JUDGMENT NO. 79 YEAR 2022

Constitutional Court Judgment No. 79 (Judge Rapporteur Emanuela Navarretta) declares Article 55 of Law No. 184 of 1983 to be incompatible with Articles 3, 31 and 117(1) of the Constitution insofar as it requires the rules laid down in Article 300(2) of the Civil Code for the adoption of adults to be applied to the adoption of children "in special cases". The Court stated that the protection of a child's best interests requires all adopted children to be guaranteed the recognition of kinship resulting from adoption.

Children adopted under the procedure known as "adoption in special cases" have the status of son or daughter and may not be deprived of ties of kinship, which the legislator introducing reforms to the law on filiation "wished to guarantee to all children on equal terms, so that all minors can grow up in a solid environment protected by family ties, starting with the most immediate ones, namely with siblings and grandparents". Non-recognition of a family tie with the adoptive parents' relatives is tantamount to disregarding a child's identity, which derives from belonging to the new network of family relations that are so important to a child's family life.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 55 of Law No. 184 of 4 May 1983 (The right of the child to a family life), in so far as it lays down the provision, referencing Article 300(2) of the Civil Code, that adoption in special cases does not give rise to any civil relationship between the adopted child and the adoptive parent's relatives, initiated by the Bologna branch of the *Tribunale ordinario per i minorenni* [Juvenile Court] of Emilia Romagna, in the proceedings brought by M. M., with the referral order of 26 July 2021, registered as Case No. 143 in the 2021 Register of Referral Orders 2021 and published in *Official Journal of the Republic* No. 39, first special series, 2021.

[omitted]

Conclusions on points of law

1.– With the referral order of 26 July 2021, registered as No. 143 in the Register of Referral Orders 2021, the Bologna branch of the *Tribunale ordinario per i minorenni* [Juvenile Court] of Emilia Romagna, raised, in reference to Articles 3, 31 and 117(1) of the Constitution – the latter with regard to Article 8 of the European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950, ratified and made enforceable by Law No. 848 of 4 August 1955 – raised questions as to the constitutionality of Article 55 of Law No. 184 of 4 May 1983 (The right of the child to a family life) in so far as it rules out, referencing Article 300(2) of the Civil Code, that adoption in special cases can give rise to any civil relationship between the adopted child and the adoptive parent's relatives.

2.– The referring court states that the applicant in the main proceedings had requested, pursuant to Article 44(1)(d) of Law No. 184 of 1983, to adopt a child, the biological daughter of his civil partner, with whom he had taken part in a surrogacy programme, which led to the birth of the child.

The referring court stated that it was able to grant the application for adoption but not the request for recognition of the child's civil relationship with the applicant's

relatives. The obstacle was the reference in Article 55 of Law 184/1983 to Article 300(2) of the Civil Code, in so far as it provides that "adoption does not give rise to any civil relationship [...] between the adopted child and the relatives of the adopting party, save for the exceptions established by law".

First, the referring Court ruled out that the aforementioned provisions may be considered partially and tacitly abrogated by Article 74 of the Civil Code, as amended by Article 1(1) of Law No. 219 of 10 December 2012 (Provisions on the recognition of natural children). Secondly, the referring court raised questions as to constitutionality in reference to Articles 3, 31 and 117(1) of the Constitution, the latter with regard to Article 8 ECHR.

2.1.– Then, the referring court illustrated why the submitted questions of constitutionality are not manifestly unfounded. First, it observed that the rules concerning adoption in special cases do not allow the establishment of civil relations between the adopted child and the adoptive parent's relatives, which undermines Articles 3 and 31 of the Constitution. In the referring Court's view, this is incompatible "with the principle of the equal treatment of all children, regardless of whether they are born in or out of wedlock or adopted, as enshrined in Articles 3 and 31 of the Constitution and actualised by the reform concerning the relationship between parent and child (Law 219/2012) and the amended Article 74 of the Civil Code, making every kind of filial status of equal value without distinction, with the sole exception of the adoption of an adult".

