Essays

An Anthropological Reading of Surrogacy and the Role of Supreme Courts

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Abstract

Far from being confined within the narrow confines of law, the theme of surrogacy evokes delicate meta-legal questions arising from the evident axiological, moral, and religious implications. The patchwork of solutions adopted across the various legal systems provides legislators with food for thought, in the expectation of a regulatory intervention at national and international levels, to bring about a new and unavoidable child-centred change of perspective in the legal debate.

I. A Critical Assessment of the Attempts to Define the Phenomenon of the So-Called 'Surrogacy', Between the Interpretation of International Courts and the Principle of 'Puerocentrism'

The expression 'surrogacy'[1] indicates a delicate circumstance that has been effectively described[2] as 'the situation of a biological mother[3] (that is, of a woman

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[1] This contribution investigates topics covered in S. Aceto di Capriglia, 'I profili etico-giuridici concernenti la maternità surrogata. Un confronto tra modelli' *Le Corti salernitane*, 1, 3 (2019).

[2] In an arduous attempt to offer a single all-encompassing definition, it may be said that surrogacy, gestational substitution, supportive gestation, or 'womb-for-rent' – as it is sometimes improperly referred to with an evidently critical tone – is an assisted procreation technique in which a woman, variously called a 'woman who is pregnant for others', a gestational bearer, or a pregnant woman, undertakes gestation on behalf of one or more people who will be the parent or parents of the unborn child. Consent to the use of this technique is granted by means of a gestational surrogacy contract. In this contract, the future parent – or parents – and the woman who becomes pregnant for others set out in detail the procedure, rules, consequences, and possible contribution to the medical expenses borne by the pregnant woman, as well as any remuneration for her service. Fertilisation may be carried out using spermatozoa (gametes) and eggs provided by the sterile couple and donors through *in vitro* conception. For further information, see I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), 15; F.M. Zanasi, 'Maternità surrogata', available at www.personaedanno.it, 21 January 2014; G. Cassano, *Le nuove frontiere del diritto di famiglia. Il diritto a nascere sani, la maternità surrogata, la fecondazione artificiale eterologa* (Milano: Giuffrè, 2000), passim; A.B. Faraoni, *La maternità surrogata. La natura del fenomeno, gli aspetti giuridici, le prospettive di disciplina* (Milano: Giuffré, 2002), passim; E. Trerotola, 'Bioetica e diritto privato. Crepuscolo del *mater semper certa* est nella prospettiva della maternità surrogata' *Il nuovo diritto*, 403 (2003).

[3] A hallmark of the choice of the woman who accepts and brings the pregnancy to full term is undeniable intentionality, as well illustrated by D. Danna, *Contract Children, Questioning Surrogacy*

who shares the experience of pregnancy with an unborn child) who consciously and freely chooses to undertake a reproductive project that is not destined to continue with her motherhood after the birth of the child but is meant to become the 'parental project' of others'.[4]

This definition does not embrace all the multifaceted forms that the phenomenon of surrogacy can assume in reality and which have been identified and examined in depth in the literature (both legal and otherwise).[5] In addition to considerable morphological differences, a comparison of the legal systems in which the practice in question is considered lawful, reveals a marked teleological heterogenesis.

In some legal systems, in fact, surrogacy is lawful solely if practised free of charge for altruistic purposes (such as in the case of a relative who agrees to become pregnant for reasons of affection and solidarity towards the future parents). In other legal systems, gestation on behalf of third parties for financial gain is also considered admissible. These are the cases in which the biological

(Stuttgart: Verlag, 2015), 39.

[4] B. Pezzini, 'Nascere da un corpo di donna: un inquadramento costituzionalmente orientato dell'analisi di genere della gravidanza per altri', available at www.costituzionalismo.it, 201 (2017), 'The experience of pregnancy for others manifests itself today as the drop point of the transformations in the sphere of sexual reproduction and the sphere of gender roles in family relations: here converge the effects of the deep changes that parental relationships have undergone and that have largely redefined the boundaries of maternal and paternal roles towards children, and those of technological medically assisted fertilisation processes, especially considering the practicability of heterologous fertilization with the use of female gametes unrelated to the couple of would-be parents'. The definition is also adopted by G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 94-95. It should be added that, according to the most recent orientation of the Joint Divisions of the Italian Court of Cassation, the essential feature of this figure is 'the fact that a woman lends her body (and possibly the eggs necessary for conception) for the sole purpose of helping another person or sterile couple to fulfil their desire to have a child, assuming the obligation to arrange for gestation and childbirth on behalf of the same, and agreeing to deliver the unborn child'. The reference is to the key judgment rendered by Corte di Cassazione 8 May 2019 no 12193, available at www.neldiritto.it. with an insightful commentary in G. Perlingieri, 'Ordine pubblico e identità culturale. Le Sezioni unite in tema di c.d. maternità surrogata' *Diritto delle successioni e della famiglia*, 377 (2019).

[5] It may be appropriate to list some of the more usual theoretical distinctions found in legal scholarship. In fact, *traditional* surrogacy occurs when the surrogate mother is the subject of artificial insemination with sperm donated by the father, which links the child to the father genetically. Then, there is *gestational* surrogacy, where an embryo produced from the eggs and sperm of the parents is implanted in the surrogate mother. More specifically, legal scholarship has categorised surrogacy into three groups of cases: one in which eggs are donated to a woman who becomes pregnant in order to bear her own child; true surrogacy, in which the oocyte of a woman who completes the pregnancy and hands over the new-born child to the client couple is fertilised; the loan of the uterus, in which the embryo is created *in vitro* using genetic material from the couple and subsequently implanted in the woman's uterus. At the end of the pregnancy, the mother hands the new-born baby to the couple. See, G. Cassano, *Le nuove frontiere del diritto di famiglia* (Milano: Giuffrè, 2000), 55 and T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2014), 329-335.

mother agrees to complete the gestation in exchange for payment.[6] In the light of these various scenarios, it is immediately clear that complex institutional problems regarding lawfulness may arise.[7]

The tension between the practice in question and the fundamental rights of the human person enshrined in Art 2 of The Italian Constitution is evident, as is the risk, particularly germane to the case of surrogacy for financial gain, that the bodies of both the mother and the unborn child become mere commodities.[8] In more general terms, the lack of any standardised regulation of the phenomenon reflects the delicate meta-legal implications pertaining to the question of surrogacy. Under such circumstances, the interpreter of the law cannot avoid coming up against the precepts of religion, morals, and philosophy. In such a scenario, it is not surprising that a leading role should be attributed to international sources, and even more so to the hermeneutic activity of international courts, which undoubtedly enjoy a privileged standpoint with regard to the solution of issues that are at the same time both intricate and fascinating.[9] As a result of technological and scientific progress, we are now witnessing the introduction of new procreative techniques, in relation to which family law has great difficulty in maintaining its traditional role as a regulator. So, challenges to the so-called 'living law' are increasingly frequent. The 'living law' is called upon to address unusual requests for protection, related to factual situations not covered by positive law, which require the use of evolutionary and innovative, if not radically *creative* interpretations.[10] Moreover, intervention by the European Union in the field of family law can only be indirect: in this regard, not only is the general principle whereby the European Union's authority is characterised by the principles of attribution, subsidiarity, and proportionality always true, but it also emerges that the examination of the founding treaties and the Treaty of Lisbon itself reveals no exclusive jurisdiction on the part of the

[6] For an initial comparative analysis, please refer to K. Trimmings and P. Beaumont, *Legal Regulation at the International Level (*Oxford: Hart Publishing, 2013); and G. Tobin, 'To Prohibit or to Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' 63 *International Comparative Law Quarterly*, 352-357 (2014).

[7] Indeed, even in legal systems that allow surrogate motherhood, the debate is far from dormant, given that, as underlined by G. Perlingieri and G. Zarra, n 4 above, 97, proposals for review, or even abolition of the practice, are far from infrequent.

[8] On this point, see E. Olivito, 'Una visione costituzionale sulla maternità surrogata. L'arma spuntata (e mistificata) della legge nazionale', in S. Nicolai and E. Olivito eds, *Maternità, Filiazione, Genitorialità. I nodi della maternità surrogata in una prospettiva costituzionale (*Napoli: Edizioni Scientifiche Italiane, 2017), 7-14.

[9] This role has been readily picked up on in the more scrupulous scholarship, which has not failed to provide a critical contribution to the solutions gradually devised in judge-made law. On this point, without claiming to be exhaustive, C. Campiglio, 'Il diritto dell'Unione europea si confronta con la maternità su commissione' *La nuova giurisprudenza civile commentata,* I, 763-768 (2014). See also L. Chieffi, *La procreazione assistita nel paradigma costituzionale* (Torino: Giappichelli, 2018), 150, where the regulatory inadequacy in this regard is remarked.

[10] On this, see C. Campiglio, 'Norme italiane sulla procreazione assistita e parametri internazionali: il ruolo creativo della giurisprudenza' *Rivista di diritto internazionale privato e processuale*, 481-516 (2014).

EU Institutions.[11] The Lisbon Treaty, of course, endorsed the communitarisation of the ECHR,[12] crystallising the accession of the Union to the convention system, which made it possible to elevate the case law of the Court of Strasbourg to the rank of standard of constitutionality in relation to national norms.[13] It should be immediately clear that, contrary to some occasional claims, the ECHR has never been called upon to address the *quaestio iuris* of the admissibility of surrogacy. Rather, it has intervened to censure the behaviour of individual Member States in relation to the legitimation of the relationship between couples and the children born as a result of surrogate motherhood. This has been done by making use of the Art 8 of the Convention[14] as a normative standard, which protects the right to the peace of family life.[15] In other words, the hermeneutic work of the ECHR

[11] A. Pera, *Il diritto di famiglia in Europa. Plurimi e simili o plurimi e diversi* (Torino: Giappichelli, 2012), 30-38, insightfully observes that EU law has never dealt directly with family relationships, which have only caught the interest of EU sources insofar as they might affect economic freedoms. In any case, a very confused procedure has remained in place for the approval of resolutions involving family arrangements. It is subject to unanimous Council approval, a prior opinion from the European Parliament, and the power of veto from national parliaments. This reveals the concern not to jeopardise the legal traditions and the cultural identities of the individual member States.

[12] The institutional status of the ECHR has found itself at the centre of a tumultuous evolutionary path, being, until only a few years ago, attributed the rank of ordinary law, the importance of which was as an instrument of ratification. On this point, the famous *twin judgments* of the Corte costituzionale 24 October 2007 nos 348 and 349, *Giurisprudenza italiana*, 565 (2008), with commentary by, among others, B. Conforti, 'La Corte costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione', and R. Calvano, 'La Corte costituzionale e la CEDU nella sentenza no 348/2007: Orgoglio e pregiudizio?' *Corriere giuridico*, 185-189 (2008), with a critique by R. Conti, 'La Corte costituzionale viaggia verso i diritti CEDU: prima fermata verso Strasburgo', and D. Tega, 'Le sentenze della Corte costituzionale nn. 348 e 349 del 2007: la CEDU da fonte ordinaria a fonte "sub-costituzionale" del diritto' *Quaderni cosituzionali*, 133-166 (2008). With these judgments, the Court clarified that ordinary courts do not have the power to set aside domestic law normally considered to collide with an ECHR standard, since 'the alleged incompatibility between the two is presented as a question of constitutionality, for any breach of Art 117 Constitution, which is of exclusive competence of the judge of the laws'. The Court clarifies that although ECHR provisions supplement the constitutional standard of said Art 117 (the so-called interposed ECHR provisions), they hold a sub-constitutional rank in the hierarchy of sources. Hence the need to subject them to a question of constitutionality.

[13] On the other hand, prior to the entry into force of the Lisbon Treaty, the relevance of the ECHR to the EU Court of Justice operated on a merely hermeneutical level, as the Convention was part of the ocean of widely recognised general principles of law. In this regard, see C. Amalfitano, 'Il rilievo della CEDU in seno all'Unione Europea ex art. 6 TUE', in L. D'Andrea et al eds, *La Carta dei diritti dell'Unione Europea e le altre Carte (ascendenze culturali e mutue implicazioni)* (Torino: Giappichelli, 2016).

[14] Which reads verbatim: 1 Everyone has the right to respect for his private and family life, his home and his correspondence. 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[15] The Eur. Court H.R., *Mennesson* v *France*, judgement of 26 June 2014, available at www.hudoc.echr.coe.it, is emblematic in this regard, as the Court found itself having to verify the

consists in verifying whether or not the legal restrictions on 'surrogacy' constitute undue intrusions by the State in the family life of the individuals involved. In carrying out this assessment, the reference standard adopted by the Court undoubtedly rests on the *best interest of the child*, and it is no coincidence that this standard constitutes the *leitmotiv* of numerous judgments.[16]

The conceptual outline described above is fully discernible in *Paradiso and Campanelli*,[17] a famous surrogacy case in which, in the opinion of the Strasbourg Court, the Italian public authorities had omitted to strike a reasonable balance between the interests at stake, and especially the *best interest* of the child. In particular, the Court was called upon to assess the appeal presented by an Italian couple who had been refused the civil registration of a certificate regarding a child born in Russia as a result of heterologous fertilization and therefore devoid of any genetic relationship with the intended mother. For the Court, the rejection and consequent decision to separate the child from the couple, and declaring it eligible for adoption, constituted a violation of Art 8 ECHR.[18]

Following its previous pronouncements,[19] the Strasbourg court reaffirmed

existence of an unlawful intrusion into private and family life – prohibited by Art 8 ECHR – following the refusal of the French Court of Cassation to register the civil status of two couples of spouses, who, due to the sterility of their partners, both resorted to gestation via implant (with oocytes not belonging to the surrogate mother) in the United States using the male gametes of the clients.

