Post-Mortem Homologous Fertilization: Parental Patterns in the Dialectical Comparison Between the Constraints of Biology and Rules on Consent

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La vie est un mouvement inégal, irrégulière et multiforme

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Abstract

Starting from a judgment by the Italian Supreme Court (Corte di Cassazione), the present work seeks to analyse the multifaceted and intricate system of assisted reproduction and new parenting models within the framework of Italian law; the Italian Civil Code is structurally unfit to regulate these contemporary phenomena. The rules on biological parenthood (largely found in the Civil Code) and social parenthood (for which some principles are enshrined in legge 19 February 2004 no 40) have a complex relationship, requiring fair balance in the protection of the interests involved, including those of minors. After outlining the regulatory system of social parenting, this study also attempts to tackle tomorrow's challenges, including some critical issues which are likely to emerge.

I. Introduction: The Case Law

The question on which the Italian Supreme Court (Suprema Corte di Cassazione) ruled with judgment no 13000 on 3 May 2019 arose from a case of *post-mortem* fertilization with the late husband's cryopreserved gametes, pursuant to Art 8 of legge 19 February 2004 no 40.[1]

The minor, L., who was born in Italy, was conceived by the *post-mortem in*

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[1] Corte di Cassazione 3 May 2019 no 13000, *Giurisprudenza italiana*, 1506 (2019).

On the judgment, see the comments of A. Morace Pinelli, 'La filiazione da p.m.a. e gli spinosi problemi della maternità surrogata e della procreazione *post mortem* (Nota a Trib. Agrigento, decr. 15 maggio 2019)' *Foro italiano*, I, 3359 (2019); E. Bilotti, 'La fecondazione artificiale *post mortem* nella sentenza della I sezione civile della Cassazione n. 13000/2019' (2019), available at www.centrostudilivatino.it; M. Faccioli, 'La condizione giuridica del soggetto nato da procreazione assistita *post mortem*' *Nuova giurisprudenza civile commentata*, I, 1282 (2019).

vitro fertilization technique (IVF). In fact, the mother, R.C. (an Italian citizen), had resorted to this technique in Spain, after the death of her husband G.A.; the latter had agreed to the use of his cryopreserved gametes. When the child's birth report was filed, R.C. had requested the registration of the girl using the paternal surname, submitting her husband's consent both to medically assisted procreation and to a *post-mortem* IVF.

The civil registrar had refused and therefore R.C. had appealed to the Tribunale di Ancona, on her own behalf and on behalf of the daughter, requesting the latter's registration with the paternal surname and the certification of the paternity of the deceased husband.

By a judgment issued on 19 July 2017, the Tribunale di Ancona had rejected the appeal and upheld the registrar's decision.

Another appeal had been rejected by the Corte d'Appello di Ancona. The Court of Appeals ruled that: the legge no 40 of 2004 allows *in vitro* fertilization (IVF) only if both parents (married or not) are alive; the civil registrar, being unable to assess the validity and enforceability of foreign acts, had correctly applied the general rules of the Civil Code on personal *status* (Arts 231-232 of the Civil Code); the rules on birth registration, the establishment of paternity and the attribution of the paternal surname are established in the pre-eminent interests of the minor.

The Corte d'Appello had also ruled that the conditions to raise an issue of constitutionality (questione di legittimità costituzionale) of Art 232 of the Civil Code and of Art 5, 12 and 8 of legge no 40 of 2004 were not fulfilled, since the lack of recognition in Italian law of *post-mortem* IVF was aimed at protecting the child's right to mental and physical well-being and his right to be raised by two parents.

The Corte di Cassazione, instead, established the following rule (*principio di diritto*), that the consent of the husband or partner to a procreation technique, if not withdrawn, is an adequate basis to attribute to the child the legal status of legitimate or recognized child, even if the husband or partner has died and more than three hundred days have passed since his death. According to the Supreme Court, Art 8 of legge no 40 of 2004. 40 applies, instead of Art 232 of the Civil Code.

II. The Legal Background to the Decision

After R.C.'s appeal was denied by the Corte d'Appello di Ancona, she appealed to the Corte di Cassazione, on the grounds that: the Corte d'Appello had incorrectly attributed to the civil registrar a discretionary power to evaluate the authenticity of a statement, thus allowing the registrar to deny the registration of the paternal surname in the child's birth certificate; the Corte d'Appello had applied Arts 5 and 12 (para 2) of legge no 40 of 2004, instead of Art 8 of the same Law, in order to establish the possibility of recognizing post-mortem IVF in Italy; the Court of

Appeals had wrongfully applied Art 232 of the Civil Code. R.C. also argued that the judgement was contrary to constitutional, European and international principles on child protection.[2]

While the first ground of appeal was not accepted, the Corte di Cassazione found that the matter of the case was the possibility of amending a birth certificate which had already been issued in Italian territory, under Arts 95 and 96 of decreto del Presidente della Repubblica 3 November 2000 no 396. According to the Supreme Court, when R.C. declared the birth of her daughter to the civil registrar of her municipality and applied for a registration of the deceased husband's fatherhood and for the attribution of the paternal surname to the child, she made two different declarations, one for the birth, the other for the attribution of paternity and of the paternal surname. By filing the documentation related to the procreation procedure which she had undergone in Spain, R.C. had proven the consent of her deceased husband, as well as the use of his gametes after death.

The Court stressed that the civil registrar, in receiving the documentation, was not entitled to issue any decision on R.C.'s requests or to establish whether or not the event described was compatible with Italian law. In other words, the civil registrar was not entitled to rule on the *trascrivibilità* in Italy of a birth certificate issued by a country allowing artificial fertilization techniques (such as the one used by R.C.). The registrar was only entitled to rule on the possibility, or not, of amending a birth certificate which had already been issued on Italian territory.

Therefore, the lawfulness of *post-mortem* IVF in Italy was not relevant; the correlation between R.C.'s statements and the content of the birth certificate was the only issue to be considered.

According to the Supreme Court, any consideration – whether or not based on legge no 40 of 2004 – on the lawfulness of a homologous post-mortem fertilization technique in Italy was irrelevant. Once the child was born, it was necessary to determine if the presumptive mechanisms established in Arts 231 and 233 of the Civil Code were to be applied in order to prove paternity, or if it was also necessary to take into account the provisions of legge no 40 of 2004 on the role of consent in artificial procreation.

As the mother – the person declaring the birth to the civil registrar – was

[2] For previous cases which rejected the application for access to post-mortem procreation with a husband's cryopreserved gametes, Tribunale di Bologna 31 May 2012, *Foro italiano*, I, 3349 (2012); Tribunale di Bologna 21 May 2014, *Corriere giuridico*, 933 (2015); Tribunale di Roma 19 November 2018, *Foro italiano*, I, 692 (2019), dismissed the urgent appeal (Art 700 of Code of Civil Procedure) brought by a widow to obtain the cryopreserved gametes of her deceased husband from a medical centre in order to have access to procreation abroad. Otherwise, in contrast, Tribunale di Palermo 8 January 1999, *Foro italiano*, I, 1653 (1999), with commentary by L. Nivarra, 'Fecondazione artificiale: un caso recente e un'opinione dissenziente (ma solo sul metodo)'; and *Famiglia e diritto*, 384 (1999), with commentary by G. Cassano, 'Diritto di procreare e diritto del figlio alla doppia figura genitoriale nella inseminazione artificiale post morte'; Tribunale di Bologna 16 January 2015, *Foro italiano*, I, 1101 (2015), with note by G. Casaburi; Tribunale di Roma 8 May 2019, *Foro italiano*, I, 1952.

certainly no longer married, the marriage having being dissolved by the death of her husband, and since she had undergone an artificial procreation treatment with her husband's gametes, which had been collected prior to his death, it was necessary to verify whether or not the presumption established by Art 232 of the Civil Code impacts on the correspondence of the content of the certificate to the factual truth, ie, the paternity of the mother's ex-spouse.

