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The notion of international public order and the worthy of approval recent decisions of the United Sections of the Italian Court of Cassation*

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SUMMARY. 1. Introduction. – 2. The four different hypothetical notions of international public order. – 3. The preferability of a relatively advanced notion of international public order. – 4. The emergence of the notion herewith preferred in the 2017 United Sections judgement on punitive damages. – 5. The confirmation and further elaboration of the same notion of international public order in the 2019 United Sections judgement on surrogate motherhood. – 6. The fluctuating developments in the following judicial practice. – 7. Summary of the different opinion trends among the scholars. – 8. Conclusions.

1. Introduction

After revealing the various notions of international public order, the study will focus on the one that according to the author is to be preferred. Furthermore, such a notion is in line with the position taken by the United Sections of the Italian Court of Cassation in two relevant recent judgements.

Illustration will be subsequently provided of the considerable attempts to replace the aforementioned view that are already emerging not only among the scholars (who are giving rise to a very heated debate in this subject matter perhaps more than in others), but also in some later judgements. It is to be hoped that these attempts will not be successful (at least not in the

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near future), if only to preserve the effectiveness of the "nomophilacy" function of the United Sections of the Court of Cassation, that is the function of ensuring the highest possible level of compliance and uniform interpretation of the law and consequently, along with it, the legal certainty[1].

2. The four different hypothetical notions of international public order

Given that the international public order is «meant to protect the founding values of the domestic legal order concerned»[2], going a little more in detail, it is possible, although with a certain approximation, to imagine at least four different notions, in order of decreasing amplitude of the relative contents (and correspondingly of increasing possibility of execution of foreign judicial measures in Italy).

A first hypothetical notion of international public order could be so extensive as to embrace all or almost all the mandatory rules of the Italian law. However, such a notion would come considerably close to that of internal public order, so that it would be very difficult if not impossible for foreign judicial measures issued on the basis and in application of rules that may be significantly different from the Italian ones to produce effects in Italy. This opinion has been quite commonly shared among the Italian scholars in the past, but it seems, for some time now, very difficult to be supported in a context of widespread international cooperation, if only in so far as it would risk to imply a denial of the very existence of private international law[3].

However, it is possible to conceptualize a second and less broad notion of international public order which, while also referring to the ordinary Italian legislation, does not take into consideration all or almost all the mandatory rules relevant in the context of internal public order, but only some of them[4]. Those rules should be only those necessary from a constitutional point of view, even if without any constitutional constrain with regard to their specific contents; that is to say, the rules implementing constitutional principles, even if only on a discretionary basis[5], including in this category both the principles of the Italian Constitution and those

[1] It is important always to remind also in Italy what is traditionally pointed out especially in the French literature, namely that «un revirement de jurisprudence est une chose grave» (see, among others, S. BOLLÉE and B. HAFTEL, *L'art d'être inconstant. Regards sur les récents développements de la jurisprudence in matière de gestation pour autrui*, in *Rev. crit. DIP*, 2020, p. 274, note 21).

[2] M.C. BARUFFI, *International surrogacy arrangements test the public policy exception. An Italian perspective*, in *Yearbook of Private International Law*, 2017/2018, 19, p. 296.

[3] For further references and cases, see M. TESCARO, *L'ordine pubblico internazionale nella giurisprudenza italiana in tema di risarcimento punitivo e di maternità surrogata*, in *Nuovo dir. civ.*, 2020, p. 24 ss.

[4] For an interesting example, see M. DOGLIOTTI, *Le Sezioni Unite condannano i due padri e assolvono le due madri*, in *Fam. e dir.*, 2019, p. 673, who hypothesizes a foreign measure that is to some extent discriminatory towards children who are born outside marriage, whose effectiveness in Italy should be denied not only in consideration of para. 3 of art. 30 of the Constitution (which may not be sufficient to reach this purpose since it is just offering «any legal and social protection» for children who are born outside marriage only if «compatible with the rights of members of the legitimate family») but also, and above all, on the basis of the results of the reform of the filiation law in Italy as expressed in the l. no. 219/2012 and the d. lgs. no. 154/2013, which stated a regime of a unitary status of a son/daughter.

[5] On the topic, see O. FERACI, *La nozione di ordine pubblico alla luce della sentenza della Corte di Cassazione (Sez. Un. civ.), no. 12193/2019: tra «costituzionalizzazione attenuata» e bilanciamento con il principio del superiore interesse del minore*, in *Riv. dir. int.*, 2019, p. 1144 s.

enshrined in charters – not always perfectly in line with each other[6] – at European and international level which have nonetheless constitutional value in Italy. Such a notion would impose the task, certainly complicated but not impossible, of grouping the mandatory rules in the Italian law within two different categories (those implementing constitutional principles, albeit in a discretionary manner, and those merely not in conflict with them). Such an approach may lead to results that could appear inadequate to fully guarantee the legal certainty and the predictability of the judicial decisions, but it would overcome the above-mentioned fundamental objections towards the more traditional thesis, appearing as a plausible mean to review it.

Theoretically, a third and even more restricted notion of international public order could be considered. Such a notion would exclusively involve rules of higher hierarchical level than the ordinary law. In other terms, rules which may not be discretionally modified by the ordinary law, based not only on the Constitution but also on the European and international instruments of constitutional status to which Italy is bound[7]. Such a notion would probably not be much better than the previous one from the point of view of the legal certainty and of the predictability of judicial decisions if only by considering how general the terms provided in the fundamental laws are (those will be taken into consideration again in the following paragraph)[8]. However, this notion could be more favorable with respect to the effectiveness of foreign measures in Italy, at least if these measures are issued in application of rules implementing (albeit in a different way from the Italian ones) principles which can be deemed of constitutional status also for the Italian legal order.

Finally, there may be a fourth notion of international public order, aimed at maximizing the value of fundamental European and international instruments as well as the international cooperation and the globalization as positive objectives to be pursued with growing determination also from the point of view under consideration in this study. In this way, such a narrow notion of international public order can be outlined that would be merely used to exclude the efficacy in Italy only of foreign measures issued in application of rules devoid of any connection, even if very generic, both to the Constitution or to the other international charters and instruments considered as of constitutional status in Italy. That is to say, of foreign measures that are based on opinions that are not receiving significant approval at international level. Similar to the opposite extreme thesis considered at first above, the latter seems nonetheless difficult to be supported[9], especially since it would imply an almost total opening

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[6] On this issue, see, among others, J.H.H. WEILER, *Diritti umani, costituzionalismo ed integrazione: iconografia e feticismo,* in *Quad. cost.*, 2002, p. 530 s.

