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Private Autonomy and Family Public Policy in Italy

Abstract: The article deals with the general clause of public policy in Italian family law. It analyses the recent case-law application of both international and internal public policy in the Italian legal system. Nowadays, public policy is used for protecting and developing the fundamental rights of individuals in the EU space. However, the content of this general clause is debated, and there are several theses (e.g. constitutional, discretionary, globalized public policy). Adhering to one concept rather than another has different consequences. Think, for example, of the recognition of double paternity acquired abroad through a surrogacy contract. Moreover, family public policy can be viewed both as public policy of the family (a general clause that protects the family rather than its members) and public policy in the family (a general clause that protects the fundamental rights of the individuals rather than the family). Subsequently, the article analyses prenuptial and postnuptial agreements in Italy. Italian jurisprudence considers both agreements invalid because they are in contradiction to public policy. The article suggests that families can use the contractual instrument. However, personal and patrimonial clauses in domestic family agreements need to be compatible both with the public policy of the family and public policy in the family. Ultimately, public policy becomes a tool attributed to ordinary judges for guaranteeing widespread constitutional legality.
Keywords: family, family public policy, postnuptial agreements, prenuptial agreements, private autonomy, surrogacy contracts

Introduction

This contribution explores the relationship between private autonomy and the family. Full recognition of private autonomy in family law would give its members the power to regulate legal relations in the way they prefer. In the Italian system there

are three main options.[1] The first is that of the absolute unavailability of juridical situations arising from the family. The second is that of mandatory rules. Not all family legal situations are unavailable but only those whose rules are mandatory. The third, then, is that of the availability of the interests underlying some family legal transactions. In these terms, it opens up to private autonomy and to family contracts, but this opening must be balanced by thorough checks on the content.

Private autonomy has, notoriously, some limitations.[2] In many legal systems (including the Italian one) public policy represents a limit both to contractual autonomy (constituting one of the criteria, together with morality and mandatory rules, of a contract's unlawfulness which render it null and void pursuant to Articles 1343 and 1418 of the Italian Civil Code) and to the application of foreign law or to the recognition of foreign judgments or provisions (previously: Article 31 Pre-laws; now Articles 16, 64 and 65, Law 218 of 1995). In this regard, a distinction is made between *internal* and *international public policy*. Public policy is a general clause, the content of which is filled by principles. In particular, in the application of the law, the interpreter is called to concretize the content of the clause through a delicate balance between interests and values to be referred to the specific case.[3]

1. Family Public Policy: Public Policy of the Family and Public Policy in the Family

Public policy is a concept in itself variable in time and space, but the formula is further complicated by the use of the word 'family'. Two meanings of family public policy seem to emerge: that of public policy *of* the family and that of public policy *in* the family context. In the first sense, family public policy seems to translate as *the family's public policy*. Especially in the past, the family was seen as an institution, a model for the organization of the state. The superior interest of the family was identified, recognizing the role of germ-cell of the state. Family public policy was for a long time seen as a general clause that protected the family rather than its members. Limitations on the rights of individual family members were allowed in the best interests of the family, and through the general clause the aim of identifying the most favourable solutions for the household, which mirrored state organization, would be pursued. Thus, the natural rights of each member of the family would weaken when they clashed with the interests of the family group.

1 A. Zoppini, L'autonomia privata nel diritto di famiglia, sessant'anni dopo, 'Rivista di diritto civile' 2002, vol. 48, no. 2, p. 213.