In addition, the referring court added that the challenged provision is in breach of Article 117(1) of the Italian Constitution in relation to Article 8 ECHR, "insofar as it [would] prevent the child within the family constituted by the civil union from fully enjoying a 'private and family life' in the broad sense, including any expression of the person's personality and dignity and also the right to an individual identity".

[omitted]

4.– On the merits, the issues are well-founded.

5.– To examine the questions regarding constitutionality, it is necessary to recall the distinctive features of adoption in special cases as they transpire from blackletter law and its development in the living law.

5.1.– Adoption in special cases was introduced by Law No. 184 of 1983 to address special circumstances involving children, thus permitting adoption under different conditions from those required for so-called full adoption.

This kind of adoption combines a variety of special scenarios that arise from two fundamental rationales.

The first is to promote the effectiveness of a relationship that has been established with the child.

"Adoption in special cases under Article 44", this Court observed in Judgment No. 383 of 1999, offers the child "the possibility of remaining within the new family that has taken him or her in, formalising the emotional relationship established with the persons who effectively look after him or her".

Adoption of a child who has lost both parents by persons bound to him or her either "through kinship up to the sixth degree or a pre-existing stable and lasting relationship, including one that has formed over a prolonged period of foster care" (Article 44(1)(a)) meets this need. The same rationale also applies to the adoption of the child by the "spouse, when the child is the son or daughter of the (even adoptive) parent of the other spouse" (Article 44(1)(b)), since the child lives within that family unit.

The second reason, which transpires from the law, lies in the fact that for some

children access to full adoption is extremely difficult, if not legally impossible.

This scenario includes the case of orphans who have lost both parents and "find themselves in one of the situations listed in Article 3(1) of Law 104 of 5 February 1992" (Article 44(1)(c) – namely a person "with a stable or progressive physical, mental or sensory disability causing difficulties in learning, forming relationships or working, in such a way as to lead to a process of social disadvantage or marginalisation" – or the case of a child who cannot be adopted because of the "ascertained impossibility of pre-adoptive fostering" (Article 44(1)(d)).

The special circumstances mentioned, and the reasons underlying them, justify access to this form of adoption also – or, in the case of (b), solely – by both single parents and spouses (Article 44(3)).

At the same time, the further requirements for application, apart from an ascertained state of abandonment – which, even in the case of Article 44(1)(d), may in fact subsist – explain the need for the consent of the parents, should there be any, and lasting ties with the family of origin. Regarding adoption in special cases, there is no provision similar to Article 27(3) of Law No. 184 of 1983, whereby, with full adoption, "the adopted child's relationship with his or her family of origin shall cease, except with regard to marriage prohibitions".

5.2.– The legislative fact, which appears to bear the characteristics of a marginal and particular institution, has been subject to a development in the living law, which has begun to give importance to certain specific features of this form of adoption and gradually broaden its range of application. By hermeneutically extending the notion of impossibility referred to in Article 44(1)(d) of Law No. 184 of 1983 – which refers to both legal and factual impediment – the case law has opened up two new lines of interpretation in the wake of the original rationale.

5.2.1.– The first is contained in the effective image of open or 'mild' adoption.

This is the case of children who have not been abandoned, but whose biological parents cannot exercise their parental responsibility (so-called semi-permanent abandonment). These children are allowed to access "adoption in special cases", so to avoid being placed in institutional care or temporary foster care through. In these cases, adoption "in special cases" is available on the assumption that "closed" or "full adoption" is not (Article 44(1)(d)), as the requirement of abandonment is not met.

Adoption in special cases does not sever ties with the family of origin and makes it possible to avoid otherwise compulsory full adoption. Full adoption, in the absence of actual abandonment, would undermine the biological parents' "right to respect for family life", as the European Court of Human Rights has observed, cautiously suggesting a "simple adoption" option (ECtHR, Judgment of 21 January 2014, *Zhou v. Italy*, para. 60; similarly, ECtHR, Grand Chamber, Judgment of 10 September 2019, *Strand Lobben and Others v. Norway*, paras. 202-213, and Judgment of 13 October 2015, *S.H. v. Italy*, paras. 48-50 and 57).

