RECOGNITION OF A STATUS ACQUIRED ABROAD: ITALY*

RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO: ITALIA

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Abstract: Analyzing the recent Italian case-law is clear that a difficult balance is maintained between the Italian Law and the State's obligation to recognize a foreign status under the EU law and ECHR principles. Moreover, the recognition of foreign judgment and provisions related to personal status are surely interconnected with the role of public policy, on one hand, and the effectiveness of human rights on the other hand.

Keywords: recognition, acceptance, status acquired abroad, Italian private international law, surrogacy, international name law, status registration, fundamental rights.

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Este trabajo analiza los efectos de dicha jurisprudencia europea sobre el Derecho internacional privado cuando éste se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en Italia.

Palabras clave: estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado italiano.

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The following parts of this report have been written exclusively by Marta Giacomini: II.1.B) Surrogacy and C) Adoption, II.2.D) Non-(state-) registered relationship, II.4. Gender, II.5. Name; III.2. Recognition of Decisions: How Does It Work?, III.4. Recognition by Acceptance, IV. The Role of Public Policy and Human Rights. The following parts of this report have been written exclusively by Martina Vivirito Pellegrino: I. Introduction; II. Status Recognition by subject Matter – Illustrating Overview; 1. Filiation; A. Paternity/Parentage; 2. Couple Relationships; A. General; B. Marriage; C. Registered Partnership; 3. Capacity; III. Methodological Analysis/Methodology Explained; 1. General; 3. Recognition by PIL: How Does It Work?; V. Reception, Transformation and Effects; 1. Reception; 2. Establishing or contesting of Status; 3. Registration of a 'Foreign' Status – document; VI. Awareness in Academia and Politics; 1. Literature on Recognition; 2. Political and Legislative Awareness; 3. Recognition as a Topic in Legal Education.

I. Introduction

1. Par excellence the identification and recognition of status are the way through which the legal system binds to itself the persons who compose it. In particular, through the so-called *status familiae*, Italy should recognize and guarantee the individual a set of fundamental legal positions within the family. For this reason, even within the European Union[1] and the Council of Europe system, the matter remains under the Member States' area of competence, and authorities enjoy a wide margin of appreciation, when deciding on the recognition of gender identity, marital and parental status[2]. For example, Regulation (EC) no. 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, shall not apply to the establishment or contesting of a parent-child relationship (Article 1, § 3, a)[3].

II. Status Recognition by subject Matter – Illustrating Overview

1. Filiation

A. Paternity/Parentage

2. The establishment or contesting of a parent-child relationship is set by the law of nationality of the child or, if more favourable, the law of nationality of the parent at the date of birth (Article 33, § 1, PIL); if the establishment or contesting of a parent-child relationship applicable law by PIL can't be assigned under applicable law, the Italian law shall apply (Article 33, § 1 and § 2, PIL).

3. The reform of filiation, the so-called unification of *status filii* according to Law no. 219/2012 and Law Decree no. 154/2013, involved also a reform of Law no. 218/1995, Articles 33- 36 *bis*, regarding parentage recognition. Article 33 states no more difference between natural and matrimonial child, and all the Italian rules regarding the uniqueness of *status filii* are overriding mandatory provisions. The so-called *favor filiationis* and the best interest of the child[4] inspired the recognition by PIL. Under Article 33, Law no. 218/1995, the nationality of the child identifies the applicable law to filiation; therefore, the identification of the child's nationality seems to constitute a preliminary question with respect to filiation.

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[1] The identification and recognition of status have an effect regarding the right of EU citizens and their family to move and reside freely within the EU: see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) no. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[2] M. Vivirito Pellegrino, "Diritti patrimoniali nella filiazione non riconosciuta", *Comparazione e diritto civile*, 2017.

[3] M. C. Baruffi, "Regolamento (CE) 27 novembre 2003, no. 2201/2003 – Artt. 1-2", in A. Zaccaria (edited by), *Commentario breve al diritto di famiglia*, Padova, 2008, p. 2449 *et seq*.

[4] See Article 3, 9, 18, 21, and e 40 of the 1989 Convention on the Rights of the Child (ratified under Law no. 176/1991); Article 1 and 6 of the European Convention on the Exercise of Children's Rights (ratified under Law no. 77/2003); Article 24, § 2, of the EU Charter of Fundamental Rights.

4. Recently, the Italian Supreme Court ruled on a recognition of a Poland judgment (Court of Tarnow) regarding the recognition of natural paternity (Cass. no. 5327/2021)[5]; according to the Italian Supreme Court, since under Article 45 Regulation (EU) no. 1215/2012 the recognition of a judgment shall be refused "(a) if such recognition is manifestly contrary to public policy in the Member State addressed" the judge must verify whether the fundamental principles of the Italian legal system, including those relating to the decision-making process, have been respected, as a guarantee of the right to a fair trial. In the present case, the applicant claimed the breach of public policy, assuming that he had been recognized by the judge in Poland as the father of the child without a DNA test, even though he agreed to do it. The Italian Supreme Court dismissed the applicant's claim because of the Italian principle of law regarding the free conviction of the judge referred to in Article 116 Italian Civil Procedural Code; however, the Court granted the second applicant's claim regarding the so-called procedural public policy and dismissed the request to enforce the judgment of the Court of Tarnow because the judge in Poland interrupted the collection the applicant's DNA test without justification.

B. Surrogacy

5. Under Article 12 § 6 Law no. 40/2004, surrogacy is forbidden in any form and it's also a criminal offence; however, since the Italian law doesn't specify the status of the child born abroad thanks to surrogacy, Italian and European jurisprudence step into this breach to restore the balance between the best interest of the child and the principle of public policy. Among other consequences about surrogacy, the first obstacle is to obtain the registration of the birth certificate in Italy – it is difficult to reconcile the content of a foreign act (come from a State where surrogacy is provided by the law) with the Italian legal system, where there's no rule to protect surrogacy childhood[6].

6. Considering the Italian's Parliament's inactivity, the ECtHR ruled in the case *Paradiso and Campanelli*[7]: the case concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract. In 2015, the ECtHR held – by five votes to two – that there had been a violation of Article 8 of the ECHR, because "the Italian authorities failed to strike the fair balance that has to be maintained between the interests at stake" considering that "the State had an obligation to take the child's best interests into account irrespective of the nature of the parental link, genetic or otherwise" and that "The removal of a child from the family setting is an extreme measure which should only be resorted to as a very last resort". However, in 2017 the ECtHR – by eleven votes to six – that there had been no violation of Article 8[8]. Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court held that family life did not exist between the applicants and the child. Moreover, the Court considered that the contested measures had

[5] See also Cass. no. 19453/2019 and Cass. no. 17463/2013.

[6] M. D'Amico, M. P. Costantini, *L'illegittimità costituzionale del divieto di "fecondazione eterologa". Analisi critica e materiali*, Milano, 2014; A. Cordiano, "La tutela dell'interesse del nato da maternità surrogata fra (in)disponibilità del corpo e aspirazioni genitoriali", in Aa.Vv., *Autonomia e heteronomia no Direito da Família e no Direito das Sucessões*, Almedina, Coimbra, 2016, p. 739 *et seq.*; G. Palmieri, "Accordi di gestazione per altri, principio di autodeterminazione e responsabilità genitoriale", in M. Caielli, B. Pezzini, A. Schillaci (edited by), *Riproduzione e relazioni. La surrogazione di maternità al centro della questione di genere, CIRSDe – Centro Interdisciplinare di Ricerche e Studi delle Donne e di Genere dell'Università degli Studi di Torino*, 2019, p. 44 *et seq.*; M. Giacomini, "La trascrizione degli atti di nascita e il divieto di maternità surrogata: un'indagine comparata in tema di diritti fondamentali", being published in *Atti del V Congresso internazionale "Europa, società aperta"*, Milan, 14 December 2020.