2 G.B. Ferri, Ordine pubblico, buon costume e la teoria del contratto, Milan 1970, p. 1.

3 G. Perlingieri, G. Zarra, Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale, Naples 2018, p. 82.

In Italy, family law has undergone profound changes over the past fifty years. Think, in particular, of the fragmentation and juridicization of family relationships other than those based on marriage (all constitutionally recognized and guaranteed), the transition from the centrality of marriage to filiation and, finally, to greater equality – in the family founded on marriage – between the spouses, as a result of a constant process of removal of the patriarchal aspects that characterized the family as an authoritarian, hierarchical unit.[4]

In the latter sense, family public policy might be translated as *public policy in the family*, in that today there are fundamental values of the individual (proclaimed first in the Constitution and then in supranational sources, in the integrated EU system of sources of law) as a single member of the family that find application in families. These families may or may not be founded on marriage, and may be heterosexual or homosexual through Article 2 of the Constitution, according to which they constitute social groups where human personality is expressed. In other words, the term public policy in the family is intended to highlight that superindividual interests cannot, in any case, harm the fundamental rights of the individual as such, which are protected precisely by the general public policy clause.

With regard to the family founded on marriage (the so-called legitimate family), the Italian constitutional text seems to recall both concepts of family public policy. On the one hand is *public policy in the family*, as according to the first part of Article 29, paragraph 2 of the Constitution, marriage is based on the moral and legal equality of the spouses (thus reaffirming the application of the principle pursuant to Article 3 of the Constitution of the institution of marriage). On the other hand is the *public policy of the family*, where the second part of Article 29, paragraph 2 of the Constitution allows the law (but not private autonomy) to derogate from moral and legal equality in the name of the superior interests of the family.[5]

Judgment no. 494 of 28 November 2002 is the only pronouncement of the Italian Constitutional Court in which 'family public policy' was expressly mentioned.[6] The Court declared unconstitutional the provision of the Civil Code (Article 278) which prohibited incestuous children from acting for the judicial declaration of natural paternity and maternity and the related investigations for cases in which, pursuant to Article 251 of the Civil Code, the recognition of incestuous children was banned. The Constitutional Court recalled that family public policy – which we can define as the public policy *of* the family – represented a solid doctrinal argument that justified the discrimination between children (legitimate and natural) and incestuous children. In other words, it would have been precisely the public policy of the family that allowed

4 P. Perlingieri, Il diritto civile nella legalità costituzionale, Naples 1991, p. 197.

5 M. Sesta, Ultima lezione di diritto di famiglia, 'Jus Civile' 2020, vol. 8, no. 3, p. 814.

6 The Judgment of the Italian Constitutional Court of 28 November 2002 no. 494, "Foro it." 2004, I, c. 1053.

a sub-distinction within the category of children born out of wedlock. The family order would, in fact, have been subverted had the judicial declaration for the recognition of incestuous children been allowed. The Constitutional Court made a *shift* from the traditional interpretation, stating that the public policy of the family found an insuperable limit in the subjective positions of the individual members of the family that can be crystallized through the formula of public policy *in* the family. The ruling therefore proposes a different model of family public policy based on the balance between the protection of the family (as a social group) and the protection of individuals who express their personality within the family.

2. Globalized, Constitutional and Discretionary Public Policy

Nowadays, public policy is a general clause that protects the fundamental rights of the individual, as recognized and guaranteed by the Constitution. We have moved from the conception of public policy as a limit to that of public policy as a clause with a promotional function of fundamental rights. It is debated whether, in order to concretize the content of the public policy general clause, the interpreter should include the principles present in supranational sources and/or the principles of national legislative discretion.

On the one hand, the premise is the proliferation of Charters of Rights at a supranational level. As regards the specific sector of the family, think of the right to respect for private and family life (Article 8, European Convention on Human Rights) and the consideration of the best interests of the child (Article 3, Convention on the Rights of the Child). Thus, some judgments of the Italian Supreme Court and part of the doctrine have theorized the so-called 'globalized public policy'. Public policy would be composed exclusively of supranational principles, thus placing public policy outside the internal legal system The metaphor has been used of an 'axiological cloud' of principles common to nations of similar civilization. The Supreme Court has stated that: 'In recent case law the reference to international public policy has to be understood as the entirety of the fundamental principles characterizing the internal legal order in a determined historical period, but based on the need for the protection of the fundamental rights of humankind common to different orders and inferable, first of all, from the systems of protection prepared at a supranational level despite ordinary legislation.'[7] This is the thesis of supranational origin rights as a counter-limit to the limit represented by public policy. Thus, if the foreign act, *prima facie*, cannot be recognized for being contrary to the public policy of the state, principles expressed in supranational sources would, however, allow the recognition of the act. Think of the transcription of a birth certificate showing double paternity following a surrogacy

