Essays

The Same-Sex Parented Family Option: The View from Italian Case Law

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Abstract

The essay offers a critical look at the recent Italian case law on same-sex parenting, investigating the relationship between the adult freedom of self-determination in the family sphere and the best interests of the child. After investigating the legal meaning of this formula as it is understood under the Italian legal system, the essay examines whether the original legislative framework aimed at the superiority of the child's interest has given way, in the case law, to an adult-centric path. Moreover, this topic represents an important challenge for the 'argumentation by principles' and for the subsidiary role of the legal institutions (Legislator and Courts), with regards to the freedom of self-determination of adults and the position of the child.

I. Introduction

Nowadays the complex context of dynamics of affections and the issue of same-sex parenting allow for an investigation of the relationship between the adult freedom of self-determination in the family sphere and the (best) interest of the children, whose emerging personalities are affected and influenced, in their developmental dynamics, by the choices of the adults. These include the adults who are, or are assumed to be, or want to be, their parents; as well as those who are legislators, legal scholars, and judges. This topic represents an important challenge for the 'argumentation by principles'[1] and for the subsidiary role of the

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[1] It is important to recall the path that has led to affirmation of the *Drittwirkung* of constitutional principles: it began with the reflections of those who first promoted a constitutionally-oriented reading of civil law as necessary, stimulating a radical renewal of traditional dogmatic tools and calling for a legislative technique founded on constitutional principles, through which society's needs can penetrate into the legal order: S. Rodotà, 'Ideologie e tecniche della riforma del diritto civile' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 83 (1967); P. Barcellona, *Gli istituti fondamentali del diritto privato* (Napoli: Jovene, 1970), passim; Id, *L'uso alternativo del diritto*, I, *Scienza giuridica e analisi marxista*, II, *Ortodossia giuridica e pratica politica* (Roma-Bari: Laterza, 1973), passim; N. Lipari, *Diritto privato. Una ricerca per l'insegnamento?* (Roma-Bari: Laterza, 2nd ed, 1974), XVI; P. Perlingieri, *Il*

regulatory institutions[2] (the legislator and courts), with regards to the freedom of self-determination of adults and the position of the child.

The essay attempts to offer a critical look at the recent Italian case law on same-sex parenting.

First, it investigates the formula of the best interests of the child, as it has been interpreted in the Italian legal system. This section will begin to address the constitutional foundation of the (allegedly) superiority of the child's interest.

After identifying this foundation for the personality-solidarity binomial, the essay moves on to examine the superiority of the child's interest in the normative framework.

In this context, the analysis deals with how case law on same-sex parenting is applying the child's interests standard. Here, it will focus on whether courts have tended to keep the child's interest as a primary and preventive criterion, acting to limit the wishes of adults and their choices within a very narrow perimeter of rules, in harmony with current regulatory provisions, or whether, on the contrary,

diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti (Napoli: Edizioni Scientifiche Italiane, 1983), passim. In this context, a fundamental role is played by the interpreter – the judge – who, as the guarantor of a new balance between legal regulation and reconstruction of reality, and through the persuasiveness of the argumentation, restores the connection with the social reality from which s/he draws value criteria, only apparently summarized in the elasticity of constitutional formulas, verifying the compliance of the rule with hierarchically superior principles: supranational, international and constitutional ones: N. Lipari, 'Il diritto civile dalle fonti ai principi' *Rivista trimestrale di diritto e procedura civile*, 5 (2018); E. Navarretta, *Costituzione, Europa e diritto privato. Effettività e* Drittwirkung *ripensando la complessità giuridica* (Torino: Giappichelli, 2017), passim; P. Femia ed, Drittwirkung*: principi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018), passim; P. Perlingieri, 'Il diritto come discorso? Dialogo con Aurelio Gentili' *Rassegna di diritto civile*, 781 (2014); Id, 'I principi giuridici tra pregiudizi, diffidenza e conservatorismo' *Annali SISDiC*, 1 (2017). In this line of work, Constitutional and European principles are the new criteria to be taken as a reference point for decisions leveraging on the direct applicability (*Drittwirkung*) of the values that they express in the application processes of law (N. Lipari, 'Costituzione e diritto civile' *Rivista trimestrale di diritto e procedura civile*, 1260 (2018).

[2] The subsidiary function of the legal system, reflected in the principle of horizontal subsidiarity, aims to contain the intervention of the State within the limits of the efficiency of the action of private people. It expresses 'the vicarious function of law with respect to the determinations of private people': E. Del Prato, 'Principio di sussidiarietà sociale e diritto privato' *Giustizia civile*, 381 (2014). The principle of subsidiarity can be understood, both as a principle of legitimacy for the interpreter to protect concrete situations not directly envisaged in specific regulatory provisions, but marked by interests worthy of protection, as well as a criterion of legitimization for the legislator to define the limits within which the action of private persons can be allowed. Although the natural soil giving rise the principle of subsidiarity was that of a patrimonial relationship (based on the Ordoliberal doctrine elaborated by the Friborg School: among many, L. Di Nella, 'La Scuola di Friburgo, o dell'ordoliberalismo', in N. Irti ed, *Diritto ed Economia* (Padova: CEDAM, 1999), 171, the model is now extending itself into the family context. However, it should be noted that this can hardly be applied in the context of relationships between adults and children, due to the legal duty of child protection: R. Giampetraglia, 'Il principio di sussidiarietà nel diritto di famiglia', in M. Nuzzo ed, *Il principio di sussidiarietà nel diritto privato* (Torino: Giappichelli, 2014), I, 329; G. Ballarani, 'La mediazione familiare alla luce dei valori della Costituzione italiana e delle norme del diritto europeo' *Giustizia civile*, 495 (2012).

courts have adopted an adult-centric trajectory with regard to the freedom of self-determination of adults, consequently applying the child's best interests in a secondary and remedial way.

Finally, the essay focuses on whether the rights of children have been sacrificed in same-sex parenting rulings.

The first aspect to be analysed is the legal meaning of the formula 'the best interests of the child' (to a healthy and harmonious psychophysical development) in the way in which the Italian legal system has interpreted it.[3]

Considering that this formula plays a fundamental role both from the regulatory perspective, and from the judicial one, it is necessary to investigate its scope and the concrete meaning under which it must be accepted in the legal context. The purpose of this analysis is to avoid the risk of degrading the expression to a mere style clause[4] that can be easily used to justify contradictory situations and can be interpreted in a subjective and discretionary way. The analysis leads into a consideration of the function that the legal system as a whole (legislator and courts) is called to perform (as a mediator) between the need to guarantee proper

[3] On the legal concept of the best interests of the child, see among many, P. Stanzione, 'Minori (condizione giuridica dei)' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), IV, 725; G. Ferrando, 'Diritti e interesse del minore tra principi e clausole generali' *Politica del diritto*, 169 (1998); F. Ruscello, 'La potestà dei genitori. Rapporti personali (artt. 315-319)', in P. Schlesinger ed, *Commentario del codice civile* (Milano: Giuffrè, 1996), 78; E. Quadri, 'L'interesse del minore nel sistema della legge civile' *Famiglia e diritto*, 80 (1999); M. Dogliotti, 'La potestà dei genitori e l'autonomia del minore', in A. Cicu, F. Messineo and P. Schlesinger eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2007), VI, 93; P. Perlingieri, 'Norme costituzionali e rapporti di diritto civile', in Id ed, *Tendenze e metodi della civilistica italiana* (Napoli: Edizioni Scientifiche Italiane, 1979), 95; G. Ballarani, 'La responsabilità genitoriale e l'interesse del minore (tra norme e princìpi)', in P. Perlingieri and S. Giova eds, *Comunioni di vita e familiari tra libertà, sussidiarietà e inderogabilità. Atti del 13° Convegno nazionale della SISDIC – Napoli 3-5 maggio 2018* (Napoli: Edizioni Scientifiche Italiane, 2019), 317; Id, 'Diritti dei figli e della famiglia: antinomia o integrazione?', in G. Dalla Torre ed, *Studi in onore di Giovanni Giacobbe* (Milano: Giuffrè, 2010), II, 473.