[16] As for the role of the *best interest of the child* in the rationale of the ECHR, see B. Casalini, 'Nel *best interest* dei bambini e delle madri surrogate', in *Cambio: rivista sulle trasformazioni sociali*, V, 9, 30-31 (2015), as well as L. Vizzoni, 'Quando il *best interest* del minore azzera la verità biologica. Riflessioni a partire dal caso Paradiso e Campanelli contro Italia', available at www.juscivile.it, 639 (2015).

[17] Eur. Court H.R., *Paradiso and Campanelli* v *Italy*, available at www.hudoc.echr.coe.it. In this regard, see I. Rivera, 'Affaire Paradiso e Campanelli c. Italie. La Corte Edu torna a pronunciarsi sulla maternità surrogata e sul best interest of child come linite all'ordine pubblico internazionale', available at www.federalismi.it, *Focus Human Rights*, 3-10 (2005), As well as O. Feraci, 'Maternità surrogata conclusa all'estero e convenzione europea dei diritti dell'uomo: riflessioni a margine della sentenza Paradiso e Campanelli C. Italia' 7 *Cuadernos de Derecho Transnacional*, 424 (2015).

[18] It should be noted that, at almost the same time as the *Campanelli and Paradiso* judgment, Italian justice had found itself facing the criminal implications of surrogacy, and, in good governance of the principles elaborated by the Court of Strasburg, had come to exclude the criminal aspect of this conduct. In this regard, see the Court of Cassation, Criminal Section VI, judgment no 48696 which states that 'the criminal offence referred to in Art 567, second paragraph, of the Criminal Code must be excluded in the case of declarations of birth made under Art 15 of DPR 396/2000 with regard to Italian citizens born abroad and made consular authority on the basis of the certificate drawn up by the Ukrainian authorities who designate them as parents, in accordance with the rules established by local law'. The ruling of the Supreme Court had been anticipated in some judgments of the ordinary courts, including Milan, with a judgment of 15 October 2013, and the Varese Court on 8 October 2014, both available at www.dirittopenalecontemporaneo.com. In scholarship see the comment of S. Tonolo, 'La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore' *Rivista di diritto internazionale privato e processuale*, 81-96 (2014).

[19] See Eur. Court H.R., *Moretti and Benedetti* v *Italy*, Judgment of 27 April 2010, available at www.hudoc.echr.coe.it; Eur. Court H.R, *Havelka and others* v *Czech Republic*, Judgment of 21 June 2007, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Wallová and Walla* v *Czech*

the need for a decision-making process culminating in the adoption of fair measures regarding the private and family lives of the citizens able to take into account all the interests considered in Art 8. A *jus receptum* in the case law of the ECHR is represented by the necessity to place them in the context of a *democratic society*, in which it is the task of the public institutions to guarantee a fair balance between general and private interests. These can be linked teleologically to the right to respect for private and family life,[20] guaranteed, as mentioned, by Art 8 ECHR.[21]

It follows that, in order to legitimately adopt such an invasive measure of taking the child and entrusting it to the social services, it is necessary to establish that the minor is exposed to an immediate and not otherwise avoidable peril.[22] The Court clarified that the article in question does not only work in the negative sense, preventing arbitrary interference by public authorities to the detriment of the individual; it also has a positive meaning, acting as a source of obligations to ensure effective respect for family life. Once the existence of a family connection is clarified, the State is required to ensure that this link can be consolidated,[23] adopting *ad hoc* measures when necessary.

It should be emphasised that, following the Court's approach, in order to

Republic, 26 October 2006, available at www.hudoc.echr.coe.it.

[20] See, among many, Eur. Court H.R., *Wagner and JMWL*, Judgment of 28 June 2007, paras 133-134, available at www.hudoc.echr.coe.it; Eur. Court H.R., *Mennesson* v *France* n 15 above, para 81; Eur. Court H.R., *Labassee* v *France*, Judgment ot 26 June 2014, para 60, available at www.hudoc.echr.coe.it.

[21] Obviously, the extreme vagueness of the concept of private and family life escapes no one. On the other hand, the whole framework of the Convention is scattered with broad and indeterminate formulas, to the point that, for the most authoritative legal scholarship, it can be defined as *'a very generic catalogue'* of rights. The expression is used by V. Zagrebelsky, 'Corte, convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali' *Il Foro Italiano*, I, 253-560 (2006). It must not be imagined that the noted general nature of the norms of the Convention is the result of faulty technique in the preparation of the rules; it is, in fact, a deliberate choice of the drafters of the ECHR, in order to create a framework with a view to favouring a case-study approach by the Court, while guaranteeing the necessary elasticity so that the rules can easily be adapted in the light of social, economic and cultural change. In this regard, see S. Bartole et al, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali* (Padova: CEDAM, 2001), 307.

[22] See Eur. Court H.R., *Scozzari and Giunta* v *Italy*, Judgment of 13 July 2000, para 148; Eur. Court H.R., *YC* v *United Kingdom*, Judgment of 13 March 2012, paras 133-138; Eur. Court H.R., *Pontes* v *Portugal*, Judgment of 10 April 2012, paras 74-80, all available at www.hudoc.echr.coe.it. See Eur. Court H.R., *Dewinne* v *Belgium*, Judgment of 10 March 2005; Eur. Court H.R., *Zakharova* v *France*, Judgment of 13 December 2005, all available at www.hudoc.echr.coe.it. The underlying principles of the aforementioned rulings are brought together and analysed in the literature by C. Masciotta, 'L'allontanamento del minore come *extrema ratio* anche in caso di maternità surrogata: la Corte di Strasburgo condanna l'Italia per violazione della vita familiare' *Rivista Aic*, 2-21 (2015).

[23] See Eur. Court H.R., *Eriksson* v *Sweden*, Judgment of 22 June 1989, para 71; Eur. Court H.R., *Olsson* v *Sweden*, Judgment of 27 November 1992, para 90, and, more recently, Eur. Court H.R., *Neulinger and Shuruk* v *Switzerland*, Judgment of 6 July 2010, para 140, all available at www.hudoc.echr.coe.it. See also G. Ferrando, 'Genitori e figli nella giurisprudenza della Corte Europea dei Diritti dell'Uomo' *Famiglia e diritto*, 1049 (2009).

constitute a family bond deserving of protection, the existence of a formal legal link among *partners* should be disregarded; in this way, the phenomenological concept of family life is reduced to any factual situation where family ties that need to be maintained and protected may emerge.[24]

A fortiori, it must be recognised that the scope of Art 8 ECHR has been much extended by the Strasbourg Court[25] to encompass the ability to establish and maintain family relationships not necessarily characterised by the bond of cohabitation, as well as the right to identity and legal status.[26] It is worth pointing out, however, that the broad interpretation of the concept of family life envisioned by the Court of Strasbourg, regardless of its abstract commendability,[27] refers to cases in which the existence of a genetic link between the child and at least one of those who claim to be his or her parents is ascertained, and where one of the possible forms of surrogacy is therefore present.

From this perspective, the role that must be attributed to Art 8 ECHR is clear, as in the case of Strasbourg case law, the interpretation of which performs a unifying function in the family law system: it allows the identification of a minimum level of protection, below which no adherent State may abut under penalty of infringing fundamental rights and freedoms.[28] The case is even more complex when no genetic link between the minor and the alleged parents is ascertained; in this case, the lack of a biological relationship with at least one of the parents inevitably involves a change of perspective, since it brings before the court a case that has numerous points of contact with adoption, which differs

[24] This phrase is first found in the historical at Eur. Court H.R., *Marckx* v *Belgium*, Judgment of 13 June 1979, available at www.hudoc.echr.coe.it.

[25] The Strasbourg Court proposes and develops in *Campanelli and Paradiso* v *Italy*, also through a learned survey of previous case law in this direction, stating that '*La notion de 'famille' visée par l'art. 8 ne se borne pas aux seules relations fondées sur le mariage, mais peut englober d'autres liens 'familiaux' de facto, lorsque les parties cohabitent en dehors de tout lien marital et une relation a suffisamment de constance*' (Kroon et autres v Pays-Bas, 27 October 1994, § 30, série A no 297-C; *Johnston et autres* v *Irlande*, 18 December 1986, § 55, série A no 112; *Keegan* v *Irlande*, 26 May 1994, § 44, série A no 290; *X, Y et Z* v *Royaume-Uni*, 22 April 1997, § 36, Recueil 1997 -II)'.

[26] As regards the scope of Art 8 ECHR in relation to the family, please refer to the contribution of G. Ferrando, 'Diritti delle persone e comunità familiare nei recenti orientamenti della Corte Europea dei Diritti dell'Uomo' *Famiglia persone e successioni*, 281 (2012).

[27] For a critique in this regard, see the study by F.D. Busnelli and M.C. Vitucci, 'Frantumi europei di famiglia' *Rivista di diritto civile*, 267-277 (2013), which highlights the role played by Art 8 ECHR in the broader phenomenon of the destructuring of the family. In particular, the increasingly frequent opposition, in the argumentative framework of the Strasbourg Court, between the traditional archetype of the family and a 'liberal' family model, which, in our reading, is based on an excessively broad reading of Art 8 ECHR, as a result of which the concept of family life loses its ontological identity, ending up being confused with one of the variants into which the notion of private life is subdivided, thus giving rise to an extremely individualistic vision, ignoring altogether the individual's membership of a family community.

[28] Thus, scholars have found in Art 8 ECHR a 'safety valve in the system, proving that it is well suited to a wide and multifaceted case history, which ranges from family reunification to the protection of de facto bonds, up to the recognition of the particular protection that the minor deserves' see. L. Vizzoni, n 16 above. In a similar vein, see G. Ferrando, n 16 above, 1049-1050.

from filiation, despite their similarities.[29] It comes as no surprise then, that in the cases just mentioned, the hermeneutic criterion of reference is not the value of the 'peace of family life', but the different principle of the best interest of the child, which constitutes a standard normally used in adoption cases.[30] Italian law has followed the interpretative orientation of the international courts, as illustrated by a number of judgments in which the Italian Supreme Court of Cassation, by reiterating the priority of the interest of the child, has found innovative solutions, mainly seeking to put into practice the legal protection of *de facto* families.[31] Nevertheless, two years after the ECtHR ruling, an appeal was lodged by the Italian Government before the Grand Chamber. The latter, with ruling[32] 24 January 2017 no 25358/12, overturned the approach of Strasbourg, recognising that the Italian authorities had not infringed Art 8 of the ECHR and the lawfulness of entrusting the child to social services before passing it on to another family. The detailed rationale did not underline the existence of a *de facto* family, nor did the court challenge the firm desire of the applicants, who had assumed their parental role from the start, to become actual parents. Rather, the focus was on the duration of the relationship with the child (six months starting from arrival in Italy preceded by a period of two months in Russia in the company of the intended mother). Although the Court rejected the principle that a family relationship must have a minimum duration in order to be defined as such, it nevertheless considered that the time elapsed had been too insignificant to cause permanent damage to the child as a result of being placed in the custody of other parents. The Court also ascertained the firm will of the couple to engage in prohibited behaviour in the country where they later decided to settle and the objective danger recognised by the Italian government to clearing customs, a

[29] P. Zatti, 'I nuovi orizzonti del diritto di famiglia', in G. Ferrando et al eds, *Trattato di diritto di famiglia,* under the direction of P. Zatti (Milano: Giuffrè, 2011), 3-19.

[30] This Gordian knot is also present in Italian case law, as may be seen from Judgment of Corte di Cassazione 11 November 2014 no 24001, *Il Foro Italiano*, 3408-3410 (2014), with a note by G. Casaburi, and in www.dirittoegiustizia.it, with a contribution by A. Di Lallo, 'Madre è colei che partorisce. Dichiarato lo stato di adottabilità del minore nato dall'accordo di maternità surrogata'. In this judgment, the Supreme Court, specifically due to the ascertained lack of biological relations with the minor, upholds the conflict between public order and surrogate motherhood – already prohibited by the law on medically assisted procreation, going to far as to affirm that choices on this matter fall into a sphere that is solely the province of the legislator, without the possibility of interference by any part of the judiciary.