[7] ECtHR (Grand Chamber), *Paradiso and Campanelli c. Italy*, 24 January 2017, no. 25358/12.

[8] M. Gervasi, "Vita familiare e maternità surrogata nella sentenza definitiva della Corte europea dei diritti umani sul caso Paradiso et Campanelli", in *Osservatorio AIC*, no. 1/2017; C. Masciotta, "La *Grande Chambre* pone un freno alla forza espansiva della "vita familiare": uno stop all'attivismo giudiziario in tema di maternità surrogata nel caso Paradiso e Campanelli contro Italia", in *Osservatorio AIC*, no. 2/2017.

pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. On this last point, it regarded as legitimate the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children. The Court then accepted that the Italian courts, having concluded that the child would not suffer grave or irreparable harm as a result of the separation, had struck a fair balance between the different interests at stake, while remaining within the room for manoeuvre ("margin of appreciation") available to them[9].

7. Adoption as a possible alternative was pointed out by the Italian Constitutional Court in 2017[10]: the Constitutional Court held that, while maintaining the high degree of dis-value that our legal system reconnects to surrogacy, the child's best interest in continuity of parental status can be assured with "adoption in special cases" under Article 44 Law no. 184/1983 as amended[11].

8. In 2019[12], the Supreme Court held that the recognition of a foreign status related to surrogacy is contrary to public policy, without prejudice to the application of adoption in "special cases" to recognize family ties.

9. In 2020[13], once again the Constitutional Court confirmed that adoption could be used to recognize the parent-child relationship with the intended parent. The Constitutional Court ruled in a case where a child was born abroad in a lesbian family and stated that the birth certificate can only reveal the name of the mother who gave birth to him, while the intended mother, however, could proceed through adoption in special cases under Article 44 Law no. 184/1983[14].

10. In 2021, the Constitutional Court ruled regarding the registration of a foreign birth certificate of a child born through a gestational surrogacy arrangement[15]. On this occasion, the Court declared the question of constitutional legitimacy inadmissible, highlighting the lack of an organic discipline and urging the Parliament to intervene and recognize new forms of parental ties[16].

11. Just a few weeks after the decision delivered by the Constitutional Court, a draft law has been submitted before the Parliament to regulate surrogacy arrangements[17], but the discussion hasn't been scheduled yet.

C. Adoption

12. Questions regarding adoption (e.g.: requirement, proceeding, parental relationships, withdrawal – Article 38 and 39 PIL) are subject to the law of nationality of the adopters or, failing that, to the law of the State where they are habitually resident. Anyway, should the adoption be a full adoption the Italian law shall apply (Article 38 PIL).

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[9] Press release, ECHR 034 (2017) 24.01.2017.

[10] Corte Cost. no. 272/2017.

[11] See also Cass. no. 24001/2014; Cass. no. 14878/2017 quoting Cass. no. 12962/2016 and Cass. no. 19599/2016; Tribunale dei minori di Firenze, 8 March 2017, in *Nuova giurisprudenza civile commentata*, 2017, p. 996 *et seq*.

[12] Corte Cass. no. 12193/2019.

[13] Corte Cost. no. 230/2020.

[14] S. Spatola, "Il giudice delle leggi dice "no" al riconoscimento dell'omogenitorialità per via estensiva: non è la Corte costituzionale il luogo ma il Parlamento. A margine della sentenza no. 230 del 2020 della Consulta" in *Federalismi.it*, no. 35/2020, p. 105 *et seq.*; M. Picchi, "Figli di un dio minore": quando lo *status filiationis* dipende dal luogo di nascita (Brevi riflessioni a margine della sentenza no. 230/2020 della Corte costituzionale)", in *Forum di Quaderni costituzionali*, no. 1/2021, p. 2 *et seq.*

[15] Corte Cost. no. 33/2021; B. Liberali, "La legge no. 40 del 2004 di nuovo alla Corte costituzionale: una svolta decisiva (ma forse non ancora definitiva) nella ricostruzione di un possibile diritto a procreare?", in *Studium Iuris*, no. 5/2020, p. 534 *et seq.*

[16] A. Ruggeri, "La PMA alla Consulta e l'uso discrezionale della discrezionalità del legislatore (Nota minima a Corte Cost. nn. 32 e 33 del 2021)", in *Consulta Online*, 2021.

[17] Draft Legislation, 20 April 2021.

13. An adoption certified by a foreign competent authority may be recognized by application of Article 41, 64, 65, 66 PIL, subject to the respect of the Italian public policy and the best interests of the child according to Law no. 184/1983 regarding full adoption and "adoption in special cases".

14. Regarding intercountry adoption, in 1976, Italy ratified the European Convention on the Adoption of Children of 1968, and in 2000 The Hague Convention on Protection and Co-operation in Respect of Intercountry Adoption, implemented by Law no. 476/1998 which introduced its principles into Law no. 184/1983 – since then, Italian law recognizes foreign full and simple adoptions (by the "*Commissione per le adozioni internazionali*" – CAI[18]) and provides for a special procedure for Italian couples who wish to adopt abroad[19]. The first place for those aiming to adopt a foreign child to go is the Juvenile Court competent for the area of residence, since the couple must gain the "*dichiarazione di idoneità*" (declaration of availability) for Intercountry adoption[20]. Once a child eligible for international adoption has been identified (i.e.: the child is declared adoptable for ICA by the Country of origin competent authorities and the requirements of the State of origin are determinative), accompanies the aspirant parents to a meeting with the child and follows them through the stage of initial contact. If the meetings lead to a positive opinion from the authorities of the foreign country, the competent agency forwards the papers and the reports on the combination between adoptee and adopters to the CAI, attesting the requirements laid down by The Hague Convention in Article 4. Once the documentation on the meeting abroad and the assent to it by the couple has been received by the accredited body, the CAI authorizes the adopted child's entry to Italy, having certified that the adoption conforms with the provisions of The Hague Convention. Once the child has entered Italy and any period of pre-adoptive fostering has elapsed the procedure is completed with an order from the Juvenile Court to transcribe the adoption decision in the registries of civil status – the power to have this registration done lies with the Juvenile Court of the place of residence of the parents at the moment of their entry into Italy with the child (even if this differs from the one that first issued the decree of suitability). With registration, the child definitively becomes an Italian citizen and a member to all intents and purposes of the new "multi-ethnic" family that has just come into being.

15. However, since Italian rules regarding adoption are restrictive, the recognition of foreign adoption seems to be not automatic in case of unknown institutes to the Italian legal system, such as adoptions by (mere) private contract or the Islamic *kafāla*[21], often indirectly recognized by a proceeding of adoption in special cases to protect the child's best interest in continuity of parental status[22].

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[18] See www.commissioneadozioni.it/en.

[19] See Law no. 184/1983 updated with: Law no. 476/1998; Law no. 149/2001; Law no. 173/2015, regarding the right to the affective continuity of foster children; Decree of the President of the Republic no. 108/2007; Legislative Decree no. 154/2013; Decree of the President of the Council of Ministers of 13 March 2015; Decree of the President of the Council of Ministers of 16 February 2018; eventual regulation from the Central Authority (as the latter Regulation no. 13/2008 on the specific criteria and procedures for Accredited Bodies); additional guarantee of the respect of commitments taken at international level by Italy comes from its Constitution: according to Article 11 and 117 of the Italian Constitution, every national law must respect all agreements concluded at international level by the State and in case of conflict the international agreements must prevail.