Thus, as the Supreme Court has observed (Supreme Court of Cassation, Civil Section I, Orders No. 40308 of 15 December 2021, No. 35840 of 22 November 2021, No. 1476 of 25 January 2021 and No. 3643 of 13 February 2020), table seems to have turned, in the sense that mild adoption operates as a far from last resort institution if compared with "full adoption"..

5.2.2.– The second line introduced by living law, again in the wake of Article 44 (1)(d) of Law No. 184 of 1983, concerns children who have emotional links with the partner of the biological parent, who cannot adopt the child because of legal impediments.

On the one hand, this concerns the cohabiting partner of a different sex to the biological parent, who is not covered by letter (b), which refers only to the spouse. On the other, it concerns a same-sex partner in a civil partnership or cohabiting with the biological parent, who has often taken part with him or her in a surrogacy programme, necessarily carried out abroad since Law No. 40 of 19 February 2004 (Rules on medically assisted procreation) only permits different-sex couples to have access to MAP.

The case law came to admit "adoption in special cases" in such scenarios, on the basis of the convergent interest of the child in maintaining already-established relationships and the general interest of settling situations where it is legally impossible to access full adoption.

[omitted]

The living law and the case law of this Court have therefore focused on the primary interest of the child, a principle established by Articles 2, 30 (Judgments No. 102 of 2020 and No. 11 of 1981) and 31 of the Constitution (Judgments No. 102 of 2020, No. 272, No. 76 and No. 17 of 2017, No. 205 of 2015 and No. 239 of 2014). This principle is also affirmed in numerous international sources, indirectly or directly binding on our legal system, such as the Convention on the Rights of the Child, signed in New York on 20 November 1989, ratified and implemented by Law No. 176 of 27 May 1991; the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, adopted in New York on 3 December 1986; the International Covenant on Economic, Social and Cultural Rights, adopted in New York on 16 December 1966, ratified and implemented by Law No. 881 of 25 October 1977; the Strasbourg Convention on Adoption, drawn up by the Council of Europe, which came into force on 26 April 1968 and was ratified by Italy with Law No. 357 of 22 May 1974, and European sources (Article 24(2) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007; Articles 8 and 14 ECHR), as interpreted respectively by the Court of Justice and the European Court of Human Rights.

The interests of the child has recently led this Court to broaden its focus from the mere premises for access to adoption in special cases to the legal status of the child adopted in this way.

This broader perspective has thus led the Court to find that, although the adoption procedure offers "a significant form of protection of the child's interests", it does not yet appear to be "fully in line with constitutional and supranational principles" (Judgment No. 33 of 2021; concurring Judgments No. 32 of 2021 and No. 230 of 2020).

One of the critical issues highlighted is the one at issue in this case. Adoption in special cases "does not ensure that a relationship of kinship will be created between the adopted child and the adoptive parent's family" (Judgment No. 32 of 2021), "given the continual reference made in Article 55 of Law No. 184 of 1983 to Article 300 of the Civil Code" (Judgment No. 33 of 2021). (Judgment No. 33 of 2021).

6.– The unambiguous wording of the challenged provision and its impact on a central point of the rules on adoption in special cases led this Court to rule out that it may be considered tacitly abrogated as a result of the amendment of Article 74 of the Civil Code introduced by Article 1(1) of Law No. 219 of 2012 (in the same sense see Judgments No. 33 and No. 32 of 2021, embracing an interpretation supported also by the referring court).

[omitted]

7.– Since this interpretative settlement is unavailable, the Court must therefore

assess whether the denial of a bond of kinship between the adopted child and the adoptive parent's relatives amounts to discriminatory treatment in violation of Articles 3 and 31 of the Constitution. Specifically, the Court must assess whether the contested provision discriminates against the adopted child with respect to the uniqueness of the status of son/daughter and the legal status of the child from the point of view of the rationale behind the law that links the establishment of bonds of kinship with such a status (on the assessment of the discriminatory nature of provisions see, among many, this Court's Judgments No. 276 of 2020, No. 241 of 2014, No. 5 of 2000 and No. 89 of 1996, in addition to Order No. 43 of 2021).