[31] In particular, the case law of the Supreme Court has had occasion to apply the above principles, above all in relation to the issue of the possibility for homosexual couples to obtain custody of children. In this regard, see Judgment of Corte di Cassazione 11 January 2013 no 601, *Famiglia e diritto*, 570-585 (2012), with a contribution by F. Ruscello, 'La convivenza omosessuale di un genitore non può costituire ex se un ostacolo all'affidamento dei figli al medesimo genitore'. The same sensitivity has also underpinned decisions by ordinary courts, such as the Tribunale di Bologna 10 November 2014, *Nuova giurisprudenza civile commentata*, II, 387 (2015). See L. Balestra, 'Affidamento dei figli e convivenza omosessuale tra "pregiudizio" e interesse del minore' *Corriere giuridico*, 893-910 (2013).

[32] See https://tinyurl.com/y9jew899 (last visited 27 December 2020).

practice that risked overshadowing that of child trafficking. For these reasons, the Grand Chamber departed from the previous judgment, arguing that:

> 'The Court does not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicants' private life. While the Convention does not recognise a right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case'.

While it is true that the merit of emphasising the notion of family life must be ascribed to the ECHR, it is also undeniable that the concept of best interest[33] of the minor is not found in the Convention,[34] whereas the Nice Charter refers to it expressly.[35] Therefore, the hermeneutic attitude of the Court of Justice of

[33] The expression '*best interest of the child*' appears for the first time in the international context in the United Nations Declaration on the Rights of the Child of 1959, to be taken up again in 1979 on the occasion of the beginning of the works for the drafting of the text of the Convention on the Rights of the Child. For a historical recognition of the concept of *best interest of the child,* see C. Focarelli, 'La convenzione di New York sui diritti del fanciullo e il concetto di "best interests of the child" ' *Rivista di diritto internazionale*, 981 (2010).

[34] R. Conti, 'Alla ricerca del ruolo dell'art. 8 della Convenzione europea dei diritti dell'uomo nel pianeta famiglia', available at www.minoriefamiglia.it.

[35] Art 24, para 2, states that, 'In all acts relating to children, whether they are carried out by public authorities or private institutions, the best interests of the child must be considered paramount'. The provision in question should be read in conjunction with the said paragraph, according to which, 'Every child has the right to maintain regular personal relationships and direct contact with both parents, unless this is contrary to its interests'. Furthermore, the Community legislator had attempted to affirm the centrality of the best interest of the minor within the family community. This was demonstrated by the European Parliament's resolution on the proposal for a Council regulation on jurisdiction, recognition, and enforcement of decisions in matrimonial matters and in questions of parental responsibility, containing a specific article dedicated to the Best interest of the child, stating, 'In all judicial decisions relating to children, the best interest of the child must be considered paramount'. The opinion on the proposal, delivered by the Economic and Social Committee on 18 September 2002, stressed that, 'the interests of the child are difficult to define, but there is no doubt that it should be paramount. Although it can sometimes be difficult to determine the child's best interests after listening to the effect of age, the immaturity or undue parental influence, it is important to always try and do it anyway. The parents' point of view (often in conflict) is not always useful to clarify what satisfies the best interests of the child, as they sometimes confuse their emotional needs with those of their children and othe times they use them

the European Union (CJEU) comes as no surprise, having been repeatedly called upon to negotiate the weight to be attributed to the interest of the child, in order to establish whether it should be understood as an absolute value, not susceptible to reconciliation with other possible interests of the parties. According to the consolidated case law of the Luxembourg Court, in matters of family unity, the interest of the child certainly rises to a primary rank, but this does not imply that it should be granted unconditional pre-eminence in cases of conflict with other needs, since the public authorities of the single States must recognise the power/duty to wait for a 'balanced and reasonable assessment of all the interests involved, taking into account especially those of the minors concerned'.[36]

A methodological consideration is required with regard to evaluating the hermeneutic contribution offered by the case law of international courts, underlining how both the Strasbourg and the Luxembourg courts recognise the existence of an unavoidable margin of discretion[37] to the by Member States, given that, as we have seen, the protection of the right to peaceful family life and promotion of the *best interest* of the child has never been semantically elevated to the extent of saying that they should always prevail.[38] Indeed, in *Labassee* v *France*, the applicants had challenged the refusal of the French authorities to register a birth certificate. It should be borne in mind that the refusal was rooted in the prohibition of recourse to surrogacy techniques. The parents, therefore, had not raised the issue of compatibility of the aforementioned ban with the ECHR, since the complaint was intended to raise the issue of possible violation of the rights of the child as a result of the lack of recognition of the *status filiationis* by French authorities and the failure to issue the pertinent documents.[39] So, the *thema decidendum* did not adhere at all to the issue of whether the ban on surrogacy operating in France was legitimate or not, and indeed, in an *obiter dictum,* the Court underlined the legitimacy of the French legislation prohibiting the transcription of civil status documents in surrogate motherhood cases. From this point of view, the Strasbourg judges observed no violation of Art 8 ECHR but, conversely, considered the refusal reasonable as a way of discouraging citizens

as a bargaining chip'. It was hoped therefore that the Commission would work in order to 'coordinate the settling of the issue by the various national courts, through cooperation in the European Judicial Network. The Committee also recommends that national governments ensure that the training of legal practitioners also includes practical knowledge of children's rights, as an integral part of human rights identified in them'.

[36] See CJEU, 6 December 2012, case C-356/11 and C-357/11, *Maahanmuuttovirasto,* where the correct interpretation of Art 7, para 1, letter *c*) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification is discussed.

[37] This statement is also shared in Spanish scholarship, commenting on *Campanelli* v *Italy*, see A.J. Sanchez Vela, '¿Ha variado el TEDH su Doctrina favorable a los convenios de gestación por sustitución realizados en países que legalmente los permiten? (A propósito de la Sentencia de la Gran Sala del TEDH de 24 de enero de 2017)' *La Ley,* 15-24 (2017).

[38] In these terms*,* Case C-540/03 *Parliament* v *Council* of 27 June 2006 and Case C-403/09 *PPU* v *Detiček* of 23 December 2009.

[39] See S. Aceto di Capriglia, n 1 above.

from using a method of procreation prohibited on the national territory. *Mutatis mutandis*, they did not deny that there is interference by the public authorities in the private lives of individuals, but they acknowledged the full legitimacy of such interference, this being considered in line with the goals set out Article 8 of the ECHR, ie the protection of the health, rights, and freedoms of others. Otherwise, the interference is unjustified if you look at it from the perspective of the minor, in whose legal sphere the failure to recognise the *status filiationis* and the refusal of citizenship may produce significant judicial effects, which are not justified by the exceptional requirements indicated by Art 8 of the Convention. See, for example, the *vulnera* that arise in relation to inheritance rights, or obstacles related to the recognition of parental relationships, to which the Court attaches a primary role in the structuring of the personal identity of individuals.[40]

We can therefore agree with those scholars stating that, in terms of filiation, the use of discretionary power by public-sector authorities is destined to be reduced, since the identity of the individual is more important. Nonetheless, it is worth pointing out that a discretionary limitation of the powers of the public authorities does not mean automatically denying them any possibility of intervention, which indeed becomes even more important, albeit within the limits established by the criterion of reasonableness.

If the case law of the international courts affirms that the decision to deny *status filiationis* to a child conceived through surrogacy is harmful to the right to peace of family life,[41] it is still risky to see, in such a claim, a general recognition of the legitimacy of such a practice, and, even less, the formulation of an obligation on the Member States to legitimise recourse to surrogate motherhood. In terms of interpretation, the hermeneutic contribution offered by international courts requires the interpreter to establish at least two fixed points of reference: the first is the recognition that judicial intervention regards aspects that, on a logical-legal level, arise after the decision to undergo gestation techniques on behalf of others, since, as we have seen, the *dicta* analysed do not prejudice the assessment of the lawfulness or illegality of such practices operated by individual national systems. Secondly, the perspective from which courts deal with the question of the infringement of the right to peaceful family life is not that of the parents, who, in order to fulfil their own parenting project, resort to practices prohibited by the laws that they live under. Rather, they consider the interests

[40] See Mennesson v France n 15 above, para 99, '*les effets de la non reconnaissance en droit français du lien de filiation entre les enfants ainsi conçus et les parents d'intention ne se limitent pas à la situation de ces derniers, qui seuls ont fait le choix des modalités de procréation que leur reprochent les autorités françaises: ils portent aussi sur celle des enfants eux-mêmes, dont le droit au respect de la vie privée, qui implique que chacun puisse établir la substance de son identité, y compris sa filiation, se trouve significativement affecté*'; in the same terms, see Labassee v France n 20 above, para 78.

[41] This happened in the aforementioned *Mennesson* v *France* case, referred to in M. Di Masi, 'Maternità surrogata: dal contratto allo "status" ' *Rivista critica di diritto privato*, 615-623 (2014).

of the children conceived by means of such practices, and this occurs, now, by referring Art 8 ECHR not to the entire familiar nucleus but only to children, by invoking the canon of *best interest*. In conclusion, from an examination of the international case law, a hermeneutic cue can be drawn that may be useful in choosing the correct methodological approach to adopt, requiring the problem to be addressed not from the perspective of the 'customer' couple, which can lead to the unreasonable assumption of a right to reproduce at all costs but a child-centred reading, focusing on the search for a legal framework able to satisfy the primary interests of the baby, regardless of how it was conceived.

II. A Comparative Overview

Clearly, the phenomenon of surrogacy involves very delicate meta-juridical aspects bordering the fields of morality, philosophy and religion. This makes the identification of a uniform solution by international courts impossible. The ample room left to the sensitivity of the national legislative bodies determines a range of inevitably diversified solutions, which requires comparative study not only on the theoretical plane, but also in terms of practical issues. A ban in some countries, in fact, does not entirely preclude couples from fulfilling their aspirations to parenthood, as they are able to take advantage of favourable legislation in foreign States, giving rise to the well-known phenomenon of *procreative tourism*.

Starting with an examination of the continental context, one study conducted by the European Parliament[42] reveals an interesting tripartite division within EU countries: in one group of Member States, the practice of surrogate motherhood is totally prohibited. A second group has legislation to regulate access to, and the legal consequences deriving from, surrogacy. Finally, a third group is characterised by a narrower prohibition on profit-making surrogacy agreements. Within the first group, Austrian law stands out in particular. Here, the prohibition of surrogate motherhood is not affirmed explicitly in law, but may implicitly be deduced from the provision whereby, in the event of *in vitro* fertilisation only the oocytes and spermatozoa of the cohabiting partner may be used, being implanted only in the woman from whose body they are taken.[43]

Under the German legal system, leaving aside criminal law,[44] the civil

[42] See Policy Department. Citizens' rights and Constitutionals affairs (2013). A comparative study on the regime in EU Member States, European Parliament.

[43] In this sense, Art 3 of the federal law with which assisted reproduction was introduced ('Bundesgesets mit dem Regelungen über die medizinich Fortpflanzung'). However, the donation of embryonic cells from a third party is allowed, provided that the agreement is officialised by means a notarial act and authorised by the judicial authority. On this point, see A. Ciervo, 'Il divieto di fecondazione eterologa davanti alla Corte di Strasburgo: un campanello d'allarme per la legge 40?' *Università degli Studi di Perugia. Dipartimento di Diritto pubblico*, 5-15.

[44] For this purpose, a complementary rule, called *Embryonen Schutzgesetz* (law for the protection of the embryo) is highlighted, which, unlike in Italy, criminalises the act whereby a doctor

consequences of recourse to surrogacy are directly inferred from the interpretation of the Fundamental Law, which is accompanied by the Guidelines on assisted procreation issued in 2006, containing a ban on gestation for others. Looking at the case law, it should be noted that the German courts have made some hermeneutical openings, as evidenced by some judgments handed down by the Federal Court of Justice,[45] which allowed a same-sex couple to have the birth certificate of a child conceived by means of a surrogate pregnancy transcribed in the civil registry.

The approach to the theme of pregnancy in French law is more systematic, starting from the taxonomic position of the institution, included in the *Code civil*.[46] In more detail, the combined provisions of Arts 16-7 and 16-9, express the absolute prohibition of surrogate motherhood, expressly defined by the legislator as a prelude to public policy.[47]

Moving on to examine the legal systems in which recourse to surrogacy is allowed and juridical consequences are also established, Greece, *in primis,* stands out because of its regulatory apparatus, with its significant ethical character, since recourse to 'gestation on commission' is subject to altruistic intentions. This is inferred from the combined provision of two laws[48] by virtue of which the practice in question is conceived as a tool to remedy serious pathologies suffered by the intended mother,[49] and no real asset is due to the pregnant woman, but a sum of money may be paid out as a reimbursement.

1. The Spanish Experience

The Spanish legal system is extremely interesting, since it allows us to observe a close similarity with the Italian system in terms of the underlying methodological approach to the problem of surrogacy. In Spain, there is a profound gap between the legal regulations concerning the various assisted fertilisation techniques and the current situation regarding childbearing for others, with the result that while the former is clearly provided for in law,[50] the latter is

facilitates surrogacy, excluding, on the other hand, any criminal implication regarding the conduct attributable to the leased mother or the 'clients'.

