A Critical View on the Italian Ban of Surrogacy: Constitutional Limits and Altruistic Values

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Abstract

Despite the position of the Joint Divisions of the Italian Court of Cassation, which appears to hold that altruistic surrogacy is prohibited, a different – narrow – interpretation of the Italian ban on surrogacy is still possible. Altruistic surrogacy does not fall within the scope of the ban, according to the reasoning of the Italian constitutional judges in Judgment 9 April 2014 no 162, which declared it unconstitutional to forbid heterologous fertilization.

Doubts arise, first, from the broad interpretation of the right to physical and mental health, which the Constitutional Court attributed as a whole to couples and, second, from the inclusion of the right to reproductive freedom as part of the right to self-determination. As a fundamental right, its exercise may be limited only if there is a need to protect rights of the same level, such as to safeguard the dignity and health of the surrogate mother or the well-being of the child.

I. Introduction

In surrogate maternity a woman, who is not a member of a couple (whether or not she is also the donor of the oocyte), makes her uterus available to carry a pregnancy to term, agreeing to hand over the resulting child to the commissioning couple.

There are two types of surrogate maternity: *traditional surrogacy*, in which the fertilized ovum belongs to the surrogate mother, and *gestational surrogacy*, in which the surrogate mother, who carries the pregnancy to term, is implanted with an embryo, generated through in vitro fertilization, using samples collected from the requesting parents or from donors.[1]

In most cases, compensation is given to the surrogate mother for her time and energy, as well as for the sacrifices she makes and the many physical and emotional challenges she faces during the surrogacy process. It is, therefore, not surprising that surrogacy raises serious issues of commodification by allowing

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[1] In this case, some authors have highlighted that the legal system must make a tragic choice between the truth of childbirth and the genetic truth: S. Patti, 'Verità e stato giuridico della persona' *Rivista di diritto civile,* I, 242 (1988); A. Cordiano, 'Alcune riflessioni a margine di un caso di surrogacy colposa. Il concetto di genitorialità sociale al banco di prova delle regole vigenti' *Diritto di famiglia e delle persone*, 487 (2017).

contracts, sales, and money to manage these once non-commercialized areas of life.[2] This kind of commercialization of childbirth could have profoundly impacts on our society. Surrogacy also has the potential to exploit women instead of liberating them.[3] Accordingly, many states forbid commercial surrogacy, in order to safeguard women's dignity and protect the psychophysical health of children.[4]

The alternative to commercial surrogacy is altruistic surrogacy, in which the surrogate mother does not receive any other compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy-related expenses. Usually, these arrangements are made between family members or close friends and are completed as independent surrogacies.[5]

[2] L. Del Savio and G. Cavaliere, 'The problem with commercial surrogacy. A reflection on reproduction, markets and labour' 7(2) *Biolaw Journal*, 73-91 (2016).

[3] A. Wertheimer, 'Exploitation and Commercial Surrogacy' 74(4) *Denver University Law Review*, 1215-1230 (1997); G. Corea, *The mother machine: reproductive technologies from artificial insemination to artificial wombs* (New York: Harper & Row, 1985), 343; M.G. Radin, 'Market Inalienability' 100(8) *Harvard law review*, 1849 (1987); J. Ballesteros, 'Los valores femeninos en bioética', in A. Parisi ed, *Por un femminismo de la complementariedad* (Pamplona: Eunsa, 2002), 68; J. Damelio and K. Sorensen, 'Enhancing autonomy in paid surrogacy' 22(5) *Bioethics*, 269 (2008); K. Brugger, 'International law in the gestational surrogacy debate' 35(3) *Fordham international law journal*, 665 (2012); J.L. Guzman and A.A. Miralles, 'Àproximaciòn a la problemàtica etica y jurìdica de la maternidad subrogada' 78 *Cuadernos de bioética*, 23, 259 (2012); M. Rizzuti, 'Maternità surrogata: tra gestazione altruistica e compravendita internazionale di minori' 2 *Biolaw Journal*, 91 (2015).

[4] Very few states allow commercial surrogacy. For example, in Georgia, Arts 143 and 144, law 'On Health Care', gives married heterosexual couples the right to have a baby through surrogacy: I. Khurtsidze, 'Legal regulation of surrogacy in Georgia' 10 *European Scientific Journal,* 165-169, (2016); in Israel, the Agreements for the Carriage of Fetuses Law (Approval of Agreement and Status of the New Born), 5756-1996 (Hebrew), allow surrogacy using in vitro fertilization to implant an embryo conceived from sperm of the husband of the contracting couple (only heterosexual couple) and an ovum, in a woman who carries child who is not genetically related to her: D.A. Frenkel, 'Legal regulation of surrogate motherhood in Israel' 20(4) *Medicine and Law*, 605-612 (2001); in Ukraine, Art 123 of the Ukrainian Family Code (amended 22 December 2006 no 524-V) expressly states that: *'if embryos created by assisted reproductive technology are transferred into the body of another woman, the contracting couple shall be the parents of the child'*; in Russia, only gestational surrogacy arrangements are permitted by the Federal Law of the Russian Federation no 323-FZ of 21 November 2011 'On the fundamentals of health protection of citizen in the Russian Federation': K. Svitnev, 'Legal regulation of assisted reproduction treatment in Russia' 20(7) *Reproduction biomed online*, 892-894 (2010); in the Nigerian Parliament there is a bill introducing commercial surrogacy: O.S. Adelakun, 'The concept of surrogacy in Nigeria: Issues, prospects and challenges' 18(2) *African Human Rights Law Journal*, 617 (2018). On the contrary, Countries like India: O. Timms, 'Ending commercial surrogacy in India: significance of the surrogacy (Regulation) bill, 2016' 3(2) *Indian Journal of Medical Ethics*, 99 (2018); J. Saran and J.R. Padubidri, 'New laws ban commercial surrogacy in India' 1 *Medico-Legal Journal*, (2020); Thailand: A. Stasi, 'Protection for children born through assisted reproductive technologies act, B.E. 2558: the changing profile of surrogacy in Thailand' 11 *Clinical medicine insights-reproductive health* 1-7 (2017); and Nepal: R. Abrams, 'Nepal bans surrogacy, leaving couples with few low-cost options' *New York Times* 2 May 2016, centers of the surrogacy international market once, now have introduced legislation with the aim of discourage the procreative tourism.

[5] For this reason, in some Countries altruistic surrogacy is allowed only among family members. In Brazil, altruistic surrogacy is regulated by a resolution of the Conselho Federal de Medicina (2.013/2013), which determines the conditions under which surrogacy is allowed. One of

Altruistic surrogacy does not raise the same issues of commodification as commercial surrogacy because of the absence of any economic benefit; therefore, the same requirements of safeguarding surrogate mothers' dignity and the welfare of children cannot justify an identical ban for altruistic surrogacy.

On this basis, a minority of states allows altruistic surrogate motherhood. Among the countries in which it is permitted, some allow for a gestational surrogacy with as little as 50% of genetic material taken from the intended parents while others require that the embryo be formed with 100% genetic material drawn exclusively from the intended partners.[6]

Italy is one of the countries that forbids surrogacy. Art 12, para 6, of legge 19 February 2004 no 40 provides significant penalties for people who carry out, organize or publicize surrogate motherhood.[7]

Many Italian couples unable to conceive naturally, both heterosexual and homosexual, have circumvented this prohibition by going to Countries that allow surrogacy and then returning to Italy with the resulting child. Problems arise, however, from the fact that Italian registrars are not permitted to lawfully process the applications of intended parents to register the foreign birth certificates recognizing them as parents of the child.[8] These complex cases have

these conditions is that the surrogate mother should be the mother, the sister, the daughter, the aunt or the cousin of one of the intended parents.

[6] Permanent Bureau of The Hague Conference on Private International Law (HCCH), Directorate-General for Internal Policies – Policy Department, Citizens' rights and constitutional affairs 'A comparative study on the regime of surrogacy in EU member States' 2013, available at https://tinyurl.com/y3s3uk4x (last visited 27 December 2020).

[7] For more details on the Italian Law no 40/2004 about assisted reproductive technology, see, among others: A. Santosuosso, *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004, n. 40* (Milano: Giuffrè, 2004), passim; G. Ferrando, 'La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche' *Corriere giuridico*, 810-816 (2004); C. Casini et al, *La legge 19 febbraio 2004, n. 40, "Norme in materia di procreazione medicalmente assistita". Commentario* (Torino: Giappichelli, 2004), passim; M. Dogliotti, 'La legge sulla procreazione medicalmente assistita: problemi vecchi e nuovi' *Famiglia e diritto*, 117 (2004); M. Sesta, 'Procreazione medicalmente assistita' *Enciclopedia Giuridica* (Roma: Treccani, 2004), Agg XIII, 1-13; E. Quadri, 'Osservazioni sulla nuova disciplina della procreazione assistita' *Diritto e giustizia*, 224 (2004); M.R. Marella, 'Esercizi di biopolitica' *Rivista critica di diritto privato*, 3 (2004); M. Faccioli, 'Procreazione medicalmente assistita' *Digesto delle discipline privatistiche* (Torino: UTET, 2007), Agg III, 1051; G. Di Rosa, *Dai principi alle regole. Appunti di biodiritto* (Torino: Giappichelli, 2013), 39-129; L. D'Avack, 'La legge sulla procreazione medicalmente assistita: un'occasione mancata per bilanciare valori ed interessi contrapposti in uno stato laico' *Diritto famiglia e persone*, II, 793-812 (2004); G. Oppo, 'Diritto di famiglia e procreazione assistita' *Rivista di diritto civile,* I, 329 (2005); R.Villani, *La procreazione assistita* (Torino: Giappichelli, 2004); F. Gazzoni, 'Osservazioni non solo giuridiche sulla tutela del concepito e sulla fecondazione artificiale' *Diritto famiglia e persone*, II, 168-210 (2005); F. Ruscello, 'La nuova legge sulla procreazione medicalmente assistita' *Famiglia e diritto*, 628-642 (2004); T. Auletta, 'Luci, ombre, silenzi nella disciplina di costituzione del rapporto genitoriale nella fecondazione assistita' *Annali del Seminario Giuridico* (Milano: Giuffrè, 2005), V, 481-498 (2005); U. Salanitro, 'Norme in materia di procreazione medicalmente assistita', in G. Di Rosa ed, *Della famiglia,* IV, *Leggi collegate*, *Commentario codice civile Gabrielli* (Torino: Giappichelli, 2018), 1655-1824.

[8] This is a common problem in the countries that currently have a ban on surrogacy: recently,

been the object of numerous judgments by the European Court of Human Rights (ECtHR) (eg Case of *Paradiso and Campanelli* v *Italy*),[9] which has dealt

in Germany, see *Bundesgerichtshof* 10 December 2014, XII ZB 463/13, available at https://tinyurl.com/yxf77kcr (last visited 27 December 2020); Bundesgerichtshof 5 September 2018, XII ZB 224/17, available at https://tinyurl.com/y6hu6bms (last visited 27 December 2020); Bundesgerichtshof 20 March 2019, XII ZB 530/17, available at https://tinyurl.com/yxejeunk (last visited 27 December 2020). Concerning Spain, see *Tribunal Supremo* 6 February 2014 (Tol 4100882), available at https://tinyurl.com/y3aaypfo (last visited 27 December 2020). By reference to France, see Cour de Cassation 31 May 1991 no 90-20.105, available at https://tinyurl.com/yyjq2nf2 (last visited 27 December 2020). Many of the disputes on which the European Court of Human Rights has ruled in recent years came from the French legal system, which, for a long time, did not recognise relationships formed abroad between children born from surrogates and the intended parents, even in the case of biological fathers. Recently, however, the case law of the French Court of Cassation has changed course and has admitted both the transcription of the foreign birth certificates in the part in which it recognizes the parent-child relationship with biological fathers and to allow wives of biological fathers to adopt the child, even if she is not genetically related: see *Cour de Cassation* 5 July 2017 nos 824, 825, 826, 827, available at https://tinyurl.com/y2yolh9q (last visited 27 December 2020). Finally, the French Court of Cassation, in the *Mennesson* case, which came to the attention of the French judges after the recent Advisory Opinion of the European Court of Human Rights (see n 12 below), allowed for the transcription of an American foreign birth certificate concerning twins born to a surrogate, even in the part in which it recognized Mrs Mennesson as the legal mother of the twins: *Cour de Cassation* 4 October 2019 no 648, available at https://tinyurl.com/y2cye4j4 (last visited 27 December 2020), with note by A.G. Grasso.