7 The Judgment of the Italian Supreme Court of 21 June 2016 no. 19599 (first section), "Foro it." 2016, I, c. 3329.

contract concluded abroad. Surrogacy is banned in Italy. However, the best interests of the child proclaimed by supranational convention would allow the recognition of the double paternity certificate in Italy with the supranational principle acting as a counter-limit to the limitation represented by the prohibition of surrogacy. This thesis is criticized by those who believe that public policy, regardless of its qualification (internal or international), is still and in both cases a concept of domestic law, and adherence to the 'globalized public policy' could lead to a significant loss of national identity, a value to be safeguarded.[8] Thus, the reference to principles contained in conventions and in universal declarations is acceptable on the condition, however, that they are implemented by the single legal system of the state.

On the other hand, if in the public policy clause, principles should be included that are the result of legislative discretion. This is the so-called 'discretionary public policy'. In a joint-sections judgment of the Italian Supreme Court a distinction seems to emerge between constitutional public policy (values and principles inferable from the Constitution) and discretionary public policy (values and principles inferable from the entire national ordinary legislation).[9] The judgment states that compatibility with public policy requires a broad assessment, including not only the fundamental principles of the Constitution and supranational principles but also the principles of the ordinary laws and codified rules. Thus, in the context of recognition of the effects of the foreign judgment or foreign measure, it is therefore necessary to verify its compatibility with the fundamental legal principles drawn from supranational principles, from the Constitution but also from the ordinary laws and from the norms of the internal codes which regulate the institution in Italy.

3. Double Paternity Acquired Abroad Through Surrogacy and its Recognition in Italy

The distinction between constitutional and discretionary public policy is the pivot around which the question of parenting in male and female homo-affective couples develops, and which is connected to both the biotechnological turn of the contemporary family and the change of family paradigms. In Italy, surrogacy constitutes a crime (Article 12, paragraph 6, Law no. 40 of 2004). Thus a contract concluded in Italy is void. In any case, homosexual families go abroad to states where it is permitted. Once the parental bond with the child is validly established abroad, the couple applies for the recognition of that status legitimately acquired abroad in the Italian legal order. Moving from the thesis that includes ordinary legislation for the concretization of the public policy general clause, a recent joint-sections judgment

8 G. Perlingieri, G. Zarra, Ordine pubblico..., *op. cit.,* p. 66.

9 The Judgment of the Italian Supreme Court of 21 June 2016 no. 12913 (joint sections), "Foro it." 2019, I, c. 1951.

of the Italian Supreme Court held that the prohibition of surrogacy provided by the ordinary legislator constitutes a principle of public policy because it aims to protect fundamental values such as the dignity of the pregnant woman and the institution of adoption.[10] In those terms, the judgment excluded the transcribability of the foreign birth certificate which showed double paternity because the fathers had concluded a surrogacy contract abroad. The Supreme Court leaves the possibility for the intentional father to adopt the child in Italy, thus protecting the interests of the child who can remain with the couple that has taken care of him/her since the beginning of his/her life. It has to be noted that the intentional father can adopt the child through the so-called 'adoption in special cases' pursuant to Article 44, paragraph 1, letter d), Law no. 184 of 1983. This kind of adoption does not generate a real parenting relationship between the adopted and the adopter.[11]