[45] On the *Bundesgerichtshof (BGH)* ruling, see the commentary by M. Costantini and M.P. D'Amico, *L'illegittimità costituzionale del divieto di "fecondazione eterologa"* (Milano: Giuffrè, 2014), 338-339.

[46] In fact, the *loi de bioétique* of 29 July 1994 (amended in 1994 and in 2011) brought a change to Chapter II of the *Code*, 'of the human body', revolving around Art 16, which states that 'the law ensures the primacy of the person, prohibits any attack on the dignity of the same and guarantees respect for the human being from the beginning of his life'.

[47] The first provision, in fact, states that 'all surrogacy agreements are null'; the second, on the other hand, seeks to specify that 'the provisions of this chapter regard public order'.

[48] These are, specifically, Law no 3089/2002 and Law no 3305/2005.

[49] Specifically, gestation for others is allowed when the woman has no uterus or ovaries, or if the woman suffers from potentially lethal illness. For completeness, it should be noted that in both cases, the Greek legal order precludes access to surrogate motherhood for homosexual couples.

[50] The topic is examined in depth in S. Aceto di Capriglia, 'La stepchild adoption e il fenomeno

strictly prohibited.

Indeed, Art 10, para 1, of law 26 May 2006 no 14,[51] in the light of the provisions of Art 10 of law 22 November 1988 no 35[52] on the subject of assisted procreation, establishes the total nullity of contracts expressing the *ex-ante* renunciation of the configuration of a subsidiary maternal relationship between the pregnant woman and the unborn child. It should be pointed out that the nullity in question must be ascribed to the dogma of virtual nullity, regardless of the provision or otherwise in favour of the woman who hands over the child.[53] As a result of successive prohibitions, once contractual nullity has been established, Spanish law prescribes that the *status filiationis* must be determined on the basis of natural childbirth;[54] it follows that the status of mother can only be attributed to the woman who gives birth to the child and never to the woman who commissioned the birth. This is because the Spanish legal system considers the commerce of motherhood and reproductive functions to be contrary to public order, so that the invalidity of contracts of this kind arises from the principle that the human body is inalienable in all its parts.[55] Some scholars state that such a contract is in conflict with the principles of human dignity. Far from being considered a merely ethical concern, this aspect constitutes a solid regulatory base, found in Art 10, para 1, of the Spanish Constitution of 1978, whose very purpose is to protect human dignity. However, although faced with such a rock-solid regulatory landscape, Spanish scholars strive to offer innovative readings in line with the approaches of international courts. *In primis,* they[56] complain that the majority position omits to find a balance between the principle of inalienability of family status, protected, as we have seen, by the prohibition of surrogacy, and the principle of free expression of human personality, from which one can derive an (alleged) right to reproduction. The main argument put forward in support of the anti-prohibitionist thesis is countered by the last part

delle coppie same sex nel diritto europeo contemporaneo', available at www.federalismi.it, 1-22.

[51] Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida, published in the Boletìn Official de Estado (BOE) on 27 May 2006 no 126.

[52] Published in the BOE on 24 November 1988.

[53] The normative provision states precisely that '*Será nulo de pleno derecho el contrato por el que se gestación, con or sin precio, a cargo de una mujer que renunciata a la filiación materna in favor of the contractor or a tercero*'. In this regard, see F. Pantalèon Prieto, 'Contra la Ley sobre Tècnicas de Reproducciòn Asistida' 5 *Jueces par la democracia*, 27-28 (1988).

[54] Art 10, para 2, of law no 14/2006 establishes that in this case '*La filiación de los hijos nacidos por gestación de sustitución será determinada por el parto*'.

[55] On this specific profile of damage to public order see the widespread arguments of V. Bellver Capella, 'Nuevas tecnologías? Viejas explotaciones. El caso de la maternidad subrogada internacional' *Revista de Filosofía, 19-52 (*2015); E. Corral Garcìa, 'El derecho a la reproducción humana. ¿Debe permitirse la maternidad subrogada?' 38 *Revista de Derecho y Genoma Humano*, 69 (2013).

[56] Among the many authors who have addressed the issue, see L. Àlvarez De Toledo Quintana, 'El futuro de la maternidad subrogada en España: entre el fraude de Ley y el correctivo del orden público internacional' 2 *Cuadernos de Derecho Transaccional*, 39 *(*2014); M.P. Garcìa Aburuza, 'A vueltas con los efectos civiles de la maternidad subrogada' *Revista Aranzadi Doctrinal*, 97-111 *(*2015).

of the above-mentioned Art 10, para 2, of Law 14/2006, which, in addition to establishing the nullity of surrogacy agreements and the consequent attribution of motherhood to the woman who gives birth to the child, is nevertheless open to the possibility that the 'customer' father may obtain recognition of paternity. Upon recognition, the partner of the biological father is entitled to adopt the child, and thus the 'intentional' mother will establish a parent-child relationship with a child born to another woman, acquiring the consent of the latter without making it necessary to activate the complex procedure of having the child declared eligible for adoption pursuant to Art 176 of the *Codigo civil*.

Therefore, Spanish legal scholarship, while not challenging the rationale underlying the ban, outlines, through systematic interpretation, ways of safeguarding their aspiration to parenthood, giving life to a delicate work of balancing, which, has also made headway in recent case law.[57]

The first part of the ruling of 2014 sets out the arguments whereby it can be argued that registering a relationship of filiation (not corresponding to biological reality) is in breach of the public order, not only by virtue of Art 10 of Law no 14/2006, but also of the supreme principals, including the dignity of women and children. In the light of these fundamental values, the generalisation of institutions such as adoption or assisted fertilisation can never be a prelude to the reification of pregnant women and unborn children. Such a scenario is considered all but remote; indeed, it is highly likely that, following the removal of the ban, the work of intermediaries may well be facilitated in their speculative intent to take advantage of the difficult situation in which some women find themselves, pushing them into surrogacy. Nor must we neglect the discriminatory effect that would probably ensue, given the high cost of those techniques, which would be accessible only to wealthy couples.[58] The Spanish courts also show awareness of the doctrinal principle[59] whereby affirming the absolute nullity of surrogacy agreements would

[57] This refers to the ruling adopted by the Supreme Court (see *STS*, 6 February 2014, in *Tol* 4100882) in a case relating to a male couple who had resorted to a surrogate motherhood procedure in California.

[58] This concern was promptly noted also in Italian doctrine, as acutely observed in G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 115-116. The authors textually specify: 'if it is true that – reasoning ex post facto by virtue of the need to balance the values at stake – it is possible to admit the recognition of surrogacy taking place abroad, it is also true that this leads to discrimination against poorer citizens who find it impossible to have children. The latter cannot – for economic reasons – bear the costs of procreative tourism (still a criminal offence in Italy) and will find themselves subordinated to those who, on the other hand, have this possibility and, going abroad, also escape criminal punishment'.

[59] On this point, reference should be made to the reflections of J. Ramòn De Verda y Beamonte, 'La filiaciòn derivada de las técnicas de reproducciòn asistida (un anàlisis crìtico de la experiencia jurìdica española, treinta años depuès de la aprobacìon de la primera regulaciòn legal sobre la materia)' *Diritto successioni e famiglia*, 334 (2018). Against M. Nùñez Bolaños et al, 'El interés del menor sustitución y los supuestos de discriminación en la maternidad subrogada, entre la realidad jurídica y la ficción' 29 *Derecho Privado y Constitución*, 259-260 (2015).

not be a *vulnus* in relation to the minor's interests.[60] Having said that, the Madrid Court, referring to Art 10, para 2, of Law no 14/2006, highlights that this provision constitutes a solid textual basis for offering legal recognition to the relationship between the 'client' couple and the child, firstly through adoption, which gives the biological father the chance to adopt the child with the consent of the pregnant woman, and secondly through the institution of the custody of minors in a state of moral and material abandonment. Simply on the basis of the above-illustrated *ratio decidendi*, in a subsequent decision[61] relating to an incident in the execution of the previous one, the Spanish Supreme Court denied that this ruling is in conflict with the principles established by the ECHR in the well-known *Mennesson* and *Labassee* case, which culminated in a judgment against France for infringing the right to peace of family life. The Court says that the French legal system had drastically interfered with the recognition of a legally significant relationship between the child and the 'intentional' parents, given the impossibility of both transcribing a birth certificate drawn up in the United States and of establishing a bond of parenthood through adoption.

Therefore, according to the Court of Madrid, the rulings of the Strasbourg court, rightly understood, do not require outright recognition of the parent-child relationship established by the birth certificate of the country where the birth took place, but merely require that the person born enjoys certain identity and a defined legal status in the State where (s)he will reside. This is already ensured in the Spanish system through the adoption procedure referred to in the aforementioned Article 10, para 2, of Law no 14/2006, which, as repeatedly stressed, legitimises the adoption by the biological father. Nor can the importance of some administrative acts be neglected, given their undoubted impact on the matter in question, since they grant a *minimum* legal protection to the relationship between the 'client' parents and children. In this context, the Regulation issued on 5 October 2010 by the General Directorate of Registrars and Notaries is of particular note;[62] it establishes a *summa divisio* between foreign judgments and mere administrative acts issued by foreign authorities.[63] In the guideline,

[60] Moreover, before addressing the substantive aspects of the question, it should be noted that, from the methodological point of view, it is certainly correct to see in the interest of the child a means to fill the legislative gaps, but at the same time, it is undoubtedly wrong to think that it can be used as a tool to arrive at solutions *contra legem;* and indeed, this solution contradicts the hierarchy of sources clearly outlined in Art 117, para 1, of the Spanish Constitution, which subjects the judiciary to the rule of law.

[61] ATS, 2 February 2015 no 335, appeal no 245 of 2012, available at www.poderjudicial.es.

[62] See J. Ramòn De Verda y Beamonte, 'L'impatto dei principi costituzionali e del diritto convenzionale europeo sullo status dell'embrione e della filiazione nel diritto spagnolo', in P. Perlingieri and G. Chiappetta eds, *Questioni di diritto delle famiglie e dei minori* (Napoli: Edizioni Scientifiche Italiane, 2017), 269.

[63] It should be pointed out that the distinction made in the *Instrucción* follows the interpretive route suggested in authoritative scholarship, see. A.J. Vela Sanchez, 'Los hijos nacidos de convenio de gestación por sustitución no pueden ser inscritos en el Registro Civil español, (A propósito de la Sentencia del Tribunal Supremo de 6 de febrero de 2014)' *La ley,* 1264, 9 (2014).

the GDRN did not hesitate to explain that the mere presentation of a birth certificate issued by a foreign Authority does not bestow eligibility for transcription in the Spanish register of births (still less, therefore, may it be possible when applicants submit a simple statement of the birth, accompanied by a medical certificate). On the other hand, as a necessary but not sufficient condition for the Spanish authorities to accept the application for registration of the birth certificate, prior issuance of a judicial ruling by the local court declaring the existence of a relationship of filiation is required. This ruling must therefore be subject to the *exaequatur* procedure governed by art 954 *et seq* of the *Ley de Enjuiciamiento Civil*[64] of 2000. In particular, only the intervention of a court can ensure the thorough verification of the capacity of the natural mother, as well as the integrity of her consent, especially with regard to lack of willingness (intentional defect, coercion or error). Last but not least, the court is considered the institution best suited to verify the existence of any contractual simulation, which in this case could constitute a legal screen behind which to hide egregious and illicit child trafficking. The solution proposed by the GDRN has not gained unanimous consent among scholars, who have focused their greatest criticism on the possibility that the *Instrucción* has the effect of encouraging illegal procreative tourism, which will consist in the absolute nullity of the contract, perfectly in line with the general principle that reproductive capacity and pregnancy cannot constitute the object of trade.[65]

Underlining the importance of the topic, and not only of the legal travail that accompanies legislative interventions *in subiecta materia,* it must be noted that on 14 February 2019 a new and more deeply innovative *Instrucción* was issued.[66] This *Instrucción*, in fact, introduced the possibility of allowing the recognition of the *status filiationis* even in the absence of a judicial ruling, solely on the basis of a foreign certification. In order to establish the relationship of filiation, the act in question considers the consent of the pregnant woman and a DNA test, demonstrating the biological origin of the minor with the 'client' father sufficient; thereafter, the intentional mother is entitled to initiate procedures pursuant to Art 177 of the *Código Civil* (on adoption).

However, the provision in question had a very short life, being repealed by a provision[67] of 18 February 2019. This, in turn, led to the revival of the *Instrucción*

[64] The reference is to Law 7 January 2000 no 1, published in the official bulletin of 8 January 2000 no 7, as modified by Law 30 December 2003 no 62, containing fiscal, administrative, and social measures.

[65] The opinion is shared, among others, by E. Corral Garcìa, 'El derecho a la reproducción humana. ¿Debe permitirse la maternidad subrogada?' *Revista de Derecho y Genoma Humano*, 48 (2013); J. Vela Sànchez, 'El interés superior del menor como fundamento de la incorporación de la filiación derivada del convenio de gestación por encargo' *Diario La Ley*, 8162, 3 October 2013.

[66] Found at http://www.migrarconderechos.es.