[4] The principle of the best interests of the child has been strongly criticized in legal scholarship, due to its excessive vagueness, which allows for the risk of conflicting readings based on subjective discretion: Cf Y. Benhamou, 'The New York Convention, le droit international et le juge français' 2 *La Semaine Juridique Edition Générale*, 321 (11 Janvier 1995). It has induced scholars to define it as a 'fairy-tale' concept (P. Ronfani, 'L'interesse del minore: dato assiomatico o nozione magica?' *Sociologia del diritto*, 55 (1997)), where the Author takes up the famous expression of J. Carbonier, 'Note sous cour d'appel de Paris, 30 avril 1959' *Dalloz*, 673, 675 (1960), or magic potion (I. Thery, 'Nouveaux droits de l'enfant, the potion magique?' *Esprit*, 5 (1994)), or having an empty tautology (M. Dogliotti, 'Cos'è l'interesse del minore' *Diritto di famiglia e delle persone*, 1093 (1992)), or again as a sort of discretionary passepartout (G. Dosi, 'Dall'interesse ai diritti del minore' *Diritto di famiglia e delle persone*, 1604 (1995)); see also, among many, J. Eekelaar, 'Interests of child and child's wishes: The Role of Dynamic Self-Determinism', in P. Alston ed, *The best interests of the child* (Oxford: Clarendon Press, 1994), 57; I. Gaber and J. Aldridge, *In the Best Interests of the Child: Culture, Identity, and Transracial Adoption* (London: Free Association Books, 1994), passim; C. Breen, *The Standard of the Best Interests of the Child* (The Hague: Martinus Nijhoff, 2002), passim; M. Freeman, *Article 3* (Leiden-Boston: Martinus Nijhoff, 2007), passim; Id, 'Why it remains important to take Children's rights seriously' *The International Journal of Children's Rights*, 5 (2007); T. Buck, *International Child Law* (London: Routledge, 2014), passim.

protection of children and the need to respect the spaces of self-determination of adults who are partners in an affective relationship.

In this perspective, the starting point is represented by the Art 3, para 1, of the UN Convention on the Rights of the Child (UNCRC):[5]

> 'In all actions concerning children, whether by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

The best interests of the child formula is the basic element underlying the entire legal framework concerning children in the Italian, European and international legal systems. It is a general and flexible clause that commits the legal system and every institution to the protection of children, in general, and to the protection of a specific child in particular.[6] The concept of the superior interest of the child is, in fact, aimed at considering the specificity of the childhood as a broad temporal space, characterized by a presumptively continuous evolutionary path, in which the personality and identity of a person grow.[7] This is why the formula is projected towards the healthy and harmonious psychophysical development of the child.[8]

II. The Superiority of the Child's Interest

The Italian legal system has accepted the formula of the 'best interests of the child' in terms of the 'superior' (or sometimes 'prominent') interest of the child. It has done so using comparative and relational words, which invoke the comparison with the interests of other people with their respective legal positions. This, however requires the identification of a constitutional justification in order to assess its acceptability and consequences.

If the superiority of the child's interest applies in relation to the interests of

[5] The Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on November 20, 1989 with resolution 44/25, was then ratified in Italy with legge no 176 of 27 May 1991.

[6] G. Ballarani, 'Contenuto e limiti del diritto all'ascolto nel nuovo art 336-*bis* c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato' *Diritto di famiglia e delle persone*, II, 841 (2014); A. Nicolussi, 'La filiazione nella cultura giuridica europea', in Id ed, *Diritto civile della famiglia* (Milano: EduCatt, 2012), 341.

[7] C. Ruperto, 'Età (diritto privato)' *Enciclopedia del diritto* (Milano: Giuffrè, 1977), XVI, 85.

[8] P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 22; Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006), I, 717; P. Stanzione, *Capacità e minore età nella problematica della persona umana* (Napoli: Edizioni Scientifiche Italiane, 1975), 127; V. Scalisi, *Il valore della persona umana e i nuovi diritti della personalità* (Milano: Giuffrè, 1990), 43; G. Ballarani, *La capacità autodeterminativa del minore nelle situazioni esistenziali* (Milano: Giuffrè, 2008), 5.

other subjects, the axis of reflection shifts towards balancing operations[9] because the horizontal geometry[10] of the constitutional 'table of values'[11] does not allow for the abstract primacy of one value over another.[12] Indeed, balancing criteria must be applied every time that, between values, interests and principles (that are equal to each other)[13] 'a simple coordination without sacrifice or subordination of one to the other is not possible'.[14]

III. The Superiority of the Child's Interest in Comparison with Constitutional Principles: The Dignity-Solidarity Binomial

Since, as stated above, it is necessary to analyse the assumed superiority of the child's interest in light of constitutional principles, the analysis must be oriented primarily under the 'open-scheme case'[15] of Art 2 of the Italian Constitution,[16] according to which the personalist principle is linked to that of solidarity.

The main element that allows the superiority of the child's interest to be affirmed derives from the constitutional provision that includes children in the concept of human person (Art 2) – the primary value in the constitutional framework –[17] but with their own, unique specificity (Arts 30, 31 and 37 of the Constitution).

The anthropocentric vision on which the architecture of the constitutional

[9] *Ex pluribus*, Eur. Court H.R., *Odièvre* v *Francia*, Judgment of 13 February 2003, available at www.hudoc.echr.coe.int; J. Long, 'La Corte Europea dei Diritti dell'Uomo, il parto anonimo e l'accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia' *Nuova giurisprudenza civile commentata*, 283 (2004); Corte costituzionale 16 November 2005 no 425, *Familia*, 161 (2006); Eur. Court H.R., *Godelli* v *Italia*, Judgment of 25 September 2012, available at www.hudoc.echr.coe.int; Corte costituzionale 18 November 2013 no 278, *Famiglia e diritto*, 11 (2014); Corte di Cassazione 21 July 2016 no 15024, *Corriere giuridico*, 21 (2017) and Corte di Cassazione 9 November 2016 no 22838, *Famiglia e diritto*, 19 (2017); Corte di Cassazione-Sezioni Unite 25 January 2017 no 1946, available at www.italgiureweb.it.

[10] R. De Stefano, *Assiologia (Schema di una teoria generale del valore e dei valori)* (Reggio Calabria: Laruffa, 1982), 377, now published in Id, *Scritti sul diritto e sulla scienza giuridica* (Milano: Giuffrè, 1990), 353; V. Scalisi, 'Assiologia e teoria del diritto (Rileggendo Rodolfo De Stefano)' *Rivista di diritto civile*, I, 1 (2010).

[11] A. Baldassarre, 'Costituzione e teoria dei valori' *Politica del diritto*, 639 (1991).

[12] ibid 65.

[13] R. De Stefano, n 10 above, 353; Id, *Il problema del diritto non naturale* (Milano: Giuffrè, 1955), passim; V. Scalisi, 'Assiologia e teoria del diritto' n 10 above, 1.

[14] G. Oppo, 'L'esperienza privatistica', in *Atti del Convegno Linceo I principi generali del diritto* (Roma, 27-29 maggio 1991) (Roma: Accademia Nazionale dei Lincei, 1992), 220.

[15] N. Lipari, 'Costituzione e diritto civile' n 1 above, 1265.

[16] C.M. Bianca, *Diritto civile*, I, *La norma giuridica. I soggetti* (Milano: Giuffrè, 2002), 136; S. Cotta, 'Soggetto di diritto' *Enciclopedia del diritto* (Milano: Giuffrè, 1990), XLII, 1225; G. Capograssi, 'Il diritto dopo la catastrofe', in Id ed, *Opere* (Milano: Giuffrè, 1959), V, 185.

[17] P. Perlingieri, *La personalità umana* n 8 above, 22; V. Scalisi, 'Complessità e sistema delle fonti di diritto privato' *Rivista di diritto civile*, I, 147 (2009); C.M. Bianca, n 16 above, 136; S. Cotta, n 16 above, 1225; G. Capograssi, n 16 above, 185.

principles rests[18] is revealed by the connection between the personalist principle and that of solidarity, set in Art 2 of the Constitution. Individual and community interests, like an inseparable hendiadys, merge together to form the indissoluble binomial dignity-solidarity,[19] which forms the axiological foundation of the constitutional system[20] and represents the principal inspiration and criterion for every other constitutional principle.[21]

This reveals the anti-individualistic tenor of the constitutional system, which prevents the human person from being considered an 'entity' detached from the social system itself, as if it were an absolute monad.[22] Therefore, in a system that aims to govern interpersonal relations through the link between personhood and solidarity, the superiority of the child's interests is rooted in the State's primary function, such as protecting the weak.[23] The State has to assure that the physical and mental integrity of people will be protected (Art 32 of the Constitution), especially in the moments of greatest weakness and fragility in human life, such as childhood, the period of maximum development of the personality.