[9] The case deals with a legal battle of an elderly married couple who could not conceive for years (either naturally or with the assistance of in vitro fertilization) and were unable to adopt a child in Italy (due to the shortage of children eligible for adoption). Finally, they decided to retain a company that brought them to a Moscow-based clinic for reproductive tourism, providing them with a service that was illegal in Italy but legal in Russia: conceiving an embryo from anonymous sperm and donated oocyte and paying a surrogate woman to carry the pregnancy and deliver the child. Although this was the outcome, the couple claimed that their intention had been for one spouse to be genetically related to the child, but that, for 'unknown reasons,' the child's genetic provenance was 'unknown' (something they found out through genetic testing back in Italy). Because there was no genetic link between either parent and the child, the Italian authorities started a formal investigation for 'altering civil status' and forgery. The State Counsel's Office asked for proceedings to declare the child abandoned and free for adoption. The applicants objected to such measures and asked to be permitted to at least adopt the child, but the Family Court decided to remove the child from them. The child was placed in a children's home in a place unknown to the applicants and had no official identity for more than two years. Afterwards, he was given a different name and birth certificate and was placed with a foster family that intended to adopt him. In the meantime, the couple now faced charges of double illegality: forgery of the child's birth certificate, and consequently bringing a child to Italy that was not theirs. The Italian authorities considered it necessary to take rather severe urgent measures to remove the child from the intended parents, despite the fact that no criminal liability had yet been established. The Second Section of the ECtHR ruled that removing the child from his intended parents – due to non-recognition of a foreign birth certificate – constituted interference with the applicants' right to private and family life, enshrined in Art 8 of the European Convention of Human Rights (ECHR). Then, the Grand Chamber of the ECtHR, to which the case was later referred, ruled that the immediate and irreversible separation of the child from his parents was tantamount to interference with their private life (specifically their right to personal development through their relationship with the child). Nevertheless, it also held that the opposite scenario would have been tantamount to legalizing the situation they had created in breach of important rules under Italian law. As a result, the Court decided that the national interests to prevent illegality and protect public order prevailed over the applicants' right to private life and concluded that there had been no violation of Art 8 of the ECHR. See Eur. Court H.R.,

on several occasions with questions relating to the recognition of a parental relationship between a child born through surrogacy and its intended parents[10] (the ECtHR recently issued its first Advisory Opinion on this precise subject).[11]

However, it is beyond the scope of this article to dwell on potential safeguards for the relationship established abroad between intended parents and surrogate children. These issues, long a topic of interest for Italian legal scholars,[12] seem to have recently reached a point of clarity, including in domestic and international case law, in the form of recourse to adoption or to registering foreign births in the Italian civil status registers.[13]

Paradiso e Campanelli v *Italia*, Judgment of 25 January 2015, *Il Foro Italiano,* IV, 117 (2015). Subsequently, Eur. Court H.R. (GC), *Paradiso e Campanelli* v *Italia*, Judgment of 21 January 2017, *Nuova giurisprudenza civile commentata*, I, 495 (2017), with note by L. Lenti, overturned the previous decision; also in www.*giustiziacivile.com*, 6 July 2017, 1-8, with note by A.G. Grasso. For more details, see E. Lucchini Guastalla, 'Maternità surrogata e best interest of the child' *Nuova giurisprudenza civile commentata*, 1729 (2017); G. Perlingieri and G. Zarra, *Ordine pubblico interno e internazionale tra caso concreto e sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2019), 105.

[10] Eur. Court H.R, *Mennesson* v *France*, Judgment of 26 June 2014 *Il Foro Italiano*, IV, 561 (2014), with note by G. Casaburi; Eur. Court H.R., *Labassee* v *France*, Judgment of 26 June 2014, available at echr.coe.int; Eur. Court H.R., *Foulon* v *France*, Judgment of 21 July 2016, and *Bouvet* v *France*, both available at echr.coe.int; Eur. Court H.R., *D and Others* v *Belgium*, Judgment of 8 July 2014, available at www.echr.coe.int.

[11] Eur. Court H.R. Advisory Opinion of 10 April 2019, *Nuova giurisprudenza civile commentata*, 757-770 (2019), with note by A.G. Grasso; see also the recent opinion of S.A. González, 'Luces y sombras en el primer dictamen del TEDH sobre la gestación por sustitución', in *El Derecho internacional privado entre la tradición y la innovación. Libro homenaje al Prof. Dr. José María Espinar Vicente* (Madrid: Casa del libro, 2020), 101.

[12] See, among others, C. Campiglio, 'Il diritto all'identità personale del figlio nato all'estero da madre surrogata (ovvero la lenta agonia del limite dell'ordine pubblico)' *Nuova giurisprudenza civile commentata*, I, 1132 (2014); S. Tonolo, 'L'evoluzione dei rapporti di filiazione e la riconoscibilità dello status da essi derivante tra ordine pubblico e superiore interesse del minore' *Rivista di diritto internazionale*, 1070 (2017); A. Di Blase, 'Riconoscimento della filiazione da procreazione medicalmente assistita: problemi di diritto internazionale privato' *Rivista di diritto internazionale privato e processuale*, 839 (2018); A. Sassi and S. Stefanelli, 'Nuovi modelli procreativi, diritto allo status e principi di ordine pubblico' 1 *Biolaw Journal*, 377 (2019).

[13] The *Mennesson* and *Labassee* cases have made it clear that the domestic prohibition of surrogacy cannot prevent children from obtaining recognition of their relationship with their intended parents, since the fact that they were born by means of medically assisted procreation techniques illegal under domestic law is not, in itself, a sufficient reason to deprive them of the recognition of such an important bond. This principle, which was also followed in subsequent European Court of Human Rights judgements, was last confirmed by a recent Advisory Opinion issued by the Court at the request of the French Court of Cassation. According to the Advisory Opinion, the child's right to respect for private life requires that domestic legal systems provide a possibility of recognition of a legal parent-child relationship with the intended mother, even if she has no genetic link to the child. However, transcription of the birth certificate is not required in order to ensure compliance with this right because other means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests. Also, in the Italian context, despite the fact that the Joint Divisions of the Supreme Court of Cassation (see n 15 below) denied the registration of a foreign birth certificate listing an intended parent with no biological connection with the children as their legal father, on the ground that this would violate

Rather, the purpose of this article is to offer a different – narrow – interpretation of the Italian ban on surrogacy, which does not include altruistic surrogacy in the scope of the prohibition.

According to the current prevailing view, Art 12, para 6, legge no 40/2004 must be interpreted as an absolute prohibition banning any form of surrogate maternity, including altruistic surrogacy. This prevailing view among scholars is consistent with the position adopted recently by the Joint Divisions of the Italian Supreme Court of Cassation in Judgment 8 May 2019 no 12193, in the field of international public policy.[14] According to the Joint Divisions of the Civil Court of Cassation, in fact, the Canadian birth certificate of a surrogate child cannot be recognized in Italy because it goes against public policy.[15]

Despite the position of the Supreme Court of Cassation, some grey area remains about whether there is a true conflict between altruistic surrogacy and the dignity of women. Doubts about this were expressed most recently by the First Civil Division of the Court of Cassation in Order 29 April 2020 no 8325,[16] with which the Supreme Court referred to the Constitutional Court the question of whether the interpretation adopted by the Joint Divisions in Judgment 2019 no 12193 is consistent with the recent ECtHR Advisory Opinion of 10 April 2019.[17]

The Italian Constitutional Court has heard only one surrogacy case, which concerned a child born abroad through surrogacy whose birth certificate was originally transcribed in Italy stating that the child was the natural child of a couple

Italy's international public policy, they have, however, admitted the possibility for non-biological parents to adopt the children of their partners (ie stepchild adoption).

[14] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, *Nuova giurisprudenza civile commentata*, I, 737 (2019), with note by U. Salanitro; also in *Il Foro Italiano*, I, 1951 (2019), with note by G. Casaburi; *Familia*, 345 (2019) with note by M. Bianca; *Famiglia e diritto*, 653 (2019) with notes by M. Dogliotti and G. Ferrando; *Corriere giuridico*, 1198 (2019) with notes by D. Giunchedi and M. Winkler. For more details on this recent ruling see G. Perlingieri, 'Ordine pubblico e identità culturale. Le Sezioni unite in tema di cd. maternità surrogata' *Diritto delle successioni e della famiglia*, 337 (2019); F. Ferrari, 'Profili costituzionali dell'ordine pubblico internazionale. Su alcuni "passi indietro" della Corte di Cassazione in tema di PMA' *Biolaw Journal*, 169 (2020); V. Barba, 'Gestación por sustitución y orden público internacional en el ordenamiento jurídico italiano' *Revista de derecho civil*, 69 (2020); 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*, 347 (2019); M. Winkler and C.T. Schiappo, 'A Tale of Two Fathers' 1 *Italian Law Journal*, 559 (2019). See also Corte di Cassazione-Sezione penale VI 20 December 2018 no 2173, available at www.italgiure.giustizia.it.

[15] In Canada it is forbidden to pay the surrogate mother: Assisted Human Reproduction Act - S.C. 2004, c. 2 (Section 6).

[16] Corte di Cassazione 29 April 2020 no 8325, *Corriere giuridico*, 902 (2020), with note by U. Salanitro; also in *Famiglia e diritto*, 675 (2020), with notes by G. Ferrando and G. Recinto. According to the first civil section of the Court of Cassation the only instrument capable of safeguarding the rights of the child, as protected by the Italian Constitution and the European Convention on Human Rights, is the transcription of the foreign birth certificate in the registers of civil status.

[17] Eur. Court H.R. Advisory Opinion of 10 April 2019 n 11 above, 757.

of Italian citizens. When family court investigations revealed the surrogate origins of the child, a guardian was appointed for the child and the transcription of the birth certificate was challenged on the basis of fraud. The Judgment reveals an intention to defend the normative framework of legge no 40/2004 on this point: the Constitutional Court held that the constitutional relevance of the public interest in the dignity of surrogate mothers and human relations prevailed upon the couple's right to health and the right to self-determination.[18]

However, the restrictive position of the Constitutional Court of 2017 does necessarily apply to altruistic surrogacy, also in light of the fact that the case brought before the Constitutional Court concerned commercial surrogacy.

Regardless of how the Constitutional Court might rule, it is my view that altruistic surrogate maternity does not fall within the scope of the prohibition set out in Art 12, para 6, of legge no 40/2004, because the lack of a payment eliminates the threat to the human dignity of the women and children involved. This perspective allows for a different interpretation of the prohibition,[19] since commercial surrogacy is only prohibited in the supranational regulatory framework[20] and the wording of the prohibition of the domestic law is open to contrary interpretations.[21]

This article offers a different – narrow – interpretation of the Italian ban of surrogacy, in accordance with the reasoning laid out by the Italian

[18] Corte costituzionale 18 December 2017 no 272, *Il Foro Italiano,* I, 10 (2018), with note by G. Casaburi; also in *Nuova giurisprudenza civile commentata,* I, 540 (2018), with note by A. Gorgoni. For more details, see U. Salanitro, 'Azioni di stato e favor minoris tra interessi pubblici e privati' *Nuova giurisprudenza civile commentata*, I, 557 (2018).

[19] Criminal and Constitutional law scholars have also interpreted the Italian ban on surrogacy narrowly, to include only commercial surrogacy: F. Consorte, 'La procreazione medicalmente assistita', in A. Cadoppi et al eds, *I reati contro la persona, I, Reati contro la vita e l'incolumità individuale* (Torino: Giappichelli, 2006), 235; S. Niccolai, 'Alcune note intorno all'estensione, alla fonte e alla ratio del divieto di maternità surrogata in Italia' *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 51 (2017); and, for an opposite approach, F. Mantovani, 'Procreazione medicalmente assistita e principio personalistico' *Legislazione penale*, 337 (2005); G. Losappio, 'Commento alla legge 19 febbraio 2004, n. 40 – Norme in materia di procreazione assistita', in F. Palazzo and C.E. Paliero eds, *Commentario breve alle leggi penali complementari* (Padova: CEDAM, 2007), 2062.

[20] International legislation in this area is unanimous in banning commercial surrogacy but is silent on altruistic surrogacy: see Art 3 of the EU Charter of Fundamental Rights; Principle 15 set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), Report on Human Artificial Procreation, 1989; European Parliament resolution on the trade in human egg cells, P6_TA(2005)0074, 10 March 2005; Paragraph 20 of the Resolution on priorities and outline of a new EU policy framework to fight violence against women (2010/2209(INI)), 5 April 2011; Art 21 of the Oviedo Convention 1996; Arts 21 and 22 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin 2006; Art 12 of the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research 2005; Art 12 of Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004.