De iure condito, in this case, the presumption of conception during the marriage, does not apply when three hundred days have passed since the date of the dissolution of the marriage. Hence, if the presumption did not apply, there could be no correlation between the facts as declared to the civil registrar and the content of the birth certificate.

On the other hand, it is likewise indisputable that, pursuant to Art 250, para 1, of the Civil Code, a child born out of marriage can be recognized, as provided by Art 254 of the Italian Civil Code. The recognition can come from the mother or the father, even if they were married to a third person at the time of conception, since recognition can take place both jointly and separately. Obviously, a separate recognition can only have effect with regard to the author; for example, only a recognition by the father can attribute the paternal surname.[3]

The Court further noted that, under legge no 40 of 2004, a child born after an assisted procreation technique is legally a legitimate or recognized child of the couple (Art 8); pursuant to Art 9, if heterologous assisted procreation techniques are used, the spouse or partner whose consent to the usage of the said techniques has been given cannot challenge his paternity or her maternity.

According to the Court, the R.C. case is not about the lawfulness of assisted procreation – in particular, a technique of homologous *post-mortem* fertilization – in Italy. The case must be resolved by merely applying the rules of filiation to a child born in the national territory as a result of artificial procreation – whether the latter is lawful or not.

Any consideration of the lawfulness or not of the procreation technique in Italy cannot have an adverse impact on the child or his legal *status*. Even if a birth comes after the use of techniques which are not regulated, or even forbidden, it nonetheless triggers, in the pre-eminent interest of the child, the application of all the provisions concerning his legal *status*, as clearly stated by the Eur. Court H.R. in the *Mennesson* v *France* and *Labassee* v *France* cases.[4]

[3] Regarding the differences still existing between filiation inside and outside marriage, see M. Sesta, 'Famiglia e figli a quarant'anni dalla riforma' *Famiglia e diritto*, 1012-1013 (2015); M. Dogliotti, 'La nuova filiazione fuori dal matrimonio: molte luci e qualche ombra' *Famiglia e diritto*, 480 (2014); P. Schlesinger, 'Il D.Lgs. n.154 del 2013 completa la riforma della filiazione' *Famiglia e diritto*, 443 (2014); M. Mantovani, 'Questioni di accertamento della maternità e sistema dello stato civile' *Nuova giurisprudenza civile commentata*, II, 323 (2013).

[4] Eur. Court H.R., *Mennesson* v *Francia* and *Labassee* v *Francia*, Judgment of 26 June 2014, *Nuova giurisprudenza civile commentata*, I, 1122 (2014), with note by C. Campiglio 'Il diritto all'identità personale del figlio nato all'estero da una madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)'. See also H. Fulchiron-C. Bidaud-Garon, 'Reconnaissance ou

The Corte Costituzionale, well before 2004, in judgement no 347 of 1998 had stressed the need to keep the regulation of procreation techniques separate from the dutiful and pre-eminent legal protection of the child and his or her dignity.[5] The Corte di Cassazione takes a similar stance in its landmark judgement no 19599 of 30 September 2016, according to which

> 'the consequences of the violation of the prescriptions and prohibitions set by legge no 40 of 2004, as attributable to adults, who have resorted to a fertilization practice which is illegal in Italy, cannot fall on the child'.[6]

This was also taken into consideration by the Italian lawmakers in drafting Art 9, para 1. According to the said paragraph, which was adopted when any technique of heterologous assisted reproduction was still forbidden in Italy, a spouse or cohabiting partner who has agreed to the use of the technique cannot challenge his paternity or her maternity.[7]

In assessing the relationship between the provisions of the Civil Code and those of legge no 40 of 2004 (in particular its Arts 8 and 9), it is necessary to verify if the discipline of filiation in assisted reproduction cases is an alternative system to that of the Civil Code, in line with the peculiarities of that technique or if it remains within the boundaries of the Civil Code system, regulating filiation by natural procreation through the provision of specific exceptions. In consequence of the outcome chosen, the principles and criteria for the attribution of a legal *status* to the child will be applicable, or not, to assisted procreation filiation.

reconstruction? À propos de la filiation des enfants nés par GPA, au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l'homme' *Revue critique de droit international privé*, 1 (2015); A. Renda, 'La surrogazione di maternità tra principi costituzionali ed interesse del minore' *Corriere giuridico*, 4, 479 (2015); G. Casaburi, 'La Corte europea apre (con riserve) alla maternità surrogata (Osservazioni a Corte europea diritti dell'uomo 26 giugno 2014)' *Foro italiano*, IV, 561 (2014); A. Vesto, 'La maternità surrogata: Cassazione e Cedu a confronto' *Famiglia e diritto*, 306 (2015); C. Danisi, 'Superiore interesse del fanciullo, vita familiare o diritto all'identità personale per il figlio nato da una gestazione per altri all'estero? L'arte del compromesso a Strasburgo', available at www.articolo29.it; D. Rosani, '*The best interest of the parents*. La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori' *BioLaw Journal*, 1, 24 (2017); I. Anrò, 'Surrogacy from the Luxembourg and Strasbourg Perspectives: Divergence, Convergence and the Chance for a Future Dialogue' *Il diritto dell'Unione Europea*, 3, 465 (2016).

[5] Corte costituzionale 26 September 1998 no 347, *Nuova giurisprudenza civile commentata*, I, 51 (1999), with note by E. Palmerini, 'Il disconoscimento di paternità del minore nato da fecondazione eterologa'; L. Balestra, 'Inseminazione eterologa e *status* del nato', and F. Uccella, 'Consenso revocato, dopo la nascita del figlio, all'inseminazione eterologa e azione di disconoscimento: ciò che suggerisce la Corte costituzionale' *Giurisprudenza italiana*, 461 (1999); G. Ferrando, 'Inseminazione eterologa e disconoscimento di paternità tra Corte costituzionale e Corte di cassazione' *Nuova giurisprudenza civile commentata*, II, 223 (1999).

[6] Corte di Cassazione 30 September 2016 no 19599, *Nuova giurisprudenza civile commentata*, 362 (2017), with commentary by G. Palmieri, 'Le ragioni della trascrivibilità del certificato di nascita redatto all'estero a favore di una coppia *same sex*'.

[7] A. Cordiano, 'Alcune riflessioni a margine di un caso di surrogacy colposa. Il concetto di genitorialità sociale e le regole vigenti' *Il diritto della famiglia e delle persone*, 473 (2017).

Since the said *status* stems from the birth certificate, the rules on the drafting of the said document also depend on the aforesaid solution, as those rules are applied to verify whether or not the facts declared to the registrar correspond to the content of the birth certificate drafted by the said registrar.

According to the Court, in this assessment many factors must be evaluated, such as: the importance attributed in the contemporary society to previously unknown and unpredictable needs; the constant dialogue among national Supreme Courts, the ECHR and the EU Court of Justice, establishing a *circularity of interpretative solutions*; the consideration of procreative techniques as an alternative method to natural conception, or rather as a health treatment aimed at overcoming a medical problem affecting one or both members of a couple.[8]

In light of these factors, it can be concluded that procreation in a globalized society has *a particular dynamism*, related to the concrete interests that it is aimed at satisfying; through the application of procreative techniques after the death of a partner, it is possible to overcome the 'material' limit of the *marital (or partner)* relationship, thus switching from the exercising of a right to procreation to the performance of a parental 'function'.