IV. The Superiority of the Child's Interest in the Normative Framework: The Relationship Between Parents and Children from the Child-Centric Perspective of the Italian Family Law

As the family law framework has adapted to constitutional requirements,[24]

[18] V. Scalisi, 'Ermeneutica dei diritti fondamentali e principio «personalista» in Italia e nell'Unione Europea' *Rivista di diritto civile*, I, 145 (2010); Id, 'Il diritto naturale e l'eterno problema del diritto giusto' *Europa e diritto privato*, 448 (2010); L. Mengoni, *Diritto e valori* (Bologna: il Mulino, 1985), 5; L. Ferrajoli, *Diritti fondamentali. Un dibattito teorico* (Roma-Bari: Laterza, 2002), 35.

[19] F.D. Busnelli, 'Idee-forza costituzionali e nuovi principi: sussidiarietà, autodeterminazione, ragionevolezza' *Rivista critica del diritto privato*, 18 (2014).

[20] P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 8 above, II, 433.

[21] F.D. Busnelli, n 19 above, 9; R. Nicolò, 'Codice civile' *Enciclopedia del diritto* (Milano: Giuffrè, 1960), VII, 248; G. Ballarani, *Il matrimonio concordatario nella metamorfosi della famiglia* (Napoli: Edizioni Scientifiche Italiane, 2018), 79.

[22] F.D. Busnelli, n 19 above, 18; S. Cotta, 'Il diritto naturale e l'universalizzazione del diritto' *Iustitia*, 1 (1991); G. Ballarani, *Il matrimonio concordatario* n 21 above, 79.

[23] D. Poletti, 'Soggetti deboli' *Enciclopedia del diritto*, (Milano: Giuffrè, 2014), VII, 962.

[24] The constitutionally oriented reading of the civil law has led to the gradual move beyond the concept of parental authority, establishing the conditions for a radical inversion of the trend in analyzing the legal position of the parents *vis-à-vis* that of the child: P. Perlingieri, *Il diritto civile* n 8 above, I, 114; Id, 'Depatrimonializzazione e diritto civile' *Rassegna di diritto civile*, 1 (1983); C.M. Bianca, *Diritto civile*, II, 1, *La famiglia* (Milano: Giuffrè, 2014), 329; G. Giacobbe, *Le nuove frontiere della giurisprudenza* (Milano: Giuffrè, 2001), 461, 581, 629; G. Ballarani, '*Sub* art. 155 c.c.', in S. Patti and L. Rossi Carleo, 'Provvedimenti riguardo ai figli, art. 155 – 155-*sexies*', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 2010), 28; Cf, among many, Corte di Cassazione 17 April 2008 no 10094, available at www.dejure.it; Corte di Cassazione 11 January 1978 no 83, available at www.dejure.it; Corte di Cassazione 2 June 1983 no 3776, *Diritto di famiglia e delle persone*, I, 39 (1984); Corte costituzionale 27 March 1992 no 132, *Quaderni di diritto e politica ecclesiastica*, 3, 685 (1993).

the link between the superiority of the child's interest and the personalist and solidarity principles has stimulated a redetermination of the normative paradigms that apply to the relationship between adults and minor-age people (especially parents and children), with child-centricity dominating (an outcome neatly summarized in the '*favor minoris*' formula). These principles, codified into legislations, were then given concrete application in case law.

This child-centred, constitutional-based approach to the relationship between adults and children has made it possible for a plurality of new concepts to emerge, in both the regulatory and judicial fields, which aim to supplement the available tools for governing situations involving a child, as well as to orient the action of the interpreter in the solidarity-based and altruistic perspective of constitutional principles:

- the right of the child to grow up in his or her family, pursuant Art 1 of the adoption law (legge 4 May 1983 no 184);[25]

- the right of an adopted child to know his or her origins, as a direct corollary of the inviolable right to personal identity, established by the adoption reform (legge 28 March 2001 no 149);

- the concept of 'affective continuity' as derived from the reform of the Italian family custody law in relation to adoption[26] (legge 19 October 2015 no 173);

- the child's right to have (the affectionate and educational contribution of) two parents ('bi-parenting') in the context of the crisis of couple relationships,[27] established by legge 8 February 2006 no 54 and confirmed most recently by decreto legislativo 28 December 2013 no 154;

- the affirmation, in the same above regulatory context described above, of the child's right to be heard during legal proceedings;[28] and,

- finally, the definitive affirmation, under the reform of the children's legge 10 December 2012 no 219,[29] of the child having homogeneous *status*[30] (whether born to married couples or not), and a related remodulation of the traditional

[25] G. Ballarani, 'L'adozione che verrà', in A. Scavuzzo et al eds, *L'adozione che verrà. Atti del Convegno Nazionale del CIAI, Università di Milano Bicocca, 14 novembre 2016* (Milano: CIAI, 2016), 11.

[26] M. Dogliotti, 'Modifiche alla disciplina dell'affidamento familiare, positive e condivisibili, nell'interesse del minore' *Famiglia e diritto*, 1107 (2015).

[27] G. Ballarani, '*Sub* art. 155 c.c.' n 24 above, 28; A. Morace Pinelli, 'I provvedimenti riguardo ai figli. L'affidamento condiviso', in C.M. Bianca ed, *La riforma della filiazione* (Padova: CEDAM, 2015), 68.

[28] G. Ballarani, *Contenuto e limiti del diritto all'ascolto* n 6 above, 841.

[29] *Ex pluribus* C.M. Bianca, 'La legge italiana conosce solo figli' *Rivista di diritto civile*, 1 (2013); E. Giacobbe, 'Il prevalente interesse del minore e la responsabilità genitoriale. Riflessioni sulla Riforma "Bianca" ' *Diritto di famiglia e delle persone*, 817 (2014); G. Ferrando, 'La legge sulla filiazione. Profili sostanziali', available at www.juscivile.it, 132 (2013); M. Bianca ed, *Filiazione. Commento al decreto attuativo* (Milano: Giuffrè, 2014), passim; M. Sesta, 'L'unicità dello stato di filiazione e i nuovi assetti delle relazioni familiari' *Famiglia e diritto*, 231 (2013).

[30] G. Ballarani, *La capacità autodeterminativa del minore* n 8 above, 4, 38; P. Perlingieri, *Il diritto civile* n 8 above, II, 735, 944; C.M. Bianca, *Diritto civile* n 16 above, 157, 233, 236.

concept of parental authority in the new terms of parental responsibility,[31] as provided by the new statute on children's rights.[32] This reform, in keeping with a move toward harmonization with European legal standards,[33] included affirmation of the concept of 'social parenting', which extends liability to anyone (including both individuals and organizations) who takes care of the child.

The flexibility of all these concepts allows for divergent interpretations, depending on the perspective (child-centric or adult-centric) that is chosen, consequently leading to opposite results in the case law.

From the child-centric perspective, the child's interest is always taken as a primary criterion, aimed at preventing the production of a *vulnus*. On the contrary, from an adult-centric perspective, the child's interest can be taken as a secondary criterion, applied to a *vulnus* which, however, has already been produced.

Although initially lawmakers and courts converged in applying a child-centric perspective, more recently an intrinsically adult-centric approach seems to be emerging as dominant in the matter of same-sex parenting. Courts, making recourse to the plurality of the new concepts referred to above, disregard the preventive criteria,[34] invoking constitutional and European principles in order to adapt the legal system to social changes, offering the results that they believe

[31] C.M. Bianca, 'La legge italiana conosce solo figli' n 29 above, 3; G. Ballarani and P. Sirena, 'Il diritto dei figli di crescere in famiglia' *Nuove leggi civili commentate*, 534 (2010); G. Recinto, 'Genitori e figli tra tendenze interne "adultocentriche" e spinte "minorecentriche" della Corte EDU', in F. Dell'Anna Misurale and F.G. Viterbo eds, *Nuove sfide del diritto di famiglia. Il ruolo dell'interprete. Atti del Convegno di Lecce del 7-8 aprile 2017* (Napoli: Edizioni Scientifiche Italiane, 2018), 75, 86; Id, *Le genitorialità* (Napoli: Edizioni Scientifiche Italiane, 2016), 11.