[21] U. Salanitro, 'Ordine pubblico internazionale, filiazione omosessuale e surrogazione di maternita' *Nuova giurisprudenza civile commentata*, I, 737, 740 (2019).

constitutional judges in Judgment 2014 no 162 to declare the prohibition of heterologous fertilization unconstitutional. A number of general indicia make it plausible that the reasons for the decision extend beyond the case under consideration and even suggest that they point toward a rethinking of the constitutionality of the surrogacy ban.

This hypothesis, fleshed out in greater detail below, provides the basis for the subsequent analysis of the space the present rules leave for the implementation of the relevant interest, which is, in my view, one of constitutional and supranational relevance.[22]

II. Judgment 2014 no 162 of the Italian Constitutional Court: The Ban on Heterologous Artificial Fertilization Declared Unconstitutional

Legge no 40/2004, regarding medically assisted reproduction, has essentially been gutted over the years by different interventions by the Italian Constitutional Court.[23]

The most important of these was the Judgement 10 June 2014 no 162, in which the Court declared Art 4, para 3, legge no 40/2004 unconstitutional, specifically in the part in which it forbade access to heterologous fertilization.[24]

The constitutional judges declared the prohibition of heterologous fertilization unconstitutional because it does not allow couples suffering from serious pathologies to exercise their right to parenthood, in light of the fact that that they have no other way to overcome their disability. The Italian Constitutional Court held that this prohibition violated the rights to health and self-determination of sterile and infertile couples.

The notion of health referred to in Art 32 of the Italian Constitution must also be understood according to the comprehensive meaning of psychological health. Such a definition corresponds to the one adopted by the World Health Organization (WHO). The impossibility to form a family with children, together with one's partner, can have remarkable negative effects on the health of the

[22] Once the right of the infertile couple to have access to surrogacy is recognised as worthy of legal protection, it must be guaranteed through interpretation of the rules governing the establishment and by safeguarding of the legal status of the child accordingly. It is a subject that emerges as a consequence of the present essay, representing an ideal continuation of this article, and for which reference is had in order to make to a different and more complete work, though.

[23] In addition, see: Corte costituzionale 9 November 2006 no 369, *Famiglia e diritto*, 52 (2007), with note by A. Figone; Corte costituzionale 8 May 2009 no 151, *Il Foro Italiano*, II, 2301 (2009), with note by G. Casaburi; also in *Corriere giuridico*, 1213 (2009), with note by G. Ferrando; Corte costituzionale 5 June 2015 no 96, *Il Foro Italiano*, 2254 (2015), with note by G. Casaburi; also in *Corriere giuridico,* 186 (2016), with note by L. Iannicelli; Corte costituzionale 21 October 2015 no 229, *Il Foro Italiano*, XII, 3749 (2015).

[24] Corte costituzionale 10 June 2014 no 162, *Corriere giuridico*, 1062 (2014), with note by G. Ferrando; also in *Il Foro Italiano,* I, 2325 (2014), with note by G. Casaburi; *Famiglia e diritto*, 753 (2014), with note by V. Carbone.

couple.

Moreover, a couple's decision to have a child pertains to the most intimate and intangible sphere of human life and should not be repressed if other constitutional values are not violated.

In this context, prohibiting surrogate maternity could be detrimental to the right to health and self-determination of the couple. It can be also considered unconstitutional in that it prevents couples in which the woman is unable to have a child – for example because she no longer has a uterus or because she is ill and cannot carry the pregnancy to term – to become parents.

This controversial issue is the subject of my research. Hereafter follows a narrow interpretation of the Italian ban on surrogate maternity, following the reasoning the Italian Constitutional Court used to declare the prohibition of heterologous fertilization illegitimate.

However, it bears noting that, in heterologous fertilization, the need to protect the psychophysical health of the child only counterweight to the recognition of infertile couples' right to have access to assisted reproduction. It weighs all the more heavily where there is no genetic link with the intended parents and in light of the right of children to know their own origins.[25] On the contrary, when it comes to surrogacy, many other conflicting interests are at stake in addition to the present need to protect the child. Among these is the need to protect the dignity and health of the surrogate mother, which might justify a different balance of interests.

III. The Right to Health of the Infertile Couple

The Italian Constitutional Court, in case 2014 no 162, adopted a broad interpretation of the concept of health, ruling that heterologous fertilization was a tool useful for safeguarding the wellbeing of infertile couples and, therefore, a form of therapy that allows those who are unable to have children to become parents.[26] The concept is not limited to the physical sphere

[25] The Italian Constitutional Court has held that the interest of the children to know their own genetic origins does not create any obstacle to infertile couples' right to have access to assisted reproduction, since there was already legislation in place governing a similar issue, the right ofadopted children to know their genetic origins (Art 28, paras 4 and 5, legge no 183/1984).

[26] In doing so the Italian Constitutional Court overcame the traditional view, according to which heterologous fertilization could not be considered therapeutic because it does not cure the problem of infertility: M. Mori, 'Nuove tecnologie riproduttive ed etica della qualità della vita', in G. Ferrando ed, *La procreazione artificiale fra etica e diritto* (Padova: CEDAM, 1989), 274; M. Sesta, *'La filiazione'*, in T. Auletta ed, *Trattato diritto privato Bessone,* IV, *Filiazione, Adozione, Alimenti* (Torino: Giappichelli, 2011), 355; M. Sbisà, 'La riproduzione artificiale fra filiazione sociale e filiazione biologica', in C. Ventimiglia ed, *La famiglia moltiplicata. Riproduzione umana e tecnologia tra scienza e cultura* (Milano: Giuffrè, 1988), 144. For other authors, on the other hand, heterologous fertilization is a therapy for the psychological health problems of the infertile or sterile couple: G. Ferrando, 'Autonomia delle persone e intervento pubblico nella riproduzione assistita. Illegittimo il

alone, but is also related to psychological and relational elements.[27] This broad interpretation of the concept of health – confirmed by the most recent Judgement 23 October 2019 no 221, in which the Constitutional Court affirmed the constitutionality of the prohibition of to the use of medically assisted procreation by same-sex couples[28] – corresponds to the definition adopted by the World Health Organization (WHO), according to which health is 'complete physicial, mental and social well-being,' and 'not merely the absence of disease or

divieto di fecondazione eterologa' *Nuova giurisprudenza civile commentata*. 401 (2014); G. Casaburi, '«Requiem» (gioiosa) per il divieto di procreazione medicalmente assistita eterologa: l'agonia della l. 40/04' *Il Foro Italiano*, 2337 (2014).

[27] The turning point in the consideration of the right to health in Italian legal scholarship derives first of all from the work of Costantino Mortati, starting with his affirmation of a new dimension of disease, understood 'no longer (or not only) as an acute pathological state dangerous for society, but above all as mere instability of health in the broad sense' and, similarly, a new and broader conception of health, understood as 'a state, that is, a certain condition of well-being to be preserved in time or, better, a value perceived by the subject and generated by a complex and interdependent series of external and internal factors to the subject itself': C. Mortati, 'La tutela della salute nella Costituzione italiana' *Rivista degli infortuni e delle malattie professionali*, (1961). Mortati's thought found a broad echo in the later doctrine: L. Montuschi, 'Art. 32', in G. Branca ed, *Commentario alla Costituzione* (Roma: Treccani, 1976), 164; M.D. Cherubini, 'Tutela della salute e cc.dd. atti di disposizione del corpo diritto privato', in F.D. Busnelli and U. Breccia eds, *Tutela della salute e diritto privato* (Milano: Giuffrè, 1978), 81; D. Poletti and M. Zana, '*La tutela della salute nella legislazione speciale italiana'*, in F.D. Busnelli and U. Breccia eds, *Tutela della salute e diritto privato* (Milano: Giuffrè, 1978), 50; P. Perlingieri, 'Il diritto alla salute quale diritto della personalità' *Rassegna di diritto civile*, 1023 (1982); C.M. D'Arrigo, 'Salute' *Enciclopedia del diritto* (Milano: Giuffrè, 2001), Agg V, 1017; G. Alpa, 'Salute (diritto alla)' *Novissimo Digesto italiano* (Torino: UTET, 1996), App VI, 914; M. Bessone and V. Roppo, 'Diritto soggettivo alla "salute," applicabilità diretta dell'art. 32 della Costituzione ed evoluzione della giurisprudenza' *Politica del diritto*, 767 (1974), which specifically emphasize the importance of Mortati's thought; A. Simoncini and E. Longo, 'Sub art. 32', in R. Bifulco et al eds, *Commentario alla Costituzione* (Milano: Giuffrè, 2006), 655; V. Durante, 'La salute come diritto della persona', in S. Rodotà and P. Zatti eds, *Il governo del corpo*, I, *Trattato di Biodiritto* (Milano: Giuffrè, 2011), 584; A. De Cupis, 'Integrità fisica' *Enciclopedia giuridica* (Roma: Treccani, 1989), XVII, 1; Id, 'I diritti della personalità', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2nd ed, 1982), 114; R. Romboli, 'Sub art. 5', in A. Scialoja and G. Branca eds, *Commentario del codice civile,* I, *Delle persone fisiche*, (Bologna-Roma: Zanichelli, 1988), 235; M. Santilli and A. Giusti, 'Salute II) Tutela della salute – diritto civile' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXVIII, 6; C.M. D'Arrigo, 'Integrità fisica' *Enciclopedia del diritto* (Milano: Giuffrè, 2000), Agg IV, 727; M.C. Venuti, *Gli atti di disposizione del corpo* (Milano: Giuffrè, 2002), 26; R. Romboli, 'La relatività dei valori costituzionali per gli atti di disposizione del proprio corpo' *Politica del diritto*, 568 (1991); B. Pezzini, 'Il diritto alla salute: profili costituzionali' *Diritto e società*, 50 (1983).

[28] Corte costituzionale 23 October 2019 no 221, *Il Foro Italiano*, I, 3782 (2019), with note by G. Casaburi; also in *Corriere giuridico*, 1460 (2016), with note by G. Recinto; *Nuova giurisprudenza civile commentata*, I, 548 (2020), with note by I. Barone. According to the Constitutional Court, if access to medically assisted procreation is justified by therapeutic reasons, it can be applied only when heterosexual couples present pathologies relating to fertility, and not to couples made up of persons of the same sex, even if one or both members are sterile, since, in their case, procreation as a pair would be physiologically impossible in any event. The Constitutional Court affirmed medically assisted procreation has a therapeutic function: a ruling that tends to reinforce the thesis, proposed here, that a restrictive interpretation of the prohibition of surrogacy is appropriate, since a blanket ban would absolutely deny the possibility of access to parenthood only to couples suffering from serious physical limitations.

infirmity'.[29] This notion of health testifies to the profound conceptual shift that the meaning of health and illness has undergone, mainly in the past few centuries.[30]

In the context of problems of infertility or sterility, the health issue affects not only the person directly interested, but also their partner. The sensitive issue of infertility, which may derive, for example, from the biological incompatibility of the partners,[31] affects them both because of the social, relational and psychological consequences that arise from the permanent impossibility to have children.[32]

Now that heterologous artificial fertilization has been accepted as a form of therapy, we may well ask if surrogate maternity may be considered a medical treatment for the psychological distress of the couple and, consequently, if the absolute prohibition which bans any form of surrogate maternity, including altruistic surrogacy, could be considered undue State interference in the right to health of infertile couples.[33]

IV. The Right to Self-Determination in Procreation

According to the Italian Constitutional Court, the decision to give life to a child, even when it is exercised through heterologous artificial fertilization, is non-coercible, because it constitutes an expression of the general and

[29] Some authors have criticised this definition of health: D. Callahan, 'The who definition of health' 1 *Hastings Centers Studies*, 77-88 (1973); M. Mori, *La fecondazione artificiale: una nuova forma di riproduzione umana* (Roma: Laterza, 1995), 31; G. Berlinguer, *Etica della salute* (Milano: Il Saggiatore, 1997), 19.

[30] M. Foucault, *Maladie mentale et personnalité* (Paris: Presses Universitaires de France, 1954), 62; P. Sgreccia, *La dinamica esistenziale dell'uomo* (Milano: Vita e Pensiero, 2008), 26; G. Federspil et al, *Filosofia della medicina* (Milano: Raffaello Cortina Editore, 2008), 235; G. Canguilhem, *Le normal et le pathologique* (Paris: Presses Universitaires de France, 1998), 9; L. Nordenfelt, *On the Nature of Health: An Action-Theoretic Approach* (Dordrecht: Kluwer, 1995), 24; J.C. Lennox, 'Health as an objective value' 20(5) *The journal of medicine and philosophy*, 499 (1995); A. Bowling, *Measuring health. A review of quality of life measurement scales* (Milton Keynes, UK: Open University Press, 1991), 1; P.A. Tengland, 'A Two-Dimensional Theory of Health' 28(4) *Theoretical Medicine and Bioethics*, 257-284 (2007); E. Sgreccia, *Manuale di bioetica* I, *Fondamenti ed etica biomedica* (Milano: Vita e Pensiero, 2012), 165.