7.1.– The current rules on ties of kinship are an expression of the uniqueness of the status of son or daughter. They respond, at the same time, to the need to protect the interests of the child: this is the true guiding principle underlying the reform of the law concerning the parent-child relationship introduced in 2012-2013 (Law No. 219 of 2012 and Legislative Decree No. 154 of 2013).

7.1.1.– "All sons and daughters have the same legal status", reads the new Article 315 of the Civil Code, and the legal status of son or daughter is the fulcrum from which family ties branch out, united by the same ancestor (Article 74 of the Civil Code).

A person who has become a son or daughter joins the network of relatives that belongs to the lineage from which each of his or her parents descends, without the parental lines being influenced by the legal relationship between the parents. A child born out of wedlock is a member of two family branches between which no legal connection exists.

In the light of evolving social awareness, the driving force of the principle of equality has therefore impinged on the very concept of the status of son or daughter. This status implies in itself membership of a family community according to a logic based on the responsibilities arising from the parent-child relationship and the need to pursue the best interests of the child.

In placing importance on the ties of kinship created by the parent-child relationship, the drafters of the 2012-2013 reform outlined a set of rights and duties for the relatives who accompany the child as it matures, establishing personal relationships and providing financial support.

The child has the right "to maintain meaningful relations with relatives" (Article 315-bis of the Civil Code), regardless of the existence of any link between the parents (Article 337-ter of the Civil Code). Specifically, grandparents are obliged to contribute to their grandchildren's maintenance on a subsidiary basis (Article 316-bis of the Civil Code) and have "the right to maintain meaningful relationships with their under-age grandchildren" in the "exclusive interest of the child" (Article 317-bis of the Civil Code).

In addition to this core of reformed provisions, accentuating the importance of family relationships on the personal level, there are effects which, starting from familial relationships, branch off into the entire legal system and contribute to the protection of the child and the formation of his or her identity.

7.1.2.– The law mentioned above is, therefore, an expression of both the principle of equality and that of the protection of the interests of the child. This Court has repeatedly observed (Judgments No. 102 of 2020, No. 272, No. 76 and No. 17 of 2017, No. 205 of 2015, No. 239 of 2014) that the latter is – as – also well-established in Article 31(2) of the Constitution, affirming the commitment of the Republic to protecting "childhood and youth, fostering the necessary institutions for this purpose".

There is no doubt that the reform of the laws regarding parenthood and their effects on the personal – even before the financial – level focus primarily on the protection of

children and the need for them to be able to grow up amid the support of a suitable family environment. Behind this legal arrangement, there is the understanding that the status of son or daughter lasts throughout the lifetime of the individual.

The network of ties of kinship is therefore one of the institutions that the Republic must uphold in order to protect the interests of the child, with a horizontal projection of the aim of the Constitution.

8.– Having clarified the features of the rules acting as a *tertium comparationis* and the rationale behind the law concerning ties of kinship, which takes its inspiration from constitutional principles, a further step is needed to ascertain whether the difference in treatment is not unreasonable. In particular, the Court needs to assess whether the legal status of a child adopted in special cases can be equated with the status of son or daughter and whether there are reasons to justify the fact that no civil relationship is created "between the adopted child and the relatives of the adoptive parents".

8.1.– First of all, adoption in special cases concerns minors and is based on a court ruling that this kind of adoption is in the "best interests of the child" (Article 57(1) of Law 184/1983), which is the primary objective and guiding principle of this institution, as this Court has constantly reiterated (Judgments No. 33 and 32 of 2021; No. 221 of 2019; No. 272 of 2017; No. 183 of 1994).

As for the effects produced by adoption in special cases, numerous elements in the law point to the recognition of the status of son or daughter.

The status of the adopted child is, first of all, characterised by stability, permanence and inalienability, a typical characteristic of status.

Moreover, the wording of the law uses unequivocal vocabulary to identify the relationship between parent and child; it uses a very different language from that used for other institutions also intended to protect children, such as the appointment of a guardian, or temporary fostering.