[67] For a critical comment on the repeal of the aforementioned *instrucción,* see the cutting reflections of A.J. Sanchez Vela, 'Análisis estupefacto de la Instrucción de la DGRN de 18 de febrero de 2019, sobre actualización del régimen registral de la filiación de los nacidos by gestación por

in 2010, obviously triggering arduous questions of intertemporal law,[68] resolved by the application of the *Instrucción* on 14 February only to requests for registration submitted in the very short lapse of time between the approval and the repeal of the aforementioned administrative act. On the other hand, for requests received after the repeal, the innovative *Instrucciòn* must be considered never to have existed, as it has never been published on the BOE.[69]

2. The Conventional High-Performance Family Model in the UK

In the United Kingdom, the problems linked to surrogacy took on prominent social importance as early as 1978, when the case related to the birth of Kim Cotton broke out[70] following *in vitro* fertilization, leading the intellectual community to invoke specific regulations. Hence, the succession of commissions[71] producing several acts, none of which was legally binding, but after them the practice, though non-regulated, could be considered socially tolerated. The *punctum individuationis* of the British discipline on surrogacy is undoubtedly represented by Art 2 of the Surrogacy Arrangements Act of 1985,[72] from whose reading it is easy to deduce a total ban on subrogation for profit.[73] As a result, the English legislator gave the institution of surrogacy a nuance of solidarity, as can be deduced from the penalty prescribed for mediation and sponsorship. Thus, there is no general principle of *pacta sunt servanda* in surrogacy agreements, which rely on the category of natural bonds, so refusal by the natural mother to hand over the new-born baby is not a technical failure, and does not give the intending parents the right to take legal action to obtain any forced transfer of the child.[74]

sustitución' *La Ley*, 7687, 1-15 (2019).

[68] On this topic, see G. Muñoz Rodrigo, 'La filiación y la gestación por sustitución: a propósito de las instrucciones de la DGRN de 14 y 18 de febrero de 2019' *Actualidad Juridica Iberoamericana*, 722-735 (2019). On the identification of the criteria for intertemporal conflicts, please refer to the valuable work of F. Maisto, *Diritto intertemporale* (Napoli: Edizioni Scientifiche Italiane, 2007), passim.

[69] In this sense M.B. Andreu Martìnez, 'Una nueva vuelta de tuerca en la inscripcion de menores nacidos by gestación subrogada en el extranjero: the Instrucción de la DGRN de 18 febrero 2019' *Actualidad Juridica Iberoamericana*, 64-85 (2019).

[70] In detail, Cotton's mother abandoned him before his father recognised the baby. Thus, the problem arose of regulating his fate, given the lack of any regulatory reference in this regard. The judge decided to accept the custody request, thus attributing to the client couple the powers/duties inherent in the care and maintenance of the minor, since, according to the court, only in this way could the primary and essential needs of the child be respected.

[71] The first of these is the 1984 Warnock commission, within which the Warnock Report (Human Fertilization and Embryology) was prepared, which expressed the hope of introducing an absolute ban on surrogacy. Subsequently, the *Brazier* commission took office, which, despite envisaging some openings, did not appear inclined to approve legislation that was openly favourable to gestation for others.

[72] For further information, see D. Morgan, 'Making Motherhood Male: Surrogacy and the Moral Economy of Women' *Journal of Law and Society*, 2, 12 (1985).

[73] On this point, kindly refer to S. Aceto di Capriglia, 'I profili etico-giuridici' n 1 above, passim.

[74] In this context, the learned analysis of C. Purshouse and K. Bracegirlde, 'The Problem of

A fundamental step forward was marked by the *Human Fertilization and Embriology Act* of 1990, which states that surrogacy agreements do not constitute a crime, although they have no legal value. This predication marked a turning point for the courts, which, in view of the surrogacy agreement, may nevertheless entrust the child to the client couple, whenever this solution might appear to be in the best interest of the minor.[75] In order to obtain the recognition of parental status, the client couple must ask the judicial authority to issue a special judicial order called the *parental order*,[76] which requires the presence of a guardian for the interests of the child. However, this must be done within six months of the child's birth, after which the client couple would lose all chances of being declared the parents of the child. Nonetheless, in dealing with the Gordian knot of the mandatory nature (or otherwise) of such a period, the British Courts have shown an approach that gives priority to the best interest of the child, even if this solution is in conflict with the requirement for legal certainty in fixing the conclusion cited above. This is the reason why[77] the issue of the required *parental order* made after the expiry of the six-month period was welcomed, explicitly stating that the interests of the child are superior to the peremptory nature of the deadline.

Once accepted, a birth certificate is drawn up making no mention of the existence of the *parental order,* it being understood that the child, upon coming of age, acquires the right to access to the original birth certificate, from which s/he will have the opportunity to learn the specific mode of conception.[78] Since the surrogate mother is *ipso jure* the parent of the child, only one of the members of the commissioning couple can appear as a parent, as the child cannot be the progeny of three people. It follows that the third member of the client pair will become a parent only upon issuance of the *parental order*. Should it be impossible to obtain the *parental order,* the only alternative is to have recourse to the *Adoption and Children Act of 2002*, to be implemented under the strict control

Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?' 26(4) *Medical Law Review,* 557 (2018). According to the authors, the non-coercibility of the obligations deriving from the surrogate motherhood 'contract' means that the debtor can freely decide to default in relation to the due service, refusing to deliver the minor. In such a case it would be possible to bring, according to this doctrine, the remedy of '*unjust enrichment*' (unjust enrichment, governed in Italian by Art 2041 Civil Code). For further details, see. G. Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd ed, 2015), passim; A. Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd ed, 2011), passim. With particular reference to the non-compelling nature of the obligation to transfer the minor, please refer to K. Wade, 'The regulation of surrogacy: a children's rights perspective' 29(2) *Child and family law quarterly*, 113–131 (2017).

[75] See P. Passaglia, 'La fecondazione eterologa' *Cortecostituzionale.it*, 59 (2014)

[76] In the aftermath of the 'Human Fertilization and Embryology Act' of 2008, this can also be issued to unmarried couples (civil partners and de facto cohabitants).

[77] See https://tinyurl.com/yx9swo52 (last visited 27 December 2020).

[78] The procedure appears to be more complex when the surrogate mother is from a foreign country and the client pair is British, since in this case a further problem arises with regard to verifying whether the conditions provided for by immigration law are respected. It should also be noted that a couple can only obtain the transfer of parental status if they reside in the United Kingdom.

of the social services.[79]

Until 2018, the procedure for issuing a *parental order* could only be initiated by couples united in marriage, cohabitants, or partners in a registered union, meaning that single persons, whether homo- or heterosexual, were excluded. This was brought to the attention of the British Supreme Court, under the suspicion that it was in conflict with Arts 8 and 14 of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[80] A constitutionally and conventionally-oriented reading of the legal framework of the *parental order* was requested, implying the need to understand whether the reference to a parental couple could also be applied to individuals.[81] After a complicated and slow juridical process, the British Court, while initially assuming a negative stance, declared the regulation to be in conflict with Art 8 ECHR, also subsequent to the intervention of the Health Secretary. At the same time, it also stated that more precise indications and a concrete solution could only come from the legislator.[82]

By accepting the pressing invitation of the judiciary, on 20 December 2018 the British Parliament issued the *Remedial Order* to the *Human Fertilization and Embryology Act* which, by supplementing regulatory section 54A of 2008, expressly expanded the area of application of the *parental order* to individuals, without any distinction regarding the sexual orientation of the applicant. Single individuals, therefore, may obtain a judicial order declaring establishment of the parental relationship under the same conditions as married or cohabiting

[79] For the purposes of adoption, a further court order is required, the so-called *adoption order*.

[80] In particular, the current legislation was challenged for its focus on the unreasonable situation whereby the child would allegedly not enjoy healthy and balanced growth within a mononuclear family, which evidently translated into discrimination against single people, taking into account that, according to an orientation increasingly shared in British social awareness, also the status of the single person should be regarded as a subjective situation deserving legal protection. See the previous *Ghaidan* v *Godin-Mendoza* case (2004) UKHL 30, [2004] 2 AC 557, available at the following address: https://publications.parliament.uk.

[81] According to English legal scholarship, this interpretation is the basis of the intellectual operation known as 'reading down', the foundation of which rests on an evolved meaning of the principle of non-contradiction, by virtue of which, in the interpretation of a rule, a meaning cannot be attributed to it that conflicts with constitutional and conventional values. As has been shown elsewhere, therefore, the hermeneutic test technique goes beyond the boundaries of the classical broad interpretation, posing as a form of constitutionally and conventionally oriented interpretation. On this point, please refer to S. Aceto di Capriglia, 'I profili etico-giuridici' n 1 above, fn 41, where reference is made to the contributions of foreign literature. More generally, with reference to interpretation techniques in Great Britain, please refer, among many, to D. Aviles, 'Arguing Against the Law. Non-literal interpretation in attic forensic oratory' *Dike*, 14, 19 (2011); E.T. Feteris, 'Strategic Manoeuvring with Linguistic Arguments in Legal Decisions: A Disputable Literal Reading of The Law' *International Journal of Law, Language & Discourse*, 106 (2012); B.S. Jackson, 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence' 13(4) *International Journal for the Semiotics of Law*, 433 (2000); E.A. Peters, 'Common Law Judging in a Statutory World: An Address' 43 *University of Pittsburgh Law Review*, 995 (1982); S.E. Fish, 'Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases' 4(4) *Critical Inquiry*, 625 (1978).

[82] See para 30 of the judgment at issue.

couples, regarding which only the further assumption of the consent of the woman giving birth is required. Regulatory intervention is based on recognition of the socio-cultural importance of surrogacy; this recognition is clear in the preparatory work, as can be inferred from the examination of the considerations contained in the accompanying report.[83]

From the combined provisions of court rulings and the regulatory work that have affected the legal scenario in Great Britain in recent years, it emerges that the approach of the UK to the theme of surrogacy deserves a particular mention, since it is undoubtedly a *unicum* in the European panorama.[84] Indeed, in the English legal framework, the use of heterologous fertilization (allowed in the vast majority of European countries), as well as access to surrogacy, with no distinction based on the status of the applicant, which can be constituted both by a couple (married, cohabiting or in a civil partnership) or by a single person is fully granted. No importance is given to the sexual orientation of the person who initiates the procreative practices in question. It follows, therefore, that the dogma of biological descent is superseded, which results in the creation of a hitherto unknown family model, with its foundation in the Convention, thus constituting what is currently one of the most evolved mechanisms for the protection of human rights.

Of course, this is not a perfect system, and critical points can be detected within it, such as, for instance, the lack of legal instruments to oblige the pregnant woman to give her consent to the establishment of the *status filiationis* with the client(s). As a result, the aspiring parent risks seeing his or her aspiration to realise a parenting project hopelessly flounder, with intuitable existential consequences. Nevertheless, such a *status quo* should not necessarily be ascribed to any fault of the legislator, as it is the result of a deliberate political and legislative decision by the British Parliament, seeking to find a solution to the conflict of interests (between the ambition of the clients to become parents and the desire of the parturient to retain the child) in the hands of a prudent balancing operated by

[83] In this document, found at www.legislation.gov.uk, we read: 'Surrogacy has an important role to play in society, helping to create much-wanted families where that might otherwise not be possible. It enables relatives and friends to provide an altruistic gift to people who aren't able to have a child themselves, and can help people to have their own genetically-related children. The UK Government recognizes the value of this in the 21st century, where family structures, attitudes and lifestyles are much more diverse than in the past. Reflecting this approach, the Government recognizes the need to remedy the incompatibility in a reasonable time and has supported a project by the Law Commission to review all surrogacy legislation across the UK, which started in May 2018'. Ultimately, the British legislator appears fully aware of the role that gestation plays for others in English society, also and above all in relation to the profound changes that have affected family structures in the 21st century.

[84] On the subject, A. Stuhmcke, 'Looking backwards, looking forwards: judicial and legislative trends in the regulation of surrogacy in the UK and Australia' 18(1) *Australian Journal of Family Law*, 13 (2004). For a comparison with German law, see M. Daly and K. Scheiwe, 'Individualization and Personal Obligations – Social Policy, Family Policy, and Law Reform in Germany and the UK' 24(2) *International Journal of Law, Policy and the Family*, 177 (2010).

family judges, called upon to resolve specific cases.[85]

3. The Varied North American Model

It must not be imagined that the incoherence of the solutions offered in relation to the issue of surrogacy is a feature unique to a continental legal landscape, as can clearly be seen from a study of the North American context. This overseas fragmentation can be ascribed to the absence of rules specifically dedicated to the institute of surrogacy at federal level; the result, as may easily be understood, is a group of different solutions that reflect the different sensibilities (not just legal) characterising individual States.[86]

Indeed, although a *Uniform Parentage Act,* introduced in an attempt to identify a minimum set-up of family law for the various states of the Federation, does exist,[87] the absence of any specific reference to the issue of reproductive techniques must also be remarked. This has required a special hermeneutic effort by scholars, proceeding from the interpretation of constitutional precepts regarding the protection of privacy[88] and the principle of freedom to procreate.