[31] In these cases, although the two partners are fertile individually, together suffer a biological-reproductive incompatibility, which does not permit them to become parents: see PL. Righetti et al, *La coppia di fronte alla Procreazione Medicalmente Assistita* (Milano: Franco Angeli, 2009), 35.

[32] A. Trounson and C. Wood, 'Extracorporal fertilization and embryo transfer' 8(3) *Clinical Obstetrics Gynecology*, 681 (1981); S.R. Leiblum et al, 'The psychological concomitants of in vitro fertilization' 6(3) *Journal of Psychosomatic Obstetrics & Gynecology*, 165 (1987); D. Baram et al, 'Psychosocial adjustment following unsuccessful in vitro fertilization' 9(3) *Journal of Psychosomatic Obstetrics & Gynecology*, 181 (1988); P.L. Righetti, 'I vissuti psicologici nella procreazione medicalmente assistita: interventi e protocolli integrati medico-psicologici' *Contraccezione Fertilità Sessualità*, 163 (2001).

[33] B. Liberali, *Problematiche costituzionali nelle scelte procreative* (Milano: Giuffrè, 2017), 140; M. Di Masi, 'Maternità surrogata: dal contratto allo "status" ' *Rivista critica di diritto privato*, 642 (2014).

basic principle of self-determination.

The right of self-determination is quite difficult to define because it translates into legal terms the existential importance of the individual and individual choices.[34]

The legal origins of this right can be found in the American right to privacy,[35] which protects[36] citizens' 'sphere of sanctified isolation'[37] from interference by the public authorities. It protects, that is, the innermost and deepest dimension of existence,[38] an area within which the citizen can avoid any potential interference in decisions, and which includes the realm of reproduction.[39]

Despite its Anglo-Saxon origins, the right of self-determination did not come into European continental laws directly from the American judicial culture, but rather indirectly, through the decision of the ECtHR.

In particular, in the *Pretty* case, the judges underscored that,

> 'although no previous case has established as such any right to self-determination as being contained in Art 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle

[34] In doctrine the nature of constitutional law of the right to self-determination is controversial: S. Mangiameli, 'Autodeterminazione: diritto di spessore costituzionale?', in C. Navarini ed, *Autonomia e Autodeterminazione. Profili etici, bioetici e giuridici* (Roma: Editori Riuniti, 2011), 82; L. Antonini, 'Autodeterminazione nel sistema dei diritti costituzionali', in F. D'Agostino ed, *Un diritto di spessore costituzionale?* (Milano: Giuffrè, 2012), 11; A. Renda, 'La surrogazione di maternità e il diritto della famiglia al bivio' *Europa e diritto privato,* 421 (2015); M. Esposito, *Profili costituzionali dell'autonomia privata* (Padova: CEDAM, 2003), 93; M. Mazziotti, *Lezioni di Diritto costituzionale* (Milano: Giuffrè, 1993), II, 193; S. Rodotà, 'Il nuovo habeas corpus: la persona costituzionalizzata e la sua autodeterminazione', in S. Rodotà and M. Tallacchini eds, *Ambito e Fonti del biodiritto*, I, *Trattato di biodiritto*, 197 (2011); Id, 'Relazione introduttiva' *Nuova giurisprudenza civile commentata*, II, 103 (2016); P. Zatti, 'Rapporto medico-paziente e integrità della persona' *Nuova giurisprudenza civile commentata*, II, 406 (2008); A. Morrone, 'Ubi scientia ibi iura. A prima lettura sull'eterologa', available at www.forumcostituzionale.it, 1 June 2014, 4; G. Cricenti, 'Diritto all'autodeterminazione? Bioetica dell'autonomia privata' *Nuova giurisprudenza civile commentata,* II, 211 (2011).

[35] S.D. Warren and L.D. Bradeis, 'The Right to Privacy' 4(5) *Harvard Law Review*, 193 (1890).

[36] D. Barnard, 'The evolution of the right to privacy after Roe v Wade' 13 *American Journal of Law and Medicine*, 365-525 (1987); L. Miglietti, *Il diritto alla privacy nell'esperienza giuridica statunitense ed europea* (Napoli: Edizioni Scientifiche Italiane, 2014), 109.

[37] C.A. Mackinnon, 'Reflections on Sex Equality Under Law' 100 *The Yale Law Journal*, 1281-1328 (1991); L.C. McClain, 'Inviolability and Privacy: The Castle, the Sanctuary, and the Body' 7 *Yale Journal of Law & the Humanities*, 195-242 (1995).

[38] E. Shils, 'Privacy: its constitution and vicissitudes' 31 *Law and contemporary problems*, 281 (1966).

[39] R. Dworkin, Life's domination (London: HarperCollins, 1993), 148. For the US Supreme Court see: *Skinner* v *State of Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold* v *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v *Baird*, 405 U.S. 438 (1972); *Roe* v *Wade* 410 US 113 (1973); *Carey* v *Population Services International*, 431 U.S. 678 (1977). See also: *Davis/Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *Goodridge* v *Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Lifchez* v *Hartigan*, 735 F. Supp. 1361 (N.D. Ill. 1990).

underlying the interpretation of its guarantees'.[40]

The ECtHR, which has dealt with the problems related to appeals concerning modern biomedical technology on several occasions,[41] has also argued that

> 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Art 8, as such a choice is an expression of private and family life'.[42]

In striking down Art 4, para 3, of legge no 40/2004, in the part in which it forbade recourse to heterologous fertilization, the Italian Constitutional Court appears to have endorsed the European Court perspective that human procreation does not necessarily have to be limited to the natural course.[43]

With the acceptance of this view, the conditions were laid for recognition of the right to have access to surrogacy in Italy as well. This is not only because surrogacy is included among artificial procreation techniques,[44] but also because it might be argued that, through surrogate maternity, couples may continue to exercise their right to procreate, at least whenever one of the two intended partners has a genetic link with the child.[45]

[40] Eur. Court H.R., *Pretty* v *The United Kingdom*, Judgment of 29 April 2002, *Il Foro Italiano*, IV, 57 (2003).

[41] Eur. Court H.R., *Evans* v *The United Kingdom*, Judgement of 10 April 2007, *Nuova giurisprudenza civile commentata,* I, 1238 (2007), with note by B. D'Usseaux; Eur. Court H.R., *Dickson* v *The United Kingdom*, Judgment of 4 December 2007, *Rivista italiana di diritto processuale penale*, 337 (2008).

[42] Eur. Court H.R., *S.H. and Others* v *Austria*, Judgement of 1 April 2010 *Famiglia e diritto*, 977 (2010), with note by U. Salanitro.

[43] E. La Rosa, 'Il divieto "irragionevole" di fecondazione eterologa e la legittimità dell'intervento punitivo in materie eticamente sensibili' *Rassegna giuridica della sanità*, 141 (2014); A. Vallini, 'Sistema e metodo di un biodiritto costituzionale: l'illegittimità del divieto di fecondazione "eterologa" ' *Diritto penale e processo*, 834 (2014); C. Nardocci, 'La Corte costituzionale decide per l'incostituzionalità della fecondazione eterologa e sospende il dialogo con la Corte europea dei diritti dell'uomo', in M. D'Amico and M.P. Costantini eds, *L'illegittimità costituzionale del divieto della 'fecondazione eterologa'* (Milano: Giuffrè, 2014), 116; for a partially differing point of view, see A. Ruggeri, 'La Consulta apre alla eterologa ma chiude, dopo averlo preannunziato, al "dialogo" con la Corte EDU (a prima lettura di Corte cost. n. 162 del 2014)', available at www.forumcostituzionale.it, 14 June 2014, 2.

[44] For this perspective, see: I. Corti, 'La maternità per sostituzione,', in S. Rodotà and P. Zatti eds, *Il governo del corpo,* II, *Trattato Biodiritto* (Milano: Giuffrè, 2011), 1481; L. Lorenzetti, 'Maternità surrogata' *Digesto discipline privatistiche* (Torino: UTET, 2011), 617; G. Casaburi, 'Osservazioni a Corte costituzionale n. 162/2014' *Il Foro Italiano*, I, 2341 (2014); for an opposite point of view, S. Niccolai, 'Alcune note' n 19 above, 52; C.C.W. Chan, 'Infertily, Assisted Reproduction and Rights' 20 *Best Practice* & *Research Clinical Obstetrics and Gynaecology*, 377 (2006); C. Straehle, 'Is There a Right to Surrogacy?' 33 *Journal of Applied Philosophy*, 150 (2016).

[45] In American legal scholarship, some authors have argued that the right to appeal to surrogacy is protected by the constitutional right to privacy, in the context of the 14th Amendment: J. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth' 69(3) *Virginia Law Review*, 405 (1983); C. Spivack, 'The Law of Surrogate Motherhood in the United

V. Restrictions on the Right to Altruistic Surrogacy: *a*) The Polysemic Concept of Dignity

The Constitutional Court has held, in its already mentioned decision 22 November 2017 no 272, that surrogate motherhood 'offends in an intolerable way the dignity of women and undermines human relations deeply'.[46] Similar judgments have been expressed even more recently by the Joint Divisions of the Supreme Court of Cassation, which stated that the ban on surrogacy was introduced to safeguard fundamental legal interests, such as 'the constitutionally protected human dignity of the surrogate woman'.[47] The hypothesis of this paper, then, requires careful examination, because it is necessary to balance the rights of the partners with many opposing interests, above all the dignity of pregnant woman, especially in the wake of the judgment of the Supreme Court 2019 no 12193, which, unlike the case brought before the Constitutional Court, concerned altruistic surrogacy.

While the debate on human dignity may be as old as humanity itself,[48] but it was only with Kant that dignity took a weighty legal meaning,[49] leading to the recognition of its privileged legal status in the national constitutions which arose after the Second World War.

In the Italian Constitution only two articles explicitly mention dignity (Arts

States' 58 *The American Journal of Comparative Law*, 109 (2010); P. Nicolas, 'Straddling the Columbia: A Constitutional Law Professor's Musing on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy' 89 *Washington Law Review*, 1279 (2014). Other authors tend to deny the constitutional relevance of the right to surrogacy: L. Gostin, 'A Civil Liberties Analysis of Surrogacy Arrangements' 16 *Law, Medicine & Health Care*, 7-17 (1988); M. Schultz, 'Reproductive Technology and Intention-Based Parenthood: An Opportunity for Gender Neutrality' 2 *Wisconsis Law Review*, 297-398 (1990); S.B. Rae, 'Parental Rights and the Definition of Motherhood in Surrogate Motherhood' 3 *Southern California Review of Law and Women's Studies*, 219 (1994); R.J. Chin, 'Assisted Reproductive Technology Legal Issues in Procreation' 8 *Loyola Consumer Law Review*, 214 (1996); S. Ferguson, 'Surrogacy contracts in the 1990s: the controversy and debate continues' 33 *Duquesne Law Review*, 903-922 (1995); M. Field, 'Compensated surrogacy' 89 *Washington Law Review*, 1178 (2014).

[46] Corte costituzionale 18 December 2017 no 272 n 18 above, 10.

[47] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193 n 14 above, 737; previously see also Corte di Cassazione 11 November 2014 no 24001, *Nuova giurisprudenza civile commentata,* I, 239 (2015), with note by C. Benanti; also in *Il Foro Italiano*, I, 3414 (2014), with note by G. Casaburi; *Corriere giuridico*, 471 (2015), with note by A. Renda.

[48] F. Viola, 'Dignità umana' *Enciclopedia Filosofica* (Milano: Bompiani, 2006), III, 2863-2865; P. Becchi, '*Il principio di dignità umana*' (Brescia: Morcelliana 2009), passim; U. Vincenti, '*Diritti e dignità umana*' (Roma: Editori Laterza, 2009), passim; A. Abignente and F. Scamardella eds, '*Dignità della persona*' (Napoli: Editoriale Scientifica, 2013), passim; M. Düwell et al eds, *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014), 560-568; V. Scalisi, *L'ermeneutica della dignità* (Milano: Giuffrè, 2018), passim.

[49] I. Kant, *The Metaphysics of Ethics*, translated by J.W. Semple, edition with introduction by Rev Henry Calderwood (Edinburgh: T. & T. Clark, 1886) (3rd edition), available at tinyurl.com/8c6j69fm (last visited 27 December 2020).