Pursuant to Article 48(1)(2) of Law No. 184 of 1983, the adoptive parent assumes "parental responsibility" and has "the obligation to maintain the adopted child and to instruct and educate him or her in accordance with the provisions of Article 147 of the Civil Code", namely the provision covering "duties towards children". Articles 330 et seq. of the Civil Code also apply (Articles 51(4) and 52(4) of Law No. 184 of 1983).

Essentially, the responsibility and duties of parents towards their children number among the various other legal effects of adoption: the adoptive parent gives his or her surname to the adopted child, who not only becomes his or her legitimate heir, but also has a legal claim to a share of the deceased adoptive parent's assets; if the adopted child cannot or does not wish to inherit from the adoptive parent, his or her descendants become the beneficiaries; adoption automatically revokes the adoptive parent's will; mutual obligations of maintenance arise between the adopted child and the adoptive parent; the adopted child is included in the "family unit" pursuant to Article 1023 of the Civil Code; familial relationships have a bearing in terms of marriage prohibitions.

Furthermore, while status implies belonging to a community, it cannot be ignored that the legislator, even before the reform of Article 74 of the Civil Code alluded to the possibility that family relationships may be formed, clearly stated in Article 57(2) of Law No. 184 of 1983 that the adoption of a child must also mean that he or she becomes part of a family environment. When ruling on adoption in special cases, a court must verify not only the adopting parent's "emotional suitability and the ability to educate and instruct the child", but also assess "the adoptive parents' family environment".

8.2.– The legal framework referred to above thus demonstrates that the adopted

child has the status of son or daughter yet is nevertheless deprived of the legal recognition that he or she belongs to the family environment that the court is legally required (Article 57(2) of Law No. 184 of 1983) to assess in order to reach a decision regarding adoption. It follows that, despite the uniform status of son/daughter, only children adopted in special cases are denied ties of kinship with the adoptive parent's family.

It is unreasonable that such an essential aspect of a child's growth and stability should be regulated by an institution like that of the adoption of an adult, underpinned by requirements relating to purely financial concerns and questions of inheritance.

The law thus deprives the child of the network of personal and financial safeguards that arise from the legal recognition of ties of kinship, which, by implementing Articles 3, 30 and 31 of the Italian Constitution, the legislator reforming the law on parent-child relationships wished to guarantee to all the children of a family on equal terms, permitting them to grow up in a stable environment enjoying the protection of family ties, starting with the closest, namely with their siblings and grandparents.

At the same time, the challenged rules are prejudicial to the child's identity, which he or she gains through inclusion in the adoptive parent's family environment and thus from belonging to the new network of relations which contribute to building his or her permanent identity.

[omitted]

9.– Not only is the challenged provision incompatible with Articles 3 and 31(2) of the Italian Constitution, but it is also in breach of Article 117(1) of the Italian Constitution in respect of Article 8 ECHR, as interpreted by the Strasbourg Court.

In addition to interpreting the concept of family life in a broad sense under the meaning of Art. 8 ECHR by including therein adoptive relationships whose bonds must be no different from biological ones (ECtHR, Judgment of 28 November 2011, *Negrepontis-Giannisis v. Greece*; Judgment of 15 December 2004, *Plau and Puncernau v. Andorra*; Judgment of 13 June 1979, *Marckx v. Belgium*), the European Court of Human Rights, has also specified – in a long-standing and historic judgment concerning a law that only allowed an unmarried mother to create a tie of kinship with her 'illegitimate' child through simple adoption – that such an institution resulted in a violation of the positive obligation to protect family life. Adoption of this kind was, in fact, incapable of creating ties of kinship, which – according to the ECtHR – play "a considerable part in family life" (ECtHR Judgment of 13 June 1979, *Marckx v. Belgium*, paragraph 45, according to which, "[i]n the Court's opinion, 'family life', within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life. 'Respect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally").

At the same time, the ECtHR observed that the parent-child relationship concerns a fundamental aspect of a child's very identity, an integral part of the notion of private and family life (ECtHR, Judgment of 26 September 2014, *Mennesson v. France*, paras. 96-101; Judgment of 26 September 2014, *Labassee v. France*, paras. 75-80).