[20] Aspirants must in the first place meet the requirements of Article 6, Law no. 184/1983, meaning that the declaration of availability may be presented only by heterosexual married couples for at least three years, without any separation in being or in hand, with a maximum difference between either of 40 years (and a minimum of 18) from the child to be adopted, in possession of the capacity to bring up, educate and maintain the adoptive child (requirements which will be the object of enquiry by the area services after the first check by the Juvenile Court).

[21] Article 29 Law Decree no. 286/1998, as amended, provided – by analogy – the right to family reunification in case of kafāla; see Cass. no. 7472/2008, Cass. no. 18174/2008, and Cass. no. 19734/2008

[22] Trib. Minori Trento, decree 5.3.2002 and decree 10.9.2002, in *Nuova giurisprudenza civile commentata*, 2003, I, p. 159 *et seq*., annotated by J. Long, "Adozione "extraconvenzionale" di minori provenienti da Paesi islamici"; J. Long, "Ordinamenti giuridici occidentali, kafala e divieto di adozione: un'occasione per riflettere sull'adozione legittimante", in *Nuova giurisprudenza civile commentata*, 2003, II, p. 175 *et seq.*; R. Gelli, "La Kafala di diritto islamico: prospettive di riconoscimento nell'ordinamento Italiano", in *Famiglia e diritto*, no. 1/2005, p. 68 *et seq.*; A. Cagnazzo, F. Preite, *Il riconoscimento degli status familiari acquisiti all'estero*, Milano, 2017, p. 358 *et seq.*; G. Rossolillo, "Riconoscimento di status familiari e adozioni sconosciute all'ordinamento italiano", in *Diritti Umani e Diritto Internazionale*, 2016, p. 335 *et seq.*; A. Pastena, *Recognition of Kafala in the Italian Law System from a Comparative Perspective*, Cambridge Scholars Publishing, 2020. Recently, the

16. For the first time in 2021, the Italian Supreme Court recognized a gay-couple adoption acquired abroad[23] according to Article 64 PIL (recognition of a foreign judgment) and Article 38 (applicable law to adoption): an Italian citizen and an American one, habitually resident in the U.S.A., adopted a child in U.S.A. throughout a judicial writ and, therefore, they asked for the recognition of their status in Italy. The Supreme Court stated that the case concerns the recognition of foreign status under PIL, excluding any application of Italian Law regarding intercountry adoption. Should the case concerned Italian adopters or adopters habitually resident in Italy, the Supreme Court would have applied the Italian Law regarding intercountry adoption and referred the case to the Juvenile Court to verify, *inter alia*, the respect of public policy and the best interest of the child. Following an *excursus* of the Italian case-law, the Supreme Court held that neither the ban for the gay couple to adopt nor the ban for them to access to assisted reproduction techniques is principles of international public policy. Actually, the principle of the best interest of the child, its right to respect for family life referred to in the EU Fundamental Chart, the ECHR and the United Nations Convention on the Rights of the Child, and the principle of equal treatment of all children must prevail.

2. Couple Relationships

A. General

17. In Italy, marriage can be governed by the Italian civil law if celebrated before the Officer of the civil status, or by the Canonical law if celebrated before the Catholic minister ("*matrimonio concordatario*"); in any case, the marriage is effective according to Italian law if entered in the register of civil status where the couple has its habitual residence[24].

18. In Italy, same-sex marriage is not recognized[25]; however, after the approval of Law no. 76/2016, on civil partnerships between persons of the same-sex ("*unioni civili*"), and on living together without being married ("*convivenze*"), same-sex marriage contracted abroad is recognized as a civil

Court of Justice of the European Union stated that a minor in the guardianship of a citizen of the EU under the Algerian *kafāla* system cannot be regarded as a 'direct descendant' of that citizen; however, that citizen's Member State of residence must facilitate, following an assessment, that minor's entry to and residence in its territory: see judgment in case C-129/18 *SM v. Entry Clearance Officer*, *UK Visa Section*.

[23] Cass., SS.UU. no. 9006/2021. See also: Corte Cost. no. 33/2021; Cass. no. 12193/2019; Cass. no. 14007/2018; Cass., SS.UU. no. 16601 /2017.

[24] In Italy, marriages, as well as other family status, are effective and recognized after they are recorded in the civil registry ("registro di stato civile") of the relevant municipality; *inter alia*: G. Ferrando, M. Fortino, F. Ruscello (edited by) *Relazioni familiari, matrimonio, famiglia di fatto; tomo II: Separazione, divorzio*, Milano, 2002.

[25] Cass. no. 4184/2021, in *Nuova giurisprudenza civile commentata*, 2012, p. 588 *et seq.*; Cass. no. 2400/2015, in *Il corriere giuridico*, 2015, no. 7, p. 909 *et seq*.; P. Rescigno, "Il matrimonio same sex al giudizio di tre Corti", in *Il Corriere giuridico*, 2012, no. 7, p. 861 *et seq.*; G. Ferrando, "Il matrimonio", in *Trattato Cicu, Messineo*, II ed., Milano, 2015, p. 295 *et seq*. For the first time, after the decision delivered by Tribunale di Grosseto, 9 April 2014, a Court ordered the Officer of the civil status to transcribe in the registers of civil status the marriage contracted abroad between two U.S. citizens, habitually residents in Italy. According to the Court, the Italian civil code (Article 84-88) doesn't provide any limitation regarding the sex of the spouses, therefore same-sex marriage is not contrary to the domestic law and public policy. On 7 October 2014, the Italian Minister of Internal Affairs, Angelino Alfano, issued a document asking mayors to cancel the registration of same-sex marriages celebrated abroad; this led to an EU Parliamentary questions, on 18 December 2014, regarding the violation of the fundamental principles of the EU and previous rulings of the ECtRH and the right of EU citizens and their family members to move and reside freely within the territory of the Member States. In *Oliari and Others v. Italy*, 18766/11 and 36030/11, 21 July 2015, the ECtHR considered that the legal protection currently available at that time in Italy to same-sex couples failed to provide for the core needs relevant to a couple in a stable committed relationship. Since the Court did not consider it particularly burdensome for Italy to provide for the recognition and protection of same-sex unions (i.e.: providing a form of civil union or registered partnership), the Court found that Italy had failed to fulfil its obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their union and concluded unanimously that Italy violated Article 8, under the profile of the positive obligations (*Schalk and Kopf v. Austria,* 24 June 2010, no. 30141/04; *Vallianatos and Others v. Greece* [GC], 7 November 2013, no. 29381/09 and no. 32684/09; *Hämäläinen v. Finland* [GC], 16 July 2014, no. 37359/09).

partnership ("*unione civile*") under Article 32 *bis* PIL. Even today in Italy there remain differences mainly concerning the following points: (inexplicably) there is not a civil duty of fidelity in a civil partnership (differently from the duty of fidelity in marriage); same-sex partners cannot adopt; female same-sex partners cannot access to medically assisted procreation techniques under Law no. 40/2004.

19. Under Regulation (EU) no. 2016/1103, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, the spouses or future spouses may agree to designate, or to change, the applicable law to their matrimonial property regime[26].

20. Under Regulation (EU) no. 2016/1104, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *inter alia*, the parties may agree upon a choice of court and of applicable law[27].

21. Under Regulation (EU) no. 2010/1259, implementing enhanced cooperation in the area of the applicable law to divorce and legal separation, *inter alia*, the spouses may agree to designate the applicable law to divorce and legal separation[28].