3 and 4). If we compare this with the majority of the national constitutions,[50] we may form an impression that the concept of dignity in the Italian Constitution is radically irrelevant.[51] This conclusion would, however, be erroneous if we consider the preparatory works and the Constitution as a whole, which reveals the central role of dignity, understood as respect for any human being.[52]

With some degree of oversimplification, we might argue that two different conceptions of dignity exist: the subjectivist view and the objectivist one.[53] These two different conceptions correspond to two different ways to conceive of dignity in the American and European traditions.[54]

If we want to sketch, even as a broad outline, the main features of these different conceptions of dignity, we might say that, according to the first view, we cannot consider acts of limitation on someone's functional liberties to be legitimate if they are done in the name of that person's dignity or a superior interest. This view comes from the American tradition, where the concept of

[50] See Arts 13 and 24, para 2, of the Japanese Constitution; Art 10 of the Spanish Constitution; Art 23 of the Belgian Constitution; Art 13 of the Portuguese Constitution; Arts 2 and 7 of the Greek Constitution; Art 1 of the Czech Constitution; Art 30 of the Polish Constitution; Art 54 of the Hungarian Constitution; Art 12 of the Slovack Constitution; Arts 1, 7, 10, 25, 36 of the South African Constitution. Moreover, we find additional references to the value of dignity almost in all the Latin American Constitution: see G. Rolla, 'Profili costituzioni della dignità umana', in E. Ceccherini ed, *La tutela della dignità dell'uomo* (Napoli: Editoriale scientifica, 2008), 61.

[51] The German system and Art 1 of the German Constitution deserve special attention. This Article recognizes dignity not as a fundamental right, but as an objective rule which is not subject to comparisons or obligations, unlike fundamental rights. This differentiation has also brought about a change of terminology: where the fundamental rights in the German Constitution are classified as *unverletzlichen und unveräußerlichen* (inviolable and inalienable, the dignity, instead, is *unantastbar* (untouchable). Moreover, the German constituents has strengthened this provision by excluding it from the constitutional review (Art 79, para 3).

[52] V. Marzocco, 'La dignità umana tra eredità e promesse', in A. Abignente and F. Scamardella eds, *Dignità della persona* (Napoli: Editoriale Scientifica, 2013), 22; A. Ruggeri and A. Spadaro, 'Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni)' *Politica del diritto*, 347 (1991).

[53] Some authors, most of them American, consider dignity to be a useless concept: H. Khuse, 'Is there a tension between autonomy and dignity?', in P. Kemp et al eds, 2 *Bioethics and biolaw*, *Four Ethical Principles* (Copenaghen: Rhodes International Science and Art Publishers and Centre for Ethics and Law, 2000), 6-74; J. Aldergrove, 'On dignity', in J. Aldergrove ed, *Why We Are Not Obsolete Yet. Genetics, algeny, and the future* (Burnaby, B.C.: Stentorian, 2000), passim; R. Macklin, 'Dignity Is a Useless Concept (It Means no More than Respect for Persons or Their Autonomy)' 327 *British Medical Journal*, 1419 (2003); S. Pinker, 'The Stupidity of Dignity: Conservative Bioethics' Latest, Most Dangerous Play' 1 *The New Republic* (2008); C. McCrudden, 'Human Dignity in Human Rights Interpretation' *European Journal of International Law*, 655 (2008); J. Smits, 'Human Dignity and Uniform Law: An Unhappy Relationship' 2 *TICOM Working Paper on Comparative and Transnational Law*, 1 (2008); A. Cochrane, 'Undignified Bioethics' 5 *Bioethics*, 234-241 (2010).

[54] B. Edelman, *La personne en danger* (Paris: Puf, 1999), passim; E.J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Issues in Comparative Public Law) (Westport: Greenwood Publishing Group, 2011), passim; V.L. Raposo, *O direito à imortalidade* (Coimbra: Almedina, 2014), 333; V. Scalisi, *L'ermeneutica della dignità* n 48 above, 31; E. Poddighe, *Comunicazione e "Dignità della donna"* (Roma: Romatre-Press, 2018), 42.

dignity is connected to the notion of privacy[55] to the extent that they practically overlap.

In the European view, on the contrary, a person's intentions and their right of self-determination, however important, are subject to some limitations, like all other rights.[56] European Constitutions place the principle of solidarity at the top of the scale of values, and not the right to personal autonomy, which is overridden by solidarity when the two directly clash.[57]

If dignity is an attribute of liberty, then an individual can determine autonomously what is 'dignified' for him- or herself,[58] in which case dignity could not be applied as a limit to how the individual defines it.[59] If, on the other hand, we believe that liberty is an attribute of dignity, understood as a universal value, then the dignity of mankind can be used as a limit on individual behavior.[60]

For the purposes of this paper, the broader view of private autonomy and the objectivist view of dignity as non-overlapping is useful, because it is from this point of view that I believe we can most clearly consider the issue of the admissibility of surrogate motherhood under the Italian legal system.[61]

[55] *Lawrence* v *Texas*, 539 U.S. 558 (2003). See also G. Bognetti, 'The Concept of Human Dignity in European and US Constitutionalism', in G. Nolte ed, *European and U.S. constitutionalism* (Cambridge: Cambridge University Press, 2005), 85; N. Rao, 'On the Use and Abuse of Dignity in Constitutional Law' 14 *Columbia Journal of European Law*, 201 (2008).

[56] G. Resta, 'La dignità', in S. Rodotà and P. Zatti eds, *Trattato di Biodiritto*, I, *Ambito e fonti del biodiritto* (Milano: Giuffrè, 2011), 290; P. Zatti, *Maschere del diritto* (Milano: Giuffrè, 2009), 46; A. Ruggeri, 'Appunti per uno studio sulla dignità dell'uomo, secondo diritto costituzionale' *Rivista Associazione Italiana dei Costituzionalisti*, 6 (2011); J. Reis Novais, *A dignidade da pessoa humana* (Coimbra: Almedina, 2015), I, 78.

[57] F.D. Busnelli, 'Quali regole per la procreazione assistita?' *Rivista di diritto civile*, 583 (1996).

[58] For Pico della Mirandola it is for the individual alone to up to determine autonomously what is 'dignified' for him or herself: G. Pico della Mirandola, *Oratio de hominis dignitate* (1486), E. Garin ed of the latin text, english traslation by E. Forbes (Lexington: The Avil Press), 1953.

[59] X. Bioy, 'La dignité: questions de principes', in S. Gaboriau and H. Pauliat eds, *Justice, ethique et dignité: actes du colloque organisé à Limoges Le 19 et 20 novembre 2004* (Limoges: Presses Universitaires de Limoges et du Limousin, 2006), 65.

[60] B. Mathieu, 'La dignité de la personne humaine: Quel droit? Quel titulaire?' *Dalloz*, 285 (1996).

[61] Within the framework of the conflict between private autonomy and the objectivist view of dignity we can consider well-known court cases such as the French story involving 'Dwarf tossing.' For more details, see A. Massarenti, *Il lancio del nano e altri esercizi di filosofia minima* (Parma: Guanda, 2006), 7; E. Ripepe, 'La dignità umana: il punto di vista della filosofia del diritto', in E. Ceccherini ed, *La tutela della dignità dell'uomo* (Napoli: Editoriale scientifica, 2008), 35; G. Cricenti, 'Il lancio del nano Spunti per un'etica del diritto civile' *Rivista critica di diritto privato*, 21 (2009); M. Rosen, *Dignity. Its History and Meaning* (Cambridge: Cambridge University Press, 2012), 70; X. Bioy, '*La dignité: questions de principes,*' in A. Catherine, A. Cayol and J. M. Larralde eds, *Le corps humain saisi par le droit: entre liberté et propriété,* 83. The German Court decisions 'Peep-Show Fall' and 'Telefonsex' and also the French Court decisions SIDA-Benetton and 'Loft Story': see G. Resta, 'La disponibilità dei diritti fondamentali e i limiti della dignità (Note a margine della Carta dei Diritti)' *Rivista di diritto civile*, 836 (2002); M.R. Marella, 'Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti' *Rivista critica di diritto privato*, 74 (2007); M. Gennusa, 'La dignità umana e le sue anime. Spunti ricostruttivi alla luce di una recente sentenza del Bundesverfassungsgericht', in N. Zanon ed, *Le Corti dell'integrazione*

In our legal system, which embraces the European conception of dignity, the legalisation of commercial surrogacy, unlikely in America, has not been allowed at all,[62] and what is still open for consideration is altruistic surrogacy. Some human behavior, in fact, may run contrary to the value of human dignity if carried out for profit-making, whereas, if it is based on solidarity, the same behavior could be recognised as worthy of protection. The typical example concerns organ and blood donation.

The same kind of reasoning could be applied to surrogacy, although there is no specific law that allows it. We may speak about the logic of gift, or of solidarity that arises as a sort of fraternal feeling.[63] This logic of gift would remain outside the *ratio legis* of the ban, because the lack of payment and the spontaneity of the gesture rules out an offense to the human dignity of women and children.[64]

Two earlier cases on surrogacy coming from the Italian courts suggest that this may be so: the Court of Monza, in a 1989 commercial surrogacy case, rejected the commissioning parents' request for sole custody of the baby,[65] but the Court of Rome, in an altruistic surrogacy case in 2000, granted the intended parents' request to continue with the artificial insemination procedure and implantation of the embryo in the surrogate mother's uterus.[66]

europea e la Corte costituzionale italiana (Napoli: Edizioni Scientifiche Italiane, 2006), 203.

[62] In the United States of America, only a few states – New York (NY Dom. Rel. Law § 122), Indiana (Ind. Code § 31-20-1-1), Michigan (Surrogate Parenting 199 of 1988, § 722.855, Sec. 5 e 722.859, Sec. 9), and Arizona (Arizona Revised Statute § 25-218) – prohibit commercial surrogacy contracts and make them unenforceable. In most other states – including California (Cal. Fam. Code §§ 7960-7962), Florida (FL Stat. § 742.15: Gestational Surrogacy Contract), Maine (Maine Parentage Act (Title 19-A, § 1932), and many others – paying surrogate mothers is allowed. Another another group of states has not regulated surrogacy fully and clearly, and it falls to the courts, with their case law, to permit or forbid payments that exceed the reimbursement of expenses on a case-by-case basis: A. Finkelstein et al, 'Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Law Making' Report of the *Columbia law school sexuality* & *gender law clinic* May 2016, 1-90, available at tinyurl.com/vjfoprvp (last visited 27 December 2020).

[63] J.M. Camacho, 'Maternidad subrogada: una práctica moralmente aceptable. Análisis crítico de las argumentaciones de sus detractores' 15 (2009), available at tinyurl.com/lmpx6ek9 (last visited 27 December 2020).

[64] A. Ruggeri and C. Salazar, ' "Non gli è lecito separarmi da ciò che è mio": Riflessioni sulla maternità surrogata alla luce della rivendicazione di Antigone' *Consulta OnLine*, 143 (2017); V. Scalisi, 'Maternità surrogata: come "far cose con regole" ' *Rivista di diritto civile*, 1100 (2017); B. De Filippis, 'Maternità surrogata o assistita, utero in affitto', in A. Cagnazzo ed, *Trattato di diritto e bioetica* (Napoli: Edizioni Scientifiche Italiane, 2017), 369; A. Gorgoni, 'La rilevanza della filiazione non genetica' *Diritto delle successioni e della famiglia*, 146 (2018); V. Barba, 'Gestación por sustitución' n 14 above, 94; for an opposite point of view, S. Serravalle, *Maternità surrogata, assenza di derivazione biologica e interesse del minore* (Napoli: Edizioni Scientifiche Italiane, 2018), 89.

[65] Tribunale di Monza 27 October 1989, *Foro italiano*, I, 298 (1990), with note by G. Ponzanelli; also in *Giurisprudenza di merito*, I, 240 (1990), with note by M. G. Maglio, *Nuova giurisprudenza civile commentata*, VI, 355 (1990) with note by A. Liaci, *Giurisprudenza italiana*, II, 296 (1990), with note by G. Palmeri, *Diritto di famiglia e delle persone*, 173 (1990), with note by M. Ventura.

[66] Tribunale di Roma 17 October 2000, *Famiglia e diritto,* 151 (2000), with notes by M.

