that the new social formation would seek the competent authority to obtain the transcription of the foreign birth certificate or of the measure recognizing social filiation or the issue of documents for the child. The public servant, however, could oppose to the transcription or to the modification of the birth certificate or to the issue of documents, when the foreign certificate does not show the biological parents but two social parents or a social parent and a biological parent or only a social parent, in different sex couples or same sex couples.

The recognition of the act or the release of the requested measures finds an obstacle in the Italian law, specifically in the public policy.

The public policy is a general clause[43] used by Member States and in general by countries to defend the legal system from legal transplant of new legal phenomena effects or from the recognition of foreign legal institutes, as provided by the rules of private international law. Therefore, the public policy clause constitutes a negative limitation, with a protective function of the legal system and represents a standard for assessing the lawfulness of private actions[44].

The abovementioned clause is not defined by the legislator, but the meaning of the clause must be scrutinized with a case-by-case method, selecting the relevant principles and values to apply for the recognition[45].

Two conceptions of public order have opposed each other over time: the domestic public order and the international public order. The distinction recalls the opposing perspectives of Savigny[46] and Mancini[47]: according to the first author, the public policy

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[42] R. BIN, *Tecniche procreative, ordine pubblico e interesse del minore*, in *BioLaw Journal*, 2021, no. 3, pp. 145-150, available *online*.

[43] P. PERLINGIERI, *Obbligazioni e contratti*, in *Annuari del contratto 2016*, Torino, 2017, p. 213; V. ROPPO, *Il contratto*, II ed., Milano, 2011, p. 387; G. GALGANO, *Diritto privato*, XIII ed., Padova, 2006, p. 267-269; ID., *Il negozio giuridico*, in A. CICU, F. MESSINEO, L. MENGONI, P. SCHLESINGER (a cura di), *Trattato di diritto civile e commerciale*, vol. III, 1, Milano, 2002, p. 284; P. BARCELLONA, *Clausole generali e giustizia costituzionale*, Torino, 2006, p. 35; P. TRIMARCHI, *Istituzioni di diritto privato*, Milano, 1995, p. 238; K.G. WURZEL, *Das juristische Denken*, II ed., Vienna-Leipzig, 1924, p. 86; O. WENDT, *Die exceptio doli generali im heutigen Recht*, in *Archiv für die zivilistische Praxis*, 1906, pp. 1-417, at p. 106 ff.

[44] G.B. FERRI, *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970, p. 1042; see also F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea. I principi fondamentali nelle relazioni interordinamentali*, Verona, 2007, p. 98.

[45] F. PEDRINI, *Le "Clausole Generali". Profili teorici e aspetti costituzionali*, Bologna, 2013, p. 297; ID., *Contro "le clausole generali" (sans phrase). Precauzioni per l'uso di una categoria dottrinale ancora troppo vaga*, in *Rivista AIC*, 2017, no. 3, pp. 1-37, at p. 17, available *online*.

[46] M.F.C. DE SAVIGNY, *Traité de droit romain*, French trad. by M.C. GUENOUX, Paris, 1851, p. 34.

[47] P.S. MANCINI, *Della Nazionalità come fondamento del Diritto delle genti*, Torino, 2000, p. 23 ff.; ID., *De l'utilité de rendre obligatoires pour les Etats, sous forme d'uyn ou de plusieurs traité internationaux, un certain nombre de régles générales du Droit international privé, pour assurer la decision uniforme des conflits entre les différentes legislations civiles et criminelles*, in *Journal du droit international privé*, 1874, p. 295 ss.

clause indicates the set of principles and values that in each historical period characterize the national legislation[48]. Savigny's perspective emphasizes the defensive aspect of fundamental principles against the application of incompatible foreign rules. While the second author assigns a broader meaning to the clause and a positive function: the purpose of the clause is to ensure the application of the laws of the forum state by virtue of the interests they safeguard and, in so doing, to protect society from interference that may result from the introduction of values that are in conflict with or wholly alien to the principles of the *forum*[49].