Recently, the ECtHR intervened regarding the position of children born through surrogacy – the subject matter of the dispute in the main proceedings – and provided a twofold approach to interpretation.

On the one hand, it ruled out the possibility of inferring from Article 8 ECHR that there is a right to the recognition of filial relations established by means of surrogacy in

a foreign country; it also acknowledged a wide margin of appreciation afforded to the Member States regarding the possibility of recognising filial relations of this kind (ECtHR, Judgment of 18 August 2021, *Valdìs Fjölnisdóttir and Others v. Iceland*, paras. 66-70 and 75; Judgment of 24 January 2017, *Paradiso and Campanelli v. Italy*, paras. 197-199; *Mennesson*, paras. 74; *Labassee*, para. 58).

On the other hand, where there is a need to protect a child's interest in preserving a bond that has been de facto established with the intended parent, the ECtHR stressed that a filial relation must also be recognised in such a case in order to protect the child's own identity (ECtHR, *Mennesson*, paras. 80, 87 et seq.; *Labassee*, paras. 75-80; and, on the circumstances that bring to the surface a child's interest in need of preservation, see also *Paradiso and Campanelli*, para. 148).

In the light of such an interest, the ECtHR then stated that while the Member States remain free to establish the institution best suited to ensuring protection for the child, balancing the various requirements involved, a limit to their margin of appreciation lies, however, in the condition "that the procedures established in domestic law guarantee effective and rapid implementation in accordance with the child's best interests" (Judgment No. 33 2021 of this Court, referring to para. 51 of ECtHR Judgment of 16 July 2020, *D. v. France*; in agreement, see the decision of 12 December 2019, *C. and E. v. France*, para. 42, and ECtHR, Grand Chamber, Advisory Opinion of 9 April 2019, para. 54, handed down pursuant to Protocol No. 16, not ratified by Italy).

Since the recognition of the child's family ties with the parent's relatives as a consequence of having acquired the status of son or daughter is – as has been pointed out above (ECtHR, *Marckx*, para. 45) – particularly meaningful and significant in terms of the concept of "family life" and contributes to building the very identity of the child (*Mennesson*, paras. 96-101; *Labassee*, paras. 75-80), it must be considered that the challenged provision, being incompatible with Article 8 ECHR, breaches the international obligations set out in Article 117(1) of the Constitution.

A pronouncement of unconstitutionality thus removes an obstacle to the effectiveness of the protection offered by adoption in special cases (European Court of Human Rights, *D. v. France*, para. 51; *C. and E. v. France*, para. 42; and the opinion of 9 April 2019, para. 54) and permits this institution, the rules of which maintain a balance between the many concerns surrounding this complex issue, to fully protect the child's interests.

10.– In conclusion, Article 55 of Law No. 184 of 1983, in so far as it rules out, referencing Article 300(2) of the Civil Code, that adoption in special cases can give rise to any civil relationship between the adopted child and the adoptive parent's relatives, breaches Articles 3, 31(2) and 117(1) of the Constitution, the latter in relation to Article 8 ECHR.

[omitted]

This outcome therefore allows the extension of the ties of kinship between the adoptive child and the relatives of the adopting parent who share the same lineage, maintaining – thanks to the unbending definition in Article 74 of the Civil Code – the distinction between relatives acquired through adoption and biological relatives.

The clarity of the mechanism set out in Article 74 of the Civil Code makes it possible to apply, in a wholly linear manner, the consequences and legal effects that arise from the existence of family ties in the legal system so that all the rules that presuppose the existence of civil relationships between the adopted child and the adopting parent's relatives can be applied to the adopted child.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares Article 55 of Law No. 184 of 4 May 1983 (The right of the child to a family life) unconstitutional in so far as it rules out, referencing Article 300(2) of the Civil Code, that adoption in special cases can give rise to any civil relationship between the adopted child and the adoptive parent's relatives.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 February 2022.

Signed by:

Giuliano AMATO, President

Emanuela NAVARRETTA, Author of the Judgment