[7] In accordance with this opinion, see, among the judicial decisions, Cass., 30 September 2016, no. 19599, in *Corr. giur.*, 2017, p. 181 ss., with a note by G. FERRANDO, *Ordine pubblico e interesse del minore nella circolazione degli* status filiationis, and in *Nuova giur. civ. comm.*, 2017, p. 372 ss., with a comment by G. PALMIERI, *Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia* same sex, p. 362 ss. See also Cass., 15 June 2017, no. 14878, in *www.articolo29.it/2017*, with a note by S. STEFANELLI, *Riconoscimento dell'atto di nascita da due madri, in difetto di legame genetico con colei che non ha partorito*.

[8] International public order is by its nature a generic and elastic notion; it is the notion with a variable content *par excellence* in the field of private international law. In this sense, see O. FERACI, *L'ordine pubblico nel diritto dell'Unione europea*, Milan, 2012, p. 9 s.

[9] In the literature, see, among others, V. BARBA, *L'ordine pubblico internazionale,* in *Rass. dir. civ.*, 2018, p. 412 s., who thinks of an uncontrolled and unacceptable shift with regard to the notion of

to foreign measures[10]. It would entail the substantial negation of the parameter of international public order (not to mention the national sovereignty)[11], in contrast to the Italian legislation that repeatedly affirms it. Furthermore, such an approach would be different from that employed in the legislation of many other States (even if Member States of the European Union) on the same matter[12].

3. The preferability of a relatively advanced notion of international public order

Having to reject, as it has been clarified above, both the opposite extreme theses, there are two lines of argument that remain: one that refers only to the constitutional provisions; and another one that does not exclude also some of the mandatory rules provided by the ordinary laws (such as those rules implementing, although discretionarily, constitutional principles).

In the opinion of the author, it is the last notion of international public order that is to be preferred, as far as it is not actually giving rise to greater uncertainty than the other notion under consideration[13]. In addition, it allows that the inevitable flexibility of the subject matter is, as much as possible, driven by the discretion of the legislator, rather than by that (although perhaps enlightened) of the judge[14].

As a matter of fact, if in any case the constitutional provisions must be considered at the center of the notion of international public order, it should be kept in mind that they are fairly pluralistic and therefore require, at least to a certain extent, to be specified elsewhere[15]. In this case, it is at least more "democratic" that this necessary, and to some extent discretionary, work of concretization of the constitutional choices would be undertaken in the (also) ordinary

international public order that would occur if reference would be made to the rules of a different and autonomous international legal order common to several States.

[10] For a firm objection to a sort of uncritical appeal to what comes from abroad, as if it would be always and by definition better than what is existing in the Italian law, see more recently A. MONTANARI, *Del «risarcimento punitivo» ovvero dell'ossimoro*, in *Eur. dir. priv.*, 2019, p. 452.

[11] See, among others, M.C. BARUFFI, *op. cit.*, p. 310, according to whom «a globalisation of the notion of public policy […] seems to overlook its fundamental nature».

[12] See, more recently, M. LENDERMANN, *Strafschadensersatz im internationalen Rechtsverkehr*, Tübingen, 2019, p. 151 s., where, in particular with reference to punitive damages, it is emphasized that «der *ordre public*-Vorbehalt wird durch die nationalen Rechtsgrundsätze des jeweiligen Anerkennungsstaates bestimmt, die in den einzelnen Mitgliedstaaten sehr stark voneinander unterscheiden. Von einem einheitlichen unionsrechtlichen *ordre public* kann […] keine Rede sein».

[13] The excessive indeterminacy of the merely constitutional notion of international public order has been more recently persuasively highlighted by FA. FERRARI, *Profili costituzionali dell'ordine pubblico internazionale. Su alcuni "passi indietro" della Corte di Cassazione in tema di PMA*, in *BioLaw Journal – Rivista di BioDiritto*, no. 2/2020, p. 169 ss.

[14] For brilliant observations on the fact that the role of the legislator should return to a higher value compared to that of the judges in the creation of the rules, see, in particular, M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, in *Giur. cost.*, 2006, p. 1643 ss.; as well as N. IRTI, *Dalla lontana provincia del diritto civile*, in *Dir. pubbl.*, 2016, p. 826 ss.

[15] As it has been particularly well clarified in M. DOGLIANI and I. MASSA PINTO, *Elementi di diritto costituzionale*, 2ª ed., Turin, 2017, p. 157 s.; M. DOGLIANI, *Interpretazioni della Costituzione*, Milan, 1982, p. 22 s. See also, among others, J.H.H. WEILER, *op. cit.*, p. 528; as well as, for further references, more recently, FA. FERRARI, *op. cit.*, p. 178 ss.

legislation[16], whose relevance should therefore not be radically denied even with regard to the international public order.

Should we prefer instead an exclusively constitutional notion of international public order, we would end up introducing into the Italian legal system a kind of diffused system of constitutional review for its implementation, in contrast with what provided in art. 134 of the Italian Constitution, which instead entrusts the task of a centralized constitutional review to the Constitutional Court[17].

Furthermore, from the perspective of the hierarchy of the sources of law, it would be paradoxical that the international public order would have a rigidly and exclusively constitutional content, despite the fact that the Constitution itself carefully avoids mentioning this notion[18].

4. The emergence of the notion herewith preferred in the 2017 United Sections judgement on punitive damages

A notion of international public order similar to the one herewith preferred has also been affirmed by the United Sections of the Court of Cassation. It happened for the first time in an eminent judgement issued in 2017 on the subject of punitive damages[19], a topic that also outside of Italy is considered as a «*Musterbeispiel par excellence*»[20].

In this judgement, after recognizing a profound evolution of the international public order notion (in this case, based on art. 64, l. no. 218/1995), in essence, it is provided that a US punitive damages judgement can be recognized and enforced in Italy, although only in case three conditions are satisfied, namely: typicality, predictability and proportionality[21] of the foreign sanction[22].

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[16] In favor of enhancing the role of ordinary legislation with respect to the creativity in the interpretation of the law undertook by the judges, solid opinions have been more recently expressed in A. ZACCARIA, *Il diritto privato europeo nell'epoca del post-postmodernismo,* in *Riv. dir. civ.*, 2020, p. 1 ss.

[17] In this sense, see FA. FERRARI, *op. cit.*, p. 183. See also O. FERACI, *La nozione di ordine pubblico alla luce della sentenza della Corte di Cassazione (Sez. Un. civ.), no. 12193/2019*, cit., p. 1147, who speaks, in relation to the opinion criticized here, of a controversial hermeneutic operation that is in any case impracticable.

[18] With the special case of what provided – after the l. cost. no. 3/2001 – in art. 117, para. 2, lett. h, Cost., where, with specific regard to the relationship between State and regional legislative power, the exclusive competence of the State is reaffirmed in the matter of «public order and security, with the exception of the local administrative police».

[19] Cass., Sez. Un., 5 July 2017, no. 16601, in *Danno e resp.*, 2017, p. 419 ss. For an attempt to organize the main readings on the aforementioned judgement and also foresee its future relevance, see M. TESCARO, *Le variazioni qualitative e quantitative del danno risarcibile*, in *Danno e resp.*, 2018, p. 533 ss.