In such a scenario, in which parenting is declined in a multitude of unprecedented contexts, it is necessary to understand if the limits to parenting in Italian law can act as 'counter-limits' (*controlimiti*)[9] for the protection of the rights of the child, or if it is necessary to overcome the boundaries of tradition, accepting and regulating the new paths to parenting.

It is therefore difficult to balance the need for a clear and stable state of filiation and the correlation of the said *status* to the truth, since nowadays a child may be not just someone who was born from a natural act of conception; filiation can also be the result of assisted fertilization (homologous or heterologous).

In light of this, some scholars believe that the regulation of *status* in the legge no 40 of 2004 is a completely alternative system to the Civil Code rules. The *status* of a child born from artificial procreation is not attributed under the rules applicable to natural biological generation, which are different for matrimonial and non-matrimonial generation, but is attributed directly by the law, with respect to the couple who agreed to use the artificial techniques. The consent given by the spouse or cohabiting partner to artificial fertilization (if not revoked before fertilization) is not merely an 'informed consent' but an attribution of *status*, by a legal declaration of maternity and paternity which is public and certain, without

[8] Corte di Cassazione 6 June 2013 no 14329, *Nuova giurisprudenza civile commentata*, I, 21 (2014), with commentary by A. Schuster, 'Quid est matrimonium', talking of a 'felice contaminazione di fonti'. See also Corte costituzionale 24 October 2007, nos 348 and 349, *Giurisprudenza costituzionale*, 3475 (2007); and Corte costituzionale 7 April 2011 no 113, *Giurisprudenza costituzionale*, 1523 (2011).

[9] See, recently, S. Polimeni, *Controlimiti e identità costituzionale nazionale* (Napoli: Editoriale scientifica, 2018), passim.

the need for any further manifestation of will.[10]

Other scholars, however, hold that the same principles on natural filiation apply to children born from artificial procreation. For them, the consent given by the spouse or partner to the technique does not directly attribute any *status* to the child but will only allow the latter to identify his/her parent on the basis of the said consent.

This interpretative dilemma also impacts on the *status* of the child in the case of *post-mortem* fertilization, a technique which follows a sequence of steps, *viz*: 1) the extraction of the seed from the man's corpse; 2) the artificial insemination of the woman with cryopreserved seed, taken from her partner before death; and 3) the implantation, in the woman's body, of the embryo which came into existence when both members of the couple were alive.[11]

Art 5 of the legge no 40 of 2004 allows access to procreation only to couples whose members are both living, thus excluding a widowed woman (under penalty of sanction – Art 12).[12] The provision, however, does not specify *at which point* of the complex procedure of fertilization both members of the couple need to be alive. It is up to the interpreter, in light of the legal principles applicable, to determine whether or not each of the three different hypotheses outlined above should be considered illegal.[13]

Furthermore, putting aside the issue of the lawfulness of a *post-mortem* fertilization technique, it must also be established whether or not Art 8 of legge no 40 of 2004, regulating the legal *status* of the child, can also be applied when the said child was born (as in the case in point) more than three hundred days after the death of the father.

Those who believe that, even in the case of assisted procreation, the general principles of the Civil Code regarding natural filiation apply, are divided between, 1) those who assert that the birth of a child from homologous *post-mortem* fertilization after the period of time in which the presumption of conception in marriage operates can only lead to a judicial claim of paternity;[14] and 2) those who believe that, even in this case, the presumption of paternity operates whenever conception in marriage can be proven, under Art 234 of the Civil Code, ie when the fertilization and the creation of the embryo took place during

[10] A. Ricci, 'La disciplina del consenso informato all'accesso alle tecniche di procreazione medicalmente assistita. Il d.m. 28 dicembre 2016, n. 265: novità e vecchi problemi' *Nuove leggi civili commentate*, I, 40 (2018).

[11] S. Rodotà, 'Repertorio di fine secolo' (Roma-Bari: Laterza, 1992), 230.

[12] See G. Recinto, 'La legittimità del divieto per le coppie same sex di accedere alla PMA: la Consulta tra qualche *chiarimento* ed alcuni *revirement*' *Corriere giuridico*, 1466 (2019), about Corte costituzionale 23 October 2019 no 221.

[13] About Art 5, F. Naddeo, 'Accesso alle tecniche', in P. Stanzione and G. Sciancalepore eds, *Commento alla legge 19 febbraio 2004, n. 40* (Milano: Giuffrè, 2004), 79.

[14] *Contra* M. Sesta, 'Procreazione medicalmente assistita' *Enciclopedia giuridica* (Roma: Treccani, 2004), XXVIII, 9.

the period of the marriage.[15]

The latter thesis, however, will lead to a different legal *status* of the child, according to the procreation technique used, since it is possible to freeze and conserve for a long time not only the embryo but also the seminal fluid; the fertilization of the ovule, therefore, can take place even after the death of the husband or partner (as in the present case).

Those scholars who are favourable to the application of legge no 40 of 2004 believe that the provision of Art 8 (on the legal *status* of the child) is not limited to the hypotheses of 'lawful' assisted reproduction, but, on the contrary, applies also in the case of heterologous assisted procreation (which was prohibited in 2004);[16] since the law forbids any challenge to the child's *status* after a consent to the technique has been given, this means that consent alone attributes a legal *status* to the child.[17]

Therefore, if after the death of the husband who had given his consent, the formation and implantation of embryos with cryopreserved seed and the oocytes of the wife took place, the legal protection granted to the child should not cease; the genetic link would be enough to establish a relationship of filiation with both parents, in spite of any other national rule.[18]

By this perspective, the provision of Art 9 on heterologous procreation could well extend to homologous procreation cases.

Similarly, the undoubted pre-eminence of the need to protect the child by granting him a definite *status filiationis*, as stipulated by Art 8, should not be limited by the subjective boundaries of Arts 4 and 5.[19]

The Court ruled that the provisions of legge no 40 of 2004, in particular Art 8, apply to the case under scrutiny. It is reasonable to conclude that, when the partner dies after giving his consent to assisted procreation and before the formation of the embryo with the previously cryopreserved seed, the child is to be considered born during the marriage of the couple. Therefore, although the requirement for the existence of all subjects at the time of fertilization of the ovule is lacking, once the birth has taken place, fatherhood must be attributed to the husband or partner who expressed his consent, thus setting in time his decision to assume parenthood.

In the specific case, Art 8 of legge no 40 of 2004 applies, rather than the

[15] See A. Natale, 'I diritti del soggetto procreato *post mortem*' *Famiglia, persone e successioni*, 529 (2009); M. Faccioli, n 1 above, 1284.

[16] A. Cordiano, '*C'era una volta e una volta non c'era…*: l'interesse del minore nella pronuncia delle sezioni unite in tema di maternità surrogata', (2020) forthcoming.

[17] G. Oppo, 'Procreazione assistita e sorte del nascituro' *Rivista di diritto civile*, I, 105 (2005); and T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2018), 326.

[18] Regarding which, see, A. Valongo, 'Profili evolutivi della procreazione assistita *post mortem*' *Diritto delle successioni e della famiglia*, 538 (2019); *contra* A. Morace Pinelli, n 1 above, 3360; F. Naddeo, n 13 above, 79; C. Ciraolo, 'Brevi note in tema di procreazione medicalmente assistita e regole determinative della genitorialità' *Jus civile*, 485 (2014).