Further support emerges from the lively scholarly debate that preceded the introduction of Legge 19 February 2004 no 40: while some prominent scholars maintained that the affront to dignity did not result from the onerousness of the agreement, but rather lay in allowing women to dispose of their own bodies,[67] the prevailing view was that the functions of conception and gestation should be unmarketable but not unavailable.[68]

Dogliotti and G. Cassano; also in *Giurisprudenza di merito*, I, 530 (2000), with note by A. G. Cianci; *Diritto di famiglia e delle persone*, I, 706 (2000), with note by L. D'Avack, *Rassegna di diritto civile*, 199 (2009), with notes by E. Capobianco and M. G. Petrucci, *Corriere giuridico*, 483 (2000), with note by M. Sesta, *Giustizia civile*, 1157 (2000), with note by G. Giacobbe; *Nuova giurisprudenza civile commentata*, I, 310 (2000), with note by A. Argentesi, *Bioetica*, 498 (2000), with notes by V. Finaschi, G. Ferrando, M.G. Giammarinaro.

[67] F.D. Busnelli, 'Quali regole per la procreazione assistita?' n 57 above, 570; G. Ponzanelli, 'Il caso Baby M, la 'surrogate mother' e il diritto italiano' *Foro italiano*, IV, 101 (1988); M.T. Carbone, 'Maternità, paternità e procreazione artificiale' *Diritto di famiglia e delle persone*, 877 (1993); F. Mantovani, 'Procreazione medicalmente assistita e principio personalistico' *Legislazione penale*, 337 (2005); D. Clerici, 'Procreazione artificiale, pratica della surroga, contratto di maternità: problemi giuridici' *Diritto di famiglia e delle persone*, 105 (1987); A. Finocchiaro, 'Non basta prospettare l'evoluzione scientifica per ritenere lecito l'accordo tra le parti' *Guida al diritto,* 82 (2000); M. Moretti, 'La procreazione medicalmente assistita', in G. Bonilini and C. Cattaneo eds, III, *Filiazione e adozione* (Torino: Giappichelli, 2007), 251; F. Santosuosso, *La fecondazione artificiale umana* (Milano: Giuffrè, 1984), 33; A. Trabucchi, 'Procreazione artificiale e genetica umana nella prospettiva del giurista' *Rivista di diritto civile*, I, 503 (1986); T. Auletta, 'Fecondazione artificiale: problemi e prospettive' *Quadrimestre,* 39 (1986); A. Piraino Leto, 'I procedimenti di procreazione tra libertà e diritto' *Diritto famiglia e persona*, 1333 (1987); M. Gorgoni, 'Individuo o persona: problemi di qualificazione e tutela giuridica alle soglie della vita' *Famiglia e diritto*, 345 (1994); M. Sesta, 'Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?' *Nuova giurisprudenza civile commentata*, II, 206 (2000); M. Calogero, *La procreazione artificiale* (Milano: Giuffrè, 1989), 113; N. Lipari, 'La maternità e sua tutela dell'ordinamento giuridico italiano: bilancio e prospettive' *Rassegna di diritto civile,* 575 (1986).

[68] S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 1995), 194; P. Zatti, 'La surrogazione nella maternità' *Questione giustizia*, 838 (1999); M. Mori, *La fecondazione artificiale, questioni morali nell'esperienza giuridica* (Milano: Giuffrè, 1988), 153; G. Criscuoli, 'La legge inglese sulla "surrogazione materna" tra riserve e proposte' *Diritto di famiglia e delle persone*, 1034 (1987); F. Prosperi, 'La gestazione nell'interesse altrui tra diritto di procreare e indisponibilità dello status filiationis', in C.A. Graziani and I. Corti eds, *Verso nuove forme di maternità?* (Milano: Giuffrè, 2002), 148; I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), 193; P. Vercellone, 'La fecondazione artificiale' *Politica del diritto*, 400 (1986); S. Moccia, 'Un infelice compromesso: il testo unificato delle proposte di legge in materia di procreazione medicalmente assistita' *Critica del diritto*, 250 (1998); A. Manna, 'Sperimentazione clinica' *Enciclopedia del diritto* (Milano: Giuffrè, 2000), Agg IV, 1132; C. Pasquariello, *I confini penalistici della bioetica* (Napoli: Edizioni Scientifiche Italiane, 1999), 142; A. Cavaliere, 'Nè integralismi religiosi, nè bio-mercificazione. Le biotecniche nello stato sociale di diritto' *Critica del diritto*, 336 (1999); M. Dogliotti, 'Inseminazione eterologa e azione di disconoscimento: una sentenza d dimenticare' *Famiglia e diritto*, 185 (1994); R. Lanzillo, 'Fecondazione artificiale, «locazione di utero», diritti dell'embrione' *Corriere giuridico*, 639 (1984); M. Costanza, 'Legislazione e fecondazione artificiale' *Diritto famiglia e persone,* 1987, 1024; G. Baldini, 'Volontà e procreazione: ricognizione delle principali questioni in tema di surrogazione di maternità' *Diritto di famiglia e delle persone*, 775 (1988); M. Dogliotti and G. Cassano, 'Maternità 'surrogata,' contratto, negozio giuridico, accordo di solidarietà?' *Famiglia e diritto*, 159 (200); M. Mantovani, 'Fondamenti della filiazione, interesse del minore e nuovi scenari della genitorialità' *Nuova giurisprudenza civile commentata*, II, 262 (2003).

VI. *b*) The Health of the Surrogate Mother

The Italian ban could be interpreted as an absolute prohibition that forbids any variant of surrogate maternity, including altruistic surrogacy, whether or not there is evidence that this technique impacts the surrogate mother's health, which is protected under Art 32 of the Italian Constitution.

In reality, however, surrogacy does not entail any physical risks other than those associated with heterologous artificial fertilization,[69] connected with artificial insemination and the subsequent embryo implantation, nor does it subject the surrogate mother to risks of this kind that are different from the ones run by any woman during pregnancy or childbirth.[70]

Even so, since, during pregnancy, a unique relationship is formed between the pregnant woman and the unborn child,[71] we could hypothesize that there is a risk of psychological damage caused by separation from the new-born baby.[72] Indeed, multiple studies have noted that, in some surrogate mothers, their level of psychological distress is particularly high, even years after the 'delivery' of the child to the intended parents.[73] These studies, however, have focused primarily on cases of commercial surrogacy,[74] and they have also shown that

[69] From a feminist perspective, surrogacy should be prohibited even when there is no empirical evidence that demonstrates that it harms the psychological health of the surrogate mother because surrogacy would trigger biological processes that the surrogate mother would not be able to control: C. Overall, *Ethics and Human Reproduction: A Feminist Analysis* (Winchester, MA: Allen and Unwin, 1987), 127; H. Lindemann Nelson and J. Lindemann Nelson, 'Cutting Motherhood in Two: Some Suspicions Concerning Surrogacy' 4 *Hypatia*, 88 (1989). However, motherhood cannot be reduced to a mere biological event and this is also demonstrated by the fact that in all Western legal systems women have the right to abortion.

[70] See: V. Söderström-Anttila et al, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families (a systematic review)' 22 *Human Reproduction Update*, 2, 260-276 (2016).

[71] The physical link between the expecting mother and the unborn child passes through the placenta, which is 'an organ built of cells from both the woman carrying the pregnancy and the fetus, which serves as a conduit for the exchange of nutrients, gasses and wastes. Cells may additionally migrate through the placenta, and may have a broad range of impacts, from tissue repair and cancer prevention to sparking immune disorders' S. Allan, 'Commercial surrogate and child: ethical issues, regulatory approaches, and suggestions for change' Working paper 30 May 2014, 4. It is scientifically proven that the maternal endocrine system determines the physiological components of the fetal body, its future mental capacity, disease susceptibility, and neurological structure, as well as several complex anatomical functions: B. Oxman, 'Maternal-Fetal Relationship and Non-Genetic Surrogates' 33 *Jurimetrics*, 3, 389 (1993).

[72] R. Bitetti, 'Contratti di maternità surrogata, adozione in casi particolari ed interesse del minore' *Nuova giurisprudenza civile commentata*, I, 179 (1994).

[73] H. Baslington, 'The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process' 7 *Journal of Health Psychology*, 1, 57-71 (2002); E. Blyth, 'I Wanted to Be Interesting. I Wanted to Be Able to Say "I've Done Something with My Life": Interviews with Surrogate Mothers in Britain' 12 *Journal of Reproductive and Infant Psychology*, 189-198 (1994); H. Ragone, *Surrogate Motherhood: Conception in the Heart* (Boulder, CO: Westview Pres, 1994), 189-198; O. Van den Akker, *The Complete Guide to Infertility: Diagnosis, Treatment, Options* (UK: Free Association Books, 2002), passim.

[74] H. Baslington, n 73 above, 57; J. Jadva et al, 'Surrogacy: The Experience of Surrogate Mothers' 18 *Human Reproduction*, 10, 2196 (2003); C.G. Kleinpeter and M.A. Hohman, 'Surrogate

the surrogate mother is less impacted by her separation from the child if she can establish and maintain a strong emotional bond with the intended parents,[75] and in particular with the intended mother.[76] Furthermore, no empirical evidence has been found to show that traditional surrogacy (carried out with the genes of the surrogate mother) causes more psychological problems than gestational surrogacy (where the surrogate mother carries a genetically unrelated child);[77] research suggests that the type of surrogacy does not affect the woman's psychological health.[78] The altruistic nature of a surrogacy agreement, therefore, reduces the risks of potential injury for the psychological health of surrogate mothers, since in these cases it is very likely that the surrogate mother, the intended parents, and the child will continue to remain in close contact over time.[79]

VII. *c*) The Best Interest of the Child

Some authors, in order to support the current interpretation of the Italian ban on surrogacy as an absolute, constitutional prohibition which extends to altruistic surrogacy, have stressed the need to safeguard the rights of the unborn child. They argue that such protection is necessary to prevent it from being exploited by the infertile couple for the purpose of satisfying their

Motherhood: Personality Traits and Satisfaction with Service Providers' 87 *Psychological Reports*, 3 Pt 1, 957 (2000); O. Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' 21 *Journal of Reproductive and Infant Psychology*, 2, 145 (2003); A. Braverman and S. Corson, 'Characteristics of Participants in a Gestational Carrier Program' 9 *Journal of Assisted Reproduction and Genetics*, 9, 353 (1992); H. Hanafin, 'Surrogate Parenting: Reassessing Human Bonding' Paper presented at the American Psychological Association Convention, New York, August 1987.

[75] A.M. Fischer, 'The Journey of Gestational Surrogacy: Religion, Spirituality and Assisted reproductive technologies' 18 *International Journal of Children's Spirituality*, 3, 235-246 (2013); M. Hohman and C. Hagan, 'Satisfaction with Surrogate Mothering: A Relational Model' 4 *Journal of Human Behaviour in the Social Environment*, 1, 61 (2001); J.C. Ciccarelli and L.J. Beckman, 'Navigating Rough Waters. An Overview of Psychological Aspects of Surrogacy' 61 *Journal of Social Issues*, 1, 21-43 (2005).

[76] J. Jadva et al, n 76 above, 2196; E. Teman, *Birthing a Mother: The Surrogate Body and the Pregnancy Self* (Barkeley: University of California Press, 2010), passim; O. Van den Akker, 'Psychosocial Aspects of Surrogate Motherhood' 13 *Human Reproductive Update*, 57 (2007).

[77] G. Bernstein, 'Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy' 10 *Indiana Health Law Review*, 291 (2013); P. Trowse, 'Surrogacy: Is It Harder To Relinquish Genees?' 18 *Journal of Law and Medicine*, 3, 614 (2011).

[78] J. Jadva et al, n 76 above, 2196; C. Ciccarelli, *The Surrogate Mothers: A Post Birth Follow-Up Study* (Los Angeles: California School of Professional Psychology, 1997), passim.

[79] E. Blyth, n 73 above, 189; H. Ragone, n 73 above, 180; O. Van den Akker, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' n 76 above, 145. The psychological problems nevertheless involved only a small amount of birthchild woman: J. Jadva et al, n 76 above, 2196; C.G. Kleinpeter and M.A. Hohman, n 76 above, 957; A. Braverman and S. Corson, n 76 above, 353; H. Baslington, n 73 above, 64.

desire to become parents.[80]

It bears noting immediately that any arguments based on safeguarding the unborn child's rights come up against serious limits on a logical and axiological levels, because the protection of these rights would, paradoxically, lead to the non-existence or non-birth of the potential child.[81]

Another common argument is that altruistic surrogacy should be prohibited to prevent that the child, once born, can be regarded as an object to be transferred, as this would encroach upon its dignity as a human being.[82] This argument too, is not convincing, as

> 'the fact that this might occur within the context of surrogacy does not detract from that life having come into being and therefore being accorded dignity through its very existence as a human'.[83]

I would add that the risk of commodification of the child is eliminated by the altruistic nature of the agreement and the inclusion of the child in the intended parents' family may be the best solution for the baby, since it is certain that the surrogate mother never intended to fulfil motherly duties toward the child.