[85] For further details, see also C. Dalton, 'When Paradigms Collide. Protecting Battered Parents and Their Children in the Family Court System' 37(2) *Family Court Review*, 273 (1999).

[86] In fact, alongside states where there is an absolute and unconditional ban, there are others where access to gestation for others is reserved to married couples, and states where there is absolute freedom, with no distinction regarding the applicant's qualities and personal characteristics, including, therefore, single individuals. In detail, the laws in force in California, Connecticut, Delaware, Columbia, Maine, New Hampshire, Nevada, Rhode Island, Vermont, Washington, South Dakota, and Arkansas (the latter only after an important 2017 legal precedent) are called *surrogacy-friendly* as they are more conducive to allowing surrogacy. Then there are states where surrogate motherhood is also permissible but with limitations, namely Alaska, Colorado, Georgia, Hawaii, Massachusetts, Missouri, Mississippi, Oklahoma, Oregon, Wisconsin, and Virginia. In Alabama, Florida, Texas, Kentucky, Utah and West Virginia surrogacy is accessible only to married heterosexual couples. In Illinois, Maryland, North Dakota, Tennessee, and Idaho the eligibility of surrogacy is subjected to the condition that at least one of the clients has made a contribution at the genetic level, providing the male or female gamete. There are also states with no *ad hoc* regulation, such as Montana, Kansas, North Carolina, and New Mexico, where scrutiny regarding the admissibility of the practice is delegated to the courts, with the consequence that it is conducted on a case-by-case basis. As for Ohio and Pennsylvania, a *parental order* can be requested only after the birth of the child, while in other states it is also admitted earlier. Iowa, Montana and Wyoming have no legislation on the subject, nor is there any sizeable body of case law, so it is not possible to claim either the lawfulness or unlawfulness of the institute. Commercial surrogacy is prohibited in Nebraska, while altruistic surrogate motherhood is envisaged within certain limitations. Finally, surrogacy is totally banned in Arizona, Indiana, Louisiana, Michigan, and New York. For an analysis of the legislation in force in the individual states, see P.R. Brinsden, 'Gestational Surrogacy' 9(5) *Human Reproduction Update*, 483 (2003); A. Nakash, 'Surrogacy' 27(3) *Journal of Obstetrics and Gynaecology*, 246 (2007); R. Deonandan, S. Green and A. Van Benium, 'Ethical concerns for maternal surrogacy and reproductive tourism' 38(12) *Journal of Medical Ethics*, 742 (2012); L. Linzer Schwartz, 'Surrogacy Arrangements in the USA: What Relationships Do They Spawn?', in R. Cook and S.D. Sclater eds, *Surrogacy: International Perspectives* (Oxford: Hart Publishing, 2003), 161.

[87] E. Falletti, *La filiazione. Questioni sostanziali, processuali, internazionali nell'analisi della giurisprudenza* (Matelica: Halley Editrice, 2007) 94-97.

[88] In the interpretation provided by the American Supreme Court, the right to privacy is

Starting from this, it is easy to understand the *favor* accorded to diverse reproduction techniques made possible by the progress of medical science, appearing as a fundamental instrument for the affirmation and realisation of human personality. Thanks to this *favor* we can observe in the US the existence of family models that are very different from the usual ones, based more on contract than on status. Since this is the *humus* in which the North American legal thought developed, the greater application of the *parental order* compared with the homologous institute operating in the British system comes as no surprise. This can be inferred from the non-existence of a fixed term of expiry for the purpose of issuing the aforementioned order, unlike the situation in Great Britain, where, as we have seen, application to the court must be presented within six months of the birth. Even more significant is the absence of any reference to motives of solidarity, since in the states that allow it, surrogacy may be the subject of a real contract; in other words, gestation for another is also allowed when it is supported by eminently lucrative purposes. This means that with it comes the opportunity to apply the legal regime of contract law in full (the so-called 'breach of contract'),[89] on the basis of which, in the event of default by the pregnant woman, the client/parents are entitled to avail themselves of the usual means of protection, including compensation. A further peculiarity of some states lies in the admissibility of a *pre-birth order,* ie a judicial order[90] constituting the *status filiationis,* which can also be recognised from the third month of gestation, therefore before birth. In practice, the Court orders the appropriate health facility to register the clients as parents directly on the birth certificate, so that the parental relationship is immediately established, and the mother maintains no legal and relevant relationship with the baby, even on a temporary basis. Since surrogacy has a clear commercial and patrimonial aspect in some North-American

understood in a sense that immediately brings to mind the reading of the right to peace of family life affirmed by the ECHR.

[89] See, on the subject D.E. Lascarides, 'A Plea for the Enforceability of Gestational Surrogacy Contracts' 25 *Hofstra Law Review,* 1221 (1997), S. O'Brien, 'Commercial Conceptions: A Breeding Ground for Surrogacy' 65 *North Carolina Law Review*, 127 (1986); M. Friedlander Brinig, 'A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement' 81(8) *Virginia Law Review*, 2377 (1985); D.S. Mazer, 'Born Breach: The Challenge of Remedies in Surrogacy Contracts' 28 *Yale Journal of Law & Feminism*, 211 (2016); F. Berys, 'Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour' 42 *California Western Law Review,* 321 (2006); J.L. Dolgin, 'Status and Contract in Surrogacy: An Illumination of the Surrogacy Debate' 38 *Buffalo Law Review*, 515 (1990).

[90] Also called *declaration of parentage,* discussed by S.H. Synder and M.P. Byrn, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' 39(3) *Family Law Quarterly*, 633 (2005); D.S. Hinson, 'State-by-State Surrogacy Law Actual Practices' 34 *Family Advocate*, 32 (2011-2012); T.L. Palmer, 'The Winding Road to the Two-Dad Family: Issues Arising in Interstate Surrogacy for Gay Couples' 8(5) *Rutgers Journal of Law & Public Policy*, 895 (2011); A. James, 'Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know until They Do' 10 *Indiana Health Law Review*, 175 (2013); J.J. Richey, 'A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act' 30 *Southern Illinois University Law Journal*, 169 (2005).

States, it is evident that it has a different relationship with contract law than in Great Britain, where it is interpreted as a natural obligation.

In terms of the practical consequences of co-application, it is evident that the US scenario is characterised by greater protection for the client, who has a legal position comparable with real credit rights; it cannot be denied, however, that, in the process, the North American system leads to a devaluation of the role ascribed to the pregnant woman who, in assuming the role of obliged entity, is more exposed to the risk of real commoditisation of her body.

In more general terms, legal interpreters have address one critical issue, namely whether the solutions proposed in the US involve the risk of producing a deflation of the existential and human value ascribed to the experience of pregnancy, which evidently raises questions about the ethical – but also the legal – regulation of the matter.[91]

III. The Italian Experience. Some Considerations on a Possible Surrogacy 'Agreement'

In the light of comparative developments, we must examine the wording of Art 12 of para 6 of Italian law 40/2004 that simply 'bans' surrogacy. The analysis of the debate that has developed in Italy in recent years has shown that legal practitioners are perfectly aware of the difficulties inherent in handling concepts that form the subject of general clauses,[92] which help to achieve the goal of adapting the interpretation of legal precepts to the existing socio-cultural reality at a precise moment in history, as well as to the specified inclinations of the child, so as to ensure the realisation of its concrete interest in the light of its specific and personal context.[93] Terms such as 'public order', the 'tranquillity of family life' and 'the best interests of the child' should be thought of as means for rendering rules and legally relevant principles a concrete reality and avoiding the danger of falling into judicial arbitrariness, with decisions that cannot be based

[91] Doubts that American scholarship has not failed to raise, as demonstrated, for example, by the contribution of R. Ber, 'Ethical Issues in Gestational Surrogacy' 21(2) *Theoretical Medicine and Bioethics*, 153 (2000).

[92] G. Ferrando, 'Diritti e interesse del minore tra principi e clausole generali' *Politica del diritto*, 167 (1998).

[93] In this regard, R. De Meo, 'La tutela del minore e del suo interesse nella cultura giuridica italiana ed europea' *Diritto di famiglia e delle persone*, 461 (2012). Focusing in particular on the evolution of the protection of minors after the demise of the patriarchal view of the family, see E. Moscati, 'Il minore nel diritto privato, da soggetto da proteggere a persona da valorizzare (contributo allo studio dell'interesse del minore)' *Diritto di famiglia e delle persone*, 1141 (2014). See also V. Scalisi, 'Il superiore interesse del minore ovvero il fatto come diritto' *Rivista di diritto civile*, 1463 (2016); P. Stanzione and B. Troisi, *Principi generali del Diritto civile* (Torino: Giappichelli, 2011), 64; S. Serravalle, *Maternità surrogata, assenza di derivazione biologica e interesse del minore* (Napoli: Edizioni Scientifiche Italiane, 2018) 97.

only on the evaluation of purely moral and social aspects.[94] This, as happened in the past, when the Supreme Court strongly advocated for[95] a notion of public order decidedly oriented towards safeguarding the autochthonous cultural identity and the internal coherence of the system.

Nonetheless, it is evident that, even after the judgment of the Joint Divisions,[96] the main issue remains unsolved. This concerns the legal framework to be applied to the consequences of the ascertained use of gestation practices for others, regarding which scholarship has not failed to underline the lack of effectiveness that characterises this aspect. In other words, the law does not combine the provision of effective remedies to the formal position of the ban on the use of surrogate motherhood techniques.[97] It is not surprising, therefore, that the attention of hermeneutists has recently been shifting from the level of admissibility of the practice to the consequences that the use of procreative techniques is likely to bring about in the juridical sphere of the new-born child. Other scholars are less tolerant and more critical of the solutions proposed by the Supreme Court. The Court has, of course, recognised the total illegality of surrogacy agreements,

[94] G. Perlingieri and G. Zarra, *Ordine pubblico* n 4 above, 49. It is proposed, ultimately, to move beyond the interpretation followed in the past even by the Supreme Court, which held that it was reductive to interpret 'public order' as being limited to constitutionally protected values. The most delicate question relating to such a vision, clearly highlighted by the authors, consists in the lack of solid and univocal references that can allow the interpreter of the law to identify with certainty the ethical-juridical canons of reference, which opens the way to possible arbitrary solutions, undermining legal certainty. The solution may be found in the balance between competing rules and principles, taking into account the specificity of the situation, the limitations of sovereignty arising under general international law, and European Union law, international obligations and conventions, the identification of insurmountable principles in our legal system, taking into account the so-called margin of appreciation that each State retains in the implementation of fundamental rights recognised by the ECHR (esp 57). An interesting distinction between the internal and international public order is also observed in F. Mosconi and C. Campiglio, *Diritto internazionale privato e processuale, I, Parte generale e limiti* (Torino: Giappichelli, 2013), 257, specifying that the two reference parameters are not antithetical concepts.

[95] This reading is found in numerous decisions of the Supreme Court, including Corte di Cassazione 12 March 1984 no 1680, *Giustizia civile*, I, 1419 (1989); Corte di Cassazione 14 April 1980 no 2414, *Foro italiano*, I, 1303 (1980); Corte di Cassazione 5 December 1969 no 3881, *Foro italiano*, I, 1977 (1970).

[96] The reference is to the fundamental judgment rendered by the Supreme Court: Corte di Cassazione 8 August 2019 no 12193, available at www.neldiritto.it.

[97] The position adopted by L. D'Avack, 'La maternità surrogata: un divieto "inefficace" ' *Diritto di famiglia e delle persone*, I, 139 (2017), is emblematic in regard. In addition to the lack of suitable instruments of protection in the event of the prohibition, also suggested regulatory solutions that would strengthen compliance with the prohibition itself: 'By way of example regarding filiation, it could have been explicitly forbidden to transcribe in Italy a foreign certification attributing paternity or maternity to the commissioning and non-biological parents following surrogacy; provide for the forfeiture of parental authority, pursuant to Art 569 of the criminal code; recognise criminal responsibility pursuant to arts 495 (false declaration in civil registry documents) and 567, para 2 (change of status); normally specify that surrogacy, even if carried out abroad by Italian citizens and not treated as unlawful in that country, is contrary to public order. Or again, consider the possibility of invoking Art 9 of the Italian Criminal Code, according to which the citizen who commits a crime abroad can be punished at the request of the Minister of Justice'.

whose prohibition has its roots in fundamental principles of public order, such as the right to the dignity of the pregnant woman,[98] but also the right of the child not to be the subject of trafficking.[99] Although a 'promotional' vision of the concept of public order open to developments coming from external legal systems as opposed to the 'traditional-defensive' one (considering the principle of public order to be deeply rooted in domestic law) is gaining increasing acceptance both in scholarship and in the courts, the existence of a core of inescapable standards including, at present, those that prohibit child bearing 'for others' must be acknowledged. However, suggesting recourse to the institution of adoption in particular cases as a remedy to ensure the *status filiationis* of the child looks like 'letting what was taken out through the front door back through the window'.[100] According to this doctrinal position, from which, in the abstract, we are not too far removed, a surrogacy agreement that is clearly and categorically forbidden for the above reasons must be considered absolutely null and void. Therefore any attempt to save its effects at all costs involves prejudice to the system in the light of the *quod nullum est, nullum producit effectum* principle.[101] The suggested recourse to adoption in particular cases would appear to force the issue because it lacks one of its ontological prerequisites, namely the state of abandonment of the child, which does not exist in this case; in practice, judges would thus perform an innovating function outside their role. In any case, while wishing to accept this interpretation, at least three fundamental points must be reiterated: the first is the already discussed ban on assisted reproduction, which, *rebus sic stantibus,* in Italy is to be considered unavoidable. The second is the need for the court to evaluate the question submitted to it 'case by case'. The third principle is the assessment of the suitability of adoption in the specific case.[102] Once again, there is an inescapable need to reconcile (according to reasonableness) the interests at

[98] This principle also reflects the Kantian dictum that the human being must always be considered as an 'end' and never a 'means' (cf I. Kant, *Fondazione della metafisica dei costumi,* trans by P. Chiodi (Torino: Laterza, 1970) 88); G. Resta, 'La dignità', S. Rodotà and A. Zatti eds, *Trattato di biodiritto* (Milano: Giuffrè, 2010), 167.