[19] A. Valongo, n 18 above, 538.

presumption established by Art 232 of the Civil Code, which cannot be construed so as to impede the attribution of a *status* of filiation from the deceased husband to a child born from homologous fertilization performed *post-mortem*, even if the birth occurred after the expiration of the term of three hundred days from the dissolution of the marriage for reason of death.[20]

Therefore, according to this interpretation of Art 8, the birth, taken as a factual element, should have led to the formation of the corresponding civil *status* document, indicating the paternity of G.A. and the attribution of the paternal surname to the child. In doing so, the registrar would not have attributed to the daughter a *status* in violation of Art 232 of the Civil Code, but only amended an incorrectly drafted document, putting it in line with the facts as evaluated under the legislation in force.

III. Phenomenology of Filiation and the Dilemma of Two Alternative Systems

In today's substantial diversification of family models, it is clear that the phenomenon of social parenting is closely connected to the progress of science and technology, and their ability to manipulate and dispose of one's body; the expansion of scientific techniques can, in fact, have a strong impact on motherhood and parenting, and even on our identity.[21]

This incessant progression began with the introduction of legge 22 May 1978 no 194 on the voluntary termination of pregnancy and continued with contraceptive methods and with pre-natal and pre-implantation diagnoses. Nowadays, in the field of assisted reproductive techniques and of surrogacy, it is creating extremely complex cases, impacting on the relationship of the individual with his or her own body and identity; this is also true within a more general perspective, on an anthropological level of 'gender beings' (*esseri di genere*).[22] These techniques also challenge the dominant and traditionally structured paradigm of biological parenting, based on heterosexuality, genetic derivation, gestation and childbirth.[23]

Assisted reproductive techniques have seen the liberalization of heterologous procreation and now they highlight the split between the constitutive elements of the procreative process; alongside the traditional and more well-known forms of

[20] G. Oppo, n 17 above, 105.

[21] See A. Cordiano, *Identità della persona e disposizioni del corpo* (Roma: Aracne, 2011), 235-246. On the relevance of social parenthood, A. Gorgoni, 'La rilevanza della filiazione non genetica' *Persona e mercato*, 153 (2017).

[22] These are the words of J. Habermas, *Il futuro della genetica umana. I rischi di una eugenetica liberale* (Torino: Einaudi, 2001), 31.

[23] I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), passim; L. Rossi Carleo, 'Maternità surrogata e *status* del nato' *Familia*, 377 (2002); P. Zatti, 'Maternità e surrogazione' *Nuova giurisprudenza civile commentata*, II, 193 (2000).

homologous and heterologous procreation, the lesser known hypothesis of entirely heterologous fertilization (with donation of gametes on both germ lines) exists.

Procreation can also occur as between a lesbian couple, where the genetic mother, ie the ovule donor, is the partner of the woman who is biologically pregnant. The latter is often the legal mother, while a symbolic link is created with the social mother on the basis of biological descent.

Surrogacy is even more disruptive towards the naturalistic elements of maternity, ie gestation and childbirth, insofar as it splits the voluntarist element, related to the creation of a family project and of an engaging bond, as well as the identity one, from the organic element, which may be missing in whole or in part.[24]

As the Court correctly suggests, today, in the case of *post-mortem* fertilization different situations arise, *viz*: 1) the extraction of the seed from the man's corpse; 2) the artificial insemination of the woman with cryopreserved seed, taken from the partner before death; and 3) the implantation, in the woman's body, of the embryo formed when both members of the couple were alive.[25]

The first case raises issues which will not be explored in this work, while the other two are problematic on a different level.

It is clear, in fact, that the element of genetic derivation between the child and the parents is present. So is the voluntary profile, given the building of a shared parenting project, merged in the applicants' consent to the technique and culminating in the use of gametes or embryos after the death of one of the couple's partners.[26]

However, a profile worthy of analysis remains, which is typical of this particular case, *viz*, the temporal split between the expression of the will and the birth of the subject. This does not impede in any way the possibility of detecting the genetic link between the child and the parents, but it is nonetheless a challenge in respect of the legal *status* of the former, since conditions, requirements and effects of the establishment of the filiation bond inside and outside marriage are regulated differently.

In fact, the Court had to decide whether to apply the provisions of the Civil Code (and therefore the presumption established by Art 232 of the Civil Code) or the rules found in the 2004 legislation on assisted procreation (particularly Arts 8 and 9).

This is a most interesting profile of the long judgement which is under analysis in this work: the possible existence of two separate and parallel systems that regulate filiation in different ways, the system of biological parenting in the

[24] Tribunale di Monza 17 October 1989, *Il diritto della famiglia e delle persone*, 173 (1989), commented by M. Ventura; *Giurisprudenza italiana*, I, 2, 72 (1992), commented by M. Dogliotti; and also, Corte d'Appello di Salerno 25 February 1992, *Nuova giurisprudenza civile commentata*, I, 177 (1994).

[25] See A. Valongo, n 18 above, 525; A. Natale, n 15 above, 523; in the opposite direction for all scenarios, F. Naddeo, n 13 above, 79.

[26] See A. Valongo, n 18 above, 528. *Contra* A. Morace Pinelli, n 1 above, 3360.

Civil Code and that of social parenting in legge no 40 of 2004, with their respective rules for establishing and challenging the filiation bond.[27]

IV. Patterns of Legal Parenthood and the Bio-Paradigm

The phenomenon of social parenting does not end with assisted procreation, but is much broader:[28] the temporary foster care by homosexual couples[29] and the *sine die* adoptions transformed into 'mild'[30] or 'open' ones;[31] the new cases based on legge 19 October 2015 no 173 on the minor's right to affective continuity (continuità degli affetti);[32] the special adoptions by homosexual partners[33] and the ordinary adoptions granted abroad;[34] the transcriptions of the birth certificates of minors born abroad to homosexual couples through access to heterologous assisted procreation[35] or through surrogacy.[36]

[27] *Contra* M. Faccioli, n 1 above, 1286.

[28] A. D'Angelo, 'La famiglia nel XX secolo: il fenomeno delle famiglie ricomposte' *Rivista di diritto civile*, 13 (2011).

[29] Tribunale per i minorenni di Bologna 31 October 2013, *Famiglia e diritto*, 273 (2014), with commentary by F. Tommaseo, 'Sull'affidamento familiare di un minore a una coppia omosessuale'; and Tribunale per i minorenni di Palermo 4 December 2013, *Famiglia e diritto*, 351 (2014), with note by G. Mastrangelo, 'L'affidamento, anche eterofamiliare, di minori ad omosessuali. Spunti per una riflessione a più voci'.

[30] Tribunale per i minorenni di Bari 7 May 2008, *Famiglia e diritto*, 393 (2009).

[31] Tribunale per i minorenni di Brescia 21 December 2010, *Repertorio Foro italiano*, voce *Adozione ordinaria e in casi particolari*, no 57 (2011); Tribunale per i minorenni di Roma 8 January 2003, *Giurisprudenza di merito*, 1122 (2003); Tribunale per i minorenni di Napoli 24 November 2007, *Famiglia e diritto*, 80 (2008).

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

[33] Tribunale per i minorenni di Roma 30 July 2014, *Nuova giurisprudenza civile commentata*, I, 109 (2015), with note by J. Long, 'L'adozione in casi particolari del figlio del partner dello stesso sesso'.

[34] Corte d'Appello di Milano 16 October 2015, available at www.articolo29.it; *contra* Tribunale per i minorenni di Bologna 10 November 2014, *Guida al diritto*, 5, 15 (2015), with note by G. Buffone; in mid position, see Corte di Cassazione 14 February 2011 no 3572, *Famiglia e diritto*, 697 (2011), with note by M.A. Astone, 'La delibazione del provvedimento di adozione internazionale di minore a favore di persona singola'.