[20] M. WÜRDINGER, *Der ordre public-Vorbehalt bei Verzugsaufschlägen im niederländischen Arbeitsrecht,* in *IPRax*, 2013, p. 323; M. LENDERMANN, *op. cit.*, p. 149.

[21] More in general on the principle of proportionality as a fundamental principle with respect to which no derogation would be tolerable, see, more recently, V. BARBA, *op. cit.*, p. 443.

[22] The three requirements are listed very clearly in V. ROPPO, *La responsabilità civile di Pietro Trimarchi*, in *Jus civ.*, 2017, p. 701. See also, among others, in English, O. FERACI, *Towards the Europeanization of public policy regarding punitive damages: an inquiry between theory and practice*, in *Punitive damages and private international law: state of the art and future developments*, edited by S. BARIATTI, L. FUMAGALLI and Z. CRESPI REGHIZZI, Milan, 2019, p. 317.

More specifically, with regard to the international public order, the judgement hints in the first place – with particular reference to the evolution of the European Union – at a new function of promoting the protected values[23]. Nonetheless, in this judgement it is also possible to notice the re-emergence of a more traditional perspective according to which «the foreign judgement that is applicable to an institution not regulated by national law, even if not restricted by European regulations, must be weighed against the provisions of the Constitution and of those laws which, as sensitive nerves, fibers of the sensory apparatus and parts vital to an organism, make the constitutional order real», and according to which «Constitutions and legal traditions with their diversities constitute a frontier still alive» (albeit «deprived of selfish veins, which gave "shortness of breath", but made more complex by intertwining with the international context in which the State is placed»)[24].

Although there is no shortage of (sometimes considerably) different opinions[25], that can be understood in the light of the polysemy[26] of the expressions used and more generally the nature of compromise[27] of the judgement under consideration, it seems that the same relatively broad notion of public order considered above as the preferable one has been accepted, with the consequence that an attitude of tendential closure to the recognition in Italy of foreign judgements on the matter of punitive damages should be established by the courts in the future[28].

Despite the explicit acceptance of this relatively broad notion of international public order, in the 2017 United Sections judgement under discussion emphasis is given, in its private

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[23] The relevance of such promotional function of public order is remarked, among others, in M. GRONDONA, *La responsabilità civile tra libertà individuale e responsabilità sociale. Contributo al dibattito sui "risarcimenti punitivi"*, Naples, 2017, p. 124 ss.; as well as in N. RIZZO, *Le funzioni della responsabilità civile tra concettualizzazioni e regole operative*, in *Resp. civ. prev.*, 2018, p. 1814.

[24] On this issue, see, among others, G. DE NOVA, *Le nuove frontiere del risarcimento del danno: i* punitive damages, in *Jus civ.*, 2017, p. 391 (now also in ID., *Arbitrato, contratto, danno*, Turin, 2019, p. 259 s.), where a relatively traditional notion of international public order is brilliantly supported, based both on constitutional principles and on certain principles of Italian law found outside the Constitution.

[25] See, among others, FR. FERRARI, *Il riconoscimento delle sentenze straniere sui danni punitivi. Brevi cenni comparatistici all'indomani della pronunzia italiana del 5 luglio*, in *Riv. dir. civ.*, 2018, p. 282, who talked about the three aforementioned conditions as of requirements that will probably never be an impediment to the recognition of foreign measures; C. CASTRONOVO, *Diritto privato e realtà sociale. Sui rapporti tra legge e giurisdizione a proposito di giustizia*, in *Eur. e dir. priv.*, 2017, p. 794 ss., according to whom the United Sections, arguably, would have used the notion of international public order centered only around constitutional principles.

[26] Remarked in U. SALANITRO, *Ordine pubblico internazionale, filiazione omosessuale e surrogazione di maternità*, in *Nuova giur. civ. comm.*, 2019, I, p. 738.

[27] On this issue, see M. TESCARO, *op. ult. cit.*, p. 534. In similar terms, see also, more recently, A.M. BENEDETTI, *Sanzionare compensando? Per una liquidazione non ipocrita del danno non patrimoniale*, in *Riv. dir. civ.*, 2019, p. 225 and 237. Among others, see also R. CARLEO, Punitive damages*: dal* common law *all'esperienza italiana*, in *Contr. impr.*, 2018, p. 260, where the author thinks of an innovation, however in a well-reasoned and cautious manner.

[28] See, among others, P. IVALDI, *Civil Liability for Health Damages and Uniform Rules of Private International Law*, in *Riv. dir. int. priv. proc.*, 2017, p. 881, who very persuasively remarks that «the openness of the Plenary Session of the Court of Cassation towards punitive damages seems to be wisely inspired by caution and moderation». Among the judicial cases, substantially in line with the aforementioned tendency towards closure, see Trib. Siracusa, ord. 5 December 2018, in *Nuova giur. civ. comm.*, 2019, I, p. 936 ss., with a (critical) note by F. CAROCCIA, *Dell'ordine pubblico e dei danni punitivi. Una rosa è una rosa?*

international law related part, exclusively to constitutional provisions, essentially just arguing that the foreign judgement awarding compensation that is intended to be "imported" in Italy should not be in conflict with the values that govern the matter, based on articles 23 and 25 of the Italian Constitution[29]. At first sight, such an approach may seem to be a point of ambiguity or even as showing a contradiction within the judgement, and this explains why the part of the judgement where the notion of international public order is generally addressed could have been considered by some scholars as an empty declamation[30]. Nonetheless, it seems that there is no inconsistency and that, even without considering the compromising character of the judgement, in the end, the Court of Cassation has somehow clearly showed a preference for the aforementioned notion of international public order, although the judgement did not apply it to the case at hand, simply because in this case there were not even punitive damages with regard to which to carry out a specific evaluation of whether the parameters provided by the Italian Constitution had been observed or not[31].

5. The confirmation and further elaboration of the same notion of international public order in the 2019 United Sections judgement on surrogate motherhood

[29] Among the scholars, right before the judgement of the United Sections, the relevance of these regulatory references has been particularly underlined in M. SESTA, *Il danno nelle relazioni familiari tra risarcimento e finalità punitiva*, in *Fam. e dir.*, 2017, p. 289 and 295. On a fairly similar line of thought, see also, more recently, A. MONTANARI, *op. cit.*, p. 377 ss. and especially 390 ss. Before the aforementioned judgement, these have been discussed also in C. GRANELLI, *In tema di «danni punitivi»*, in *Resp. civ. prev.*, 2014, p. 1760 (who advocated, above all, for a particular theoretical framework of the subject – different from the prevailing one – as "punitive performances" of the wrongdoing but outside the tort law area and therefore, although in principle opening to the possibility that US judgements could be recognized in Italy, on the other hand, by keeping safe the function of the Italian civil liability, which could continue being purely the one of offering a compensation and not to punish or to deter; for a recent extensive study adopting this perspective, see C. DE MENECH, *Le prestazioni pecuniarie sanzionatorie. Studio per una teoria dei «danni punitivi»*, Milan, 2019, p. 53 ss.).