B. Marriage

22. Under Article 28 PIL a marriage is formally valid in Italy if it is valid according to the law of the place where the marriage was celebrated or the law of the country of nationality of at least one party at the moment of celebration of the marriage or the law of the state where the couple were jointly resident at the time of the marriage. Marriages[29] contracted abroad are recognized (or not recognized) by application of the PIL rules, namely Article 65, regarding the recognition of foreign measures concerning civil status, family and personal rights which have direct effect in Italy without requiring further approval procedure[30].

23. Under PIL:

— the promise of marriage and the consequences of its breach shall be governed by the law of common nationality of the betrothed or, failing this, by Italian law (Article 26);
— the capacity to marry and the other conditions to marry shall be governed by the domestic law of each of the betrothed at the time of marriage, without prejudice to the unmarried

[26] A. Las Casas, "La nozione autonoma di "regime patrimoniale - tra coniugi" del regolamento UE 2016/1103 - e i modelli nazionali", in *La nuova giurisprudenza civile commentata*, no. 6/2019, p. 1529 *et seq.*

[27] I. Viarengo, "Effetti patrimoniali delle unioni civili transfrontaliere: la nuova disciplina europea", in *Rivista di diritto internazionale privato e processuale*, 2018, p. 33 *et seq.*

[28] M.C. Baruffi, "Il divorzio nel diritto dell'Unione Europea", in *Famiglia e diritto*, no. 1/2021, p. 99 *Et Seq.*

[29] F. Pesce, "La nozione di "matrimonio": diritto internazionale privato e diritto materiale a confronto", in *Rivista di diritto internazionale privato e processuale*, 2019, p. 777 *et seq.*; M. C. Baruffi, G. Castelletti, "Artt. 21-39 Regolamento (CE) no. 2201/2003", in A. Zaccaria (edited by), *Commentario breve al diritto della famiglia*, IV ed., Padova, 2020, p. 3070 *et seq.*

[30] E.g.: if a marriage is established in Austria, but the spouses are Spanish, the marriage is recognized directly in Italy if it is formally valid according to the law of the place where the marriage was celebrated (Austrian law) or the law of the country of nationality (Spanish law). It should be noted that Regulation (EU) "no. 1259/2010" shall apply, in situations involving a conflict of laws, to divorce and legal separation; the spouses may agree to designate the law applicable to divorce and legal separation under Article 5 (e.g. Austrian Law or Spanish Law or the law of the forum in case of relocation). In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State: (a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that (c) of which both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized.

status that either betrothed may have acquired following an Italian final judgment or a final judgment recognized in Italy (Article 27);
— concerning its form, marriage is valid if it is so regarded by the law of the place of the celebration or by the domestic law of at least one of the betrothed at the time of celebration or by the law of the State in which both betrothed were resident at that time (Article 28);
— the personal relations between the spouses shall be governed by the domestic law common to them; in case of different citizenships or several citizenships in common, the personal relationship shall be governed by the law of the State where the spouses are habitually resident (Article 29);
— the proprietary relations between the spouses shall be governed by the applicable law to their personal relations; however, the spouses may agree in writing that the proprietary relations between them shall be governed by the law of a State of which at least one of them is a national or in which at least one of them resides. An agreement concerning the applicable law is valid if it is so considered by the chosen law or by the law of the place in which the agreement was entered into (Article 30);
— marriage contracted abroad is recognize after it is transcribed in the competent civil registry;
— public policy is the only limit to the registration of the marriage contracted abroad (e.g.: marriage under the age of eighteen; bigamous marriage; marriage between relatives), therefore the Officer can refuse to register the marriage and ask the competent Public Minister to investigate.

24. A same-sex marriage contracted abroad is recognized as a civil partnership ("*unione civile*") under Article 32 *bis* PIL[31]. This is a proper case of transformation/transposition named "downgrading" by doctrine and already addressed by the CJEU[32] and ECtHR[33] regarding other countries.

C. Registered Partnership

25. In Italy, a civil partnership regulated by Law no. 176/2016 is a social partnership between two persons of the same sex that entails a change in the civil status of the parties concerned; it is valid and effective after it is registered by the Officer of the civil status[34].

26. Under PIL:

— capacity and other conditions to contract a civil partnership shall be governed by the law of common nationality of the partner; shouldn't the applicable law grant the right to contract a civil partnership, the Italian law shall apply and Article 1 § 4 of Law no. 176/2016 provides overriding mandatory provisions (Article 32 *ter*);
— concerning its form, civil partnership is valid if it is so regarded by the law of the place of the celebration or by the domestic law of at least one of the partners at the time of celebration or by the law of the State in which both partners were resident at that time (Article 32 *ter*);
— personal and patrimonial proprietary relationships between the partners shall be governed by the law of the place of the celebration; if requested, the Court can apply the law where the partners are habitually resident; again, the partners may agree in writing that the proprietary relations between them shall be governed by the law of a State of which at least one of them is a national or in which at least one of them resides (Article 32 ter).

[31] Law no. 76/2016, Law Decree no. 5/2017 concerning "Norme di adeguamento delle disposizioni dell'ordinamento dello stato civile in materia di iscrizioni, trascrizioni e annotazioni alla nuova disciplina delle unioni civili".

[32] CJEU, *Coman and Others v. Romania*, 5 June 2018, C-673/16.

[33] ECtHR, *Parry v. United Kindom*, 28 November 2006, no. 42971/05; ECtHR, *Hämäläinen v. Finland* [GC], 16 July 2014, no. 37359/09.

[34] C. Benanti, "Richiesta e costituzione dell'unione civile ai sensi del d. lgs. no. 5/2017", in *Familia. Il diritto della famiglia e delle successioni in europa*, 2017.

D. Non-(state-)registered relationship

27. An unmarried partnership is also regulated by Law no. 176/2016 but it doesn't entail a change in the civil status; the partners can be heterosexual or same-sex and they can regulate their personal and proprietary relations under § 50 of Law no. 176/2016 and sign an agreement valid for all legal purposes ("*contratto di convivenza*").

28. An Italian national living abroad may declare the existence of the unmarried partnership at the competent Consular office; an Italian national living abroad can address to this same Consular office and enter into the "*contratto di convivenza*" or ask for the certification of the signatures at the end of the contract. The "*contratto di convivenza*" is regulated by the Italian law only if both parties are Italian nationals or live in Italy; if they have different nationalities and live in a foreign country, the applicable law will be the law of that country (Article 30 *bis* PIL).

3. Capacity

29. Capacity to contract, to sue and to be sued, to undertake obligations, etc. ("*capacità giuridica*") is subject to the law of nationality; capacity to contract marriage is subjected to the law of nationality, without prejudice of the Italian public policy – e.g.: marriage under the age of eighteen, bigamous marriage, and marriage between relatives are forbidden (Article 20 PIL).

4. Gender

30. Gender identity issues are fundamental rights issues that can be recognized under Article 24 PIL, according to the law of nationality.