[99] See the Universal Declaration of the Rights of the Child of 20 November 1959, principles VI and IX, 'the child needs love and understanding for the harmonious development of his personality. He must, as far as possible, grow up under the care and responsibility of his parents and, in any case, in an atmosphere of affection and material and moral security. Except in exceptional circumstances, the young child must not be separated from his mother', and 'the child must be protected against all forms of negligence, cruelty or exploitation. The child shall not be subjected to any form of trafficking'. See also Art 21 of the Oviedo Convention of 1997, and Art 6 of the 2008 Istanbul Declaration.

[100] A.R. Vitale, 'La maternità surrogata nella sentenza delle Sezioni Unite Civili n. 12193/2019', available at centrostudilavatino.it.

[101] See ibid 'it would be mere *flatus vocis* to declare the surrogacy agreement (civilly and criminally) null and void and contrary to the dignity of the person if it were not also prevented from having effects, just as it would be vain to prevent slavery by declaring it contrary to human dignity if the profit gained from it were not also affected or if, even worse, the one who is enslaved were not freed'.

[102] See G. Perlingieri, 'Ordine pubblico e identità culturale' n 4 above, 340-341.

stake. The ECHR,[103] on the one hand, states that the position of a rigid and absolute prohibition on recognising a parent-child relationship between the child and the intended mother is incompatible with the pre-eminent and concrete interest of the former; on the other hand it highlights that this does not imply, per se, full recognition of a birth certificate drawn up abroad, since it falls within the discretion of the legislator to identify the legal means through which to translate the importance attributed to the relationship of filiation, also making use, for example, of adoption. In conclusion, we can constructively criticise the Joint Divisions for not having examined the intrinsic reasonableness of the solution found, which would imply a further hermeneutic verification, to assess the suitability of adoption in particular cases as the 'right remedy' under the circumstance.[104] The Gordian knot in this case concerns the decoding of the concept of the 'impossibility of pre-adoptive fostering', which, as said, constitutes the ontological presupposition for adoption in particular cases, which must include all the situations in which, despite the absence of a state of abandonment, the relationship established by the child with its carers is highlighted, regardless of the biological link and the existence of elements of extraneousness, thus assuming the role of 'social parents'.[105]

It is therefore clear, and the Joint Divisions of the Italian Supreme Court make no secret[106] about it, that, in the light of the multifaceted reproductive techniques

[103] See also the interesting considerations in G. Recinto, 'Il superiore interesse del minore tra prospettive interni "adultocentriche" e scelte apparentemente "minorecentriche" della Corte europea dei diritti dell'uomo' *Foro italiano*, I, 3669 (2017).

[104] On the delicate relationship between *favor veritatis* and *favor filiationis*, see G. Recinto, 'La decisione delle Sezioni unite in materia di c.d. maternità surrogata: non tutto può e deve essere "filiazione" ' *Diritto delle successioni e della famiglia*, 348-354 (2019).

[105] This interpretation of the concept of the impossibility of pre-adoptive foster care has made its way into the ordinary case law, as testified, *among many*, by the Tribunale per i minorenni di Roma 23 December 2015, *Rassegna di diritto civile*, 679 (2015), with a commentary by G. Salvi, 'Omogenitorialità e adozione (in casi particolari): segnali di apertura dei giudici minorili'; in the same terms the Tribunale per i minorenni di Firenze 8 March 2017, *Foro italiano*, I, 1034 (2017) and Corte d'Appello di Trento 23 February 2017, available at www.articolo29.it, stating that a family community is to be understood as an 'effective 'continuum' of values and affections instrumental to the development of the personality of its members, to be considered both in their uniqueness as individuals understood as a whole, and in the uniqueness of their being in a relationship', regardless of the existence of a biological link. For references in scholarship, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 132 and Id, 'Interferenze tra unione civile e matrimonio. Pluralismo familiare e unitarietà dei valori normativi' *Rassegna di diritto civile*, 101-113 (2018); and C. Ghionni, 'Figlio di due madri nato all'estero e compatibilità con l'ordinamento interno: l'interesse della persona minore d'età nella famiglia omogenitoriale' *Rassegna di diritto civile*, 316 (2018).

[106] Also attracting criticism from scholars, who did not hesitate to define the attitude of the Supreme Court as '*naïve*', insofar as it considers balancing as an activity reserved to the legislator; in this sense, they caution that, 'it is balancing activity, not foreseen by the legislator but performed by the interpreter of the law at the moment of application in regard to deciding whether and how to combine two distinct rules – such as the ban on surrogate motherhood pursuant to Art 12, para 6, law 40 of 2004 and adoption in special cases pursuant to Art 44, para 2, lett. *d*), legge 184 of 1983 - and to understand the scope of a standard and to what extent it is binding and operable, in

made possible by technological developments, it is no longer possible to adhere to the precedents approach proper to case law;[107] the need for a political synthesis is increasingly pressing, which obviously can only lead to a legislative intervention requested by several parties that can no longer be deferred.[108] However, given the delicate ethical, philosophical, and religious implications that regulatory intervention on this matter would bring with it, it is not difficult to predict that the legislative *vacuum* will persist, which opens a further front, namely a ruling on constitutionality. This prospect became concrete following the issue of Interlocutory Order no 8325 of 29 April 2020 by the first Civil Division of the Court of Cassation, which, not recognising the manifest groundlessness of the question of constitutionality, referred the relative judgment (concerning a question very similar to those already examined) to the Italian Constitutional Court. This is also in the light of the opinion expressed by the Grand Chamber of the European Court of Human Rights published on April 10, 2019.[109] The referral relates to the prohibition

> 'pursuant to Art 12(6) of Law 40 of 2004, Art 18 of Presidential Decree no 396/2000 and Art 64(1) lett *g*, of law no 218/95 insofar as these do not allow the recognition of a foreign court order regarding the inclusion of a child procreated through surrogate motherhood of the so-called non-

particular if in competition with other standards (such as, for example, Art 8 ECHR), and to analyse whether a remedy, such as adoption pursuant to Art 44, para 2, lett. *d*), is able to satisfy the interests and regulatory values involved', see G. Perlingieri, 'Ordine pubblico e identità culturale' n 4 above, 343. See also, Id, 'Ragionevolezza e bilanciamento nell'interpretazione recente della Corte costituzionale', in P. Perlingieri and S. Giova eds, *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016* (Napoli: Edizioni Scientifiche Italiane, 2018), 283.

[107] B. Pezzini, 'Riconoscere responsabilità e valore femminile: il "principio del nome della madre" nella gravidanza per altri', in S. Niccolai and E. Olivito eds, *Maternità Filiazione Genitorialità* n 82 above, 99.

[108] Waiting for which, as observed by A.M. Lecis Cocco Ortu, 'L'obbligo di riconoscimento della genitorialità intenzionale tra diritto interno e CEDU: Riflessioni a partire dal primo parere consultivo della Corte Edu su GPA e trascrizioni' *Genius*, 15 (2019).

[109] The French Court of Cassation formulated the questions it intended to submit to the Strasbourg Court with its request for an advisory opinion in the following terms: a) whether a State party to the Convention, refusing to transcribe a birth certificate of a child born abroad through surrogate parenting, insofar as such an act designates the intended mother as the legal mother, while allowing the transcription of a birth certificate designating the intended father as the legal biological father, exceeds the margin of appreciation available to it under Art 8 of the European Convention on Human Rights and whether a distinction must be made according to whether the child was conceived with the intended mother's gametes or not; b) in the event of a positive answer to one of the above questions, whether the possibility of the intended mother to adopt her spouse's (the biological father's) child enables compliance with the provisions of Art 8 of the Convention, constituting an alternative way of establishing a filial relationship. In its consultative opinion, the ECHR responded affirmatively to the first question and, in response to the second, stated that adoption by the intended mother can be considered acceptable as an alternative model for the establishment of the legal parentage relationship, provided that the procedures for adoption laid down in domestic law guarantee the effectiveness and speed of recognition and that it is in the best interests of the child.

biological intended parent in the civil registry, for reasons of public order'.

Obviously, a totally new scenario is expected, given that the Italian Constitutional Court has so far ruled only in relation to issues underlying the social formation of homosexual couples, or to cases in which one of the marriage partners decides to change sex,[110] without ever directly addressing the issue of the consequences that sex or sexual orientation may produce in the relationship with children.

More generally, the non-recognition or non-retention of the status of a son or daughter in relation to an individual born through surrogate motherhood seems to clash with a principle deriving from the systematic interpretation of the rules relating to parenthood: the principle that children may not suffer injury to their rights due to the conduct of third parties, even if such determinations are subject to the greatest disapproval by the legal system, to the point of being considered criminal offences. Even more significant are the observations made by the Court on the latitude of application of the penalties laid down in the event of infringement of the prohibitions by parents, given that, according to the Court, while, on the one hand it is certainly legitimate to punish parents for the conduct in question, conversely, extending this penalty

> 'beyond this circle, involving individuals totally without responsibility – such as the children of incestuous parents, mere bearers of the consequences of their parents' behaviour (...) – would not be justifiable if not on the basis of a 'totalitarian' conception of the family'.[111]

In Italy, this has become a very timely issue, given the new legislation produced over the years in the fields of adoption and civil unions, giving rise to the need for the hermeneutist to regulate a true 'intended parentage', where *favor filiationis* assumes paramount value over *favor veritatis*. However, these essential values must be balanced with the complications and problems that can arise from the use of special techniques such as surrogacy.[112] The nature of the procedure requires national legislators to protect the dignity of the pregnant

[110] In this regard, two judgments of the Italian Constitutional Court are of note: first of all, Corte costituzionale 15 April 2010 no 138, *Giurisprudenza Costituzionale*, 2715 (2010), referred to in A. Pugiotto, 'Una lettura non reticente della sent. n. 138/2010: il monopolio eterosessuale del matrimonio', available at forumcostituzionale.it; M. D'Amico, 'Una decisione ambigua' *Notizie di Politeia*, 85 (2010), and R. Romboli, 'Il diritto "consentito" al matrimonio ed il diritto "garantito" alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice "troppo" e "troppo poco"' *Rivista AIC* (2010); secondly, see Corte costituzionale 11 June 2014 no 170, *Giurisprudenza Costituzionale*, 2694 (2014), on which see considerations by F. Biondi, 'La sentenza additiva di principio sul c.d. divorzio "imposto": un caso di accertamento, ma non di tutela, della violazione di un diritto', available at www.forumcostituzionale.it, 24 June 2014.

[111] On this point see F. Biondi, 'Quale modello costituzionale', in F. Giuffré and I. Nicotra eds, *La famiglia davanti ai suoi giudici* (Napoli: Editoriale Scientifica, 2014), 3.

[112] See G. Perlingieri, 'Ragionevolezza e bilanciamento' n 106 above, 716, with particular regard to the issues examined, see Id, 'Interferenze tra unione civile e matrimonio' n 105 above, 114.

woman in order to avoid the commoditisation of the human body, both that of the child and the woman giving birth. The most critical trait is clear if one considers that surrogacy does not entail the use of a 'separable' part of the body, as happens in the case of the donation of male or female gametes for the purpose of heterologous fertilization. On the contrary, it implies assuming the obligation of utilising the whole of someone's body for a fixed time period, in line with the wishes of the clients. This would cause an irremediable hiatus between the body and self-determination, which is not observed in natural procreation.[113] In this respect, the differences between the legal systems, with their different axiological orientations, are still broad, deep, often contradictory, and antithetical. Hence, it is extremely necessary for European and international institutions to attempt to align the various continental regulations.[114] Despite awareness of their different positions and cultural traditions, the countries of Europe (and beyond) must find common legal ground with respect to their initial opposing positions. In order to eradicate the regrettable and discriminatory phenomena of reproductive tourism (as they are only 'affordable' to the wealthy), it is of no advantage to prohibit the practice *tout court*, at least in the cases of sterile couples or those suffering from absolute or irreversible infertility (which may also include, in a particularly broad interpretation, male homosexual couples). However, as already happens in some countries, this practice should only be allowed without financial consideration and for purposes of solidarity.[115] The basic principles that should underpin the entire legislation are those fundamental to the Member States of the Union: first of all, respect for human dignity, the protection of personal identity, and the interest of the child.[116] What really matters is that the right to parenthood should be guaranteed not from an 'adult-centred' perspective, as a selfish act, but rather from a 'child-centred' one, placing the child at the core of the legal interest.[117]

[113] For these considerations, see A. Nicolussi, 'Diritto di famiglia e nuove letture della Costituzione', in F. D'Agostino ed, Valori costituzionali. Per i sessanta anni della Costituzione Italiana. Atti del Convegno nazionale dell'U.G.C.I. Roma, 5-7 dicembre 2008 (Milano: Giuffrè, 2010).