[30] See C. CASTRONOVO, *op. cit.*, p. 794, according to whom, in the judgement of the United Sections there would be the addition of some prudential warnings which, nonetheless, would be merely decorative; C. DE MENECH, *op. cit.*, p. 32 s. However, a different position on this issue can be found, among others, in M.C. BARUFFI, *ibidem*; A. SASSI and S. STEFANELLI, *Ordine pubblico differenziato e diritto allo stato di figlio nella g.p.a.*, in *www.articolo29.it/2018*, p. 5.

[31] See, in this regard, M. DOGLIOTTI, *op. cit.*, p. 673. In the judgement, there are actually also references to the ordinary Italian legislation, but only with regard to the question of the functions of Italian civil liability as faced from a merely domestic perspective, even if the United Sections deal with this question before that of private international law relating to the possibility of the recognition and enforcement in Italy of a US judgement on punitive damages. Although the point – not elaborated by the United Sections, it is worth repeating, simply because in the case at hand the punitive damages were not of relevance – is discussed, it seems to have been assumed that, in the future, the fulfillment or not of the Italian constitutional requirements – and in particular of the most relevant one, the one of proportionality – will have to be assessed in the light not only of foreign law but also, to some extent, of the domestic ordinary law: in this sense see, also for further references, M. TESCARO, *Das "moderate" Revirement des italienischen Kassationshofs bezüglich der US-amerikanischen punitive damages-Urteile*, in *Zeitschrift für Europäisches Privatrecht*, 2018, p. 475 s.; W. WURMNEST, *Towards a European concept of public policy regarding punitive damages?*, in *Punitive damages and private international law: state of the art and future developments*, edited by S. BARIATTI, L. FUMAGALLI and Z. CRESPI REGHIZZI, cit., p. 282; G. BIAGIONI, *Recognition of punitive damages in Italy*, *ivi*, p. 230.

The same notion of international public order herewith upheld was then confirmed and further clarified again by the United Sections of the Court of Cassation in another well-known judgement issued in 2019 which was touching upon the subject of surrogate motherhood[32]. In this judgement, the problem of the compatibility of a measure issued by a Canadian public authority with this notion of international public order (based on articles 16 and 65, l. no. 218/1995, as well as art. 18, d.p.r. no. 396/2000) has been addressed and it has been resolved in a negative sense. The Canadian measure granting co-parenting (that is to say, second fatherhood) of two twins born from surrogate motherhood to one of the spouses – for same-sex marriage entered into in Canada – devoid of any biological relationship has not been recognized[33].

In particular, with regard to the notion of international public order[34], the 2019 United Sections judgement is, in the first place, recalling the fact that the trend in the decisions of the Court of Cassation in the recent years has shifted towards abandoning the traditional merely defensive approach. In fact, there are numerous rulings that, in order to provide such a notion with substance, have already placed the accent on constitutional as well as (even more) on international law rules[35]. The judgement is also recalling the position taken by the 2017 United Sections decision on punitive damages, trying to frame it – more than what it really is – in a line of perfect continuity with the previous judgements aimed at remarking the relevance of the principles of international and supranational charters and instruments, along with those of the Italian Constitution.

However, the 2019 United Sections do also affirm that the 2017 judgement on punitive damages highlighted an important aspect, which perhaps remained in the shadow of the more general statements of the previous rulings, although it was taken into consideration while examining the specific cases. It highlighted how the relevance of ordinary law (according to its interpretation consolidated in the practice) has also been recognized as an instrument for the implementation of the constitutional values and therefore it is necessary to be taken into account in the notion of international public order[36].

After having described in this way the notion of international public order deemed to be applied, the 2019 judgement clarifies that the case at hand was fully falling within the category

[32] Cass., Sez. Un., 8 May 2019, no. 12193, in *Fam. e dir.*, 2019, p. 653 ss.

[33] For further references, see M. TESCARO, *L'ordine pubblico internazionale nella giurisprudenza italiana in tema di risarcimento punitivo e di maternità surrogata*, cit., p. 37 ss.

[34] Which is the aspect representing the essential core of the judgement, as underlined in G. FERRANDO, *Maternità per sostituzione all'estero: le Sezioni Unite dichiarano inammissibile la trascrizione dell'atto di nascita. Un primo commento,* in *Fam. e dir.*, 2019, p. 678.

[35] See *supra*, note 7.

[36] In adherence to this opinion with specific regard to the notion of international public order chosen by the United Sections, see A. NICOLUSSI, *Famiglia e biodiritto civile*, in *Eur. dir. priv.*, 2019, p. 746, according to whom this notion remains above all a category of domestic law, which cannot be understood regardless of the way in which the ordinary law has given specific contents to the fundamental principles of a certain legal order.

of surrogate motherhood[37], which could be rather called «dissociated motherhood»[38] (in any case, different from the assisted fertilization, albeit heterologous[39]). As a matter of fact, surrogate motherhood is punishable under the Italian criminal law[40] and therefore, already on the basis of this circumstance, it can be deduced as certainly forbidden on the ground of public order[41]. Continuing with their argument, the United Sections consider the prohibition of surrogacy of maternity as the necessary link between the regime of the medically assisted procreation and the general one of filiation. This marks the limit beyond which the principle of self-responsibility, based on the consent of the parties to such a practice, ceases to act, and the *favor veritatis* comes back into play. Based on the latter, the prevalence of genetic and biological identity can be justified, without leading to the cancellation of the interest of the minor[42].

[37] The essential feature of which, according to the United Sections, is the fact that a woman lends her body (and eventually the ova necessary for conception) in order to help another person or a sterile couple to fulfill their desire to have a child, assuming the obligation to provide for the pregnancy and delivery on their behalf, as well as committing to give them the unborn. For an in-depth analysis on the various types of surrogacy that may occur, see, more recently, I. RIVERA, *La complessa questione della maternità surrogata tra rispetto dell'ordine pubblico e protezione del* best interest of the child*: un percorso ermeneutico non sempre coerente*, in *Soc. dir.*, 2020, p. 206 ss.

[38] E. BERGAMINI, *Problemi di diritto internazionale privato collegati alla riforma dello* status *di figlio e questioni aperte*, in *Riv. dir. int. priv. proc.*, 2015, p. 331.

[39] In the literature, see, among others, also for further references, MI. BIANCA, *La tanto attesa decisione delle Sezioni Unite. Ordine pubblico versus superiore interesse del minore?*, in *Familia*, 2019, p. 375 s., who highlights that the key element of the surrogacy is the pregnancy for others, which makes it possible to draw a clear distinction with heterologous fertilization, where there is only the use of other people's genetic material.