The concept of public policy dealt with in this paper pertains to private international law, the function of which is to identify the regulation of legal relationships that have extraneous elements to the *lex fori*[50]. Given the function of private international law, the meaning of the clause is to be deduced from the entire positive legal order, which includes the constitution, criminal law, private law and the core of values and principles[51] that inspire the norms of international law, international customs, or treaty law. thus, not only domestic law but also norms contained in, among others, the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950), the International Pacts of the United Nations General Assembly of December 1966[52].

The merging of the above-mentioned principles of public international law into the principles of public international order has been facilitated by case law[53], however it is precisely the application of the clause by case law that has led to fluctuations and twists in the interpretation of the clause over time. In some cases, the clause has been interpreted strictly, with a narrow meaning, as happened in the recognition of punitive damages decisions[54], or of certain effects of polygamous marriages of Muslim origin[55], or of the

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[48] N. PALAIA, *L'ordine pubblico "internazionale"*, Padova, 2005, pp. 80-81.

[49] P.S. MANCINI, *De l'utilité de rendre obligatoires pour les Etats*, cit., p. 295.

[50] F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., p. 108.

[51] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., p. 21.

[52] See on the matter the accurate analysis of F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., pp. 109-111.

[53] A. VIVIANI, *Coordinamento fra valori fondamentali internazionali e statali: la tutela dei diritti umani e la clausola di ordine pubblico*, in *Rivista di diritto internazionale privato e processuale*, 1999, pp. 847-888, at p. 864 ff.

[54] A. PISANI TEDESCO, *Il problema della responsabilità civile compensativa. Studio per un rimedio risarcitorio effettivo*, Torino, 2022, p. 10 ff.; G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 166-177, 169; G. BROGGINI, *Compatibilità di sentenze statunitensi di condanna al risarcimento di punitive damages con il diritto europeo della responsabilità civile*, in *Europa e diritto privato*, 1999, pp. 479-508; G. PONZANELLI, *I punitive damages, il caso Texaco e il diritto italiano*, in *Rivista di diritto civile*, 1987, II, pp. 405-413; Z. ZENO-ZENCOVICH, *Il problema della pena privata nell'ordinamento italiano: un approccio comparatistico ai "punitive damages" di "common law"*, in *Giurisprudenza italiana*, 1985, IV, pp. 12-27; ID., *Il risarcimento esemplare per diffamazione nel diritto americano e la riparazione pecuniaria ex art. 12 della legge sulla stampa*, in *Responsabilità civile e previdenza*, 1983, pp. 40-59.

[55] M. RIZZUTI, *Adozioni e poligenitorialità*, in *Actualidad Juridica Iberoamericana*, August 2020, pp. 646-681, available online; ID., *Il problema dei rapporti familiari poligamici. Precedenti storici ed attualità della questione*, Napoli, 2016; G. PERLINGIERI, *In tema di rapporti familiari poligamici*, in *Diritto*

dissolution of the marriages by unilateral repudiation[56], or regarding the irrevocable will[57], or *mortis causa* agreements[58]. In other cases, such as cross border family status recognition cases, the public policy clause has been interpreted widely. The broad notion has been drawn to include not only values and general principles common to States but also binding norms, such as criminally sanctioned prohibitions and disciplines of domestic law. The broader the notion of the public policy clause, the more difficult it is to recognize the effects of a foreign act or measure in Italy. This broad interpretation has been used in filiation by cross border surrogacy[59].

The public policy clause, when interpreted with the broad definition, can lead to the non-recognition or to a phenomenon frequently called by practitioners as downgrading. The term downgrading means the placing of a passenger on a flight in a lower class and entitling them to a refund of the price paid for the trip[60]. Downgrading is also translated in Italian as «demotion» and involves the assignment of duties at a lower level to a worker with a specific level of classification[61], who will be entitled to damages for demotion due to unlawful conduct on the part of the employer, which will be assessed in court and include the financial and other consequences[62]. Moreover, downgrading is a phenomenon that also affects the rating of financial products and indicates the attribution of a lower level of reliability granted by managers and rating companies, capable of orienting the investors' choices.