31. In Italy, Law no. 164/1982 lays down rules on changes to legal gender status[35] ("*rettificazione di attribuzione di sesso*")[36]; actually, the Italian legal system has been one of the first Member States in regulating this matter and recognizes the right to change a gender status. Originally, Article 3 of Law no. 164/1982 provided two proceedings before the competent Court as follows: "Where it is necessary to adapt the person's sexual characteristics through medical or surgical treatment, the court shall deliver a judgment authorising such treatment. In such cases the Court shall order the change of legal gender status after verifying that the treatment has been carried out"; it was subsequently amended by Article 31 § 4 of Legislative Decree no. 150/2011 as follows "Where it is necessary to adapt the person's sexual characteristics through a medical or surgical treatment, the Court shall deliver a judgment authorising such treatment". The Supreme Court, in its judgment no. 15138/2015 ruled that Article 3 of Law no. 164/1982 could not be construed as requiring a transgender person to have recourse to surgery to change his or her gender identity, since a match between sexual orientation and physical appearance could be achieved through psychological and medical treatment which respected the person's physical integrity. After a few months, the Constitutional Court in its judgment no. 221/2015 rejected a plea of unconstitutionality concerning Article 1 and 3 of Law no. 164/1982, stating first of all that the legislative provisions in question were the result of cultural and legal change aimed at recognising gender identity as a component of the right to personal identity. Interpreting the absence of an explicit indication of the

[35] Article 35 Presidential Decree no. 396/2000 provides that the forename given to a child must correspond to the child's gender.

[36] P. D'addino Serravalle, P. Perlingieri, P. Stanzione, *Problemi giuridici del transessualismo*, Napoli, 1981; G. Sciancalepore, P. Stanzione, *Transessualismo e tutela della persona*, Milano, 2002; P. Stanzione, "Sesso e genere nell'identità della persona", in *Comparazione e Diritto civile*; L. Ferraro, "Il giudice nel procedimento di rettificazione del sesso: una funzione ormai superata o ancora attuale", in *Questione giustizia*, no. 2/2016, p. 220 *et seq.*

means of altering a person's sexual characteristics in the light of fundamental human rights, it added that such absence meant that surgical treatment was not a requirement to obtain a change of legal gender status, as it was only one of the possible treatments that could be used to alter a person's appearance.

32. In the case of *S.V. v. Italy*, 11 October 2018 (no. 55216/08) the ECtHR held, unanimously, that there had been a violation of Article 8 (right to respect for private and family life) of the ECHR regarding Italian authorities' refusal **-** lasted for over two and a half years – to authorise a transgender person to change the forename because no final judicial ruling had been given confirming gender reassignment. In the ECtHR's view, the rigid nature of the aforementioned judicial procedure for recognising the gender identity of transgender persons, as in force at the time, had left the applicant for an unreasonable period in an anomalous position apt to engender feelings of vulnerability, humiliation and anxiety[37].

33. Originally, Article 4 Law no. 164/1982 provided that should a transgender person be married, after obtaining the right to change his/her gender status, he/she shall divorce (i.e. a sort of divorce imposed by the law – "*divorzio imposto*"). However, in 2014 the Constitutional Court held that the "*divorzio imposto*" implicated a violation of the right to self-determination and of the right of the spouses to maintain their family rights; therefore, the Constitutional Court stated the constitutional illegitimacy of Article 4 Law no. 164/1982[38]. Moreover, in 2015 the Supreme Court stated the "survival" of the marriage, urging the Parliament to intervene and guarantee transgender family rights[39].

34. The aforementioned Law no. 76/2016, §§ 26-27, provides that should a spouse change his/her gender status he/she can preserve his/her family rights and convert the marriage in a civil partnership (in a sort of downgrading)[40], but the Legislator doesn't grant to maintain family rights in the opposite situation and convert a civil partnership in marriage[41].

5. Name

35. The CJEU has defined the naming regime of European citizens in three particular cases which demonstrate the EU's willingness to harmonize the matter – see, *inter alia*, Konstantinidis (C-168/91, EU:C:1993:115); Garcia Avello (C-148/02, EU:C:2003:539); Grunkin and Paul (C-353/06, EU:C:2008:559); Sayn-Wittgenstein (C-208/09, EU:C:2010:806); and Runevič-Vardyn and Wardyn (C-391/09, EU:C:2011:291).

36. The ECtHR has held that forenames also fall within the notion of private life (Guillot v. France §§ 21-22; Güzel Erdagöz v. Turkey, § 43; Garnaga v. Ukraine, § 36); the Court has found that some domestic laws relating to the recognition of names may strike a proper balance, while others do not (see, inter alia, Guillot v. France in comparison with Johansson v. Finland); regarding a change of name in the process of gender reassignment see S.V. v. Italy, §§ 70-75.

37. In Italy, the right to a name and personal identity[42] is recognized by Article 6 § 2 of the Italian Civil Code; since fundamental rights are at stake, the right to a name and personal identity can be recognized under Article 24 PIL, simply according to the law of nationality and EU law. However, should

[37] Press release ECtHR 335 (2018) 11.10.2018. See also *Y.Y. v. Turkey*, 10 March 2015, no. 14793/08, and *X. and Y. v. Romania*, 19 January 2021, nos. 2145/16 and 20607/16.

[38] Corte Cost. no. 170/2014.

[39] Corte Cass. no. 8097/2015.

[40] A. Cagnazzo, F. Preite, *Il riconoscimento degli status familiari acquisiti all'estero*, Milano, 2017, p. 391 *et seq.*

[41] V. Barela, "Rettificazione del sesso: effetti sugli istituti del matrimonio e dell'unione civile", in *Comparazione e diritto civile*, no. 1/2018.

[42] Corte Cost. no. 297/1996.

the recognition regard rights related to family relationship (i.e. name related to marriage, parenthood, adoption) Article 24 PIL provides that the recognition shall be governed by the applicable law to the family relationship[43].

38. As said, regarding surrogacy recently the Grand Chambre of the ECtHR[44] and the Italian Supreme Court [45] stated that the recognition of the *status filiationis* can be assured with "adoption in special cases" under Article 44 Law no. 184/1983 as amended, which among other effects entails changing the adopter's surname.

III. Methodological Analysis/Methodology Explained

1. General

39. The identification and recognition of status, through the so-called *status familiae*, guarantee the individual a set of fundamental rights within the family. Analysing the recent Italian case-law is clear that a difficult balance is maintained between the Italian Law and the State's obligation to recognize a foreign status under the EU law and ECHR principles. For example, a sort of recognition of parenthood by surrogacy is influenced by international obligations, which in some way can force Italy to accept the existence of new forms of family relationships[46];

40. Italian system knows three different methods of recognition: (i) recognition of decision delivered by a foreign Authority, governed by PIL and EU law; (ii) recognition by PIL in the absence of a decision that may be recognized, since PIL rule upon the *lex causae* concerning the establishment and/or changing of status; (iii) recognition by acceptance, governed by the application of EU principle of mutual recognition and/or resulting from the application of principles set by the Italian Constitution, overriding mandatory provisions under Italian Law, and EU and ECHR fundamental rights.

41. The first two options entail the recognition of foreign status by applying PIL rules and/or EU mutual recognition rules[47] (e.g.: Regulation (EC) no. 2201/2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility). On the contrary, the third option permits the recognition of foreign status in the absence of a mandatory provision, where there is no other way to protect individual rights related to the recognition of status (e.g.: parenthood by surrogacy).

2. Recognition of Decisions: How Does It Work?

42. Regarding the recognition of a decision establishing or changing status, PIL rules provide as follows. According to Article 64 PIL, a foreign judgment (even not related to personal and family status) shall be automatically recognized in Italy without requiring any further proceedings if:

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[43] Recently, the Constitutional Court has been asked to rule regarding Article 262 of the Italian Civil Code concerning the automatic attribution of the father surname with regard to Articles 2, 3 and 117, § 1 of the Italian Constitution and this very last Article 117 in relation to Articles 8 and 14 ECHR: Corte Cost., ord., 11 February 2021, no 18.

[44] ECtHR, *Avis consultatif relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention*, P16-2018-001.