[35] In favour of the recognition of the birth certificate established abroad, Corte d'Appello di Torino 29 October 2014, *Famiglia e diritto*, 822 (2015), with note by M. Farina, 'Il riconoscimento di *status* tra limite dell'ordine pubblico e best interest del minore'.

[36] In favour of the recognition of the legal *status* of the born from surrogate motherhood, Tribunale di Milano 1 August 2012 and Tribunale di Milano 6 September 2012, *Nuova giurisprudenza civile commentata*, I, 712 (2013), with note by F. Turlon, 'Nuovi scenari procreativi: rilevanza della maternità *sociale*, interesse del minore e *favor veritatis*; *contra*, Corte di Cassazione 26 September 2014 no 24001, *Nuova giurisprudenza civile commentata*, I, 235 (2015), with note by C. Benanti, 'La maternità è della donna che ha partorito: contrarietà dell'ordine pubblico della surrogazione di maternità e conseguente adottabilità del minore'; *Corriere giuridico*, 417 (2015), with note by A. Renda, 'La surrogazione di maternità tra principi costituzionali ed interesse del minore'. Lastly, on Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, see G. Ferrando, 'Maternità per sostituzione all'estero: le Sezioni Unite dichiarano

However, parenthood connected with technical-scientific practices is a more complex phenomenon; the said complexity once again highlights the aforementioned split between the naturalistic bond of motherhood by childbirth and gestation, the identity bond based on the transmission of genetic heritage and the voluntary, intentional link. The latter stems from the will to create a relationship, as is the case with adoption; such a relationship is both an aspiration of the parents and an assumption of parental responsibility, as it may be with the step-parents in an extended family.

Although historical studies show the past existence of forms of social parenting,[37] the dominant paradigm since the nineteenth-century codifications was biological parenting within the conjugal bond; everything that emerged beyond that model has always undergone some sort of assimilation process. However, that dominant paradigm (composed of gestation and childbirth, genetics and parental aspiration) is narrower than the complex existing phenomenology and this causes much perplexity as well as the need to re-discuss the regulatory devices in existence, which partly adhere to the biological model and partly deviate from it.

However, the need to protect minors who were born through assisted reproduction techniques, under a system of protective rules established in the paramount interest of the minor, still remains.

Among the rules inspired by the dominant paradigm of biological parenting, there was Art 4, para 3, of the legge no 40 of 2004, which prohibited access to heterologous assisted technique. Currently, only the Art 12, para 6, remains in force, criminally sanctioning the realization, organization, publication and marketing of surrogacy; a couple found in breach of this rule will be punished with imprisonment for a period of from three months to two years, together with a fine of from six hundred thousand to one million Euros.

Even in the rules on the establishment of filiation relationship, the tendency to adhere to the dominant paradigm is confirmed. Art 269, para 3, of the Civil Code, equates birth to motherhood for the purposes of the action aimed at certifying it; it is evident that, for the Code, motherhood remains connected to the gestational profile and is associated with both the genetic derivation and the voluntarist element. Therefore, the rule permitting proof of motherhood and consequently assigning the *status* of child applies uniformly to all cases, after the adoption of Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396; the rule operates via the birth certification, which is drafted by the witnesses to the birth.

On the mother's side, the attribution of parenting can only take place on a

inammissibile la trascrizione dell'atto di nascita. Un primo commento' *Famiglia e diritto*, 677 (2019); M. Dogliotti, 'Le Sezioni Unite condanno i due padri e assolvono le due madri' *Famiglia e diritto*, 667 (2019).

[37] I. Corti, n 23 above, 41.

'biological' basis, connected to the event of the birth, even if the pregnant woman is not necessarily the genetic mother; this happens when the liberalized practices of heterologous fertilization are used, but also in surrogacy, when the pregnant-surrogate is not the genetic mother.

For paternity, instead, a distinction must be drawn. For the establishment of the paternal bond, Art 231 of the Civil Code assumes the paternity of the husband of a woman giving birth to a child during a marriage, while Art 250 of the Civil Code requires an unilateral act of recognition by the father for filiation out of marriage. The attribution of the paternity to the husband is automatic and presumptive; outside the marriage, a voluntary act of recognition is needed, normally without any further verification. The automatic attribution rule of Art 231, however, applies also if the surrogate mother is married, unless she exercises her right not to be named (Art 30, para 1, of decreto del Presidente della Repubblica 3 November 2000 no 396) or recognizes the child as having been born out of marriage. On the paternal side, therefore, two deeply distinct kinds of filiation still exist, one regulated by automatic presumptions, the other remaining a 'private (confidential) affair'. It is evident that the attribution of paternity can take place, in good or in bad faith, even with a lack of genetic connection with the social father (also in case of surrogacy).

In order to challenge the filiation bond, Art 240 of the Civil Code allows, with no statute of limitations, both the parents and anyone having in interest in it (Art 248) to challenge motherhood, in case of supposition of childbirth or replacement of the new-born.[38]

Arts 243 *bis* and 263 admit challenges to paternity and recognition, respectively, if the lack of genetic relationship with the social father is proven; the action must be brought within the short-term and no later than five years from the birth; only the offspring, for whom the action is imprescriptible is exempt from the statute of limitation. It is significant, however, that recognition can only be challenged by any person having an interest in it.

Therefore, motherhood, differently than fatherhood, can be challenged without any legitimation or time limit, but only on the basis of a supposition of childbirth. Thus, the social parent, and the social mother in particular, even when she is also the genetic mother, is not entitled to challenge the *status* of the surrogate mother and have her own *status* recognized.

This applies to heterologous fertilization, despite the fact that the voluntary element of parental consent is present, but also to surrogacy, where the social and even the genetic mother succumbs to the parturient, despite the fact that the latter is a non-genetic and non-social (ie, without any aspiration of parenthood) mother.[39] Therefore, the surrogate mother can only exercise her right not to be

[38] See the critical analysis of M. Sesta, 'L'accertamento dello stato di figlio dopo il decreto legislativo n. 154/2013' *Famiglia e diritto*, 454 (2014).

[39] See L. Lenti, 'La sedicente riforma della filiazione' *Nuova giurisprudenza civile commentata,*

named, under Arte 30 of decreto del Presidente della Repubblica 3 November 2000 no 396.

V. Challenging the Bio-Paradigm and Social Parenthood

The system outlined by legge no 40 of 2004 does not appear compatible with the rules of the Civil Code on filiation, based on the coincidence of gestation, genetic profile and family project. It should be noted that Art 9 of legge no 40 of 2004, dictating some limits which are only partially related to the prohibition of heterologous procreation formerly in force, is still valid.[40]

Art 9, para 1, still regulates access to heterologous fertilization and prevents a man who had agreed to the technique to challenge his paternity (Art 243 *bis* of the Civil Code) or his recognition (Art 263 of the Civil Code). The same applies to the spouse or cohabiting partner, who agreed to heterologous procreation, to the mother and to the child; finally, since this is an *actio populi* under Art 263 of the Civil Code, it applies to anyone attempting to challenge paternity or recognition.[41]

From the impossibility of challenging the paternal relationship (a bond which is not based on a biological derivation but only on the creation of a family, the implementation of a parenting project and an assumption of parental responsibility), derives a second prohibition, as stated in Art 9, para 2. This applies to any type of procreative technique and prevents the woman from exercising her right not to be named in the birth certificate, under Art 30, para 1, of decreto del Presidente della Repubblica 3 November 2000 no 396. The prohibition of the use of so-called anonymous childbirth is aimed at protecting the child, forbidding a relinquishment of the motherhood role – on the basis of a biological identification with the foetus, similarly to the voluntary interruption of pregnancy – and allowing a greater use of adoption tools. Leaving aside the critical issues raised by the anonymous childbirth system, and by a rule which – somehow paradoxically – denies anonymous childbirth specifically to women who have had access to procreative techniques,[42] it should be noted that the prohibition applies to all types of homologous and heterologous procreation and aims at protecting the social, even if not genetic, maternity of the person who intentionally carried out the parental project.[43]

II, 201 (2013).