[40] However, the provisions in the criminal law in their current, fairly broad, formulation (indeed, see art. 12, para. 6, l. no. 40/2004, according to which «Anyone who, in any form, carries out, organizes or advertises the commercialization of gametes or embryos or the surrogacy is punished with imprisonment from three months to two years and with a fine from 600,000 to one million euros») do not seem capable of covering their infringement put in place by Italian citizens abroad (for further information on this point, see A. SASSI and S. STEFANELLI, *op. cit.*, p. 8), and consequently a law proposal has been submitted (n. 519 of June 25th, 2018, XVIII legislature, based on the initiative of senator Gasparri) with the aim of extending the coverage of the criminal law rules also to these cases.

[41] A similar line of thinking had already emerged in a decision of the Court of Cassation (see Cass., 11 November 2014, no. 24001, in *Corr. giur.*, 2015, p. 471 ss., with a note by A. RENDA, *La surrogazione di maternità tra principi costituzionali ed interesse del minore*) and also in a decision of the Constitutional Court (see Corte cost., 18 December 2017, no. 272, in *Nuova giur. civ. comm.*, 2018, I, p. 546 ss., with a comment by A. GORGONI, *Art. 263 c.c.: tra verità e conservazione dello* status filiationis, p. 540 ss.; on the subject, see also M. SESTA, *L'atto di nascita del cittadino straniero nato in Italia non può recare il riconoscimento di due madri*, in *Fam. e dir.*, 2020, p. 331, who considers the last mentioned judgement to be the most relevant among the recent judicial decisions concerning the law on filiation).

[42] Severe criticisms have been raised with regard to the notion of «best interest of the child» and some of its usages: in particular, see L. LENTI, *Note critiche in tema di interesse del minore*, in *Riv. dir. civ.*, 2016, p. 86 s.; F.D. BUSNELLI, *Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti*, in *Riv. dir. civ.*, 2016, p. 1467. Nonetheless, the perspective aimed at considering this concept in broadly positive terms and at developing this notion under various aspects is supported, among others, in V. SCALISI, *Il superiore interesse del minore ovvero il fatto come diritto*, in *Riv. dir. civ.*, 2018, p. 405 ss.; P. STANZIONE, *La genitorialità tra legittimità, verità e responsabilità*, in *Rass. dir. civ.*, 2019, p. 668 ss.

As a matter of fact, in order to protect the interest of the minor in any case, the court practice has already recognized the possibility to use other legal remedies, namely the adoption in particular cases and especially in the one referred in art. 44, para. 1, lett. d), l. no. 184/1983, which is considered applicable under the only condition of the «ascertained impossibility of pre-adoptive custody», to be understood not as a *de facto* impossibility, deriving from a situation of abandonment of the minor, but as the impossibility in legal terms to put in place a pre-adoptive custody[43]. This solution has been accepted by the United Sections, which do consider it compatible with the international conventions on the matter and the judicial practice trends already formed in this regard[44].

It follows that the notion of international public order adopted by the United Sections in the 2019 judgement is relatively broad – or, if it may be preferred, complex[45] – since it does also imply an unequivocal openness to the consideration of some norms provided in the ordinary laws[46]. This openness is clearly not a mere declamation, but it has rather been decisive for the solution of the dispute at hand since with a narrower notion of public order it would have been different. The fundamental motivation given by the United Sections to deny the enforcement of the foreign remedy in Italy is, in fact, the consideration of fundamental values,

[43] In this sense, see already Cass., 22 June 2016, no. 12962, in *Fam. e dir.*, 2016, p. 1025 ss. In the literature, see, among others, also for further references, C. CAMPIGLIO, *La genitorialità nelle coppie same-sex: un banco di prova per il diritto internazionale privato e l'ordinamento di stato civile*, in *Fam. e dir.*, 2018, p. 930; E. BILOTTI, *Convivenze, unioni civili, genitorialità, adozioni*, in *Dir. fam. pers.*, 2017, p. 873 ss.; ID., *L'adozione del figlio del convivente. A Milano prosegue il confronto tra i giudici di merito*, in *Fam. e dir.*, 2017, p. 1003 ss.; R. SENIGAGLIA, *Genitorialità tra biologia e volontà. Tra fatto e diritto, essere e dover-essere*, in *Eur. dir. priv.*, 2017, p. 1006 ss.; as well as M. CINQUE, *Quale statuto per il "genitore sociale"?*, in *Riv. dir. civ.*, 2017, p. 1490 ss., who persuasively argues that an intervention by the legislator remains necessary, at least in order to unequivocally consolidate this interpretation, if not for the purpose of more widely putting in place a modernization of the rules on this topic.

[44] See especially ECtHR, 26 June 2014, no. 65192/11, in *Nuova giur. civ. comm.*, 2014, I, p. 1122 ss., with a comment by C. CAMPIGLIO, *Il diritto all'identità personale del figlio nato all'estero da madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)*; ECtHR, 24 January 2017, Grand Chamber, no. 25358/12, in *Nuova giur. civ. comm.*, 2017, I, p. 501 ss., with a comment by L. LENTI, *Ancora sul caso Paradiso & Campanelli c. Italia: la sentenza della Grande Camera*, p. 495 ss. Subsequently, see the first *avis consultatif* of the ECtHR, Grand Chamber, 10 April 2019, no. P16-2018-001, in *Nuova giur. civ. comm.*, 2019, I, p. 764 ss., and the related comments by U. SALANITRO, *op. cit.*, p. 740 s., and by A.G. GRASSO, *Maternità surrogata e riconoscimento del rapporto con la madre intenzionale*, in *Nuova giur. civ. comm.*, 2019, I, p. 757 ss., in particular p. 762 s., who are considering this advisory opinion of the ECtHR as generally compatible with the position upheld by the United Sections in the 2019 judgement. However, it should be emphasized that such advisory opinions are not binding, not even for States which – unlike, so far, Italy – have already ratified the Protocol no. 16 of the ECHR, although it is easy to foresee that it will have a very significant incidence and in many States, as it has been remarked in I. ANRÒ, *Il primo parere reso dalla corte europea dei diritti dell'uomo ai sensi del protocollo n. 16 alla CEDU: il nuovo strumento alla prova del dialogo tra giudici sul delicato tema della maternità surrogata*, in *Sidi Blog*, 6 May 2019. In general, on the new Protocol no. 16 of the ECHR, see also, among others, N. POSENATO, *O "Protocolo do Diálogo" entra em vigor*, in *Espaço Jurídico Journal of Law*, 2018, p. 325 ss.; as well as A. HENKE, *La giurisdizione consultiva della Corte di Strasburgo nel nuovo Protocollo no. 16 alla CEDU*, in *Riv. dir. proc.*, 2018, p. 1244 ss.

[45] MI. BIANCA, *op. cit.*, p. 373.