[45] Corte Cass. no. 24001/2014; Corte Cass., SS.UU. no. 12193/2019.

[46] *Inter alia*, R. Baratta, "Diritti fondamentali e riconoscimento dello *status filii* in casi di maternità surrogata: la primazia degli interessi del minore", in *Diritti umani e diritto internazionale*, no. 1/2016.

[47] G. Caggiano, *Integrazione europea e sovranazionalità*, Bari, 2018; F. Deana, *Rapporti e status familiari nel diritto dell'Unione Europea. Tra mutuo riconoscimento e salvaguardia dei particolarismi nazionali*, Torino, 2020.

(a) the foreign Court (however named) had jurisdiction on the matter;
(b) the defendant was properly informed of the proceeding under the law of the state where the proceedings took place, and the fundamental rights of defence have not been violated (e.g.: right to be heard);
(c) the parties appeared before the foreign court in compliance with the applicable procedural law, or contumacy was properly declared under such law;
(d) the foreign judgment is final and binding according to the applicable law of the State in which it was delivered;
(e) the foreign judgment doesn't conflict with any other final judgment delivered by an Italian Court;
(f) no proceedings are pending before an Italian Court between the same parties and on the same matter filed before the foreign proceedings at stake;
(g) the foreign judgment and its provision are not contrary to Italian public policy[48].

43. These requirements will be ascertained by the Registrar when registration of the decision is requested or by the competent Court of Appeal in case of litigation.

44. The recognition of a decision establishing or changing family and personal status seems to have privileged effectiveness even if delivered at the end of a voluntary process ("*giurisdizione volontaria*" - covered by Article 66 PIL[49]); in general terms, Article 65 states that a foreign measure is recognized if concerns capacity, family relationship and individual rights, and when they have been delivered by the Authorities of the State whose law is referred to by the provisions of this law or produce effects in the system of that State, even if pronounced by Authorities of another State, provided that those effects are not contrary to public order and the essential rights of the defence have been guaranteed[50].

45. According to Article 67, in the case of a challenge to the automatic recognition of a foreign judgment or to enforce a foreign judgment, any interested party may request the competent Court of Appeal to ascertain whether the requirements for recognition are satisfied. Therefore, while recognition of a foreign judgment is automatic (unless challenged under Article 67), for its enforcement prior formal recognition by an Italian Court is a formal requirement, and the enforcement procedure that follows is entirely governed by Italian law.

46. Under Article 21, Regulation (EC) 2201/2003 (Reg. (EU) 1111/2019 as from 1 August 2022) a judgment given in a Member State will be recognised in the other Member States without any special procedure being required. However, according to Article 22, a judgment relating to a divorce, legal separation or marriage annulment will not be recognised where either:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;
(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

[48] E.g.: since under Article 12 § 6 Law no. 40/2004, surrogacy is forbidden in any form and there is no regulation of filiation related to surrogacy agreements, the recognition of a foreign status resulting from a surrogacy can be obtained if the Court ascertain whether the aforementioned requirements for recognition are satisfied, as experience has recently shown – i.e.: in Cass., SS. UU. no. 9006/2021, in a case of a challenge to the automatic recognition of a foreign status under Article 67 PIL, the Supreme Court recognizes a gay-couple adoption acquired abroad, even if resulting from a surrogacy agreement; following an *excursus* of the Italian case-law, the Supreme Court held that neither the ban for the gay couple to adopt nor the ban for them to access to assisted reproduction techniques is principles of international public policy.

[49] In Italy, for instance, the voluntary process is used for the consensual separation of spouses and the recognition of a different gender identity.

[50] Corte Cass. no. 17463/2013, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 624 *et seq.*

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or
(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

47. *Inter alia*, Italy also recognizes the application of the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations, Luxembourg European Convention of 20 May 1980 on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children.

3. Recognition by PIL: How Does It Work?

48. According to Article 65 PIL[51], foreign measures relating to capacity as well as the existence of family relationships or personality rights are recognized in Italy, without any special procedure being required, when they have been delivered by the Authorities of the State whose law is referred to by the provisions of this law or produce effects in the system of that State, even if pronounced by Authorities of another State, provided that those effects are not contrary to public order and the essential rights of the defence have been guaranteed.

4. Recognition by Acceptance

49. Recognition by acceptance proves its strength where principles and fundamental rights allow a sort of recognition of status in the absence of a foreign decision that may be recognized. For instance, regarding surrogacy parenthood, while the ban for surrogacy agreements is still in force, indirectly their effects are recognized because of the application of principles set by the Italian Constitution, overriding mandatory provisions under Italian Law, and EU and ECHR fundamental rights[52]. Precisely, the ECtHR it its first Advisory Opinion, concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, held that – where the legal parent-child relationship with the intended father has been recognised in domestic law – 1. the child's right to respect for private life within the meaning of Article 8 of the ECHR requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother"; 2. the child's right to respect for private life within the meaning of Article 8 of the ECHR doesn't require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests[53].

[51] The difference between Article 64 and Article 65 PIL concerns (i) what kind of measure shall be recognized (document, measure, judgment, writ, etc.); (ii) what kind of matter shall be recognized (civil law, administrative law, family law, etc.).

[52] E. Crivelli, "La Corte Edu richiama in sede giurisdizionale la prima Advisory opinion: un incentivo per l'Italia a ratificare il Protocollo 16?", in *Quaderni costituzionali*, no. 2/2020; A. M. Lecis, "Una nuova frontiera del dialogo tra giurisdizioni: la Cassazione rimette alla Corte costituzionale una q.l.c. fondata sul parere consultivo della Corte Edu in materia di GPA", 2020, www.dirittocomparati.it.; M. Giacomini, "Il caso Mennesson: la Corte di Strasburgo si (ri)pronuncia con il suo primo parere preventivo", in *Osservatorio costituzionale AIC*, n. 5/2019; B. Liberali, "Il divieto di maternità surrogata e le conseguenze della sua violazione: quali prospettive per un eventuale giudizio costituzionale?", in *Osservatorio AIC*, no. 5/2019.

[53] The case concerned the refusal to recognise a parental link between intended parents and a baby, born via a surrogate mother in the United States not biologically related, in Iceland where surrogacy is illegal. The Court found that despite the lack of a biological link between the applicants, there had been «family life» in the applicants relationship. However, the Court found that the decision not to recognise the first two applicants as baby's parents had had a sufficient basis in domestic law and, taking note of the efforts on the parts of the authorities to maintain that «family life», ultimately adjudged that Iceland had

50. In Italy, between 2017 and 2021, Italian case-law regarding surrogacy has quite changed, also thanks to the ECtHR's rulings[54]:

— in 2017[55] and the Constitutional Court held that, while maintaining the high degree of disvalue that our legal system reconnects to surrogacy, the child's best interest in continuity of parental status can be assured with "adoption in special cases";
— in 2019[56], the Supreme Court held that the recognition of a foreign status related to surrogacy is contrary to public policy, without prejudice to the application of adoption in "special cases" to recognize family ties;
— in 2021[57], for the first time, the Supreme Court recognizes a gay-couple adoption acquired abroad, even if resulting from a surrogacy agreement.