[114] Solution also suggested by L. Poli, 'Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale' *BioLaw Journal – Rivista di Biodiritto*, 28 (2015). An attempt at harmonisation at European Community level is hoped for by C. Sànchez Hernàndez, 'La reproducciòn médica asistida en la jurisprudencia of the European Tribunal de Derechos Humanos: especial consideraciòn desde la perspectiva de la seguridad juridica' *Revista de Derecho Privado*, 39-92 (2018).

[115] In some States, the use of surrogacy is allowed, provided that gestation is carried out by a woman within a certain degree of kinship with the clients, a widespread practice. See the recent C. Pizzimenti, 'Nebraska, the grandmother who acted as surrogate mother for her son and husband' *Vanity Fair* (3 April 2019).

[116] As P. Perlingieri teaches, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), passim.

[117] This is what State Attorney G. Palmieri emphasised in the hearing held on 18 June 2019 before the Constitutional Court, called to decide on the question raised by the Bolzano Court. In particular, he pointed out that the right to parenthood is not absolute; on the contrary, it can be balanced with other fundamental rights. Parents do not (only) have rights but duties towards their

The *quaestio iuris* that the States of Europe (and beyond) should really be asking themselves concerns first of all the legal nature of the agreement in place between the clients and the pregnant woman.[118] Since it is no longer possible to ban the procedure outright, the dilemma can no longer be avoided by hiding the issue behind criminal and virtual nullity. Given the need for regulation, the surrogacy agreement must be classified within the vast field of civil law and specifically that of contracts. The regulatory choice to be made in the coming years will be whether to qualify such contracts as gentlemen's agreements or, conversely, as legal contracts in the strict sense. In the former case, the parties to the parental agreement will concur that the consequent relationship will have a social, but not a legal, nature. This case would be particularly advantageous for the pregnant woman, because the gentlemen's agreement, characterised by an express desire not to legalise the relationship, involves extra-judicial penalties. Conversely, this agreement could be dangerous for the clients, who would run the risk of default. In any case, this would be a rather problematic interpretation of the matter, since in the continental legal tradition, although a gentlemen's agreement is not enforceable, it is linked to the pecuniary interests of the creditor and to an equally patrimonial content of the service.[119] This does not appear to be the compulsory burden of the pregnant woman, and certainly the patrimonial interest cannot be considered a credit interest, which, by observing the negotiation in the light of specific cause, would manifest itself as corresponding to the realisation of the parental project and the creation of a family. If this main interest is worthy of protection, reasons of substantial justice would suggest placing surrogacy arrangements within the field of contracts in the strict sense.

Critical issues would arise, however, when the legal definition of this contract is questioned: provided that the pregnant woman is only entitled, according to the main legal thinking, to reimbursement for the costs incurred, the category

children, and they have the obligation (legal as well as moral) to refrain from irresponsible behaviour prejudicial to them. For these reasons, not everything that is allowed by science and technology can be authorised by law.

[118] On this topic, see E. Crivelli, 'Gli accordi di maternità surrogata tra legalità ed affettività', in A. Apostoli et al, *Scritti in ricordo di Paolo Cavaleri* (Napoli: Edizioni Scientifiche Italiane, 2016), 213.

[119] For further information on these considerations, please refer to G. Cansacchi, 'Gentlemen's Agreement' *Novissimo digesto italiano* (Torino: UTET, 1968), VII, 796; R. Martini, 'Gentlemen's Agreement' *Digesto discipline privatistiche, sezione civile* (Torino: UTET, 1992), VIII, 639; S. Sica, *Gentlemen' Agreements e intento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1995), passim; L. Barchiesi, 'Gentlemen's Agreement', in G. Monateri et al, *Il nuovo contratto* (Bologna: Zanichelli, 2007), 461; N. Sapone, *La responsabilità precontrattuale* (Milano: Giuffrè, 2008), 561; G. Sicchiero, 'La risoluzione per inadempimento. Artt. 1453-1459', in P. Schlesinger ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2007), 399; B. Gardella Tedeschi, 'Gentlemen's Agreement' *Rivista di diritto civile*, II, 731 (1990); G. Alpa, *Contratto e common law* (Padova: CEDAM, 1987), 48; F. Galgano, 'La categoria del contratto alle soglie del terzo millennio' *Contratto e impresa*, 919 (2000). In German law, see M. Huber, 'Zur Versicherung von Elementarrisiken: das englische Gentlemen's Agreement und seine Entwicklungsmöglichkeiten' *Vierteljahrshefte zur Wirtschaftsforschung*, 44 (2008).

of non-profit-making contracts, based on an altruistic and supportive principle, should be chosen. It would certainly be a very peculiar contract and an exception in the contractual field, since it is impossible to speak about a mutual interest, even in abstract terms. From a technical-legal point of view, then, by reversing the usual perspective, it is not impossible to think of a *surrogacy* contract structured in the same way as a contract with obligations only on the principal, pursuant to Art 1333 of the Italian Civil Code. In fact, a phenomenological structure of this kind could offer the pregnant mother greater protection, in that she herself willingly decides autonomously to commit herself without receiving a proposal in this sense from the clients. A pregnant woman enrolled on official ministerial lists could be put in contact, through a third-party organisation, with subjects aspiring to parenthood. She would decide the details of the start of gestation according to a contract which, by virtue of its own rules, would be terminated if the beneficiary did not express a contrary intention.[120] The latter, on the other hand, can always envisage a so-called preventive refusal within the established terms, which is consistent with the fact that this is a contract that is meant to be concluded '*intuitu personae*'. Even without wishing to indulge in such a hypothesis, there are certainly numerous ways in which this instrument could be acceptable in the Italian and other continental legal systems, and such a decision should be delegated to national Parliaments or supranational legislative assemblies. A further question, regarding the structure and legal nature of the contract in question, concerns the legal remedies that can be addressed. If it is considered a legal transaction, we should wonder whether the general discipline of Art 1218 of the Italian Civil Code might be applied, or if a derogation from a legislative source should prevail. Indeed, the pregnant woman undertakes to carry out the pregnancy on behalf of the clients (with an obligation that must be considered pertinent to means and not results, since the opposite situation would excessively aggravate the pregnant woman's legal position). It goes without saying that, if the service becomes impossible to carry out due to some non-attributable cause (miscarriage, unpredictable sterility), the provisions of Art 1256(1), of the Civil Code should apply. In the event of an only temporary impossibility (for various reasons, such as when a pregnant woman has had a pregnancy of her

[120] For further information on the structure for completing the contract with obligations borne by the proposer alone, strongly derogating from the traditional proposal-acceptance scheme, please refer to G. Benedetti, 'La categoria generale del contratto' *Rivista di diritto civile*, 652 (1991); E. Damiani, *Il contratto con obbligazioni a carico del solo proponente* (Milano: Giuffrè, 2000), passim; A. Rosboch, 'Conclusioni del contratto' *Rivista di diritto civile*, 910 (2000); A. Palazzo, 'Profili di invalidità del contratto unilaterale' *Rivista di diritto civile*, 587 (2002); R. Rolli, 'Antiche e nuove questioni sul silenzio come tacita manifestazione di volontà' *Contratto e impresa*, 257 (2000); G. Petrosini, 'Il contratto con obbligazioni a carico del solo proponente' *Rivista del cancelliere,* 295 (1973); A. Diurni, 'Il contratto con obbligazioni a carico del solo proponente: la tutela dell'oblato' *Rivista di diritto civile*, 681 (1998); A. Simionato, 'La fideiussione a titolo gratuito e i contratti con obbligazioni a carico del solo proponente (art. 1333 c.c.)' *Nuova giurisprudenza civile commentata*, 503 (1999).

own), para 2 of the same article may apply. Conversely, if a pregnant woman voluntarily interrupts the pregnancy, having changed her mind or decides not to hand over the child, it is not unreasonable that the latter should compensate, at least, the non-pecuniary damage suffered by the clients, as well as subjective, psychic and moral damages. On the other hand, in spite of the postulates found in English scholarship, the path of enrichment without just cause (Art 2041 of the Italian Civil code) seems untenable. Not only because it is applied exclusively on a subsidiary and residual basis[121] but because it is more correctly suited to patrimonial benefits and movements related to assets subject to economic evaluation, and this does not extend to an unborn child. The same instrument could at most be applicable if one chooses to consider the surrogacy agreement a natural obligation pursuant to Art 2034 of the Italian Civil Code. Lastly, it must be specified that, with specific regard to these types of contracts, compulsory execution or compensation in specific form will never be admissible, since this is a strictly voluntary, spontaneous and personal service. Even less likely is the provision of an accessory 'guarantee' for any 'defects' in the baby, which the clients will be required to accept in their family. In fact, the constitutive trait of the family bond is that the individual is recognised and accepted even if fragile or different from expectations. The new-born child cannot be considered a 'useful result', and therefore 'good'.[122] The contracting parties, the 'creditors' of the contractual service, could only seek compensation. Alternatively, the legislator could expressly fix a special allowance, quantified as a flat-rate payment or determined on an equitable basis by the court.

Comparative study reveals that the phenomenon is variously attested in the Western legal tradition. The range of proposed solutions counterbalances the rigid Italian situation, centred on para 6 of Art 12 of legge 19 February 2004 no 40 concerning assisted procreation, which simply bans and punishes the practice. However, this does not obviate the series of legal issues currently on the table before Italy's own judiciary, in particular the recognition of children born abroad following a surrogate pregnancy.[123] This is an extremely sensitive and controversial issue, and judges and legislators need a 'child-centred' perspective. The path to parenthood, albeit legitimately pursued by adults, must not, however, end in degrading techniques involving the manipulation of new-born babies, who would thus no longer be the subjects but the objects of a right exercised by adults.[124]

[121] As expressly stated in Art 2042 Civil Code.

[122] On this point cf U. Salanitro, 'Il divieto di fecondazione eterologa alla luce della Convenzione Europea dei Diritti dell'Uomo: l'intervento della Corte di Strasburgo' *Famiglia e diritto*, 988 (2010).

[123] The latest interesting ruling on the subject by the Joint Divisions is Judgment no 12193 of 2019 with an interesting first interpretation offered by G. Ferrando, 'Maternità per sostituzione all'estero: le Sezioni Unite dichiarano inammissibile la trascrizione dell'atto di nascita. Un primo commento' *Famiglia e Diritto*, 677 (2019) and G. Perlingieri, 'Ordine pubblico' n 4 above, 337.

[124] For C. Ciraolo, 'Certezza e stabilità delle relazioni familiari nella procreazione medicalmente assistita' *Ordine internazionale e diritti umani*, 822 (2016).

Birth must take place in the context of the exercise of the freedom to give life, and not that of a supposed absolute and irreducible right to parenthood, aimed at furthering the interests of mature individuals.[125] It is certainly desirable to endow the spirit of human solidarity with a range of possible solutions,[126] but the focus should shift from the right of parents to have their role recognised, to that of children to grow up supported and assisted by a personal and direct relationship with both the parties identified as parents (Art 24 Charter of Fundamental Rights of the European Union).[127]

[125] See also F.D. Busnelli, 'Il diritto della famiglia di fronte al problema della difficile integrazione delle fonti' *Rivista di diritto civile*, 1467 (2016).

[126] On this, see also C.M. Romeo Casabona, 'Las multiplas caras de la maternidad subrogada: ¿ aceptamos el chaos jurídico actual o buscamos una Solución?' *Folia Humanistica, Revista de Salud, ciencias sociales y Humanidades*, 5 (2018), showing how, in certain cases, surrogacy may also be a harbinger of positive values, such as solidarity and altruism. In order to support this thesis, a similarity is drawn between the donation of bodily organs and the 'donation' of motherhood. Opposing this view, see V. Bellver Capella, 'Tomarse en serio la maternidad subrogata altruista' *Cuadernos de Bioética*, 229 (2017), holding the opinion that such advanced practices may result in opening up to new and more complex problems. An opposite view is found in A. Aparisi Miralles, 'Maternida d subrogada y dignidad de la mujer' *Cuadernos de bioética*, 163 (2017).

[127] See L. Rossi Carleo, 'Maternità surrogata e status del nato' *Familia*, 967 (2002).