A little less than a year after this judgment, a section of the Italian Supreme Court raised the question of the constitutional legitimacy of Article 12, paragraph 6, Law no. 40 of 2004 through a preliminary referral to the Italian Constitutional Court.[12] The Constitutional Court has the task of assessing the conformity of a Law with the Italian Constitution. Interestingly, the section of the Supreme Court raises the question of legitimacy not for the law itself but for the law as interpreted by the joint sections of the Supreme Court, which constitutes the so-called living law. The preliminary referral is based on the distinction between constitutional and discretionary public policy. It is stated that discretionary public policy, including the imperative rules of the forum, must give way to constitutional public policy, which constitutes a hierarchically superior public policy. The referral affirms that international public policy constitutes the criterion of reasonableness on the basis of which is established the axiological hierarchy between norms. It postulates that the application of a foreign law, or the recognition of effectiveness of a foreign act, can go so far as to create, in the concrete case, a fracture with respect to the internal order, resulting from the application of foreign law or from the recognition of the foreign act, but not beyond the point at which the contrast concerns fundamental and inalienable principles of the Italian legal system. Those are the principles inspired by the protection of the fundamental rights of the individual and his or her dignity.[13] According to the pre-

10 The Judgment of the Italian Supreme Court of 21 June 2016 no. 12913 (joint sections), cit.

11 The Judgment of the Italian Constitutional Court of 28 March 2022 no. 79 has subsequently intervened on this point declaring unconstitutional Article 55, Law no. 184 of 1983 (Law on the Right of the Children to a Family). The Court has stated that family relationships established by virtue of adoption must be recognized for all adopted children. Any failure to recognize the family bonds existing with the relatives of the adoptive parent would be tantamount to rejecting the child's identity as established by his or her membership of a new network of family relations.

12 The Preliminary Referral of the Italian Supreme Court of 29 April 2020 no. 8325 (first section), 'Familia' 2020, vol. 5, no. 5, p. 767.

13 V. Barba, L'ordine pubblico «internazionale», 'Rassegna di diritto civile' 2018, vol. 39, no. 2, p. 403.

liminary referral with regard to fundamental rights of the individual, public interest (even if assisted by a criminal sanction) must necessarily take second place, according to the hermeneutic principle of balancing between principles of public policy of constitutional rank and principles of public policy of ordinary legislation rank. The consequence is that in the case of double paternity (the case of two men that stipulate a surrogacy contract in a country where it is allowed and ask for recognition of this status in Italy) the notion of public policy must be circumscribed only to the supreme and binding values contained in the Constitution and in the Charters of Fundamental Rights. In those terms, the ordinance does not see a contradiction between the protection of the superior interest of the minor and the principle of public policy, since 'only apparently are these two opposing entities because, on the contrary, it is precisely the pre-eminent interest of the minor, as expression of the inviolability of human rights, to contribute to the formation of the individual, to contribute to the formation of the principle of public policy, and to constitute a value which is an integral and constitutive part of the Italian legal order'. It would have been an advisory opinion of the European Court of Human Rights – which is not binding for Italy, as well as for other countries – to determine the non-conformity of the Italian living law with the Constitution. For the referral order there would 'clearly' be two profiles of conflict between the ECHR advisory opinion and the current situation of the living law in Italy as configured by the joint-sections judgment. On the one hand, it would not be possible to lift the ban on surrogacy provided by Article 12, paragraph 6, Law no. 40 of 2004 as a principle of international public policy prevailing *a priori* over the interests of the child as a result of a choice made by the Italian legislator in a general way and abstract from the assessment of the individual case. On the other hand, the pre-eminence of the minor's interests would preclude the legislator from imposing a general and abstract compression of these interests and determining a legal weakening of the child's right to the recognition of the *status filiationis* legitimately acquired abroad.

The Italian Constitutional Court has recently ruled that the question of unconstitutionality raised by the preliminary referral was unfounded.[14] Moreover, it has affirmed that the adaptation of the law for the better protection of minors is the responsibility of the ordinary legislator (and not of the Constitutional Court) especially in a matter of such great complexity as this, in which there is a difficult balancing between the legitimate aim of discouraging recourse to surrogacy and the inescapable need to ensure respect for the rights of the minor. The Constitutional Court invites the legislator to act as soon as possible. Law no. 40 of 2004 is thus a constitutionally necessary law but the legislator could regulate the matter differently in the future.