[32] M. Sesta, n 29 above, 231; G. Ballarani and P. Sirena, n 31 above, 534; G. Giacobbe and G. Frezza, 'Ipotesi di disciplina comune nella separazione e nel divorzio', in P. Zatti ed, *Trattato di diritto di famiglia*, I, *Famiglia e matrimonio*, G. Ferrando, M. Fortino and F. Ruscello eds, 2, *Separazione e divorzio* (Milano: Giuffrè, 2002), 1325.

[33] Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no 1347/2000 [2003] OJ L338/1; G. Ballarani, *Diritti dei figli e della famiglia* n 3 above, 473; J. Long, 'L'impatto del Regolamento CE 2201/2003 sul diritto di famiglia italiano: tra diritto internazionale privato e diritto sostanziale' *Familia*, 1127 (2007); Corte di Cassazione 20 dicembre 2006 no 27188, *Famiglia e diritto*, 697 (2007).

[34] F. Di Giovanni, 'Il «diritto dei giuristi» e la complessità della realtà' *Rassegna di diritto civile*, 981 (2014); G. Doria, 'Pluralismo e verità della legge' *Giustizia civile*, 394 (2014); P. Grossi, 'La formazione del giurista e l'esigenza di un ripensamento metodologico' *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 26 (2004); V. Scalisi, 'Regola e metodo nel diritto civile della postmodernità' *Rivista di diritto civile*, 57 (2005); G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 16, 86; N. Lipari, 'Il diritto civile dalle fonti ai principi' n 1 above, 21, 28; Id, 'Costituzione e diritto civile' n 1 above, 1272; P. Perlingieri, 'La «grande dicotomia» diritto positivo-diritto naturale', in P. Sirena ed, *Oltre il «positivismo giuridico» in onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2011), 87, 89; Id, 'Complessità e unitarietà dell'ordinamento giuridico vigente', in *Scritti in onore di Vincenzo Buonocore*, I (Milano: Giuffrè, 2005), 635; A. Falzea, 'Complessità giuridica' *Enciclopedia del diritto* (Milano: Giuffrè, 2007), Agg. I, 201; P. Grossi, 'L'identità del giurista oggi' *Rivista trimestrale di diritto e procedura civile*, 1089, 1095 (2010).

to be *embraceable* by society.[35]

The individual self-determination of adults in the context of affective relationships have claimed and obtained ever greater recognitions in the European legal context, effecting a true Copernican revolution the effects of which extend from the family law system to that of children's rights, opening the way for an implicit adult-centric view of the relationship between adults and children in the field of reproductive and parenting choices.

The Italian legal system's acceptance of the legitimation of homosexual loving relationships[36] has led to the propagation of the related effects in the context of reproductive freedom (made concrete, beyond any ontological impediment, with the help of reproductive techniques). The now achievable desire to be parents and the related desire to be considered a parental couple are starting to be intend in the social context as an actual existential right, with resulting reflections on the pre-existing life, on the one hand, and on the nascent life, on the other.

Taking the perspective of presumed unquestionability of the reproductive self-determination, legal scholarship and case law have been making the following deductions, through the propensity to argue by principles in the case law according to the *Drittwirkung* of constitutional values:

- the child's right to grow up in *a* family,[37] derived from the child's right to grow up *in his or her own family*;[38]
- the adult's right to have children, derived from the child's right to have a family;[39] and,
- the couple's right to be considered parents, derived from the adult's right to have children.

The fundamental principles invoked to support these positions, presumed to derive from them, are principles that were initially part of the child-centric perspective, under which they were assumed to place limits upon the free determination of adults, such as:

- parental responsibility;[40]
- the related concept of 'social parenting';
- the 'affective continuity';[41] and,

[35] N. Lipari, 'Il diritto civile dalle fonti ai principi' n 1 above, 24.

[36] *Ex multis*, G. Ballarani, 'La legge sulle unioni civili e sulla disciplina delle convivenze di fatto. Una prima lettura critica' *Diritto delle successioni e della famiglia*, 623 (2016); Id, 'Verso la piena autonomia privata in ambito familiare?' *Diritto delle successioni e della famiglia*, 27 (2019); G. Perlingieri, 'Interferenze fra unione civile e matrimonio. Pluralismo familiare e unitarietà dei valori normativi' *Rassegna di diritto civile*, 101 (2018); Id, 'Discriminazione di coppie eterosessuali?' *Diritto delle successioni e della famiglia*, 1 (2019).

[37] Art 315-*bis* Civil Code.

[38] Art 1, legge 4 May 1983 no 184.

[39] Art 1, comma 4, legge no 184 of 1983; Corte costituzionale 6 July 1994 no 281, *Giustizia civile*, I, 2706 (1994).

[40] Council Regulation (EC) 2201/2003.

[41] Legge 19 October 2015 no 173.

- a child's right to have two parents ('bi-parenting').

Thus, the results achieved by the case law through the argumentation by principles allow to verify if the original legal order aimed at the superiority and pre-eminence of the child's interest has given way to an adult-centric path.

V. The Judicial Paths Toward Same-Sex Parenting, Between Rules and Principles

Here, a preliminary look at the main case law in the field of same-sex parenting is necessary in order to identify the most critical issues.

The first case concerns a couple of women. After one of them gave birth to a child through *in vitro* fertilization (IVF), her partner asked (with the other's consent) to be recognized as a parent under the 'adoption in particular cases' provision (Art 44, para 1, letter *d* of legge no 184/1983), which governs adoptions in cases where pre-adoptive custody is not possible.

Although the impossibility of pre-adoptive custody had been consistently understood as the 'factual impossibility'[42] to implement custody, the court[43] allowed the request by interpreting it broadly as a 'legal impossibility'. More specifically, the court connected the lack or impossibility of a declaration of adoptability to the non-existence of a prior state of abandonment. In its decision, the court then relied on the need to guarantee the child's right to 'affective continuity'.

The theory put forward by the court was then confirmed by the Italian Supreme Court of Cassation (SC),[44] which held that Art 44, para 1, letter *d* can

[42] In the traditional reconstruction, in fact, the formula refers to the factual impossibility, referring to those hypotheses in which, besides the abandonment situation, there are *de facto* obstacles (particular character elements of the child, age of the child, disabled child) that prevent pre-adoption custody and full adoption. In this perspective, unfailing conditions remain the state of abandonment and the declaration of adoptability: T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2014), 399; M. Dogliotti, 'Adozione di maggiorenni e minori', in P. Schlesinger ed, *Codice civile. Commentario* (Milano: Giuffrè, 2002), 807; L. Rossi Carleo, 'L'affidamento e le adozioni', in P. Rescingno ed, *Trattato di diritto privato* (Torino: UTET, 1997), 397; P. Vercellone, 'La filiazione legittima, naturale, adottiva e la procreazione artificiale', in F. Vassalli ed, *Trattato di diritto civile* (Torino: Giuffrè, 1987), 194. Cf G. Salvi, *Percorsi giurisprudenziali in tema di omogenitorialità* (Napoli: Edizioni Scientifiche Italiane, 2018), 17.

[43] Tribunale per i minorenni di Roma, 30 July 2014 no 299, among many in *Rassegna di diritto civile*, 679 (2015). In the same sense, cf Tribunale per i minorenni di Roma, 22 October 2015, among many in *Foro italiano*, 339 (2016); Tribunale per i minorenni di Roma 23 December 2015, *Nuova giurisprudenza civile commentata*, 969 (2016).

[44] Corte di Cassazione 22 June 2016 no 12962, among many in *Nuova giurisprudenza civile commentata*, 1218 (2016), with annotation by G. Ferrando, 'Il problema dell'adozione del figlio del partner. Commento a prima lettura della sentenza della Corte di Cassazione n. 12962 del 2016'. In this case law, the Corte di Cassazione recall two precedents of Eur. Court H.R.: *Moretti and Benedetti* v *Italia*, Judgment of 27 April 2010, available at www.hudoc.echr.coe.int, and *X and others* v *Austria*, Judgment of 19 February 2013, *Giurisprudenza italiana*, 1764 (2013); *Nuova giurisprudenza civile commentata*, I, 519 (2013).

be applied in cases where the pre-condition of a child's abandonment does not exist (Art 7, para 1, legge no 184/1983). It was the view of the SC that the need to consolidate the emotional relation between the child and the parent's partner should be emphasized.