Notwithstanding the beforementioned meanings assigned to the term mentioned, the term has frequently been used by case law with a new meaning and in a different part of the legal system. It has been used to designate the recognition of certain foreign

delle successioni e della famiglia, 2019, pp. 821-849; G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit.

[56] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 141-155, 153; P. VIRGADAMO, *Ripudio islamico e contrarietà all'ordine pubblico tra unitarietà del limite e corretta individuazione dei principi*, in *Il Diritto di famiglia e delle persone*, 2017, I, pp. 353-364; O. VANIN, *Ripudio islamico, principio del contraddittorio e ordine pubblico italiano*, in *La Nuova giurisprudenza civile commentata*, 2015, pp. 1031-1038.

[57] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 177-187; G. PERLINGIERI, *Invalidità delle disposizioni "mortis causa" e unitarietà degli atti di autonomia*, in *Diritto delle successioni e della famiglia*, 2016, pp. 119-148, 139; A. DAVÌ, A. ZANOBETTI, *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014, p. 175.

[58] G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., pp. 187-199; V. BARBA, *I patti successori e il divieto di disposizione della delazione. Tra storia e funzioni*, Napoli, 2015; C. CACCAVALE, *Contratto e successioni*, in V. ROPPO (a cura di), *Interferenze*, vol. IV, in V. ROPPO (diretto da), *Trattato del contratto*, Milano, 2006, pp. 403-632; ID., *Patti successori: il sottile confine tra nullità e validità negoziale*, in *Notariato*, 1995, pp. 552-561.

[59] See the comparison in G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., p. 107 ff.

[60] Court of Justice, judgment of 22 June 2016, case C-255/15, *Steef Mennens* v *Emirates Direktion für Deutschland*, EU:C:2016:472.

[61] M. SIGNORELLI, *L'evoluzione giurisprudenziale del danno da demansionamento: una ricostruzione sistematica – Parte I*, in *Responsabilità civile e previdenza*, 2018, pp. 1494-1517.

[62] Tribunal of Avezzano, labour section, judgement of 3 September 2019, no. 168; Tribunal of Rome, labour section, judgement of 8 July 2020, no. 4190.

measures and acts in Italy, such as foreign marriages between persons of the same sex, birth, and adoption of minors in favor of same-sex couples[63]. In this cases, downgrading means the recognition of a less protected status between the parent and the child: a legal parenthood status can be legally recognized as a mild adoption, which does not generate parenthood, as stated by the Italian Constitutional Court, and it is subject to the consent of the biological parent, which is hard to get if the biological parent has not a legal power in his or her own country to express a valid consent to the adoption.

The lack of a legal and full recognition of the social link between the social parent or the social parents and the child exposes the lack of a common notion of parenthood through the Member States and constitutes the background for discrimination of children in social families. The downgrading has been used in order not to provide a full recognition, but recently the Italian Constitutional Court expressed the doubts on and the ambiguities of the mild adoption of social children[64].

The illustrated view recently has been embraced also by the Italian Supreme Court, which has proposed to the United Sections a review of its own case law[65], in the persistent inertia of the Italian legislator[66].

The recent order issued by the Italian Supreme Court aims to question the orientation adopted in 2019 by the Supreme Court, in its most authoritative composition, on the recognition of filiation effects from surrogacy abroad and, for this reason, on the public policy clause.

The case concerns the recognition of a foreign judgment to modify the birth certificate of a child born by gestation for others in favor of a same sex couple. The Court confirms the unsuitability of Art. 44(1)(d) of Law no. 184/1983 for the protection of the child and, in the event of persistent inertia on the part of the legislature, points out the advisability of a new ruling by the United Sections, compatible with constitutional and

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[63] F. DEANA, *Rapporti e status familiari nel diritto dell'Unione europea. Tra mutuo riconoscimento e salvaguardia dei particolarismi nazionali*, Torino, 2020, p. 173.

[64] Italian Constitutional Court, judgment of 9 March 2021, no. 33.