14 The Judgment of the Italian Constitutional Court of 9 March 2021 no. 33, "Foro it." 2021, I, c. 1923. For the Constitutional Court's ruling comments, see 'Nuova Giurisprudenza Civile Commentata' 2021, vol. 37, no. 4, p. 929ff.

Therefore, also in the light of this judgment, the position expressed by the joint sections is still true. The establishment of a legal relationship between the intentional father and the child seems to be achieved in Italy only through adoption in special cases. However, authoritative doctrine recognizes the power of the individual judge to decide for the transcribability of the foreign birth certificate or for the adoption 'in special cases'. The choice depends on the specific case and the aim is to identify the fair and proper remedy (the so-called '*rimedio giusto*').[15]

4. Public Policy as a Technique for Managing the Conflict between state and Community

In cases characterized by elements of extraneousness where so-called international public policy applies, this general clause constitutes a technique for managing the conflict between state and community, between authority and freedom. It is said that the content of international public policy is more limited than internal public policy, in order to allow a wider circulation of foreign legal models which, in any case, remain such with respect to the legal system in which the recognition of legal effectiveness is required.

Sometimes (international) public policy represents the means to affirm the *priority of the state over the family relationship*: consider, for example, the case of surrogacy for gay male couples (A). In other instances, however, (international) public policy makes it possible to affirm the *primacy of the interest of the family relationship over the state*: see the case of legitimizing adoption for gay male couples (B).

(A) The matter of filiation in male homosexual couples demonstrates how the general clause of international public policy protects the values of the legal system, as implemented through ordinary legislation, despite the different aspirations and claims of the members of the family community to be fathers. In an effort to fulfil their desire of parenthood, they try to sidestep the stringent Italian legislation that penalizes surrogate motherhood pursuant to Article 12, paragraph 6, Law no. 40 of 2004 by going to foreign countries where surrogacy is legal. Having entered into surrogacy contracts with surrogate mothers and acquired the status of fathers, they ask Italian civil registrars to recognize the situation legitimately formed abroad. Thus, international public policy intervenes as a manifestation of the state, to prevent cross-border family autonomy from stabilizing the desired result achieved abroad. The joint sections of the Court of Cassation held in 2019 that the ban on surrogacy provided by the ordinary legislator constitutes a principle of public policy aimed at protecting the fundamental values of the legal system, such as the dignity of the pregnant woman and the institution of adoption. However, the Supreme Court ruled that

15 G. Perlingieri, In tema di ordine pubblico, 'Rassegna di diritto civile' 2021, vol. 42, no. 4, p. 1382.

the relationship between intentional father and child can only be protected through the institution of 'adoption in special cases'.[16]

(B) Once more in respect to the male homosexual family, the general clause of international public policy allows, at times, the stabilization of the structure of interests created by the family abroad. Thus, in 2021, the jurisprudence of legitimacy considered recordable in Italy the provision by which a male couple had adopted a child abroad because, on the one hand, the consent of the biological parents to adoption was ascertained and, on the other, the absence of the use of surrogacy as a technique for the birth of the child, subsequently adopted, was certain.[17] It is a sort of compensatory public policy because while the aspiration to parenthood of same-sex couples is fulfilled, the value established in the constitutional and legitimacy jurisprudence of total closure towards surrogacy is not abdicated. Thus, the private autonomy of the homosexual couple is allowed to realize a form of full parenting, not enclosed within the narrow spaces of 'adoption in particular cases', but at the same time the prohibition of surrogacy is not waived. To reach this outcome, the ruling considers that even the legislation inspired by the axiological system originating from the Constitution must be used in the concretization of the general clause of public policy, although maintaining that the conditions for legitimate adoptive parenthood barred to homosexuals cannot be included in the general clause of international public policy.

5. Families' Contractual Autonomy in Italy

There are various ways in which private autonomy is implemented in the family. Its maximum expression is in the use of the contractual instrument to achieve the structure of interests desired by the family. The emergence of private autonomy in families is observed, in Italy, both in families based on de facto relationships and in those based on marriage.