[46] Among the scholars it has been very persuasively supported by R. SENIGAGLIA, *op. cit.*, p. 1008.

such as the human dignity of the pregnant woman, and the existence of the regime of adoption, which are – not unreasonably – considered to prevail over the interest of the minor. Such a prevalence is emerging from a balance of interests directly carried out by the legislator, to which the judge cannot substitute his own evaluation.

Although, as already mentioned above, the 2019 United Sections have also declared to be substantially in line with the trend already emerged in the decisions of the Court of Cassation which for the notion of international public order did only refer to constitutional rules[47], it is therefore clear that, with regard to this notion, the United Sections did actually take a different path, rather following the trend of its own 2017 decision on punitive damages[48].

6. The fluctuating developments in the following judicial practice

Despite the fact that, as it has been demonstrated, there is a judicial trend grounded on two consistent judgements of the United Sections of the Court of Cassation, the following judicial practice still seems to be significantly fluctuating[49].

First of all, there is no lack of decisions which, even if facing partially different problems, have placed themselves on a line of substantial continuity with the aforementioned judicial trend, or at least with some of the ideas it is based upon. In this regard, it can be pointed out, in the first place, to a judgement of the Constitutional Court[50], which ruled out the unconstitutionality of articles 5 and 12, paragraphs 2, 9 and 10, l. no. 40/2004, by affirming, for what matters the most here, that the legislative concern to guarantee, in the face of the new procreative techniques, the respect of the conditions considered as the best for the development of the personality of the newborn cannot be considered as irrational and unjustified in general terms. This judgement did also remark the difference between the adoption, which aims to give a family to a child who is deprived of it, and the medically assisted procreation, which instead

[47] See *supra*, note 7.

[48] For similar findings, see MI. BIANCA, *op. cit.*, p. 377, who stresses also the sometimes ambiguous style adopted by the United Sections; U. SALANITRO, *op. cit.*, p. 738; G. FERRANDO, *op. ult. cit.*, p. 681; O. FERACI, *La nozione di ordine pubblico alla luce della sentenza della Corte di Cassazione (Sez. Un. civ.), no. 12193/2019*, cit., p. 1145 s. On this issue, see also M. DOGLIOTTI, *op. cit.*, p. 673, as well as, more recently, FA. FERRARI, *op. cit.*, p. 184 ss. Against the possibility of applying the same notion of international public order with regard to the patrimonial aspects related to the topic of punitive damages, see A. SASSI and S. STEFANELLI, *op. cit.*, p. 5 ss., who upheld the opinion that differentiated effects should be produced based on the relevance of the different interests at stake.

[49] Similar or even greater fluctuations of the judicial practice can be observed in France: see, also for further references, S. BOLLÉE and B. HAFTEL, *op. cit.*, p. 274, where it is critically emphasized «la formidable instabilité jurisprudentielle qui caractérise l'époque actuelle», and p. 281, where the judgments even of the French *Cour de cassation* seem to be more and more «une toile de Pénélope».

[50] Corte cost., 23 October 2019, no. 221, in *Corr. giur.*, 2019, p. 1460 ss., with a note by G. RECINTO, *La legittimità del divieto per le coppie* same sex *di accedere alla PMA: la Consulta tra qualche "chiarimento" ed alcuni "revirement"*. On this judgement, see also U. SALANITRO, A strange loop. *La procreazione assistita nel canone della Corte costituzionale*, in *Nuove leggi civ. comm.*, 2020, p. 206 ss., who talks about a position taken by the judges that lends itself to various interpretations and which in any case is to be considered as uncertain; as well as B. LIBERALI, *La legge n. 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 *St. iur.*, 2020, p. 534 ss. See also the very critical remarks on this judgment by M.C. VENUTI, *La genitorialità procreativa nella coppia omoaffettiva (femminile). Riflessioni a margine di Corte cost. n. 221/2019*, in *Nuova giur. civ. comm.*, 2020, II, p. 664 ss.

serves to give a child who did not yet come into existence to a couple (or to a single person) realizing the parental aspirations[51]. The same judgement did also finally specify, with regard to art. 32, para. 1, of the Constitution, that the protection of health cannot be extended to impose the satisfaction of any subjective aspiration that a couple (or a single person) considers essential, so as to make any regulatory obstacle to its realization unconstitutional[52].

In the same line of thinking, also the Court of Cassation, in a following judgement[53] has, for what is of utmost interest in this study, reaffirmed the principle that medically assisted procreation techniques cannot become a mean to realize the «desire for parenting» alternative and equivalent to natural conception, left to the free self-determination of the interested parties[54].

However, significant attempts have already emerged aiming to overcome, always by way of judicial decisions, the position of the United Sections. It may be enough to recall here[55] that

[51] In the literature, see, among others, F. AZZARRI, *I quindici anni della legge 40: nemesi e questioni aperte nella disciplina della fecondazione assistita*, in *Familia*, 2019, p. 572.

[52] A similar line of thinking has also been followed by the Italian Constitutional Court, 15 November 2019, no. 237, in *Fam. e dir.*, 2020, p. 325 ss., with a note by M. SESTA, *L'atto di nascita del cittadino straniero nato in Italia non può recare il riconoscimento di due madri*, who points out – p. 330 – that it is the Constitution itself (articles 29 and 30) to demand that parent-child relationships exist between a child, a father and a mother and that this has no discriminatory character.

[53] Cass., 3 April 2020, no. 7668, in *Dir. fam. pers.*, 2020, p. 885 ss. (with notes by E. TROTTA, *Prevalenza della verità biologica nella redazione degli atti di stato civile e tutela della "genitorialità intenzionale"*, and by I. BARONE, *Le vie della doppia maternità*), in *Corr. giur.*, 2020, p. 1041 ss. (with a note by A.G. GRASSO, *Nascita in Italia e PMA da coppia di donne: la Cassazione nega la costituzione del rapporto filiale*), and in *Fam. e dir.*, 2020, p. 537 ss. (with a note by A. SCALERA, *Doppia maternità nell'atto di nascita: la Cassazione fa un passo indietro*), on the rectification of a birth certificate issued in Italy after heterologous fertilization, which took place abroad, of a member of a female homosexual couple. The Court of Cassation refused the rectification, denying the recognition of the parenting of the "intentional" mother, arguing that in such a case, since the birth took place in Italy, the domestic public order (not the international one) is to be observed, in accordance with which only one person has the right to be mentioned as a mother in the birth certificate (more recently on the same topic see also Corte cost., 20 October 2020, no. 230, in *Pluris*, where the broad discretion of the ordinary legislation is very persuasively shown). For a first comment, see FA. FERRARI, *op. cit.*, p. 193, note 138, who deems the formal correctness of this reasoning to be indisputable, but considers it paradoxical that the same dispute would probably have been solved in the opposite sense, if only the birth had taken place abroad, as had happened in the case faced by Cass., 30 September 2016, no. 19599, cit. However, critical opinions with respect to this last judgement have been expressed, among others, by M. SESTA, *op. ult. cit.*, p. 331, where it has been remarked that the idea that two people of the same sex, incapable by nature of reproduction, can form a parental couple is not recognized by the Italian Constitution, and also by FA. FERRARI, *op. cit.*, p. 172 ss., who has highlighted that such a judgement could have been criticized from the perspective of the sources of law and the way they mark the respective areas of intervention by the judge and the legislator.