[65] Italian Court of Cassation, united sections, judgment of 8 May 2019, no. 12193, commented by M. DOGLIOTTI, *Le Sezioni Unite condannano i due padri e assolvono le due madri*, in *Famiglia e diritto*, 2019, pp. 667-676 and G. FERRANDO, *Maternità per sostituzione all'estero: le Sezioni Unite dichiarano inammissibile la trascrizione dell'atto di nascita. Un primo commento*, in *Famiglia e diritto*, 2019, pp. 677-686. For an accurate analysis, see V. BARBA, *Ordine pubblico e gestazione per sostituzione. Nota a Cass. Sez. Un. 12193/2019*, in *GenIUS*, 2019, no. 2, pp. 19-37; M. BIANCA, *La tanto attesa decisione delle Sezioni Unite. Ordine pubblico* versus *superiore interesse del minore?*, in *Familia*, 2019, pp. 369-385; G. PERLINGIERI, *Ordine pubblico e identità culturale. Luci e ombre nella recente pronuncia delle Sezioni Unite in tema di c.d. maternità surrogata*, in *Diritto delle successioni e della famiglia*, 2019, pp. 337-345; G. RECINTO, *La decisione delle Sezioni unite in materia di c.d. maternità surrogata: non tutto può e deve essere "filiazione"*, in *Diritto delle successioni e della famiglia*, 2019, pp. 347-354; U. SALANITRO, *Quale ordine pubblico secondo le sezioni unite? Tra omogenitorialità e surrogazione, all'insegna della continuità*, in *Giustiziacivile.com*, 29 May 2019; M.C. VENUTI, *Le sezioni unite e l'omopaternità: lo strabico bilanciamento tra il best interest of the child e gli interessi sottesi al divieto di gestazione per altri*, in *GenIUS*, 2019, no. 2, pp. 6-18.

[66] Italian Court of Cassation, united sections, order of 21 January 2022, no. 1842.

European law, with the statements contained in the recent ruling of the Court of Justice already illustrated and in view of the lack of drafts or bills currently under discussion in Parliament on filiation by surrogacy[67].

The first section of the Italian Supreme Court opens a «call of the Courts, and first and foremost of the United Sections, to seek an interpretation suitable to ensure the protection of the constitutional goods at stake»[68].

The Court reflects on the elaboration of a new and different interpretative address since the Legislator does not intervene in an innovative manner. The first section moves from the rules on the deliberation of foreign judgments, to verify the limits of recognition of the foreign judgment and the actual existence of public policy obstacles. The Court states that Art. 64 of Law no. 218/1995[69] does not determine, through the deliberation of the foreign measure, the entry of the institution unknown to domestic law, but rather the recognition only of the effects deriving therefrom and thus of the rights that that institution attributes to the persons involved.

For the recognition of a foreign measure, the effects deriving from the foreign institute must not collide with public order, that is, with Art. 12(6) of Law no. 40/2004 and its corollaries. It thus becomes necessary to go beyond the fact of the general prohibition of surrogacy to identify the application boundaries of this type of offence, its constituent elements, and its protected legal assets.

Particular attention, though not expressly mentioned, is thus devoted to the principle of so-called offensiveness[70] in the abstract and in concrete terms. The compatibility test of the effects of the foreign institution with the set of principles of public order must be carried out in concrete terms, considering in what way the surrogacy carried out abroad was carried out and ascertaining whether those ways can offend the dignity of the pregnant woman, as well as undermining human relations.

In the Court's opinion, it is doubtful that the typical conduct of surrogacy can be considered offensive when it is carried out in a state where the procedure is medicalized, where the procedure is regulated by law with a discipline which aims to protect the pregnant woman and the child. There is also doubt as to the offensiveness and incompatibility with public order of surrogacy when the rules of the State in which it is

[67] Numerous drafts and bills on surrogacy have been presented: none of these deals with the protection of the best interests of the child, none of them has reached an advanced state of examination such as to respond to the Constitutional Court's warning. Most of the recent bills propose changes to the offence of surrogacy provided for by Law no. 40/2004, extending prosecution to facts committed also abroad and requiring civil registrars to communicate the request for transcription to the judicial authority. In this sense, see the most recent ones *supra*, at footnote 41.