The removal of the child from the surrogate mother has also garnered attention as a significant source of severe psychophysical injury for the baby, since it is very important for birth mothers to maintain a relationship with the children during the period of growth, particularly immediately following birth.[84]

[80] C. Chini, 'Maternità surrogata: nodi critici tra logica del dono e preminente interesse del minore' 1 *Biolaw Journal*, 185 (2016); E. Giacobbe, 'Dell'insensata aspirazione umana al dominio volontaristico sul corso della vita' *Diritto di famiglia e delle persone*, II, 593 (2016); G. Ballarani, 'The Same-Sex Parented Family Option: The View from Italian Case Law' 6 *The Italian Law Journal*, 1, 12 (2020).

[81] See J.M. Camacho, n 63 above, 15; V.L. Raposo, 'Quando a cegonha chega por contrato' 88 *Boletim da Ordem dos Advogados*, 27 (2012).

[82] E.S. Anderson, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales' 8 *Health Care Analysis*, 1, 19 (2000); P. Otero, 'A dimensão ética da maternidade de substituição' 1 *Direito e política*, 87 (2012); S. Niccolai, 'Maternità omosessuale e diritto delle persone omosessuali alla procreazione. Sono la stessa cosa? Una proposta di riflessione' 3 *Costituzionalismo.it*, 50 (2015); C. Tripodina, 'C'era una volta l'ordine pubblico. L'assottigliamento del concetto di "ordine pubblico internazionale" come varco per la realizzazione dell'"incoercibile diritto" di diventare genitori (ovvero, di microscopi e di telescopi)', in S. Niccolai and E. Olivito eds, *Maternità Filiazione Genitorialità* (Napoli: Edizioni Scientifiche Italiane, 2017), 136; M. Aramini, *Introduzione alla bioetica* (Milano: Giuffrè, 2015), 266; E. Montero, 'La maternidad de alquiler frente a la summa divisio iuris entre las personas y las cosas' 1 *Persona y derecho*, 230 (2015); D. Rosani, 'The Best Interests of the Parents. La maternità surrogata in Europa tra Interessi del bambino, Corti supreme e silenzio dei legislatori' 1 *Biolaw Journal*, 127 (2017).

[83] K. Galloway, 'Theoretical Approaches to Human Dignity, Human Rights and Surrogacy', in P. Gerber and K. O'Byrne eds, *Surrogacy, Law and Human Rights* (Abingdon: Routledge, 2015), 25; J. Reis Novais, *A dignidade da pessoa humana* (Coimbra: Almedina, 2015), 120.

[84] M. Johansson Agnafors, 'The Harm Argument Against Surrogacy Revisited: Two Versions not to Forget' 17 *Medicine, Health Care and Philosophy*, 357 (2014); M. Tieu, 'Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers' 35 *Journal of Medical Ethics*, 172 (2009).

However, this observation is not decisive with respect to altruistic surrogacy, because the relationship that usually links the surrogate mother with the intended parents is generally sufficient to ensure affective continuity between the baby and the surrogate mother. Consequently, we may exclude potential injuries for the psychological health of the child resulting from separation from the birth mother.[85]

Moreover, these relationships could already be protected under the current rules of Italian family law. The rules that apply in the case of an unjustified interruption of relationships in conflict with the interest of the child, referred to in Arts 337-*ter* and 333 of the Italian Civil Code could also extend to the relationship between surrogate mother and child (the first or second provision would apply, depending on whether the surrogate mother is related to the intended couple or not).[86]

VIII. *d)* The Relevance of the Genetic Link Between the Intended Parents and the Child

Without a genetic connection between the intended parents and the unborn child, it might be argued that the infertile couple has no constitutional right to have access to surrogacy. Additionally, to allow surrogacy even when there is no genetic link between the intended parents and the unborn child could lead to the potential breach of criminal rules contained in Italian adoption legislation Legge no 40/2004.[87]

[85] V. Jadva et al, 'Surrogacy Families 10 Years on: Relationship with the Surrogate, Decisions over Disclosure and Children's Understanding of Their Surrogacy Origins' 27 *Human Reproduction*, 3008-3014 (2012); S. Imrie and V. Jadva, 'The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements' 29 *Reproductive Biomedicine Online*, 430 (2014); V. Söderström et al, n 70 above, 273; S. Golombok et al, 'Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment' 54 *Journal of Child Psychology and Psychiatry*, 6, 653 (2013); S. Golombok et al, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' 47 *Journal of Child Psychology and Psychiatry*, 2, 220 (2006); K.H. Sheltona et al, 'Examining Differences in Psychological Adjustment Problems among Children Conceived by Assisted Reproductive Technologies' 33 *International Journal of Behavioural Development*, 385-392 (2009); S. Golombok et al, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' 53 *Developmental Psychology*, 1966 (2017).

[86] See Tribunale di Milano, 1 August 2012, *Nuova giurisprudenza civile commentata*, I, 712 (2013), with note by F. Turlon; M. Gattuso, 'Gestazione per altri: modelli teorici e protezione dei nati in forza dell'articolo 8, legge 40,' available at giudicedonna.it, 1-54 (2014), 14; opposite to G. Biscontini, 'Intervento', in I. Corti and C.A. Graziani eds, *Verso nuove forme di maternità?* (Milano, Giuffrè, 2002), 61. In the US legal context see P. Laufer-Ukeles, 'Mothering For Money: Regulating Commercial Intimacy, Surrogacy, Adoption' 88 *Indiana Law Journal*, 4, 1254 (2013); R.F. Storrow, '*Surrogacy: American Style*', in P. Gerber and K. O'Byrne eds, *Surrogacy, Law and Human Rights* n 83 above, 215.

[87] Corte di Cassazione-sezione penale VI, 20 December 2018, no 2173 n 14 above.

However, requiring that the child's genetic material should come 100 % from the intended parents may be inconsistent with the current ability to use double heterologous methods and run counter to foreign systems that allow altruistic surrogacy, for which it is sufficient that 50% of the genetic material come from intended parents.[88]

This perspective is also confirmed by the *Mennesson*, *Labassee* and *Paradiso-Campanelli* cases of the European Court of Human Rights: even where there was only a genetic link on the paternal side, as in the *Mennesson* e *Labassee* cases, the European Court has recognized the existence of a family life union between the child and the intended parents and has, therefore, required states to legally recognise these types of family ties.[89] On the contrary, in the absence of a genetic link with either of the intended parents, as in the case of *Paradiso and Campanelli*, the ECtHR has considered it necessary to verify the child's best interest in maintaining the family relationship established with commissioning parents on the basis of the characteristics of that relationship (above all its duration).[90]

IX. *e)* The 'Costs' of Altruistic Surrogacy for Society

The prevailing interpretation of the Italian ban of surrogacy as an absolute prohibition which also includes altruistic surrogacy could be justified, on the one hand, because of the potential financial costs for the community of allowing couples to have access to surrogacy, and, on the other hand because of the high risk that apparently altruistic agreements could hide a reality of economic motives, with the consequent risk of exploitation of women (under the

[88] For instance, the Portuguese law (Law 22 August 2016, no 25, subsequently declared largely unconstitutional by the Tribunal Constitucional de Portugal 24 April 2018, no 225, available at www.tribunalconstitucional.pt and waiting to be reformed by Parliament) requires that half of the genetic patrimony of the baby comes from the social parents; in the United Kingdom, to obtain the parental order – which concretely determines the *status* of the child – the Courts require that one of the two parents be genetically related to the baby.

[89] Eur. Court H.R., *Mennesson* v *France*, Judgment of 26 June 2014, *Foro italiano*, IV, 561 (2014), with note by G. Casaburi; Eur. Court H.R., *Labassee* v *France*, Judgment of 26 June 2014, available at *echr.coe.int*; Eur. Court H.R., *Foulon* v *France*, Judgment of 21 July 2016, and *Bouvet* v *France*, both available at echr.coe.int; Eur. Court H.R., *D and Others* v *Belgium*, Judgment of 8 July 2014, available at echr.coe.int. Recently, Eur. Court H.R., Advisory Opinion of 10 April 2019 n 11 above, concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation (Request no P16-2018-001) – Arrêt 5 October 2018, no 638 (10-19.053), available at tinyurl.com/mb8z8tfj (last visited 27 December 2020).

[90] Eur. Court H.R., *Paradiso e Campanelli* v *Italia*, Judgment of 25 January 2015, *Foro italiano, IV,* 117 (2015). Subsequently, Eur. Court H.R. (GC), *Paradiso e Campanelli* v *Italia*, Judgment of 21 January 2017 *Nuova giurisprudenza civile commentata*, I, 495 (2017), with note by L. Lenti, overturned the previous decision; see E. Lucchini Guastalla, 'Maternità surrogata e best interest of the child' *Nuova giurisprudenza civile commentata*, 1729 (2017); G. Perlingieri and G. Zarra, 'Ordine pubblico interno e internazionale' n 9 above, 105.

precautionary principle).

This consideration is necessary because, in the legal systems of Continental Europe, the purpose of the welfare state is to ensure the implementation of the principle of legal equality, unlike in the American model, in which the downside of the right to be left alone is the substantial absence of public support for the development of the individual personality.[91]

It follows that, in the US system, people wishing to have abortions,[92] have sex reassignment procedures, or have access to assisted reproduction do so at their own expenses and not at public expense, whereas in the European legal systems, political society takes on the same choices as their own.[93] Under the European perspective, in fact, a couple's inability to procreate through natural methods and, therefore, to realize their parental project autonomously, assumes not only individual, but also social importance, in light of the substantive equality principle.[94]

However, the need to consolidate public finances cannot prevail over social needs, since in a democratic and social constitutional system (such as that of Italy and all the Countries of Continental Europe) financial equilibrium represents a recessive value with respect to the satisfaction of the social rights of persons.[95]

The prohibition of altruistic surrogacy could also be justified to impede the

[91] M. Paradiso, 'Au bon marché des droits. tra globalizzazione dei diritti e delocalizzazione della procreazione' *Rivista di diritto civile*, 988 (2018); M. Mazziotti, 'Diritti sociali' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), XII, 804.

[92] An emblematic case regarding this is *Maher* v *Roe*, 432 U.S. 464 (1977), in which the Supreme Court held that the right to abortion does not give rise to a state obligation to bear the cost of abortions: see S. Holmes and C.R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton & Company, 1999), 35.

[93] However, it should be noted, first, that in the US system many families with overall low incomes receive tax rebates and subsidies to reduce insurance costs and, second, that the number of persons with private insurance coverage is very large, provided to them in many cases by employers, or by federal governments, through the Medicaid health insurance program. Nonetheless, although the number of people receiving insurance coverage has been expanded as a result of Obamacare, many people still remain without insurance coverage. But, in any case, we cannot fail to notice the difference between a system, such as the European system, and Italian in particular, which places the costs of health procedures, including those described above, at the expense of the whole community, regardless of the income of those in need, and a system, such as the American one, which for large sections of the population, certainly for the higher income groups, leaves the costs to be borne by those who access to the procedures.

[94] G. Ripert, *Le regime démocratique et le droit civil moderne* (Paris: Librairie Générale de Droit et de Jurisprudence, 1936), passim; A. D'Aloia, 'Storie "costituzionali" dei diritti sociali', in V. Baldini et al, *Scritti in onore di Michele Scudero* (Napoli: Jovene, 2008), II, 743; F.D. Busnelli and E. Palmerini, 'Bioetica e diritto privato' *Enciclopedia del diritto* (Milano: Giuffrè, 2001), Agg V, 142.

[95] D. Bifulco, *L'inviolabilità dei diritti sociali* (Napoli: Jovene, 2003), 212; M. Benvenuti, 'Diritti sociali' *Digesto discipline pubblicistiche* (Torino: UTET, 2012), Agg V, 267; M. Luciani, 'Sui diritti sociali' *Scritti in onore di Manlio Mazziotti di Celso* (Padova: CEDAM, 1995), II, (126). See also: Consiglio di Stato 20 July 2016 no 3297, available at www.giustizia-amministrativa.it; Tribunale Amministrativo Regionale Lombardia Milano 28 October 2015 no 2271, available at www.giustizia-amministrativa.it; Tribunale Vercelli 15 October 2018 *Giurisprudenza italiana*, 2390 (2019), with note by E. Falletti.

commission of potential abuses,[96] which would be difficult to detect,[97] as shown by the experience of countries that allow altruistic surrogacy.[98] In addition, there are some circumstance where, unlike in heterologous fertilization in which the donor remains anonymous and has no contact with the couple, the relations between the intended parents and the woman in surrogacy cannot be prevented, increasing the risk of economic contamination.[99] These complicating factors could lead to a *tout court* rejection of surrogacy as a precautionary measure.[100]

However, despite these critical aspects, the current prevailing interpretation of Art 12, para 6 of Legge no 40/2004, as an absolute prohibition that bans any form of surrogacy including altruistic surrogacy, is not justified, chiefly because it violates the rights of the infertile couple. It will be up to the legal system to find ways of avoiding the perpetration of possible abuses, through an extensive system of checks and balances, aimed primarily at preventing the risk that

[96] B. Sgorbati, 'Maternità surrogata, dignità della donna e interesse del minore' 2 *Biolaw Journal*, 120 (2016).