[54] For a similar opinion, see also Cass., 22 April 2020, no. 8029, in *Pluris*. This case was again about heterologous fertilization, which took place abroad, of a member of a female homosexual couple. The Court of Cassation reiterated that the recognition of the child, born in Italy, could only be accomplished by the biological mother, not also by her partner, who had not provided any biological contribution to the procreation.

[55] For references also to some recent judgements that are formally agreeing, but substantially disagreeing with the position upheld by the United Sections, see M.C. BARUFFI, *Gli effetti della maternità surrogata al vaglio della Corte di Cassazione italiana e di altre corti*, in *Riv. dir. int. priv. proc.*, 2020, p. 306 s.

recently the first Section of the Court of Cassation has raised, with an interlocutory ruling[56], the question of constitutional legitimacy of art. 12, para. 6, of the l. no. 40/2004 together with articles 18 of the d.p.r. no. 396/2000 and 64, para. 1, lett. g), of the l. no. 218/1995, on the ground of the fact that they could be considered as in contrast with the Constitution (articles 2, 3, 30, 31, 117, para. 1), the European Convention for the protection of human rights and fundamental freedoms (art. 8), the New York Convention on the Rights of the Child of 20 November 1989 (articles 2, 3, 7, 8, 9 and 18) and the Charter of Fundamental Rights of the European Union (art. 24). According to the verbose (in the opinion of the author, more than it would be convenient for such a kind of measure) ruling under consideration, which invokes insistently the first advisory opinion of the ECtHR[57] in order to criticize the current situation of the Italian law regarding it as markedly incompatible with this ECtHR opinion[58], the aforementioned Italian internal legislation should now be declared illegitimate by the Constitutional Court. This Italian internal legislation, in fact, interpreted in accordance with the 2019 judgement of the United Sections on the surrogate motherhood, as it is well known, undoubtedly requires the denial of recognition (without the possibility of a differentiated evaluation on a case by case basis) of a foreign judicial measure pursuant to which it would be possible to insert in the civil status record of a minor born from a gestational surrogacy also the non-biological parent. However, a similar outcome, according to the first Section of the Court of Cassation, would be in clear contrast to the various constitutional provisions mentioned above, especially in light of the first advisory opinion of the ECtHR. Therefore, this ruling aims at overcoming the position of the United Sections, albeit not autonomously but provoking an intervention by the Constitutional Court[59], whose outcomes are not easy to be predicted[60].

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[56] Cass., ord. 29 April 2020, no. 8325, in *Corr. giur.*, 2020, p. 902 ss., with a note by U. SALANITRO, *L'ordine pubblico dopo le Sezioni Unite: la Prima Sezione si smarca... e apre alla maternità surrogata*; and in *Fam. e dir.*, 2020, p. 675 ss., with notes by G. FERRANDO, *I diritti del bambino con due papà. La questione va alla Corte costituzionale*, and by G. RECINTO, *Un inatteso "*revirement*" della Suprema Corte in tema di maternità surrogata*. In the literature, see also ANG. FEDERICO, *Forme giuridiche della filiazione e regole determinative della genitorialità: la maternità surrogata e il superiore interesse del minore*, in *Quale diritto di famiglia per la società del XXI secolo?*, edited by U. Salanitro, Pisa, 2020, p. 340 ss.

[57] See *supra*, note 44.

[58] See, however, for a persuasive argument with a contrary opinion, more recently, M.C. BARUFFI, *op. ult. cit.*, p. 308 ss., where also further references can be found.

[59] This profile, at least from the particular point of view of the path through which the constitutionality check should strictly take place (i.e. through the intervention of the Constitutional Court and not autonomously by the Court of Cassation), is praised by FA. FERRARI, *op. cit.*, p. 192 s., note 138; ID., *La legge "presa sul serio". Sulla q.l.c. sollevata dalla Cassazione in tema di maternità surrogata e ordine pubblico internazionale (ord. 8325/2020)*, in *Forum di Quad. Cost.*, 2020, p. 532 ss.

[60] For interesting observations on the possible content of the decision of the Constitutional Court, see B. LIBERALI, *Il divieto di maternità surrogata e le conseguenze della sua violazione: quali prospettive per un eventuale giudizio costituzionale?*, in *Oss. cost.*, 2019, p. 197 ss. According to the author, in any case, an immediate and sound intervention by the legislator would be more appropriate, since it would offer certain and homogeneous parameters, which are fundamental in such a sensitive matter as the surrogacy. Also in France it was recently pointed out that «a reform in this field is imperative in order to guarantee the coherence of the system» (C. BIDAUD, *La transcription des actes de l'état civil étrangers sur les registres français. Cesser de déformer et enfin reformer…*, in *Rev. crit. DIP*, 2020, p. 247).

7. Summary of the different opinion trends among the scholars

The fluctuations in the judicial decisions outlined above, which are still not settled on uniform trends, as it has been illustrated, give rise to an even more uncertain and complicated picture if the opinions of the scholars would be also taken into account. This should not be particularly surprising, given the famous German saying, certainly suitable also for the Italian context, *zwei Juristen, drei Meinungen*.

There is, in fact, a first trend, perhaps involving only a minority of scholars (or only less eye-catching?) but far from negligible[61], definitely favorable, at least in its fundamental findings (and with the exception, sometimes, of some critical considerations on other aspects), to the notion of international public order chosen by the United Sections, to which, for the reasons already recalled above, this study agrees upon[62].

Nonetheless, there is no shortage of very severe criticisms of the notion upheld by the United Sections[63]: for instance, some scholars even dared to consider it as an approach, if not intentionally sovereignist, at least easily exploitable by dangerous sovereignist political movements[64].

However, the trend of opinion which is apparently winning the largest support among the scholars is taking a kind of intermediate position, as it identifies significantly valuable aspects in the position of the United Sections, but also no less significantly criticizable ones. Within this trend there is a number of opinions (that cannot be analyzed in detail here) which may be different with regard to the more specific aspects. Nonetheless, it seems to be fairly widespread among them the idea that the most serious mistake made by the United Sections had been to exclude, with regard to surrogacy motherhood, the possibility for a judge to render remarkably diversified solutions by taking into account the peculiarities of each specific case[65].