[68] Italian Court of Cassation, order no. 1842/2022, cit., p. 17, translated by the author of this paper.

[69] Law of 31 May 1995, no. 218, Riforma del sistema italiano di diritto internazionale privato.

[70] F. MANTOVANI, *Diritto penale. Parte generale*, XI ed., Milano, 2020, p. 181 ss.; V. TIGANO, *Il delitto di surrogazione della maternità come limite di ordine pubblico al riconoscimento dei provvedimenti stranieri in materia di* status filiationis, in *Rivista italiana di diritto e procedura penale*, 2021, pp. 1043-1070.

performed provide for the possibility for the pregnant woman to revoke consent at any time, with a formal and calculable provision, up to the moment of birth, from which significant relations are established between the social parents and the child. Again, surrogacy carried out in a state in which parenthood is attributed according to predictable and certain rules, with a series of strict prohibitions on exploitation or coercion or even just payment in favor of the pregnant woman, is considered not incompatible *a priori* with the public policy clause.

Thus, by carefully analyzing the scheme of the offence of surrogacy in the light of the mentioned principles is correct to argue that the criminal sanction does not apply to those conducts without offensiveness towards the protected legal value. Therefore, the incompatibility with public policy clause does not exist when the procedure is carried out in jurisdictions where the practice is not remunerated or does not entail any margin for the exploitation of the woman and her body. Furthermore, it is pointed out that it would be disproportionate to have an automatic sanctioning mechanism for the former on a par with the latter.

The approach thus described enhances a principle peculiar to criminal law, as was already the case in the United Sections' ruling on the deliberation in Italy of punitive damages[71], by resorting to the principles of certainty, predictability, and proportionality. For these reasons, therefore, the dignity of the pregnant woman cannot always and in any case be held to prevail, just as the superior interest of the child cannot automatically be held to prevail.

In the recent order, the Court of Cassation opts for a meaning of the public policy clause which includes not only the domestic State law but also basic principles of legal civilization, typical of modern States and also of the Italian legal system[72].

4. The recent ruling by the European Court of Justice.

A positive signal towards a common and shared notion of «parenthood», or more in general «family member», and a strict interpretation of the public policy clause comes from the European Court of Justice, in a recent preliminary ruling.

[71] Italian Court of Cassation, united sections, judgment of 5 July 2017, no. 16601, commented by A. PALMIERI, R. PARDOLESI, E. D'ALESSANDRO, R. SIMONE, P.G. MONATERI, in *Il Foro italiano*, 2017, I, cc. 2626-2654; A. BRIGUGLIO, *Danni punitivi e delibazione di sentenza straniera: "turning point nell'interesse della legge"*, in *Responsabilità civile e previdenza*, 2017, pp. 1597-1608. See also on the issue the report of *Ufficio del Massimario della Corte di Cassazione*: R. MUCCI, *Danni punitivi e ordinamento interno: la natura polifunzionale della responsabilità civile*, in *Rassegna della giurisprudenza di legittimità. Gli orientamenti delle Sezioni Civili – approfondimenti tematici*, vol. III, pp. 41-49, available *online*. On the criminal law principles applied in private law, see F. VIGANÒ, *Garanzie penalistiche e sanzioni amministrative*, in *Rivista italiana di diritto e procedura penale*, 2020, pp. 1775-1819; V. MANES, *Profili e confini dell'illecito para-penale*, in *Rivista italiana di diritto e procedura penale*, 2017, pp. 988-1007.

[72] F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., p. 112.

A brief description of the case seems useful, in order to fully understand the impact of the decision.

A Bulgarian national and a United Kingdom national, in a same sex married couple, gave birth to their daughter in Spain. According to the Spanish birth certificate both were appointed as mothers of the child. To obtain a Bulgarian identity document for the daughter useful for the circulation on the territory, the Bulgarian national mother was requested a transcript of the birth certificate and the public officer appointed that on the request form only one person can check the box «mother». By a following decision, the Sofia municipality refused to the Bulgarian mother the issue of the birth certificate for her daughter. The reasons given for that refusal decision were the lack of information concerning the identity of the child's biological parent and the fact that a reference to two female parents on a birth certificate was contrary to the public policy of the Republic of Bulgaria, which does not allow marriages between two same sex people. The Bulgarian citizen brought an action against that refusal decision and the court raised some doubts, which brought to the referring to the European Court of Justice according to Art. 267 TFEU, on Art. 4(2) TEU, Arts. 20-21 TFEU, which states: «[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect» but also on Arts. 7, 9, 24 and 45 of the Charter of Fundamental Rights of the European Union.