Concerning the former, cohabitation was regarded for a long time with extreme suspicion since the conception of the family based on marriage was prevalent and, consequently, the role of private autonomy was basically non-existent. Subsequently, so-called cohabitation contracts developed, under which cohabitants regulate the patrimonial (and personal) aspects of a relationship not based on marriage. In Italy, attention is to be called to cohabitation agreements which regulate the patrimonial aspects of unmarried couples (cohabitants *more uxorio*). Law 76 of 2016 establishes the general rule according to which de facto partnerships (both heterosexual and homosexual) can regulate the patrimonial relationships relating to their life together by entering into a contract. In particular, such agreement may contain the methods of

16 The Judgment of the Italian Supreme Court of 21 June 2016 no. 12913 (joint sections), cit.

17 The Judgment of the Italian Supreme Court of 31 March 2021 no. 9006 (joint sections), "Foro it." 2021, I, c. 2054.

contributing to the needs of life in common, in relation to the substances of each and to the ability to work professionally or at home as well as the property regime of community of assets provided for by the Civil Code regarding marriage. The property regime can be modified at any time. The contract – as well as its modification or termination – must be in writing under penalty of nullity under a public deed or a private deed with signature authenticated by a notary or a lawyer, 'to certify compliance with mandatory rules and public policy'. This introduces an *advance* verification of compliance of the contract with public policy by the notary or by the lawyer.

In regard to the latter, one should consider the assisted negotiation agreement for the consensual solution of personal separation, termination of civil effects or dissolution of marriage and modification of the conditions of separation or divorce (Article 6, Legislative Decree 132 of 2014, converted into Law 162 of 2014).

Moreover, the expansion of the spaces reserved for private autonomy emerge in the so-called *pathology* and *physiology of family relationship contracts*.[18]

With reference to cases of an international character (e.g. foreign citizens residing in Italy that stipulate an agreement in contemplation of divorce) and to which international public policy applies, these have been deemed fully effective in Italy.[19]

With reference to internal cases, in jurisprudence, a distinction is made between an 'open' and a more 'closed' approach, although for a long time the latter orientation prevailed.

Internal jurisprudence has mainly dealt with agreements that regulate patrimonial aspects in anticipation of divorce. The starting point is a 1981 Supreme Court ruling, which held that the agreement entered into by the separated spouses to determine the economic regime of divorce was invalid because the provisions concerning the patrimonial aspects of the divorce would favour the abandonment of the marital relationship.[20] In support of the nullity, the 'closure' approach is essentially based on two arguments: the unavailability of the divorce allowance and the trade-off of spouse status with breach of the right of defence.

The first observation stems from Article 160 of the Civil Code, according to which the rights and duties arising from marriage are non-negotiable. It is therefore stated that the maintenance allowance and the divorce allowance would not be negotiable. The second argument that has always been used to support the unlawfulness of patrimonial agreements in view of divorce concerns the impact of such agreements on the freedom of procedural conduct and on the commodification of the status of spouse. Reference is made to the violation of Article 24 of the Constitution on

18 G. Oberto, I contratti della crisi coniugale. Ammissibilità e fattispecie. Contenuti e disciplina, Milan 1999, p. 1.

19 The Judgment of the Italian Supreme Court of 3 May 1984 no. 2682, 'Rivista di diritto internazionale private' 1985, vol. 21, no. 3, p. 579.

20 The Judgment of the Italian Supreme Court of 11 June 1981 no. 3777, Foro it. 1982, I, c. 184.

the right of defence. In particular, the agreements on the divorce property regime would have been null and void due to the illegality of the cause, resulting in the commodification of the status of spouse by identifying, in the consideration laid down in the agreement in view of the divorce, the price for consent to the dissolution of marriage.[21] Italian jurisprudence does not seem willing to go beyond the traditional teaching that considers property agreements in contemplation of divorce null and void.[22] However, from an analysis of the case law it appears clear that some judges, while formally reaffirming the principle of law on the nullity of the agreements in contemplation of divorce, regard as valid agreements reached during the separation with a clear divorce and post-divorce value. In other words, judges use different arguments to consider the agreements valid (for example, regarding the annuity established on the occasion of the family crisis as extraneous to the mandatory discipline of relations between spouses; holding settlement agreements as valid; configuring a nullity with relative legitimacy that can only be activated by the spouse entitled to the allowance and not by the other, etc.)