[40] See A. Cordiano, 'Alcune riflessioni a margine di un caso di surrogacy colposa. Il concetto di genitorialità sociale e le regole vigenti' n 7 above, 473.

[41] The prohibition provided for by Art 263 of the Civil Code also exists, in fact, for the mother and child, as well as for third parties. See Corte d'Appello di Milano 10 August 2015, available at tinyurl.com/ybf2z9gp (last visited 7 July 2020); F. Borrello, 'Alcune riflessioni sulla disciplina della procreazione eterologa' *Famiglia e diritto*, 947 (2010).

[42] G. Ferrando, 'La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche' *Corriere giuridico*, 816 (2004).

[43] U. Salanitro, 'La disciplina della filiazione da procreazione medicalmente assistita' *Familia*,

Finally, the Art 9, para 3, states that the gamete donor does not acquire any legally recognized parental *status* and thus cannot exercise any right or assume any obligation in consequence. The rule, different from than that enshrined in Art 28, para 8, of the Adoption Law, provides that, even in the presence of a genetic link, no parental relationship can be recognized, since the gamete donation is construed as a (simple) act of solidarity, with no the desire to become a parent or any willingness to take on parental responsibility.[44]

Art 8 of the same Law, under the heading 'Legal *status* of the child', prescribes:

> 'Those who were born as a result of procedures of assisted procreation techniques have the *status* of children born in marriage or recognised children of the couple who agreed to use the same techniques pursuant to Art 6'.

Art 8 clearly assumes consent as prevailing and as the determining factor of parenting, for children who are born after the use of assisted procreation techniques.[45]

From this perspective, the law strongly asserts self-responsibility in procreation, requiring subjects to abide by their voluntary and informed consent to carry out a parenting project.[46]

Furthermore, in strictly subjective terms, the rule does not contain any reference to Arts 4 and 5, defining the subjective requirement to access to assisted procreation techniques, which confirms the protection of the child (by the attribution of a clear and stable *status filiationis*), as prevalent over a rigid regulation of this particular procreative technique.[47]

The lawmakers did not expressly limit the applicability of the rule to lawful assisted procreation; rather, it can undoubtedly apply to heterologous procreation. In relation to the latter, the impossibility of challenging paternity implies that, even in such cases, a consent to medically-assisted procreation techniques is enough to attribute a *status filiationis*.

The rules of legge no 40 of 2004 in general, do not rigidly attach to the so-called *favor veritatis*, by accepting a split – even a temporal split – between the naturalistic element of gestation and childbirth, the identity and genetic connection

(2004), I, 502.

[44] See R. Villani, 'La nuova procreazione medicalmente assistita', in P. Zatti ed, *Trattato di diritto di famiglia*, *Le riforme* (Milano: Giuffrè, 2019), II, 328.

[45] G. Oppo, n 17 above, 105; and T. Auletta, n 17 above, 326; V. Lojacono, 'Inseminazione artificiale (diritto civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 1971), XXI, 759.

[46] See V. Caredda, 'Scambio di embrioni e titolo di paternità e maternità' available at www.giustiziacivile.com; A. Thiene, 'Figli, finzioni e responsabilità civile' *Il diritto della famiglia e delle persone*, 244 (2016); G. Ferrando, 'Il caso Cremona: autonomia e responsabilità nella procreazione' *Giurisprudenza italiana*, I, 996 (1994). *Contra*, P. Virgadamo, 'Falso e consapevole *riconoscimento* del figlio naturale o vero atto (illecito) comportante l'assunzione della responsabilità genitoriale? Per un'interpretazione non formalistica dell'atto privato' *Rassegna di diritto civile*, 943 (2013).

[47] M. Faccioli, n 1 above, 1285.

and the affective and intentional element. In particular, the discipline of legge no 40 of 2004 overcomes the traditional conflict between *favor legitimitatis* and *favor veritatis*, and introduces a different *favor*; a *favor* for the formal and stable attribution of the parental bond, regardless of the genetic basis of the relationship (so-called *favor stabilitatis*), as well as a *favor* for the volitional and affective element (*favor affectionis*), ie the intention not only to carry out a procreative project but also to build an engaging parental relationship.

Finally, these norms may be extended to all reproductive techniques, thereby establishing an organic system alternative to that of the Civil Code and applicable thus: to surrogate motherhood and fertilization *post-mortem*; to children who were born after a violation of the rules forbidding reproductive cloning (Art 12, para 7); to ectogenesis (artificial uterus); to the production of hybrids or human chimeric beings; to eugenic manipulations on embryos (Art 13).[48]

In all these cases, Arts 8 and 9 of legge no 40 of 2004 should apply, in order to safeguard the interest of the minor to a preservation of his *status* and to a bond with his or her parents, even if the latter generated him or her with eugenic manipulative techniques or with the help of an artificial uterus. This would crystallize a model of non-genetic filiation and social parenting, which balances opposing interests and gives priority to the pre-eminent one, that of the minor.[49]

VI. *Post-mortem* Procreation: Challenges and Boundaries of Social Parenthood in the Near Future

Having set the broad range of 'new' parenting cases in context, a number of observations can be made.

Primarily, as to the case submitted to the Corte di Cassazione, its ruling must be fully endorsed.

In fact, the application of Art 8 of legge no 40 of 2004 (in addition) to the specific and quite peculiar hypothesis of homologous *post-mortem* fertilization, appears entirely reasonable. When the husband (or the partner) dies after giving his consent to assisted reproductive techniques, under Art 6 of the Law and the said consent is given before the formation of the embryo, using his previously cryopreserved seed (the use of which he had duly authorized),[50] the child is to be considered born during the marriage of the couple, insofar as the consent was granted before the dissolution of the marriage due to the death of the husband.[51]

[48] F.D. Busnelli, 'Il problema della soggettività del concepito a cinque anni dalla legge sulla procreazione medicalmente assistita' *Nuova giurisprudenza civile commentata*, II, 185 (2010).

[49] Regarding the prudent (but effective) balance of interests, see the perspective adopted by G. Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (Napoli: Edizioni Scientifiche Italiane, 2013), 111.

[50] G. Ferrando, 'Orientamenti e tendenze in tema di filiazione' *Rassegna di diritto civile*, 308 (1991).

[51] See I. Corti, n 23 above, 60; A. Valongo, n 18 above, 528; G. Baldini, 'La legge sulla

In this case, even if the requirement for the existence of all elements at the time of fertilization of the ovule are lacking, the child must be attributed with the paternity of the man who had expressed his consent under Art 6, without ever revoking it; the willing choice of parenting must be considered relevant. Therefore, and despite the wording of Arts 5 and 6, para 1, of legge no 40 of 2004, even if the birth occurs after the death of the husband and the granting of his consent, the child born from homologous fertilization must be protected.[52]

The said technique can defer the birth after the consent but in doing so does not impair the certainty of biological paternity. A certain genetic derivation allows the establishment of the parenting relationship with both genetic parents, even if the rules on access to the technique established in Italian law are violated.

This solution recognizes the biological link between a man who has given his consent to assisted procreation and to the utilization of his collected and cryopreserved seed, and a child. By this perspective, the moment at which conception and birth took place (and their lawfulness or otherwise) assume no relevance, since medical techniques allow the delay of birth, without compromising the certainty of biological paternity.