The Grand Chamber of the CJEU has ruled on the refusal of the Bulgarian public officer to issue the birth certificate of the child, daughter of a British biological mother and a Bulgarian social mother, which precluded the obtaining of an identity document and, consequently, frustrated the child's right to move within the territory of the European Union[73].

The refusal of the civil registrar of the Municipality of Sofia, as in the Italian cases described above, is based on the public policy clause in the Bulgarian State, in the meaning of the domestic public policy. Bulgaria does not recognize same sex parenthood, nor same sex adoptions, nor same sex marriage, so – according to the public officer – the couple cannot form a legal recognized family abroad and be recognized in the Bulgarian State. Consequently, the Bulgarian officer cannot issue the identity documents for the child, as requested by her social mother, without checking on the request form the box «father» and with a lack of information concerning the identity of the child's biological parent.

The European Court of Justice states, in contrast with the opinion of the officer, that the Bulgarian State has a duty to issue an identity document to Bulgarian citizens and to the child, born of a Bulgarian mother, regardless of the issue or the transcript of a new

[73] Court of Justice (Grand Chamber), judgment of 14 December 2021, case C-490/20, *V.M.A.* v *Stolichna obshtina, rayon "Pancharevo"*, EU:C:2021:1008.

birth certificate with the biological parent mention. In this way, the minor can exercise her rights of movement, together with her parents, regardless of their gender and sexual orientation. Otherwise, a national measure that seeks to impede the free movement of persons and of minors, on the grounds of the sexual orientation and gender of their parents, can only be justified to protect fundamental rights enshrined in the Treaties and the Charter of Fundamental Rights.

This is not the case of protection of other fundamental rights of Treaties and the Charter. In the decided case, the obstacle interposed by the State is not functional to the protection of fundamental rights. On the contrary, the alleged application of the limits of internal public policy to the issuance of the document determines an unjustified sacrifice of the rights of the child, provided for in Arts. 7, 24 and 45 of the Charter of Fundamental Rights of the European Union. Furthermore, it infringes with the principle of non-discrimination and with the best interests of the child. It would be contrary to the fundamental rights of the Charter to deprive the child of the relationship with one of her parents in the context of the exercise of her right to move and reside freely on the territory of the Member States or even to make it *de facto* impossible or excessively difficult for her to exercise that right merely because her parents are of the same sex.

The affirmation of the prevalence of the law of the Treaties of the Charter of Fundamental Rights has a peculiarity in the present case: the right to movement brings with it a new and modern meaning of the right to move and reside. The right to movement of persons also becomes the right of movement along with the *statuses* of which people are legitimate holders, whatever the place where the *status* is conferred. Therefore, guaranteeing the movement and residence within the Union also means guaranteeing the enjoyment of the rights and relations deriving from the *statuses* originally acquired by the social formation, independently of the limits of public policy present in the States in which the social formation circulates and resides.

Therefore, the Court states that the child must be considered a direct «descendant» of the Bulgarian citizen, even in the absence of a genetic or a biological link; similarly, the social mother must be considered a «family member». On this point, however, the CJEU specifies that this statement is relevant «for the purposes of the exercise of the rights conferred by Article 21(1) TFEU and related secondary legislation». The court regulates the boundaries within which the pronouncement is relevant: if the public policy clause does not operate when it is necessary to ensure the freedom to move and to reside in the Union with the *status* acquired abroad, the internal limits come back to operate in other cases and, therefore, for civil purposes.

More importantly for the public policy clause interpretation, it is useful to highlight that the European Court of Justice restricted again the public policy clause spectrum of

application, by quoting the summary of another important ruling on the subject[74]: «[t]he concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society».