This interpretation of the legislative provision has been subjeted to various criticisms, first of all based on the exceptional nature of the provision regarding adoption in particular cases, which prevents its analogical interpretation (Art 14 of the Preliminary Provisions of the Civil Code),[45] as well as the risk of indiscriminately opening the way for distorted or abusive uses of the law, in accordance with what the Corte di Cassazione has established in its decision.[46]

The second case involved a couple of men who made use of surrogacy in a country where it was lawful. After obtaining a birth certificate from that country which indicated the two men as parents of the child, they requested registration of the birth in Italy, and the Public Official refused to produce it.

This case differs from the erlier one, due to the prohibition (with criminal repercussions) of surrogacy and similar practices in Italy, established by Art 12, para 6 of legge 19 February 2004 no 40.

In this regard, the court[47] stated that, despite of the prohibition of surrogacy under legge no 40/2004, the best interest of the child in the continuity of his or her *status* must prevail over the international public order, in accordance with the definition recently handed down by the SC.[48] As some scholars have pointed out,

> 'according to a correct balance of values, there can be no axiological prevalence of the punitive logic towards the parents, over the logic of protecting the child, as the child itself is a person worthy of special protection'.[49]

This interpretation is only acceptable if we carry out an analysis under an

[45] Corte di Cassazione 2 February 2015 no 1792. Upon the exceptional nature of a rule, see, among many, P. Perlingeri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1991), 102.

[46] Cf Corte di Cassazione 27 September 2013 no 22292, 46 *Guida al diritto*, 34 (2013); Corte di Cassazione 2 February 2015 no 1792 n 45 above; Tribunale per i minorenni del Piemonte e Valle d'Aosta 11 September 2015, nos 258 and 259, *Nuova giurisprudenza civile commentata*, I, 205 (2016); Tribunale per i minorenni di Milano 17 October 2016, no 261; Tribunale per i minorenni di Milano 20 October 2016, no 268, *Nuova giurisprudenza civile commentata*, 271 (2017); Tribunale per i minorenni di Potenza 15 May 1984, *Diritto di famiglia e delle persone*, I, 1039 (1984); Tribunale di Roma 22 December 1992, *Giurisprudenza di merito*, 924 (1993); Corte d'Appello di Torino 9 June 1993, *Diritto di famiglia e delle persone*, I, 165 (1994); Tribunale per i minorenni di Ancona 15 January 1998, *Giustizia civile*, I, 1711 (1998); G. Salvi, *Percorsi giurisprudenziali in tema di omogenitorialità* n 42 above, 21.

[47] Corte d'Appello di Trento 23 February 2017, *Foro italiano*, 1034 (2017).

[48] Corte di Cassazione 30 September 2016 no 19599, among many in *Nuova giurisprudenza civile commentata*, 372 (2017).

[49] G. Salvi, *Percorsi giurisprudenziali* n 42 above, 72; A. Valongo, *Nuove genitorialità nel diritto delle tecnologie riproduttive* (Napoli: Edizioni Scientifiche Italiane, 2017), 91.

exclusively adult-centric perspective. After all, the 'logic of the child's protection as a person worthy of special protection' is precisely the same logic which underlies the criminal prohibition of surrogacy (Art 12, para 6 of legge no 40/2004) and which justifies the punishment established by this article. Furthermore, adhering to the proposed reconstruction also means legitimizing behaviour that is contrary to the law, transforming the decision to violate the prohibition into an act triggering a reward procedure.

If it is true that the consequences of the illegal actions of adults should be managed in a way as not to prejudice the child,[50] when a reproductive procedure (in addiction to disposing, monetizing and objectifying on the mother's body) ends with the act of transferring the child (like transferring a good), and the practice is subject to criminal sanctions in Italy[51] and condemned by the European Union,[52] a failure to recognize that the dignity of the human being (the dignity of the woman and that of the child) has been violated appears excessive.[53]

The case was recently examined by the United Divisions of the SC,[54] which established that granting legal effect to the foreign jurisdictional measure establishing the relationship between a child born abroad by surrogacy and the intended parent (who has, it bears underscoring, no genetic connection with the child) is impermissible, due to the prohibition of the surrogacy provided by Art 12, para 6 of legge no 40/2004. This Article is the expression of the public order principle that safeguards adoption and the fundamental values of the human dignity of pregnant women. The protection of these values, not unreasonably considered to prevail over the interests of the child, in the context of a balancing carried out directly by the legislator – and which courts cannot replace with their own evaluation – does not mean that the intented parent cannot be recognized through other legal instruments, such as adoption in particular cases, provided by Art 44, para 1, letter *d* of legge no 184/1983.

The third case concerned a child born abroad to two women through IVF, one of whom donated the egg and the other carried the pregnancy. The women requested that Italy register the foreign birth certificate, which listed them both

[50] P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 8 above, II, 780.

[51] Corte di Cassazione 11 November 2014 no 24001, *Nuova giurisprudenza civile commentata*, 235 (2015).

[52] Cf Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italia*, Judgment of 24 gennaio 2017, available at www.hudoc.echr.coe.int: G. Salvi, *Percorsi giurisprudenziali* n 42 above, 74. On this, see the Report of the European Parliament of 17 December 2015 no 115: 'The Union expressly condemns the practice of surrogacy of maternity', as well as the rejection of the 'De Sutter' Report of the Children's Rights related to surrogacy on 11 October 2016 by the Council of Europe (Doc. no 14140 of 26 September 2016), condemning the practice as detrimental to human dignity.

[53] It doesn't seem to be possible to argue otherwise, including in reference to what the Constitutional Court has laid down (Corte costituzionale 10 June 2014 no 162, *Corriere giuridico*, 1062 (2014) in order to consider the rules of legge no 40/2004 with its non-constitutionally bound content.

[54] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, available at www.italgiure.giustizia.it.

as mothers[55] (under Art 28, para 2, letter *b*) of Decreto del Presidente della Repubblica 3 November 2000 no 396). This case, again, differs from the previous one because of the genetic link between the women and the newborn.

The matter concerns the concept of public order again, and the distinction between internal[56] and international[57] public order, in cases involving parental relationships based on rules that do not exist under the Italian legal system.

According to the SC, courts have to evaluate the international public order on the bases of fundamental constitutional principles and,

> 'where compatible, (of) those (...) inferable from the Treaties and from the Charter of Fundamental Rights of the European Union, as well as from the European Convention of Human Rights'.[58]

So,

> 'a contrast with the public order cannot be recognized merely for the fact that the foreign law is different from one or more provisions of the national law, because the standard of reference is not constituted by (...) rules by which the ordinary legislator exercises (or has exercised) its discretion in a determined area, but exclusively from the fundamental principles which are binding on the ordinary legislator'.[59]

In this regard, the United Divisions of the SC, in the more recent ruling mentioned above,[60] has specified that, when it comes to recognition of the effectiveness of a provision from a foreign jurisdiction, the compatibility with the public order (required by Arts 64 *et seq* of legge 31 May 1995 no 218), must be assessed, not only in light of the fundamental principles of the Constitution and those enshrined in International and Supranational Sources, but also in light of how they have been adopted by the lawmaker in specific areas, as well as in the interpretations provided by the Constitutional and Supreme Courts. The work of synthesis and reconstruction of these Courts, indeed, gives shape to that 'living law' (as a sort of Italian law of precedent) which cannot be ignored in

[55] Cf Tribunale Torino 21 October 2013 and Corte d'Appello Torino 29 October 2014, *Nuova giurisprudenza civile commentata*, 441 (2015); then cf Corte di Cassazione 30 September 2016 no 19599 n 48 above; in the same sense, in reference to public order, Corte di Cassazione 15 June 2017 no 14878, *Foro italiano*, 2280 (2017).

[56] Which refers to mandatory internal rules as a limit on private autonomy: Corte di Cassazione 15 June 2017 no 14878 n 55 above, 2280, and Corte di Cassazione 30 September 2016 no 19599 n 48 above, 372.

[57] Cf G. Ferrando, 'Ordine pubblico e interesse del minore nella circolazione degli *status filiationis*' *Corriere Giuridico*, 190 (2017), and V. Barba, 'L'ordine pubblico internazionale' *Rassegna di diritto civile*, 403 (2018).

[58] Corte di Cassazione 30 September 2016 no 19599 n 48 above, 372.

[59] ibid.

[60] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193 n 54 above.

the reconstruction of the notion of public order. All these standards as a whole express, infact, the set of values forming the foundation of the system at a given historical moment.