51. Another case study concern the (non)recognition of *kafāla* in Italy. In 2019[58], the CJEU in its judgment C-129/18, *SM v. Entry Clearance Officer, UK Visa Section*, stated that:

— the need for a uniform application of EU law and the principle of equality requires that, where no reference is made to the law of the Member States, the terms of the directive on the freedom of movement must normally be given an independent and uniform interpretation throughout the EU;
— given that the directive doesn't contain any definition of the concept of a 'direct descendant', it is necessary to interpret that concept to take into account not only the wording of the provision in question but also of the context in which it occurs and the objectives pursued by the rules of which it is part;
— given that the concept of a 'direct descendant' commonly refers to the existence of a parent-child relationship, that concept of a 'parent-child relationship' must be construed broadly, so that it covers any parent-child relationship, whether biological or legal;
— the concept of a 'direct descendant' of a citizen of the EU must consequently be understood as including both the biological and the adopted child of such a citizen since it's established that adoption creates a legal parent-child relationship;
— given that the placing of a child under the Algerian *kafāla* system doesn't create a parent-child relationship between the child and its guardian, a child who is placed in the legal guardianship of citizens of the EU under that system cannot be regarded as a 'direct descendant' of a citizen of the EU;
— however, such a child falls under another concept referred to in the directive on the freedom of movement, namely that of one of the other family members;
— therefore, CJEU stresses that the Member States must therefore provide the possibility for 'family members, in the broad sense' to obtain a decision on their application for entry that is founded on an extensive examination of their personal circumstances, taking account of the various factors that may be relevant, and, in the event of refusal, is justified by reasons – in the light of and in line with the provisions of the Charter of Fundamental Rights of the European Union, in particular the right to respect for family life and the protection of the best interests of the child.

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acted within its discretion in this case (see § 68-70 regarding the margin of appreciation). Cf. ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, 18 May 2021, no. 71552/17.

[54] *Inter alia*, ECtHR, *Mennesson c. France*, 26 June 2014, no. 65192/11; ECtHR; *Labassee v. France*, 26 June 2014, no. 65941/11; ECtHR, *Paradiso et Campanelli c. Italie*, 24 January 2017, no. 25358/12; ECtHR*, Avis consultatif relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention*, P16-2018-001.

[55] Corte Cost. no. 272/2017.

[56] Corte Cass. no. 12193/2019.

[57] Cass., SS.UU. no. 9006/2021.

[58] See Press release, CJEU no. 41/19, Luxembourg, *SM v. Entry Clearance Officer*, *UK Visa Section*, 26 March 2019, C-129/18.

IV. The Role of Public Policy and Human Rights

52. Public policy sets the limit for the recognition of foreign documents, decisions, and status acquired abroad[59].

53. Public policy is studied under its substantial and procedural profile. For example, the question regarding the recognition in Italy of Islamic divorce-repudiation and the related status has been recently submitted again[60] before the Italian Supreme Court which, by its judgment 7 August 2020, no. 16804, has decided it in the negative because of the violation of the so-called substantial public policy (violation of the principle of non-discrimination between men and women) and procedural public policy (lack of defensive parity and effective cross-examination).

54. As said, analysing the recent Italian case-law is clear that a difficult balance is maintained between the Italian Law and the State's obligation to recognize a foreign status under the EU law and ECHR principles[61]; the recognition of foreign judgment and provisions related to personal status are interconnected with the role of public policy, on one hand, and the effectiveness of human rights, on the other hand.

55. For instance, recently, and for the first time in 2021[62], the Italian Supreme Court recognizes a gay-couple adoption acquired abroad, in a case concerning the recognition of foreign status under PIL, stating that the principle of the best interest of the child, its right to respect for family life referred to in the EU Charter of Fundamental Rights, the ECHR and the United Nations Convention on the Rights of the Child, and the principle of equal treatment of all children must prevail.

V. Reception, Transformation and Effects

1. Reception

56. A same-sex marriage contracted abroad is recognized as civil partnership ("*unione civile*") under Article 32 *bis* PIL[63]. This is a proper case of transformation/transposition named "downgrading" by doctrine[64] and already addressed by the CJEU[65] and ECtHR[66] regarding other countries.

57. In particular, according to the CJEU, under the conditions laid down in Article 7(1) of Directive 2004/38/EC, Article 21(1) TFEU must be interpreted as precluding the competent authorities

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[59] L. Paladin, voce "Ordine pubblico", in *Nuovissimo Digesto*, XI, Torino, 1965, p. 130 *et seq.*; C. Lavagna *Il concetto di ordine pubblico alla luce delle norme costituzionali*. *Democrazia e diritto*, 1967, p. 359 *et seq.*; U. Allegretti, "Ordine pubblico e libertà costituzionali" in *Rivista Trimestrale di Diritto pubblico*, no. 1/1976, p. 473 *et seq.*; Cerri, voce "Ordine pubblico (diritto costituzionale)", in *Enciclopedia giuridica*, XXII, Istituto dell'Enciclopedia Italiana, Roma, 1990, p. 1 *et seq.*; F. Angelini, voce "Ordine pubblico", in S. Cassese, (edited by), *Dizionario di diritto pubblico*, Milano, 2006, p. 3988 *et seq.*; F. Angelini, "Il divieto di maternità surrogata a fini commerciali come limite di ordine pubblico e strumento di tutela della relazione materna: storia di un percorso giurisprudenziale irragionevolmente interrotto", in S. Niccolai, E. Olivito, (edited by), *Maternità filiazione genitorialità. I nodi della maternità surrogata in una prospettiva costituzionali*, Napoli, p. 37 *et seq*.

[60] Cass. no. 10378/2004; Cass. no. 17463/2013; Cass., SS.UU., no. 12193/2019

[61] *Inter Alia,* V. Zagrebelsky, R. Chenal, L. Tomasi, "Manuale dei diritti fondamentali", in *Europa*, II, Bologna, 2019.

[62] Cass., SS. UU. no. 9006/2021.

[63] Law no. 76/2016, Law Decree no. 5/2017 regarding "Norme di adeguamento delle disposizioni dell'ordinamento dello stato civile in materia di iscrizioni, trascrizioni e annotazioni alla nuova disciplina delle unioni civili".

[64] Recently, F. Deana, *Rapporti e* status *familiari nel diritto dell'Unione Europea. Tra mutuo riconoscimento e salvaguardia dei particolarismi nazionali*, Torino, 2020, p. 173 ss, quoting M. Melcher, "Private International Law and Registered Relationship: An EU Perspective", in *European Review of Private Law*, 2012, p. 1075 *et seq.*

[65] CJEU, *Coman and Others v. Romania*, 5 June 2018, C-673/16.

[66] ECtHR*, Parry v. United Kindom*, 28 November 2006, no. 42971/05; ECtHR, *Hämäläinen v. Finland* [GC], 16 July 2014, no. 37359/09.

of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State doesn't recognise marriage between persons of the same sex. Moreover, the CJEU referred to the Explanations relating to the Charter of Fundamental Rights, in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 ECHR – see, *inter alia*, ECtHR, *Vallianatos and Others v. Greece* [GC], 7 November 2013, nos. 29381/09 and 32684/09 § 73, and *Orlandi and Others v. Italy*, 14 December 2017, nos. 26431/12; 26742/12; 44057/12 and 60088/12.

2. Establishing or contesting of Status

58. If the applicable law doesn't provide guarantees (i.e. fundamental rights) regarding the establishment or contesting of status, including parent-child relationships, the Italian law shall apply (Article 33, §§ 1-2, PIL) because in this field Italian Law has its mandatory provisions; in the same way, shouldn't the applicable law grant the right to contract a civil partnership, the Italian law shall apply and Article 1 § 4 of Law no. 176/2016 provides overriding mandatory provisions (Article 32 *ter*).