The assumption that the legal system should protect children by granting each the right to a family made up of two parental figures, does not prevent the adoption of such a solution, because the protection of the child prevails even over his or her right to parenting.

It is the case that the legal limits for access to assisted procreation seek to grant the child the right to a family of two parents but the alternative offered to the child is not to come into existence at all. As observed by the Italian Supreme Court, the assumption that being born and growing up with a single parent is a negative existential condition cannot be emphasized to the point of preferring non-life.[53] The principle of double parenthood, despite being a guiding criterion in many situations, is not a rule without exceptions or temperaments.[54] On the contrary, the interests of the child to be quickly granted the certainty of his or her parenting derivation is of primary importance in the construction of his or her identity.[55]

procreazione medicalmente assistita: profili problematici, prime esperienze applicative e prospettive' *Rassegna di diritto civile*, 350 (2006).

[52] A. Valongo, n 18 above, 538.

[53] G. Cassano, 'Diritto di procreare e diritto del figlio alla doppia figura genitoriale nella inseminazione artificiale *post mortem*' *Famiglia e diritto*, 390 (1999).

[54] P. Perlingieri, 'L'inseminazione artificiale tra principi costituzionali e riforme legislative', in G. Ferrando ed, *La procreazione artificiale tra etica e diritto* (Padova: CEDAM, 1989), 145; F.D. Busnelli, 'Procreazione artificiale e filiazione adottiva' *Familia*, 23 (2003); M. Gorgoni, 'Rilevanza giuridica dell'embrione e *procreazione* di un solo genitore' *Rivista critica di diritto privato*, 402 (2002); A. Valongo, n 18 above, 529. See also, Corte costituzionale 16 May 1994 no 183, *Famiglia e diritto*, 245 (1994). *Contra* A. Morace Pinelli, n 1 above, 3360; also F. Santosuosso, *La procreazione medicalmente assistita. Commento alla Legge 19 febbraio 2004, n. 40* (Milano: Giuffrè: 2004), 50.

[55] About the double parenthood principle, *ex multis*, F. Ruscello, *La tutela del minore*

The Civil Code rules (Arts 232 e 234, but also Art 462, para 2) are not an obstacle to this solution. They are indeed presumptions which are functional to the establishment of filiation but which are inapplicable to the case under scrutiny.[56]

A second reflection derives from this, on the existence of a system of filiation rules in legge no 40 of 2004, which runs in parallel and is alternative to the Civil Code system.

The Court rightfully noticed that parenthood is becoming detached from marriage and a traditional concept of family, being influenced by a multitude of new contexts. It is necessary to establish a new perspective, wherein family relationships and the new inter-subjective relationships are alternative to the traditional family model. Indeed, the traditional family and parenting model can no longer be solely those which are described in a Civil Code dating from 1942. The obsolescence of the traditional, 'Mediterranean'[57] family model is evident from a significant breakdown of this dogmatic category, by which 'family' metaphorically passed from being an 'island' to becoming an 'archipelago'.[58]

If *de facto* unions have long been the aggregative concept of several instances of protection and affective needs, today, while the problem of protecting and balancing interests remains essential, the *more uxorio* union has lost its evocative and synthetic value. The reality has become so complex that the study of family law now refers to a composite and articulated multiplicity of interpersonal situations, which are indefinable, subject to constant changes and sometimes even evanescent.[59] These unprecedented family dynamics, by which individuals manifest their personalities, transcend both the typical family model and the *more uxorio* partnership model; in some cases, the threshold of legal relevance is not reached.

The evolution of traditional cultural models has been strongly influenced not only by globalization but also by the evolution of society as a whole. A contemporary jurist is confronted with some sort of 'axiological relativism'[60] and with the unfolding of these phenomena within an open,[61] liquid society.[62] Reassuring affective and family models disappear through an incessant formation and disintegration of liquid relationships, sometimes evanescent and legally irrelevant,

nella crisi familiare (Milano: Giuffrè, 2002), passim.

[56] L. Lenti, *La procreazione artificiale. Genoma della persona e attribuzione della paternità* (Padova: CEDAM, 1993), 261.

[57] Those are the words of D. Messinetti, 'Diritti della famiglia e identità della persona' *Rivista di diritto civile*, I, 137 (2005).

[58] See F.D. Busnelli, 'L'isola e l'arcipelago familiare' *Rivista di diritto civile*, 510 (2002); see also P. Zatti, 'Familia, familiae - Declinazione di un'idea. II. Valore e figure della convivenza e della filiazione' *Familia*, 353 (2002)

[59] P. Perlingieri, *Diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1991), 490.

[60] C. Salvi, 'La famiglia tra giusnaturalismo e positivismo giuridico', in F. Ruscello ed, *Studi in onore di Davide Messinetti* (Napoli: Edizioni Scientifiche Italiane, 2008), I, 883.

[61] K.R. Popper, *La società aperta e i suoi nemici* (Roma: Armando, 1973), I, 179.

[62] Z. Bauman, *Modernità liquida* (Roma-Bari: Laterza, 2000), 72.

but able nonetheless to impact on the social framework.[63] Thus, alongside the nuclear family (based or not on a marital bond and regardless of sexual characterization), there are single adults, who often evolve into single parent families.[64] The liquidity of relationships shapes a recomposed[65] and enlarged family.[66] These relations come into existence regardless of biological links and legal reference models and they require a legal recognition which is distant from traditional categories but that is legitimised by social and affective relations anyway.

However, the emergence of different inter-subjective relations based on affection is constantly evolving, so that it also requires systematic (and no longer occasional) protection of phenomena which were previously unknown or considered as minority cases and need to emancipate themselves from those traditional models, which are no longer appropriate.

By this perspective, the inapplicability of the Civil Code rules, based on a system of norms and assumptions aimed at giving legal certainty to procreation are confirmed. In the Civil Code system, the traditionally dominant paradigm of biological parenthood applies, in which heterosexuality, genetic derivation, gestation and childbirth coincide. Exceptions are strictly limited, as happens with actions to challenge parental relationship (Arts 243-*bis* and 263).

On the one hand, this system outlined by legge no 40, protects the child born from procreative techniques, granting him or her a precise legal *status* and extending such protection not only to 'lawful' assisted procreation (Art 8) but also to cases of heterologous assisted procreation (which was forbidden in 2004). In the latter case, the denial of actions challenging the parental relationship implies that the consent to assisted procreation techniques is sufficient to grant the child a legal *status*. Similarly, the paramount interests of the child to be granted a *status filiationis*, as provided by Art 8, is not subject to the limits set in Arts 4 and 5, as the said paramount interests must receive horizontal protection.

On the other hand, the rule set in Art 9 on heterologous procreation and, more generally, the limits on the possibility of challenging the parental bond, reveal a similar tension.

The prohibition on maternal anonymity, which deviates from the general principles and applies to all types of assisted procreation, highlights the differences between natural and medically assisted procreation with reference to the *status* of the child, since in the latter case, the consent given to the practice of medically-

[63] D. Messinetti, n 57 above, 145.

[64] M. Mantovani, 'Le famiglie monoparentali', in G. Castellani and A. Cordiano eds, *La famiglia nella società contemporanea* (Roma: Aracne, 2016), 25.

[65] M.T. Meulders-Klein-I. Théry, *Quels repères pour les familles recomposées?* (Parigi: Nathan, 1995); see also, S. Mazzoni, *Nuove costellazioni familiari: le famiglie ricomposte* (Milano: Giuffrè, 2002); and Id, 'Le famiglie ricomposte: dall'arrivo dei nuovi *partners* alla costellazione familiare ricomposta' *Il diritto delle persone e della famiglia*, 369 (1999).