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[61] See, among others, M.C. BARUFFI, *International surrogacy arrangements test the public policy exception. An Italian perspective*, cit., p. 300 s.; EAD., *Gli effetti della maternità surrogata al vaglio della Corte di Cassazione italiana e di altre corti*, cit., p. 298 ss.; MI. BIANCA, *op. cit.*, p. 380; T. PASQUINO, *L'incidenza della giurisprudenza della Corte costituzionale e delle Corti europee sul diritto privato*, in *Antologia di casi giurisprudenziali*, edited by T. Pasquino, 3ª ed., Turin, 2019, p. XIX s.; A.M. GAMBINO and T. PASQUINO, *Gestazione surrogata: altruismo o costrizione? Profili giuridici*, in *L'Arco di Giano*, 2016, p. 92; G. LUCCIOLI, *Dalle Sezioni Unite un punto fermo in materia di maternità surrogata*, in *Foro it.*, 2019, I, c. 4027 ss.; EAD., *Qualche riflessione sulla sentenza delle Sezioni Unite n. 12193 del 2019 in materia di maternità surrogata*, in *GenJUS*, 2020-1, forthcoming.

[62] These reasons are further elaborated in M. TESCARO, *op. ult. cit.*, p. 23 ss.

[63] See, for example, A. VALONGO, *La c.d. "filiazione omogenitoriale" al vaglio delle Sezioni unite della Cassazione*, in *Giur. it.*, 2020, p. 547 ss., who speaks of a trend in the Italian case law that can be criticized, among other reasons, because it would be suitable for encouraging an unjustified differentiation of legal treatment with regard to access to parenthood between couples of women and couples of men. *Contra*, among others, M.C. BARUFFI, *op. ult. cit.*, p. 314, who underlines how the United Sections have developed a reasoning to which any assessment relating to the gender aspect is irrelevant; as well as O. FERACI, *op. ult. cit.*, p. 1148.

[64] In this sense, see M. DOGLIOTTI, *op. cit.*, p. 673 s.

[65] See, among others, ANG. FEDERICO, *op. cit.*, p. 335 ss.; G. SALVI, *Gestazione per altri e ordine pubblico: le Sezioni Unite contro la trascrizione dell'atto di nascita straniero*, in *Giur. it.*, 2020, p. 1625 ss.; A. GORGONI, *Vita familiare e conservazione dello stato di figlio: a proposito delle Sezioni unite sulla (non) trascrivibilità dell'atto di nascita da surroga di maternità all'estero*, in *Pers. e Merc.*, 2019, p. 141 ss.; ID., *Filiazione e responsabilità genitoriale*, Milan, 2017, p. 259 s.; G. PERLINGIERI and G. ZARRA, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale*, Naples, 2019, p. 94 ss. and 222 s.; G. PERLINGIERI, *Ordine pubblico e identità culturale. Le Sezioni Unite in*

Although the last mentioned criticism is often aiming to promote some undoubtedly relevant principles, such as the principles of reasonability and proportionality[66], the author believes that such a criticism is easy to be overcome if only it would be accepted the idea that the fundamental choices for the implementation of constitutional principles, also but not only with regard to the clarification of the notion of international public order, should be carried out, in the first place, by the legislator, for the reasons already explained above[67].

8. Conclusions

Even if the analysis is limited to taking into consideration only the opinions of the Italian scholars and the decisions of the Italian judges[68], there is no shortage of different reconstructions and emphasis given to different aspects, as it has been possible to see from the previous pages. Nevertheless, the author hopes that the Italian legal system will retain a notion of international public order more evolved compared to those previously accepted, but still with a significant defensive potential of the most important features of the national legislation, such as in the case, analyzed above, of the 2017 judgement of the United Sections on punitive damages and of the 2019 judgement again of the United Sections on surrogate motherhood.

If things would not evolve in this direction and the judges, eventually including the Constitutional Court, will shortly start moving towards a different direction overcoming these United Sections judgements, even without considering the substantive issues relating to the individual aspects involved, it will give rise to considerable doubts with regard to the effectiveness of the "nomophilachy" function of the Court of Cassation and consequently also

tema di c.d. maternità surrogata, in *Dir. succ. fam.*, 2019, p. 337 ss.; V. BARBA, *Nota a Cass. Sez. Un. 12193/2019*, in *GenIUS*, 2019-2, p. 19 ss.; ID., *L'ordine pubblico internazionale*, cit., p. 435 s.; G. FERRANDO, *Maternità per sostituzione all'estero: le Sezioni Unite dichiarano inammissibile la trascrizione dell'atto di nascita. Un primo commento*, cit., p. 684 ss.; A. SASSI and S. STEFANELLI, *op. cit.*, p. 2 s. and 24 s.; V. SCALISI, *Maternità surrogata: come «far cose con regole»*, in *Riv. dir. civ.*, 2017, p. 1099 s.; U. SALANITRO, *Ordine pubblico internazionale, filiazione omosessuale e surrogazione di maternità*, cit., p. 740.

[66] In a similar vein, see, also for further references, G. PERLINGIERI and G. ZARRA, *op. cit.*, *passim*. It seems that the recent decision taken by Cass., ord. 29 April 2020, no. 8325, cit. followed this opinion.

[67] On a similar line of thought, see, more recently, M. SESTA, *ibidem*; as well as M.C. BARUFFI, *op. ult. cit.*, p. 317 ss., who persuasively, on the one hand, calls for an intervention by the legislator to reform the regime of the adoption by introducing «fast-track procedures» and, on the other hand, warns about the risk that a case-by-case approach may lead to overburdening the courtrooms with such sensitive issues, which would instead deserve uniform solutions established in advance, not a regulatory anarchy and differentiated practices. More in general on the subject see also the brilliant observations in M. LUCIANI, *Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana*, in *Oss. sulle fonti*, 2013, p. 16 s., where it is clarified that art. 101, para. 1, Cost., providing that «Justice is administered in the name of the people» and not of the nation, prohibits that the "deep streams" which the observer believes to perceive in the society may prevail over the popular will expressed through the legislation.

[68] For detailed references concerning many other legal systems, see, more recently, A. STAZI, *Human genomics and surrogate motherhood: legal pluralism and the circulation of models*, in *Comparative Law Review*, n. 9/2 (2018), p. 75 ss.; E. FALLETTI, *"Di chi sono figlio? Dipende da dove mi trovo". Riflessioni comparate su* status, *genitorialità e GPA*, in *Fam. e dir.*, 2020, p. 743 ss.

about the certainty – or calculability[69] – of the law. A sudden change occurring in the highest level of the judiciary will let the top-level judges appear no less unstable – or, as it has been recently written about the French *Cour de cassation*, «inconstant»[70] – than the scholars, within whom, however, the variety and perhaps also the changing opinions are – if not even desirable – much less problematic from the point of view of the soundness of the legal order.

[69] N. IRTI, *Un diritto incalcolabile*, Turin, 2016, *passim*. See also ID., *Il tessitore di Goethe (per la decisione robotica)*, in *Riv. dir. proc.*, 2018, p. 1177 ss.; ID., *Gli eredi della positività*, in *Nuovo dir. civ.*, 2016, p. 11 ss.

[70] S. BOLLÉE and B. HAFTEL, *op. cit.*, p. 267.