Thus, in the case of a genetic link with the child, as established by the Supreme Court with the aforementioned judgment,[61] the failure to register the foreign birth certificate in Italy would entail non-recognition of the parental relationship in Italy, resulting in prejudice to the child, both in terms of the right to personal identity, as well as in terms of heredity, and inflicting upon the child a

> 'lame legal position (...) bestowed by the decision of those who have followed a reproductive procedure that is not allowed in Italy'.[62]

In this context, the Supreme Court also invokes the child's right to have two parents ('bi-parenting'), the right to 'affective continuity', the right to the continuity of the child's *status* (with an argument related to Arts 13, para 3, and 33, paras 1 and 2 of legge no 218/1995) and the right to personal identity. It failed to consider how this reproductive choice is, however, exactly contrary to the personal identity of the child himself.

Likewise, the Supreme Court held that Art 269 of the Civil Code, according to which a child's mother is the person who gives birth to that child, is no longer a fundamental principle of the Italian legal system, now that the genetic motherhood can be separated from biological motherhood. It further held that the heterosexual paradigm of parenthood is, likewise, not based on a fundamental principle.[63]

Some further reflection on the relationship between *favor veritatis*, *favor minoris*, and *favor affectionis* is necessary. A recent ruling by the Constitutional Court[64] on the constitutionality of Art 263 of the Civil Code, insofar as it failed to provide that challenging a person's recognition of a child on falsehood grounds is only permissible when it is in line with the interest of the child, with reference to Arts 2, 3, 30, 31, 117 of the Constitution and Art 8 of the ECHR, is illustrative. The Court held that it was unconstitutional for the search for truth in the parent-child relationship to prevail automatically over the interest of the child. After all, the necessary balancing entailed a comparative judgment between the interests underlying the verification of the truth of the *status*, and the potential consequences

[61] Corte di Cassazione 30 September 2016 no 19599 n 48 above.

[62] ibid; G. Ferrando, 'Ordine pubblico' n 57 above, 193; M. Porcelli, 'Il rapporto tra *favor veritatis* e *favor affectionis* nelle relazioni familiari', in F. Dell'Anna Misurale and F.G. Viterbo eds, *Nuove sfide* n 31 above, 139; G. Salvi, *Percorsi giurisprudenziali* n 42 above, 67.

[63] Corte di Cassazione 30 September 2016 no 19599 n 48 above, 53, states that 'It is not possible to support the existence of a fundamental constitutional principle - in the sense of public order and, therefore, unalterable by the ordinary legislator - that could prevent registration of the birth certificate in Italy (*omissis*) by reason of an alleged *ontological foreclosure* (my italics) for same sex couples (linked by a stable emotional relationship) to welcome, nurture and even generate children'.

[64] Corte costituzionale 18 December 2017 no 272, *Diritto & questioni pubbliche*, 191 (2018); see, also, Corte costituzionale 15 November 2019 no 237, available at www.cortecostituzionale.it.

of this verification for the legal position of the child.

The case concerned a married, heterosexual couple who resorts to a surrogacy practice abroad, by an hypothesis of so-called 'total surrogacy of maternity', in which the expectant mother has no biological connection with the child, while both clients are genetically linked to him or her. The Constitutional Court[65] initially gave precedence to *favor veritatis*, considering it essential for the identity of the child, and removed the *status* that did not correspond to the biological truth. Later, however, it took a different approach, taking into consideration the child's interest in relation to parenting, in accordance with the positions of the European Court of Human Rights.[66] Under the latter view, the personal identity of the child must be connected to his or her growth, and so, if the criterion of biological truth is not an absolute guarantee of protection of identity,[67] the false *status filiationis* must prevail over *favor veritatis*, as it is less harmful to the interest of child. The Constitutional Court adopted this approach, noting that a comparative evaluation of the truth against the concrete interest of the child was necessary, and gave priority to the genetic link of the child with the presumptive parents given the total surrogacy, notwithstanding the

> 'high degree of negative value that our legal system reconnects to the surrogacy, prohibited by a specific penal provision'.[68]

On the basis of these considerations, the Constitutional Court rejected the question challenging the constitutionality of Art 263 of the Civil Code, and held that the truth principle must be reconciled with the principle of the concrete interest of the child; so that, given the superiority of the child's interest, a pre-established bond of affection must be preserved. According to the Court, the case was similar to adoption in particular cases regulated by Art 44, letter *b* of legge no 184/1983, by reason of the marriage between the father of the child and the woman (in this case, only a genetic mother) and in accordance with the approach followed by the Supreme Court,[69] according to which Art 44 is

> 'a system rule, which allows the adoption as often as it is necessary to

[65] Corte costituzionale 22 April 1997 no 112, *Giurisprudenza costituzionale*, 1073 (1997).

[66] Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italia* n 52 above; Eur. Court H.R., *Mennesson* v *Francia*, Judgment 26 June 2014, *Foro italiano*, 561 (2014); Eur. Court H.R., *Labassee* v *Francia*, Judgment 26 June 2014, *Responsabilità civile e previdenza*, 2041 (2014). The same Court, adhering to the European position contrary to surrogacy and the indiscriminate exercise of the right to become parents, considers the removal of the child from the family nucleus already constituted only against a non-genuine relationship (short-term cohabitation) legitimated either in the absence of formalized constraints, or to avoid a concrete risk of injury to the physical or moral integrity of the child (instability of the relationship): Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italia* n 52 above, para 148.

[67] Cf Corte di Cassazione 31 July 2015 no 16222, *Diritto di famiglia e delle persone*, 119 (2016).

[68] Corte costituzionale 18 December 2017 no 272 n 64 above, 191.

[69] Corte di cassazione 22 June 2016 no 12962 n 44 above, 1218.

safeguard the affective and educational continuity of the relationship between the adopter and the child'.[70]

VI. The Same-Sex Parenting Option in the Regulatory Context: What Rights Are Denied to the Child?

With reference to court rulings, it seems evident that the problem does not arise from the individualistic (ie non-solidaristic) desires of adults who resort to reproductive techniques prohibited in our legal system, but rather from the tenor of the answer provided by the interpreter in relation to the effects that these rulings produce on the interest (or, more properly, on the rights) of the child and on the desires of the adults. The question is resolved, in fact, in the answer provided by the interpreter: accepting requests for parental recognition from people 'forced' to resort to reproductive practices abroad that are prohibited in Italy means granting *ex post* legitimisation of an unlawful action in a regulatory context that is markedly contrary.

However, in order to correctly classify the problem, two phases need to be distinguished in the comparison between the interest of the child and the free reproductive determination of adults: the first is linked to the pre-reproductive choice as a couple's elaboration; the second is linked to the effects of a court's acceptance of this choice in relation to the child.

The first phase, in which there is a desire for a future life, seems to fall into a (apparent) normative grey area, in which a sort of 'pre-reproductive responsibility' cannot be identified due to the absence of the individual bearing potentially opposing interests. In the Italian constitutional system, the protection of the person starts with conception,[71] and so, before conception has occurred, it seems, *prima facie*, that there are no obstacles to any particular reproductive determination. Thus, to see whether the Italian legal system prevents some choices of adult parenting projects, if we consider Art 1, para 20 of legge 20 May 2016 no 76,[72] and Arts 5[73] and 12, para 6[74] of legge no 40/2004, a statutory pattern is revealed:

[70] Cf L. Cucinotta, 'La difficile ricerca dell'identità per i nati da maternità surrogata. Brevi riflessioni sulla sentenza della Corte Costituzionale del 18 Dicembre 2017, n. 272' *Diritto & questioni pubbliche*, 191 (2018).

[71] See, among many, Corte costituzionale 18 February 1975 no 27, *Foro italiano*, I, 515 (1975); Corte costituzionale 10 February 1997 no 35, *ex pluribus* in *Giurisprudenza costituzionale*, I, 281 (1997). Cf G. Ballarani, 'Nascituro (soggettività del)', *Enciclopedia di bioetica e scienza giuridica* (Napoli: Edizioni Scientifiche Italiane, 2015), IX, 136.

[72] Para 20 of the Art 1, legge no 76/2016 excludes access to legitimizing adoption (legge no 184/1983) to same-sex couples: cf G. Ballarani, 'La legge sulle unioni civili' n 36 above, 638.