[66] A. Oliviero Ferraris, *Il terzo genitore. Vivere con i figli dell'altro* (Milano: Raffaello Cortina, 1997); A.L. Zanatta, *Le nuove famiglie* (Bologna: il Mulino, 2008), passim.

assisted procreation indicates a strong awareness by the perspective parent, who takes upon himself or herself a responsibility with regard to filiation, such as to exclude the right of the woman not to be registered as the mother.

Having the same purpose of protecting the child, lawmakers linked the establishment of the filiation relationship to the consent given by parents to procreation techniques, marking yet again a difference between the rules regulating assisted procreation and those issued for natural procreation. This is also evident in Art 9 of the Law, wherein, in the case of heterologous fertilization, the child's interests become a constraint on the principle of biological fact. Again, the consent given by spouses or cohabitating partners to the use of assisted reproduction techniques prevails. Therefore, for the mother as well as for the father, voluntary and informed engagement in the parental bond are constitutive elements of the parental relationship (and of social parenthood), which become impossible to remove. Therefore, a person who, after having been given appropriate information, has given his or her consent to a procedure of heterologous artificial insemination, cannot challenge the child's *status* under Arts 243-*bis* and 263 of the Civil Code, or (in the case of the mother) exercise the right not to be named on the birth certificate, under Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396. These rules are established in order to 'prevent the parent from being able to make up for the consent he or she had already given' and oblige him or her to 'assume the responsibilities arising from the parent-child relationship'.[67]

This is confirmed by the fact that under Art 9 of the Law, the donor of gametes does not acquire any legal parental relationship with the child and cannot assert any right or assume any obligation in consequence. Furthermore, in the presence of a genetic derivation, the parental relationship with the child cannot be established because it is implicit that, at the basis of the gametes donation, there was a (mere) act of solidarity, not accompanied by any aspiration to become a parent or the will to assume parental responsibility.[68]

The principle of self-responsibility in procreation, as set out in the said provisions, is similar to the, albeit different, principle of responsibility for procreation.[69] Self-responsibility in procreation expresses a conscious project of shared parenting. For this reason, admitting a disavowal due to a subsequent reconsideration by the parent would allow that parent to betray his or her free and informed assumption of parental responsibility, despite the lack of a biological relationship; at the same time, it would be a violation of the rights and expectations of the child, by an adult who had freely and consciously assumed the obligation to accept him or her as an offspring.[70]

[67] See U. Salanitro, n 43 above, 502.
[68] Again, critically, ibid 495.
[69] A. Thiene, n 46 above, 243.
[70] R. Villani, n 44 above, 688, fn 295.

The freely adopted decision to assume parental responsibility and create a significant tie with the child triggers a *favor minoris*, under which the formal attestation and maintenance of the *status* acquired and the preservation of existing parental ties, ie the right to stability in a family relationship, are safeguarded.[71] These conclusions, which were reached well before the enactment of the legge of 2004, enshrine a principle of self-responsibility in procreation, that might also be extended to other contexts,[72] at least tentatively.[73]

This complex alternative system stands even in the case of homologous *post-mortem* fertilization, for which no conflict between *favor veritatis* and *favor minoris* is conceivable, since the latter includes the child's right to his or her own identity. The consent given by the spouses or partners is thus a qualifying and decisive element in order to establish parenthood or paternity, in order effectively to protect the minor's personality.

On the contrary, the Civil Code rules are not adequate to regulate *post-mortem* procreation, wherein procreation took place after the death of the subject who had, however, given his consent to the use of his gametes; the genetic link, which is the foundation of the Civil Code rules on filiation, will be present. In this case, although the requirement of the existence of all the subjects at the moment of the fertilization of the ovum is missing, once the birth has taken place, the child will be entitled to have, as a father, the person who had consented to that, thus making a conscious choice of parenthood.

It might be also said with a degree of confidence that, in the context of assisted reproduction, three guiding criteria apply. They are: the child's entitlement to the timely and stable establishment of parenthood and to enjoy the benefits of parenthood, in terms of care and affection; the consent to use artificial fecundation techniques does not cover just a health treatment but is also, as an essential component, a willingly assumed and informed parental project; the consent must be recognized both as the basis of the filiation bond and as a limit to the possibility of challenging the same bond.

However, the picture is still broader than that. It is unclear as to whether or not the Supreme Court would have ruled in the same way, if *post-mortem* fertilization had been carried out with embryos of the couple and the genetic contribution of a foreign donor (heterologous procreation). Would consent, in such a case, still be considered a sufficient basis in order legally to establish paternity, or, if so, would social filiation (and consent) be able to overcome a complete lack of biological derivation?

The norms of legge no 40 of 2004 are indeed able to protect the 'traditional' homologous and heterologous procreation, including perhaps *post-mortem*

[71] See also M. Sesta, '*Venire contra factum proprium*, finzione di paternità e consenso nella fecondazione assistita eterologa' *Nuova giurisprudenza civile commentata*, II, 350 (2000).

[72] See V. Caredda, n 46 above.

[73] A. Thiene, n 46 above, 244. *Contra* P. Virgadamo, n 46 above, 943.

fertilization but the same rules might prove insufficient to address, for example, surrogacy.

In the future, the Italian Supreme Court may face a case of *post-mortem* fertilization of embryos with a surrogate mother.[74] In other cases, the Italian Courts failed to protect social parenthood and the minor's paramount interests; this occurred in the unique case of crossed embryos between two couples who had undergone homologous fertilization.[75]

Some final notes should be added. When the material conduct is carried out beyond Italy, imposing sanctions and prohibitions only shows the fragility of the system, since, in addition to critical profiles related to the extraterritorial effect of internal rules, the forbidden material conduct leads to the birth of human beings, who are generated without fault of their own, as a result of the actions (sometimes illegal) of other persons. Whatever legislation is deemed applicable, it will not be able to address, in the medium term, the infinite possibilities which science is able to offer to people who are willing to realize their parental aspirations.

Legal scholars and lawmakers should instead start from definitive abandonment of any distinction between filiation inside and outside marriage, in order to create a complex system of filiation that is able to integrate the rules of the Code, based on the biological paradigm, with those on biological parenting.[76] Such a system would not be always based on biological derivation only, or on the naturalistic element of gestation and childbirth but would put greater emphasis on informed and voluntary consent, to be guided and regulated, as well as to be limited but not devalued.

[74] A. Valongo, n 18 above, 532, excluding this possibility, but also see S. Simana, 'Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?' 5(2) *Journal of Law and the Biosciences*, 329 (2018), about use gametes of a deceased person, thereby creating a child after the death of a genetic parent.

[75] Tribunale di Roma 8 August 2014 with note by A. Renda, 'Lo scambio di embrioni e il dilemma della maternità divisa (nota a Trib. Roma, ord. 8.8.2014)' *Diritto delle successioni e della famiglia*, 230 (2015); A. Gorgoni, 'La rilevanza della filiazione non genetica' no 21 above, 175; A. Mendola, 'Scambio di embrioni tra verità genetica e genitorialità biologica' *Giurisprudenza italiana*, 319 (2015); M.N. Bugetti, 'Scambio di embrioni e attribuzione di paternità' *Famiglia e diritto*, 934 (2014).

[76] A. Valongo, n 18 above, 533, about succession rights; but see also, M.C. Venuti, 'Atti di disposizione del corpo e principio di gratuità' *Diritto della famiglia e delle persone*, I, 827 (2001).