In the first place, reference should be made to a recent judgment of the Supreme Court.[23] The day before the wedding a couple entered into an agreement, under which the wife undertook, in the event of separation or divorce, to transfer to her husband a property she owned as compensation for the expenses incurred by the husband for the renovation of another property (still owned by his wife, which would remain her property) used as the marital home. Furthermore, the husband would transfer to his wife a government bond worth around ten thousand euros. The woman challenged the agreement, believing that it was a prenuptial agreement and as such null and void for the reasons mentioned above (unavailability of the divorce allowance, limitation to the freedom to act and resist in court). The Court of Cassation, on the other hand, held the agreement to be fully valid, excluding, however, that it could be qualified as a prenuptial agreement. According to the Court of Cassation, the agreement configured an atypical and legitimate contract, with proportional services and considerations, aimed at regulating well-defined aspects. This agreement was an expression of the spouses' negotiating autonomy, aimed at achieving interests worthy of protection pursuant to Article 1322 of the Civil Code. In particular, the divorce was not considered a genetic cause of the agreement but a suspensive condition for the effectiveness of the agreement. In particular, the ex-wife, instead of reimbursing her husband for the cost of the renovation, would discharge her obligation through the transfer of ownership of her property, thus integrating a hypothesis of *datio in solutum*.

21 The Judgment of the Italian Supreme Court of 11 August 1992 no. 9494, 'Rep. Foro it.' 1992, voice Matrimonio no. 180.

22 The Ordinance of the Italian Supreme Court of 24 April 2021 no. 11012, 'Famiglia e diritto' 2021, vol. 28, no. 8, p. 885.

23 The Judgment of the Italian Supreme Court of 26 April 2012 no. 23713, "Foro it." 2013, I, c. 864.

Concerning prenuptial and matrimonial agreements, in Italy, in addition to the timid, wavering jurisprudential openings, some bills have been presented but, to date, none has been approved. It is a sign, however, of the legislative ferment stirred up by the doctrine.[24] It should be noted that Article 1, paragraph 1(b) of draft no. 1151, 'Delegation to the Government for the revision of the Civil Code' presented to the Presidency of the Senate on 19 March 2019 in fact provided a delegation to the Government to act to 'allow the stipulation, between the spouses or future spouses, between the parties of a planned or established civil union, of agreements aimed at regulating between them, in compliance with the mandatory rules, the fundamental rights of the person, public policy and morality, personal and property relationships, also in anticipation of any crisis of the relationship, as well as to establish the criteria for the direction of family life and education of children'.[25] Therefore, the introduction into the Italian legal system of agreements concluded both before and after marriage was envisaged; there would be agreements concerning property as well as agreements concerning personal aspects. If anything, it should be noted that alongside the traditional tripartite division of illegality (mandatory rules, public policy, morality) there is also respect for the fundamental rights of the person which, according to a part of the doctrine, are guaranteed precisely through the general clause of public policy.

Conclusion

In Italy, the recognition of cross-border private family autonomy is subject to compatibility with international public policy. As regards property aspects, the recognition of family property autonomy does not seem to give rise to any concerns. Thus, premarital agreements concluded between foreign spouses residing in Italy and not contrary to public policy have been recognized as effective. With reference, then, to the biotechnological turn of the contemporary family, the prohibition of surrogate motherhood is part of international public policy. In these terms, recognition of the foreign measure stating that the child of two fathers born to a surrogate mother is contrary to international public policy is denied. This is counterbalanced by the jurisprudential openness to legitimate male adoption as long as the adoptee was not born through a surrogate mother.