[73] In establishing the requirements for access the IVF, the law establishes that 'Without prejudice to the provisions of Article 4, paragraph 1, couples of adults of different sex, married or cohabiting, potentially of legal age, may have access to medically assisted reproduction techniques if fertile and both living'.

one that (at the moment) prevents any same-sex parenting option, deeming it contrary to the interest of the child and aiming at preventing injury to born child.

With reference to the second phase, during which attention shifts to the born child, the couple's request to be considered a parental couple is highlighted. Such requests, made by couples in the interest of the child, need to be considered in light of the provisions indicated above, in order to verify whether the legal system's traditional child-centric approach is being maintained unaltered by the courts *vis-à-vis* the reproductive self-determination of adults, or whether it is, rather, being sacrificed on the altar of the adult's utilitarianism.[75] This creates a need to evaluate the validity of the reasoning adopted by courts in effecting their balancing

[74] This article establishes that 'Anyone, in any form, who realizes, organizes or advertises the marketing of gametes or embryos or maternity surrogacy is punished with imprisonment from three months to two years and with a fine from 600,000 to one million euros'. Cf E. Giacobbe, 'Dell'insensata aspirazione umana al dominio volontaristico sul corso della vita' *Diritto di famiglia e delle persone*, 590 (2016).

[75] In this sense, cf G. Ballarani, *Il matrimonio concordatario* n 21 above, 79; Id, *La responsabilità genitoriale* n 3 above, 317. Recently similar considerations was followed by the Corte costituzionale 23 October 2019 no 221, available at www.cortecostituzionale.it, which rejected the question of constitutional legitimacy of some provisions of legge no 40 of 2004 which limit access to PMA procedures to different-sex couples (including, especially, Arts 4, 5 and 12), stating that those limitations does not represent a sort of discrimination on the basis of sexual orientation. According to the Court, this Law is based on two fundamental ideas. The first is expressed by Art 1 which, in addition to providing that the law must 'assures the rights of all the subjects involved, including the conceived', stipulates that 'recourse to PMA is permitted for purposes of favouring a solution to reproductive problems stemming from human sterility or infertility' (para 1) and provided that 'there are no other treatment options that can effectively eliminate the cause of the sterility or infertility' (para 2)'. 'The second concept concerns the structure of the family unit that stems from the techniques in question. Indeed, the law stipulates a series of subjective limitations on access to PMA, rooted in the transparent intent to ensure that the family unit in question follows the family model characterized by the presence of a mother and father (Art 4, para 3, which, in order to ensure the existence of a biological link between the would-be parents and their offspring, stipulates a ban (which was, originally, absolute) on accessing heterologous PMA methods (that is, techniques that use one or more gametes from an "external" donor); Article 5 of Law no 40 of 2004 establishes, in particular, that only "couples of persons over the age of eighteen, of opposite sex, who are married or cohabiting, of potentially fertile age, (and who are) both living" may have access to PMA)'. In the interpretation offered by the Court, those limitations do not represent a sort of discrimination on the basis of sexual orientation: 'In general terms, legislative concern for guaranteeing respect for the conditions considered best for the development of the child's personality certainly may not be considered irrational or unjustified. In light of this, the idea underlying the provisions under review, that a family *ad instar naturae* (with two parents, of different sexes, who are both living and of potentially childbearing age) represents, as a matter of principle, the most suitable "place" to welcome and raise the newborn, cannot be considered, in turn, to be arbitrary or irrational *per se*. And this has nothing to do with the capacities of a single woman, a homosexual couple, or a heterosexual couple advanced in age to effectively perform parental functions, if need be. By, in particular, requiring sexual diversity of the members of the couple, in order to have access to PMA – a condition that is, moreover, clearly an underlying assumption of the constitutional provisions on the family – the legislator also took stock of the level of acceptance of the phenomenon of so-called "omogenitorialità" (same-sex parenting) within the societal community, and concluded that, at the time the law was passed, there was no sufficient consensus on the matter'.

operations, as well as the conformity of the judgments to the concrete, existential interest of the child, who is endowed with the same dignity and the same personal rights of those who desire to be parents.

Since balancing always leads to a loss, it is necessary to identify which existential rights of the child are being sacrificed:

- the right to the certainty of maternity established by Art 269, para 3 of the Italian Civil Code and the right to search for paternity, established by Art 30, para 4 of the Constitution. Although it is possible to renounce one's parenthood or claim to be a parent, it is not possible to prevent the child from searching for the missing or effective parent (Arts 269 and 279 of the Civil Code), and maternal anonymity may also yield under certain conditions;[76]

- consequently, the child's right to know his or her origins as an essential trait of his or her personal identity,[77] guaranteed by Art 28 of legge no 184/1983;[78]

- the child's right to grow up in his or her own family, established by Art 1 of legge no 184/1983, and the resulting conclusion that adoption is an extreme measure to resort to only after having ascertained that a child has been definitively abandoned;[79] and,

- the right to have two parents ('bi-parenting'), guaranteed by Art 337-*ter* of the Civil Code, in terms of the opposite genders of the parents.[80]

VII. Problematic Issues Concerning the Misalignment Between the Legislative and Judicial Approach

To evaluate the conformity of the same-sex parenting option with the child's interest, as well as the validity of the arguments used in the case law, investigating

[76] Eur. Court H.R., *Godelli* v *Italia*, Judgment of 25 September 2012 n 9 above; Corte costituzionale 18 November 2013 no 278 n 9 above, 11; Corte di Cassazione 21 July 2016 no 15024 n 9 above, 21 and Corte di Cassazione 9 November 2016 no 22838 n 9 above, 19; Corte di Cassazione-Sezioni unite, 25 January 2017 no 1946 n 9 above.

[77] M. Bianca, 'La buona fede nei rapporti familiari', in P. Sirena and A. Zoppini eds, *I poteri privati e il diritto della regolazione, I poteri privati e il diritto della regolazione. A quarant'anni da 'Le autorità private' di C.M. Bianca. Atti del Convegno Roma Tre (27 October 2017) – Bocconi (9 November 2017)* (Roma: Romatre Press, 2018), 159.

[78] Corte costituzionale 18 November 2013 no 278 n 9 above, 11; Corte costituzionale 18 dicembre 2017 no 272 n 64 above; Corte di Cassazione 21 luglio 2016 no 15024 n 9 above, 21; Corte di Cassazione 9 novembre 2016 no 22838 n 9 above, 19; Corte di Cassazione-Sezioni unite 25 gennaio 2017 no 1946 n 9 above; Cf G. Ballarani, 'Modifiche all'articolo 28 della legge 4 maggio 1983, n. 184 e altre disposizioni in materia di accesso alle informazioni sulle origini del figlio non riconosciuto alla nascita (ddl n. 1978)' *Diritto di famiglia e delle persone*, 965 (2017).

[79] Corte costituzionale 6 July 1994 no 281 n 39 above, 2706; G. Ballarani, *Il matrimonio concordatario nella metamorfosi della famiglia* n 21 above, 100.

[80] As a parameter expressed by the law states on the shared custody of children in case of crisis of parental cohabitation, the right of the child to 'bi-parenting' reflects implicitly the need for the child to have two parental referents of different sex because of the different contribution to the growth of a child in relation to his healthy and harmonious mental and physical development (Arts 30, 31 and 37 Cost.): G. Ballarani, '*Sub* art. 155 c.c.' n 24 above, 28.

the balancing operation is of major importance. In order to establish the prevalence of one interest over another, this operation is done by resorting to interpretative criteria based on axiological principles,[81] interpreted according to the changeable indicia of the historical and social context.

However, to evaluate instances of recognition of same-sex parenting, balancing operations may have opposite results depending on whether an adult-centric or child-centric criterion is given precedence, although the same interpretative criteria based on the same axiological principles is used. This shows that the contrast between the legislative prohibition of same-sex parenting and the judicial tendency to allow it is explained by the contrast between the traditional child-centric orientation of the legislator and the adult-centric perspective of some judges who, in balancing operations, detach from or disregard the statutory provisions.

VIII. A More Systemic Problem: Antithetical Results, Recursive Balancing, and the Risk of 'Positivization' of the Precedent in a Civil Law Context

The statutory framework described above reveals a clear misalignment between the legislative and judicial tendencies in this area. In the framework of the *Drittwirkung* of constitutional and European principles, this misalignment is justified by the fact that the written law is only one of the standards[82] that courts must evaluate, consider, and analyse in terms of reasonableness[83] to provide a 'socially acceptable'[84] ruling.