[97] According to one strain of feminist thought, any attempt to regulate the practice 'would not be enough to address the inherent wrongs in surrogacy,' because 'where there are laws governing surrogacy, loopholes, abuse, and enforcement problems remain:' A. Allen, 'Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human' 41 *Harvard Journal of Law and Public Policy,* 808 (2018); R. Klein, *Surrogacy: A Human Rights Violation* (Chicago: University of Chicago Press, 2017), 69; J. Lahl, 'Gestational Surrogacy Concerns: The American Landscape', in E. Scott Sills ed, *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge: Cambridge University Press, 2016), 287 ; V. Calderai, 'The conquest of ubiquity, or: why we should not regulate commercial surrogacy (and need not regulate altruistic surrogacy either)' *Familia*, 404 (2018). Although we cannot ignore the influences that may bear on surrogate mothers, this view cannot be ensorsed, since it leads to the total denial of the rights of the sterile couple. Instead, we need to identify the risks and the problems in practice and try to draw up rules to resolve them.

[98] In United Kingdom, the Courts often validate cash payments which exceed the reimbursement of costs and which take the form of a real payment. It is not by chance that there are proposals from many authors to overcome the ban of commercial surrogacy, which is regarded as a ban in fact overcame and which forces many couples to go abroad to have access to surrogacy: E. Jackson, 'UK Law and International Commercial Surrogacy: 'The Very Antithesis of Sensible' 4 *Journal of Medical Law and Ethics*, 197 (2016). Also in the Canadian context many authors have proposed to overcome commercial surrogacy ban which is often bypassed by the parents going abroad: K. Busby, 'Is It Time To Legalize Commercial Surrogacy in Canada?' *Law and Policy, Medical Tourism, Reproduction*, 3 February 2015, 1; M. Deckha, 'Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding' 61 *McGill Law Journal*, 31 (2015). In Greece, despite the ban of commercial surrogacy, many of the surrogacies realized are, in fact, commercial. It is therefore hoped that this formalistic and hypocritical ban will be overcome in favour of full legalisation of surrogacy: A.N. Hatzis, 'From Soft to Hard Paternalism and Back: The Regulation' *Portuguese Economic Journal*, 21 July 2009, 9.

[99] In the event of a conflict between the surrogate mother and the intended parents, in the American doctrine some authors believe that the position of the surrogate woman should be protected, even to the detriment of the rights of intended parents: C. Spivack, n 45 above, 109; other authors believe that in the case of gestational surrogacy the rights of genetic parents should rather be protected: K. Bradley, 'Assisted Reproductive Technology after Roe v. Wade: Does Surrogacy Create Insurmountable Constitutional Conflicts?' 16 *University of Illinois Law Review*, 1902 (2016).

[100] U. Salanitro, 'Norme in materia di procreazione medicalmente assistita' n 7 above, 1780.

illegal payments are hidden behind the reimbursement of expenses.[101]

X. *f)* Limits of Public Policy

Particularly in light of some important recent case law,[102] it is worthwhile to focus on the possible contradiction between altruistic surrogacy and public policy, because the effects of surrogate motherhood could not be protected at the level of the establishment of the parent-child relationship if they were in conflict with it.

The Joint Divisions of the Supreme Court of Cassation, in its aforementioned decision no 12193/2019, pointed out that the notion of public policy is that combination of fundamental principles and values which characterise the ethical and legal attitude of our legal system at a given moment, and can be derived, both from the Constitutional Charter and from supranational sources, as well as from those ordinary rules considered to be expressions of the values enshrined in the Charter and, consequently, as instruments of implementation of the same constitutional principles. The Supreme Court thus resolved a conflict concerning the actual boundaries of the notion of international public policy, adhering to the second of the two guidelines which emerged previously in case law. The debate, which was also intense among scholars,[103] concerned whether the concept of public policy should cover only the principles established by the rules of the Constitution, European law and international conventions,[104] or even those in ordinary rules

[101] For example the English model, where the authorization of a third authority (Human fertilisation and embryology Authority) and the subsequent oversight of the court are necessary establish the future status of the child: E. Jackson, n 98 above, 197; or the Greek model, where the intervention of the Greek National Authority of Assisted Reproduction is required: A.N. Hatzis, n 98 above, 9; or the Portuguese model, where the surrogacy agreement parties must obtain the authorization of the National Council for Medically assisted procreation (CNPMA): R. Vale e Reis, 'Procriação medicamente assistida: a gravitas da jurisprudência' *Gestão Hospitalar,* 50 (2019).

[102] Corte di Cassazione-Sezioni unite 8 May 2019, no 12193 n 14 above, 737; Corte di Cassazione 30 September 2016 no 19599, *Corriere giuridico*, 181 (2017), with note by G. Ferrando; Corte di Cassazione-Sezioni unite 5 July 2017 no 16661, *Corriere giuridico*, 1042 (2017), with note by C. Consolo; also in *Nuova giurisprudenza civile commentata,* 1292 (2017) with note by M. Grondona; Cassazione 22 February 2018 no 4382, *Famiglia e diritto*, 837 (2018), with note by M. Dogliotti; Corte d'Appello di Trento 23 February 2017, *Nuova giurisprudenza civile commentata*, 994 (2017), with note by V. Calderai.

[103] See, among others, V. Barba, 'L'ordine pubblico internazionale' *Rassegna di diritto civile*, 403 (2018); C. Irti, 'Digressioni attorno al mutevole "concetto" di ordine pubblico' *Nuova giurisprudenza civile commentata*, II, 481 (2016); G. Perlingieri and G. Zarra, 'Ordine pubblico interno e internazionale' n 9 above, 64; A. Mendola, 'Interesse del minore tra ordine pubblico e divieto di maternità surrogata', *Vita notarile*, 673 (2015); F. Quarta, 'Illecito civile, danni punitivi e ordine pubblico' *Responsabilità civile e previdenza*, 1159 (2016).

[104] Corte di Cassazione 30 September 2016 no 19599 n 102 above, 181; Corte di Appello di Trento 23 February 2017 n 102 above, 994; Corte di Appello di Torino 29 October 2014, *Famiglia e diritto*, 822 (2015), with note by M. Farina.

that are exercises of legislative discretion.[105]

The prohibition of commercial surrogacy certainly has public policy value, as suggested by the existence of criminal sanction provisions, usually put in place to safeguard fundamental legal interests, such as the human dignity of the woman and the adoption system.[106] However, the points discussed above support the conclusion that a different assessment is required for altruistic surrogacy: on the one hand, because the absence of profit and the spontaneity of the gesture prevent the commodification of the woman's body, leaving her dignity intact and, on the other, because if there is a genetic link among the intended couple and the child, the conflict between surrogacy and adoption law must be ruled out, due to the fact that surrogacy of this kind falls completely outside the scope of the regulations governing the adoption of children, Legge 4 May 183 no 1984.

The recent decision no 2193/2019 of the Joint Divisions of the Supreme Court of Cassation[107] appears to oppose this conclusion, however. There, in relation to a case of altruistic surrogacy, the Court held that international public order was an obstacle to recognizing a parental relationship between the child and the intended parents. The Joint Divisions adopted the view that surrogacy is clearly opposed to the values of our legal system, a view already expressed by the Supreme Court itself and by the Constitutional Court, but previously in reference to cases of commercial surrogacy, in which, moreover, neither parent had genetic links to the child.[108] It is important to stress this point because the Joint Divisions of the Supreme Court of Cassation based their decision on the reasoning previously used in case law to criminalize cases of commercial surrogacy, without making any distinction between commercial surrogacy and altruistic surrogacy.

This is the least convincing aspect of the decision, which, not by chance, was taken up again by the latest order no 8325/2020 of the First Civil section of the Court of Cassation. The order referred to the Constitutional Court the question of whether the prohibition on recognizing a foreign judgement establishing a parent-child relationship between the surrogate-baby and the intended parents – in accordance with decision no 12193/2019 of the Joint Divisions of the Supreme Court of Cassation – violates the Italian Constitution, including in light of the principles of law established by the European Court of Human Rights.[109]

In this recent order, in fact, the Judges gave weight to the fact that the pregnancy in question took place in a country that permits only altruistic surrogacy

[105] Corte di Cassazione-Sezioni unite 5 July 2017 no 16661 n 102 above, 1042.

[106] Corte di Cassazione, 11 November 2014 no 24001 n 47 above, 239.

[107] Corte di Cassazione-Sezioni unite 8 May 2019 no 12193 n 14 above, 737.

[108] Corte di Cassazione 11 November 2014 no 24001 n 47 above, 239; Corte costituzionale 18 December 2017, no 272 n 18 above, 10.

[109] Corte di Cassazione 29 April 2020 no 8325 n 16 above, 902.

(Canada). According to the Court, this case, in which the surrogate-mother was inspired by selfless interests, must be distinguished from cases in which surrogacy is carried out with commercial aims. Different cases deserve a different assessment in axiological and normative terms,[110] the Joint Divisions of the Supreme Court of Cassation have so far treated them in the same way.

XI. Protection of Fundamental Rights and the Legal Relationship Between the Intended Parents and the Child: The Way Forward

The above analysis shows very clearly that there are valid reasons to conclude that the current interpretation of the ban on surrogate maternity is not convincing and that a different, narrow interpretation of the ban should be accepted.

From this point of view, recognizing a right to access altruistic surrogacy requires a coherent and harmonious interpretation of the rules establishing and protecting the legal status of the child. In this respect, it should be possible to establish the parent-child relationship not only with the father with whom there is a genetic link, but also with the intended mother.[111]

The issues that need to be resolved are extremely complex, and here I can only indicate some methods, drawn from my ongoing research and forthcoming, more extensive critical analysis of the subject.[112]

A distinction must be drawn, however, between the situations where the surrogate mother exercises her right to be named on the birth certificate, and the situation in which she intends to waive the filial relationship with the child, bringing the pregnancy to term anonymously.[113]

In the latter case, in the absence of any conflicts between the surrogate mother and the intended parents, there is no reason to prohibit the establishment of a filial relationship between the intended parents and the child.[114] Here there would be no need to resort to adoption, since this establishment would be based on the genetic link between the intended parents and the child or, in its

[110] L. Rossi Carleo, 'Maternità surrogata e status del nato' *Familia*, 391 (2002); M. Dogliotti, n 68 above, 159; opposite to, F.D. Busnelli, 'Nascere per contratto?' *Rivista di diritto civile*, 49 (2004).

[111] Once established, the legal relationship must be protected, in the child's interest, from any second thoughts by the surrogate mother.

[112] See A.G. Grasso, 'La costituzione del rapporto con la madre intenzionale nella surrogazione solidale', in U. Salanitro ed, *Quale diritto di famiglia per la società del XXI secolo?* (Pisa: Pacini, 2020), 345.

[113] In Italy it is possible for the mother-to-be to bring the pregnancy to term anonymously, unlike in other States (like Portugal, Belgium, Netherlands, Spain etc): Art 30, para 1, grants this possibility to the birth mother.

[114] T. Auletta, 'Fecondazione artificiale' n 67 above, 57; C.M. Bianca, *'Diritto civile,'* II, *La famiglia* (Milano: Giuffrè, 2017) 446; more recently, I.A. Caggiano, *Tipologie di procreazione, stadi di filiazione e conseguenza patrimoniali* (Pisa: Pacini, 2017) 72; A. Vesto, *La maternità tra regole, divieti e plurigenitorialità* (Torino: Giappichelli, 2018), 123.

absence, on the informed consent expressed by parents in advance of the treatment process (Arts 8 and 9, Legge no 40/2004), taking into account the best interests of the child and its right to have two parents.

Where, instead, the surrogate mother decides to make use of her right to be named on the birth certificate and decides to revoke her original consent to altruistic surrogacy, the conflict will likely be resolved in her favor, due to the absence of a specific domestic legislative framework.