The recognition of internal private autonomy is subject to compatibility with internal public policy. Despite the many proposals, to date prenuptial and matrimonial agreements are not regulated in the Italian legal system. However, negotiation and contracts are starting bases and the task of the jurist is to understand under what

24 G. Oberto, I patti prematrimoniali nel quadro del diritto europeo, 'Corriere giuridico', vol. 37, no. 6, p. 797.

25 G.F. Basini, I c.d. «patti prematrimoniali». Note de iure condendo, 'Famiglia e Diritto' 2019, vol. 26, no. 12, p. 1153.

conditions and within what limits it is possible to reconstruct a discipline of the contract affecting family interests consistent with the involvement of the personalistic and existential values of the parties. Some possible clauses that could be foreseen in prenuptial or matrimonial agreements could concern both patrimonial and personal aspects. Regarding patrimonial aspects, think of the waiver of maintenance, the waiver of the divorce allowance, the provision of criteria for the contribution in marriage, etc. Among personal aspects there could be a derogation from the obligation of fidelity in marriage, the discipline of the relations of one or the other party with third parties, the use of the marital surname by the separated or divorced wife, etc. Although the above clauses can be included in the agreement, they should not conflict with public policy. It is stated that public policy in family law constitutes a protective public policy which defends the weakest from the strongest, and affirms the freedom of persons considered individually or within social groups, such as the family, within the framework of freedoms guaranteed by the Constitution. With reference to the property aspects, the clauses do not conflict with the principles of the legal system where they are limited to regulating negotiable rights such as methods, terms and extent of maintenance. Thus the clauses concerning maintenance, transfer of ownership or use of the family home, and the regulation of other movable or immovable property tend to be valid, in order to protect the freedom and purity of will that would not be compromised. With regard, in particular, to the agreements that provide for the performance of patrimonial services following termination of marriage, it is necessary to 'avoid coercion of the will to terminate the relationship' (the famous price for consent to the dissolution of marriage) but what must remain highlighted is 'the solidarity function of the pact towards the partner in difficulty'. In these terms, the agreement that provides for a former spouse to stay in the house owned by the other for the time necessary for finding new accommodation would be valid. It has been argued that the prior agreement is subject to two insuperable limits: a) inalienability of the right to alimony; b) validity of the *rebus sic stantibus* clause so as to manage contingencies along the lines of the doctrine of unconscionability. With reference to personal aspects, the general clause of public policy protects personal freedom and the interpreter is called to make a judgment of compatibility in order to understand whether the contractual discipline (e.g. limitations to expressions of sociability and affectivity) is unreasonably threatening personal freedom. These compressions of freedom in the manifestation of one's sociability do not seem valid (for example, the clauses that provide for the commitment not to start cohabitation, to keep oneself in a state of post-marital fidelity, etc.). Valid agreements, on the other hand, contain clauses that tend to avoid unpleasant subsequent contact between the parties, a subsequent condition that establishes the termination of disbursement of an allowance or the execution of a patrimonial benefit in the case of the beginning of a cohabitation relationship by the beneficiary. Thus, consider on the one hand an agreement that provides for the renunciation by one of the future spouses of their

own religious identity and on the other hand an agreement under which one of the spouses waives his/her right to parenthood. In both cases, it is reasonable to believe that public policy in the family is violated, since both would infringe the fundamental rights of the person.

Ultimately, it is believed that the validity of the individual clause depends on the judgment of compatibility in the light of the *public policy of the specific case*, the interpreter being called upon to balance interests and values with respect to the individual case. In particular, it is believed that the clause is subject to a *double judgment of compatibility*: on the one hand it must be compatible with public policy in the family, that is, it must not harm the fundamental rights of the person; on the other hand, it must be compatible with the public policy of the family, purified of any discriminatory aspect in the sense that the clause must not distort the very essence of marriage, as outlined by the constitutional text. Greater freedom of negotiation must be recognized in the clauses included in cohabitation contracts and civil unions.

It seems that public policy (internal and international) becomes a tool attributed to ordinary judges to guarantee widespread constitutional legality.

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