5. Conclusion.

A new concept of parenthood is arising and challenging lawyers, civil servants, scholars, and judges. Parenthood can be traced in several scenarios that codes could not predict, since changes have occurred in the scientific and social spheres and even legal changes have occurred in some of the European and non-European legal systems. This uneven evolution and development impacts on children and their family, specifically when a gene pool is not shared between them.

Parenthood is legally relevant and protected when States provide a legal framework specifically for it; this is the case for full, mild, and international adoptions or artificial insemination procedures with third-party gametes donation in favor of different sex couples. Once one has become a parent in one State, it shall be possible to be legally a parent in other States, especially within the European Union. On the other hand, the social parent is not always a legal parent in every State and this situation arises when States have different rules of law with public policy restrictions that hinder the movement of *status*. As explained above, this is frequently the case for surrogacy, but it may be the case also for embryo adoptions.

«If you are a parent in one country, you are a parent in every country»: is it true for social parenthood? It is quite difficult to give a clear-cut answer to the question, while national legal systems evolve and change on the matter and this area of study is intersected by several law, statutes, codes. The answer also depends on the interpretation of the public policy clause adopted by the case law and practitioners. A clause that has been interpreted quite differently in the last ten years by the Court of Justice, by the Supreme Court and by tribunals in Italy in the above-mentioned areas of contract, liability and family law. A different interpretative approach is evident within family law and also in areas where the rules and different institutions all aim to protect the dignity of women and the dignity of the unborn child[75].

[74] Court of Justice, judgment of 5 June 2018, case C-673/16, *Relu Adrian Coman e a.* v *Inspectoratul General pentru Imigrări e Ministerul Afacerilor Interne*, EU:C:2018:385, para. 44.

[75] See the different approach on the recognition of the foreign institutions' effects within contract law, tort, succession law and more specifically in family law in G. PERLINGIERI, G. ZARRA, *Ordine pubblico interno e internazionale*, cit., p. 93 ff.

Only few of European and non-European countries have a legal framework that gives certainty on the *status filiationis*, even for social families. Inequalities between systems lead to discrimination when recognition of foreign acts and judgments is sought, with an easy recourse to the public policy clause, which is subject to varying interpretations by jurists in the various countries. The public policy clause can be interpreted to make prevail the inner aversion to surrogacy or to embryo adoption, even if not every conduct can be considered offensive for the dignity of the woman and for the prevalence and non-circumvention of adoption regulations[76].

However, the recent rulings of the Court of Justice of the European Union and the first section of the Italian Court of Cassation open new scenarios of analysis for the jurist and urge the study of the new phenomenon of social parenthood, as well as a more careful analysis of principles to be included and considered in the public policy clause.

The jurist is called upon to accurately apply the mentioned clause with reference to the effects produced by the foreign institution, in consideration of the fundamental values embodied in the Constitution, treaties, conventions and international declarations, always considering the domestic discipline within which the «meanings of the fundamental principles of the legal system»[77] live and are enriched. However, it is not enough to assume the existence of a public policy clause and enumerate the principles contained therein, but it is necessary that the violation of the rules and values, within which the clause is declined, determines the infringement of the fundamental rights, protected values and legal goods deserving of protection selected by the criminal and civil codes.

[76] On this point, see Italian Court of Cassation, order no. 1842/2022, cit.

[77] F. ANGELINI, *Ordine pubblico e integrazione costituzionale europea*, cit., pp. 108-110.

ABSTRACT: Parenthood is the legal relationship between a child and the child's parents and recently EU citizens are establishing this relationship through consent or intended parent agreements, without any genetic link. The new concept is known in case law as social parenthood and can be traced in different scenarios: same sex couples' adoption; artificial reproduction; surrogacy; *post mortem* fertilization.

The paper will investigate if the lack of a common notion of social parenthood can constitute an obstacle for the free movement of citizens and analyze the recent case *Pancharevo* of the Court of Justice of the European Union.

KEYWORDS: Social parenthood; freedom of movement; artificial reproduction; adoption; surrogacy.