However, in these cases, in which the rulings justify openly unlawful actions by considering them compliant with the interest of the child, the hermeneutical investigation appears fragile, especially in light of the fact that the opposite conclusion could easily be reached on the basis of the selfsame principles.[85]

In general, the cases in this area all reach nearly identical conclusions, despite the fact that balancing operations often naturally give rise to different outcomes.

[81] V. Scalisi, 'Assiologia' n 10 above, 6; Id, 'Ermeneutica dei diritti fondamentali' n 18 above, 147; P. Perlingieri, 'La «grande dicotomia»' n 34 above, 92.

[82] N. Lipari, 'Costituzione e diritto civile' n 1 above, 1264.

[83] The principle of reasonableness is understood as 'a criterion of argumentation inherent in the «very idea of law», which operates (...) regardless of an express reference by the legislator' and also 'in the absence of a specific provision that contemplates for the case itself or that solves it': G. Perlingieri, *Profili applicativi della ragionevolezza* n 34 above, 15, 96.

[84] N. Lipari, 'Costituzione' n 1 above, 1271; Id, 'Il diritto civile' n 1 above, 24; *contra*, G. Perlingieri, *Profili applicativi della ragionevolezza* n 34 above, 22; for a different perspective, cf P. Perlingieri, '*Ius positum* o *ius in fieri*: una falsa alternativa' *Rassegna di diritto civile*, 1039 (2019).

[85] This demonstrates how the relationship between rule and principle, even if alternative, is not exclusive (nor dichotomous), being able to converge in the solution of the concrete case, guaranteeing the coherence of the system considered as a whole, as well as legal certainty: P. Perlingieri, 'Il diritto come discorso?' n 1 above, 777; A. Gentili, *Il diritto come discorso* (Milano: Giuffrè, 2013), 374; N. Lipari, 'Il diritto civile dalle fonti ai principi' n 1 above, 28.

Although these cases can be read as the guarantee of a new legal certainty, they highlight the risk of 'positivization' of judicial precedent, and of the interpretative procedure with which it is reached,[86] replacing the rigidity of the law with the rigidity of interpretative argumentation by principles and turning precedent into a new, judicial source of law,[87] even in a civil law context.

IX. The Particular System Problem: *Contra Legem* Actions, *Ex Post* Evaluation of the Child's Interest, and Legitimation of Expectations

After having analysed the results of the case law from the perspective of the relationship between the self-determination of adults and the child's best interest, it is necessary to take into account the compact statutory system which, from a child-centric perspective, currently prohibits any technique to prospectively achieve a same-sex parenting option.

With the birth of the child, however, according to the current legislative provisions, the prejudice to the child has already been produced. This reveals how, in the case law, the interest of the child is considered through an intrinsically secondary perspective, with a decidedly remedial nature. The courts evaluate this interest exclusively *ex post*, after the conduct has taken place. In this regard, it is necessary to consider how:

- on a legislative basis, the conduct of adults is prohibited because it is detrimental to the child;

- the case law moves from the need to resolve a conflict between divergent interests initially assumed to be equal (those of the adults and that of the child) and reaches the point of affirming the definitive prevalence of one person's interest (the adult's) over that of another (the child's); and,

- any outcome of the judgment (whether granting victory to one party or to the other), and of the balancing operation (giving precedence to the adult's interest or to the child's) fails to resolve the injury effected *ab initio* by the conduct of the adults to the detriment of the child (under current Italian law).

Although the need to adopt a ruling according to justice must be oriented towards the concrete protection of the superior interest of a specific child in a given

[86] The risk is far from uncertain if we consider, on the one hand, the binding force of the precedent expressed by the United Divisions of the Court of Cassation for Simple Divisions (decreto legislativo 2 February 2006 no 40, and Art 374 of Code of Civil Procedure) and, on the other hand, the exclusionary force on the right of action of the art 366 of Code of Civil Procedure: in legal scholarship it is not lacking to observe, in fact, how 'the precedent adopted by the Constitutional Court or by the Supreme Court of Cassation, in their respective functions of centralized control of constitutional legitimacy and *nomofilachia*, have a persuasive value, due to the authority of the Courts and (...) a preclusive value for the purposes of the exercise of the right of action': P. Perlingieri, 'I principi giuridici' n 1 above, 23. Not by chance, 'living law assumes the outcome of precedents as a presupposition of its analysis': N. Lipari, 'Il diritto civile' n 1 above, 29.

[87] ibid 3, 28.

situation, the need to provide an answer (even a coherent and reasonable one) highlights a problem: in these cases, it seems that the preventive protection of the child's interest (guaranteed by specific regulatory prohibitions applicable to adults), is not taken into primary consideration. In these cases, the child's interest is invoked in a secondary way as a specific remedy for unlawful behaviour by adults.

Therefore, if the *cause* is forbidden (because the legislator wants to prevent it from having any effect) but the judge legitimises the *effect*, the cause itself is also, implicitly, legitimised, generating expectations which are deemed legitimate, in the hope of being able to legalise them *ex post* through the work of the judge.

In this way, attention is shifted from the conduct of the adults to the need to protect the interest of the child, at the same time downgrading that interest to the level of a mere tool, which may be used to legalise the conduct itself.

In the context of same-sex parenting, making the self-determination of adults prevail over the interest of the child, the latter returns to a state of subjection, passively and irreversibly suffering the choice of adults and being injured in some of his or her existential rights, which are inviolable by definition. This injury takes place with the endorsement, not of the legal system as a whole, but of part of it: that part which is entrusted with the function of guaranteeing protection in concrete cases and which, regardless of being detached from the regulatory context and operating by principles, proceeds by implicitly adhering to an adult-centric reading of fundamental principles.

Thus, the misalignment described is not between the law as rule and the principle as instrument, but rather between the ordering function of the law and the servant function of the interpreter which, in these cases, seems to swap the end with the means. The initial end was, is, and must remain the need to protect and guarantee the assumed superiority of the child's interest in a healthy and harmonious mental and physical development; and the means to ensure its effectiveness were, are, and must remain the entire legal system, made up of rules based on principles, and of the axiological interpretation of the one through the other.

X. Conclusion

In light of these considerations, it is finally necessary to observe that, when the story ends with the choice to deprive a child of a parental figure (replacing them surreptitiously with the partner of the parent) and of the contribution (mental and emotional) of a parent of the opposite sex, the object of verification cannot be the parenting ability or the suitability of a given adult or couple, but rather the conduct of the adults in relation to the interest of a specific child. This requires considering how, when court's acquiesce to the requests of the adults, an injury to the child, beyond that predetermined by the choice of the adults, is produced in terms of the denial rights. The child is, in fact, in all such cases, deprived of the

possibility of having two parental references of opposite sex (a mother and a father).

Moreover, it is clear that refusal by a court may *appear*, in the concrete, to be contrary to the specific interest of that child; but the injury to the child is not determined by the court with its decision, but rather by the prior, unlawful conduct of the adults.

The arduous task that falls to judges is not that of being *kind*, but that of being *just* in applying the law, and to distribute justice also through judgments that, paradoxically, today tend to go against the child, who is deprived of existential rights and of fundamental contributions to his or her healthy and harmonious development.

Moreover, when debating the legitimisation of an adult or adult couple's choice to irreversibly deprive a child, *ab initio*, of a parenting figure of one of the two sexes (a mother or a father), deeming the 'figure' superfluous, or irrelevant, or in any case replaceable indifferently with a father-mother (parent 1) or with a mother-father (parent 2), and presuming that this corresponds to the child's interest, a final thought emerges: would it be *licit* to acknowledge (beyond the political correctness, but within the bounds common sense) that the achieved results, even though rationally reasoned, appear substantially unfair? Have we not perhaps exceeded that invisible boundary line beyond which the right, however well reasoned, and founded, and placed, becomes unreasonable?[88]

[88] Moreover, the task of a system of regulation (both on the normative and on the interpretative front) must remain, at the same time, serving the value of the human person in a solidarity manner and ordering the conduct of people, marking a boundary between the lawful and the illicit, between the allowed and the interdict, even over what science and technology can allow: cf G. Ballarani, 'Nascituro' n 71 above, 136; so that a recovery of convergence between lawmakers and judges would be necessary, as long as the normative datum is so connoted, without prejudice to the due solicitation by the interpreter to the legislator.