3. Registration of a 'Foreign' Status – document

59. Status acquired abroad has to be certified in Italy by entry into the civil register. Besides the PIL rules analysed above, regarding documents, Italy has also implemented Regulation (EU) no. 2016/1191, on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the EU, which covers public documents issued by the authorities of a Member State, under its national law, and the primary purpose of which is to establish one of the following facts: birth, that a person is alive, death, name, marriage (including the capacity to marry and marital status), divorce, legal separation or marriage annulment, registered partnership (including the capacity to enter into a registered partnership and registered partnership status), dissolution of a registered partnership, legal separation or annulment of a registered partnership, parenthood, adoption, domicile and/or residence, or nationality. It is now possible to submit documents issued by an EU country to authorities in Italy, without obtaining an apostille stamp verifying that they are authentic; moreover, documents no longer need a certified translation, and a standard EU translation form may be used instead.

VI. Awareness in Academia and Politics

1. Literature on Recognition

60. In Italy, the awareness of the issue of recognition is intermediate, depending on specific aspects of recognition. Academics are focused on (i) protection of public policy in internal and cross-border situations (e.g. regarding surrogacy and polygamy); (ii) national and international standards of human dignity (including gender identity), parenthood and childhood; (iii) recognition by acceptance under EU and PIL law (iv) Italian jurisprudence regarding the tightness between the constitutional concept of filiation based on the biological aspect and the contractual concept of filiation based on self-determination (e.g. regarding reproductive rights and surrogacy)[67].

[67] A. Nicolussi, "The ban on surrogate motherhood in Italy and the challenge of unlimited regulatory competition", in P. Mostowik (edited by), *Fundamental legal problems of surrogate motherhood*, Warszawa, 2019, p. 291 *et seq*.; V. Scalisi, "«Famiglia» e «famiglie» in Europa", in *Rivista di diritto civile*, no. 1/2013, p. 7 *et seq.*; G. Corso, voce "Ordine pubblico", in *Enciclopedia del diritto*, XX, Milano, 1980.

61. All major textbooks on the issue of recognition deal with *sub* (i) protection public policy, European integration and implementation of the ECHR[68], *sub* (ii) the relationship between international human rights and the Italian constitutional legal system[69]; *sub* (iii) applicable law to family relationship, conflict of law and procedural issues of judicial cooperation in civil matters; *sub* (iv) Italian rules regarding family relationship, basically under the 1942 Italian Civil Code, Law no. 40/2004 concerning assisted reproduction and the ban on surrogate motherhood, Law no. 83/1984, as amended, concerning adoption[70].

2. Political and Legislative Awareness

62. Apparently, political and legislative discussion concerns specific issues, not the general theme of recognition of foreign status.

63. Before the approval of the Law no. 76/2016 concerning same-sex civil partnership ("*unioni civili*") and registered partnership ("*convivenze registrate*") there was a heated discussion regarding the equality between same-sex partnership and marriage[71], particularly about the right to adoption[72]. Conservative parties prevented not only the Parliament to recognize the right to adoption for same-sex partnership and registered partnership, but also the recognition of the so-called stepchild adoption, now granted by Italian Courts. Conservative parties also demanded that same-sex marriage concluded abroad was recognized as same-sex partnership, excluding the right to adoption.

64. Regarding surrogacy parenthood, just a few weeks after the decision delivered by the Constitutional Court who urged the Parliament to intervene, a draft law has been submitted before the Parliament to regulate surrogacy arrangement, but the discussion hasn't been scheduled yet. Unexpectedly, there is no political and legislative discussion regarding assisted reproduction for female same-sex partnership.

3. Recognition as a Topic in Legal Education

65. In Italian legal education, albeit European Law is a mandatory course in University, European Private Law, International Private Law, and Human Rights Law are optional courses. This leads to

[68] Aa.Vv., *Integrazione europea e sovranazionalità*, Bari, 2018; U. Allegretti, "Ordine pubblico e libertà costituzionali", in *Rivista Trimestrale di Diritto pubblico*, no. 1, 1976; F. Angelini, "voce Ordine pubblico", in S. Cassese, (edited by). *Dizionario di diritto pubblico*, Milano, 2006; F. Angelini, "Il divieto di maternità surrogata a fini commerciali come limite di ordine pubblico e strumento di tutela della relazione materna: storia di un percorso giurisprudenziale irragionevolmente interrotto", in S. Niccolai, E. Olivito, (edited by), *Maternità filiazione genitorialità. I nodi della maternità surrogata in una prospettiva costituzionali*, Napoli, 2017; F. Angelini, "La clausola dell'ordine pubblico rispetto alle decisioni delle corti nazionali e della Corte europea dei diritti dell'uomo in materia bioetica. Il caso della maternità surrogata", in R. Fattibene (edited by), *La diagnosi genetica preimpianto fra normativa e giurisprudenza*, Napoli, 2017; R. Baratta, "Diritti fondamentali e riconoscimento dello *status filii* in casi di maternità surrogata: la primazia degli interessi del minore", in *Diritti umani e diritto internazionale*, no. 2/2016, p. 309 *et seq.*; E. Crivelli, "Il protocollo no. 16 della Cedu: la tutela dei diritti nella prospettiva del nuovo rinvio interpretativo alla Corte di Strasburgo", in M. Pedrazza Gorlero (edited by) *Studi in onore di Maurizio Pedrazza Gorlero*, Napoli, 2014; A. Cerri, voce "Ordine pubblico (diritto costituzionale)", in *Enciclopedia giuridica*, XXII, Roma, 1990.

[69] S. Bartole, P. De Sena, V. Zagrebelsky, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012; M. C. Baruffi, "La maternità surrogata nel diritto internazionale privato alla luce della CEDU", in G. Caggiano (edited by), *Integrazione europea e sovranazionalità*, Bari, 2018.

[70] M. Bianca, "La tanto attesa decisione delle Sezioni Unite. Ordine pubblico versus superiore interesse del minore?", in *Familia*, no. 3, 2019; M. Cinque, "Quale statuto per il "genitore sociale?", in *Rivista di diritto civile*, no. 6/2017; R. Bin, "*Maternità surrogata: ragioni di una riflessione*", in *BioLaw Journal - Rivista di BioDiritto*, no. 2/2016; E. Cannizzaro, "Pareri consultivi e altre forme di cooperazione giudiziaria nella tutela dei diritti fondamentali: verso un modello integrato?", in E. Lamarque (edited by), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdi-zioni nazionali: prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo*, Torino, 2015.

[71] M. Bilotta, "Identità di genere e diritti fondamentali della persona", in *La nuova giurisprudenza commentata*, 2013, p. 1117 *et seq;* V. F. Bocchini, *Diritto di famiglia, le grandi questioni*, Torino, 2014, p. 286 *et seq.*

[72] L. Trappolin, A. Tiano, "Same-sex families e genitorialità omosessuale. Controversie internazionali e spazi di riconoscimento in italia", in *Cambio*, 2015, p. 47 *et seq.*

a general discussion regarding recognition, not specifically focused on status and family relationship; obviously relevant CJEU and ECHR decisions, even if related to family law issues, are discussed in European Law classes.

Table of Abbreviations:

EU law: European law, specifically EU Treaties, regulations and directives regarding recognition of status and family reunification;

PIL: Italian Private international law, specifically Law no. 218/1995 and its amendments;
CJEU: Court of Justice of the European Union
ECHR: European Convention of Human Rights
ECtHR: European Court of Human Right
AA.VV.: various authors
Corte Cost: Italian Constitutional Court
Cass: Italian Supreme Court (or Court of Cassation)
Cass., SS.UU.: Grand Chamber of the Italian Supreme Court (or Court of Cassation)
CAI: Commission for Intercountry Adoption, Central Authority under The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption