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THE SHADOW OF OBSOLESCENCE ON FAMILY LAW RULES

Rosamaria Tristano*

Abstract

Legal rules are different from any other rule because they are legally binding, which means that a country recognizes them as right, and then enforceable, and ensures their observance.

They are legally relevant, and issued because of their effectiveness in pursuing values and objectives that each country acknowledges as its own, but from this fact comes an observation: what happens when a legal rule that is in force does not reflect society and its changes and necessities?

Regardless the binding value of a law rule, in fact, it is truly perceived as a “right” one by the people when it reflects their needs, and it gets complicated when law rules are outdated or connected to an obsolete socio-cultural background.

This situation particularly affects family law, because family is a concept that is more tightly connected with society than any other and has been strongly influenced by the technological and social development of the last decades but, undeniably, the innovation wasn't the same for family law rules, which to a large extent are still referring to outdated concepts.

That is the reason why we talk of obsolescence as a dark side of family law, analyzing the different approaches of the Italian system and the British one through their acts and decisions regarding some recent issues of family law, such as surrogate motherhood and medically assisted procreation.

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Keywords

Family law - Same sex parenting - Surrogate motherhood - Medically assisted procreation

Legal rules are adopted because of their effectiveness in pursuing values and objectives that each country acknowledges as its own, but sometimes it may happen that a rule, which is considered effective and useful at the time of its amendment, is affected by the passing of time and becomes useless or even counterproductive. In fact, society changes continuously, together with its habits and needs, and the law is supposed to reflect these changes in order to maintain its effectiveness and be actually applied.

Regardless of the persistence of the binding value of a legal rule, in fact, it is truly perceived as right and applied by the people only when it reflects their needs, and it may get complicated when it is outdated or connected to an obsolete socio-cultural and economic background.

It has been observed, in fact, that new issues cannot be addressed with concepts and legal schemes already prepared and inspired by very different needs¹, but that they require an appropriate regulation that, as said, will show how “*society responds to the reevaluation of the currency of personhood which technology has forced us upon it. That response will help to understand the sort of people we say we want to be and want to become*”².

That’s why we talk about obsolescence as one of the dark sides of the law, and of family law in particular, that is for sure the branch of private law that is most dynamic and sensitive to different influences and whose study would not lead to a correct result if it was conducted without taking into account all the extra-legal elements and their implications.

Family is not a legal institution and it is pre-existent to the law, which is limited to recognize it as a natural social entity that, consequently, evolves and changes regardless of the legal categories related to it.

This makes the subject particularly challenging for lawyers who, in reconstructing the matter in legal terms, cannot help but confront with elements that are instead sociological, religious, political, but not legal, and also for Parliaments and legislative bodies who have to deal with a constantly evolving concept, which escapes the strict classifications typical of positive law.

The approach of legal systems to family is like a continuous, endless pursuit, because as soon as a reform is enacted, new demands emerge from society, and laws are again outdated. The reason lies precisely in the remoteness of the family from law and in the absolute autonomy and independence between the two concepts: family, and its forms and expressions, changes due to social, economic or political reasons, and

¹ Giovanni Criscuoli, La legge inglese sulla “surrogazione materna tra riserve e proposte”, in *Dir. Fam. Pers.*, 1987, p. 1030.

² Derek Morgan, Who to be or not to be: the surrogacy story, in *The Modern Law Review*, 1986 (vol. 49), p. 368, cit. in G. Criscuoli, La legge inglese sulla “surrogazione materna tra riserve e proposte”, in *Dir. Fam. Pers.*, 1987, p.1030.

departs from the cases regulated by law rules, which become outdated, and then useless, and require a reform. But social changes do not stop, and with them those of the family, that are faster than the legal ones, which chase them in a loop that risks tending to infinity.

Sociology and other sciences give a definition of family which takes into account the peculiar dynamism of the concept of family, that we can consider, actually, as “*an intimate domestic group of people related to one another by bonds of blood, sexual mating, or legal ties*” that “*has been a very resilient social unit that has survived and adapted through time*”³. But this definition was very different ten, twenty or more years ago, because it has changed over time to this result and we don’t know how long it will remain adherent to reality, nor we can, actually, know it.

One of the main issues in family law arises properly from the necessity to lead back the concept of family to a legal category, in order to regulate and protect it, defining with certainty its borders but, inevitably, leaving out some aspects, including all those resulting from the physiological evolution of the concept.

A clear example can be found in the Italian legal system that, in fact, neither in the Constitution, nor in the Civil Code or other acts lays down a description of family, recognizing only some of its aspects, but neglecting many other of its peculiarities, which remain devoid of regulation, and then of legal protection, making necessary continuous reforms, additions and updates.

It’s no coincidence that family law in Italy (but even, for example, in Spain or France, which share the same approach and therefore the same issues of the civil law system to which they belong) has been one of the most frequently reformed branches of private law, since the introduction into the Constitution in 1948 of new values, which had to be transposed into legislation by updating the original regulations laid down in the Civil Code.

³ UK Essays. (November 2018). The Sociological Definition of Family. Retrieved from <https://www.ukessays.com/essays/sociology/the-definition-of-family-sociology-essay.php?vref=1>.

The first attempt of the Italian legislator to regulate family relationships was in 1942 with the Civil Code. It was referred to a traditional social context with a strong religious component, where family was based on the indissoluble marriage between a man and a woman, and the first one was in a position of supremacy and exercised his parental authority over children. This approach aimed to reflect the traditional Catholic idea of family, which was predominant at the time, and to satisfy the public interest as perceived during those days, meaning the economic interest concerning the certainty of family relations, in order to ensure that asset transfers can be predicted with certainty.

This framework was changed six years later by the Constitutional values, which replace the solidaristic - productivist principle of the 1942 Code, with the new principle of social solidarity placed by the Constitution as the guiding principle of the entire legal order.⁴

The Constitutional values of equality and protection of the individual, in fact, influenced even the idea of family, which article 29 defines as a “*natural society founded on marriage*”, reconnecting precisely to those social formations protected by article 2 as an expression of each person.

The text of articles 29-31 of the Constitution shows the new perspective on family and the integral protection of each of its members, in their dignity as persons and in the full and free development of their personality, without distinctions between the spouses, who are equal, according to article 3. This protection is no longer the expression of a specific interest of the State towards marriage and family, but is based on and intended for the individuals who compose it.

The formulation of these principles made it necessary to modernize family law by reforming the Civil Code, which was still connected to an outmoded context, but this took a little time, and the most important reforms of family law took their effects only in the Seventies.

⁴ Gabriella Autorino, *Manuale di diritto di famiglia*, Giappichelli, 2015, pp. 3-5.

These reforms, with the dual purpose to adapt the traditional scheme of family law to the new principles guaranteed by the Constitution and to reflect the social revolution started in the Sixties, introduced the legal regime of matrimonial property, abolished the institution of the dowry, and admitted divorce. The relationship between parents and sons changed too, and the patriarchal approach, marked by the strong authority of the father, was overtaken by the idea of an equal authority of both parents, and of greater equality between legitimate and natural children.

The process of adjustment to Constitutional values has continued, gaining in the following years the total equalization between sons, the evolution of the authority of parents in responsibility, a new regulation of adoption, the definitive abandonment of the concept of guilt in divorce... But these well-known reforms, while innovating family law, did not leave the path already covered: they didn't really depart from the traditional idea of family which, although modernized and adapted to new social needs, remained in the background.

However, the evolution of the family of the Seventies with respect to the 1942 one, was nothing compared to the leap forward of the Nineties and later, and the complexity of approaching family law today lies precisely in this complete detachment from the roots and in the emergence of new concepts, far from the traditional categories of family law.

In the last three decades, in fact, inconceivable possibilities have arisen: customs, values and social models have changed, also because of the simpleness of communication permitted by internet, which has facilitated the spread of habits, ideas and discoveries, and even personal movements are easier and faster.

Furthermore, the evolution of science has given the possibility to know and understand the biological mechanisms of life, and this upsets the relationship of man with procreation, making him able to control and artificially replicate it. This has opened new scenarios regarding parenting, filiation and families, even same-sex ones, introducing cases not only completely new, but also totally uprooted from the traditional concepts, and difficult, if not impossible, to trace back to the traditional legal categories of family law.

The reaction of the Italian legislator was the introduction of new laws and reforms, in order to regulate the new topics, and a new period of reform in Italy took place from 2000 onwards.

But these measures, while regulating new cases, remain anchored in outdated concepts, and instead of taking into account the continuous evolution of family and the need for protection of its new forms, they crystallize the new cases in concepts outdated and often ambiguous.

This situation complicates the framework in two ways: on one hand, they too often leave room for gaps in protection, and whenever people can't find the remedy to their concrete case in a statute enacted to regulate it, it's not uncommon for them to consider it useless and to decide not to apply it, looking for a remedy elsewhere, maybe in a more favorable foreign legal system. On the other hand, the lack of adequate provisions may lead to the opposite result of an increase in the use of justice, in an attempt to remedy the problems left unresolved by the law and to obtain clarification for concrete cases not adequately regulated; this put the Courts in the uncomfortable position of having to force their interpretations as much as possible and compensate the shortcomings of the law looking for a foothold in the Constitution or in the decisions of European and international Courts.

This is what happened, for example, with one of the most problematic Italian statutes in the field of family law, that is for sure the Human fertilization and embryology Act of 2004, which clearly shows how an act biased by policy reasons and that doesn't reflect the social context, remain empty words. The main consequence of this statute, in fact, was exactly the need for clarification and interpretation by the Courts, in parallel with the race of many interested couples for a more favorable legal regime abroad.

The debate was back a few years ago, after the enactment of the Same-sex civil unions and cohabitation regulations Act of 2016, which recognized same sex unions and cohabitations as other forms of family beyond marriage.

This Act, although innovative, has not been decisive and while trying to reconcile the pressures of opposing socio-cultural groups, ended up without completely satisfying almost anyone. The delicacy and sensitivity of the subject, in fact, has raised a bitter contrast, that was social, and not only political, and that is reflected in the disorganic formulation of the Act, which in order to obtain the approval of the Parliament had to undergo many cuts and changes.

The few years that have passed were enough to bring out the points of greater weakness of this Act which, in the path already traced by previous reforms of family law, intervenes in a fragmentary and non-organic way on a discipline that remains fundamentally anchored in its original traditional principles.

The main problem is that, even on the outcome of this reform, those that nowadays, in the common experience, are all considered three forms of family, are different for the law, and although the equalization of some specific aspects, they differ from each other for nature, rights and regulation: we have marriage, as said, as a natural society recognized by the law (article 29 of the Italian Constitution), civil unions as social formations established by the law (article 1 of the 2016 Act), and cohabitations that are not even awarded this status, but only some specific aspects of which are regulated, without a classification in legal terms (article 1, section 36 of the 2016 Act).

The practical repercussions are not few, as well as the issues arising from the many aspects that the Act has omitted, like the regulation of adoption or medically assisted procreation for same sex couples and the recognition of their parent-child relationship with a children born abroad with artificial insemination or surrogacy.

The consequences were exactly those described above, in fact it is precisely in regard of same sex parenting that there are many cases of children born abroad after medical assisted procreation or even surrogacy, and there are also many decisions of the Corte di Cassazione⁵, forced to recognize the need for legislative reforms, stating that “*in a scenario in which parenting often breaks away from the link with marriage and family, declined into*

⁵ See: Corte di Cassazione n. 13000/2019, in www.dejure.it.

a multiplicity of contexts previously considered unpublished, it is, then, necessary to put ourselves in another perspective, where the family relationship no longer stands in conventional terms, in which new hypotheses of intersubjective relationships fit the scene of the family, which can no longer be only the one which the civil code predicted in 1942”, and that “the phenomenon of the emergence of different intersubjective relationships in emotional relationships is progressively evolving, and requires a systematic and no longer occasional protection of phenomena, previously unknown or considered minority, by imposing solutions capable of emancipating themselves from those traditional models that risk, by now, proving inadequate compared to the first”⁶.

This awareness, together with the protection of the best interest of the child as the Polar Star of the family law system, should guide the reforms, given that “*any consideration regarding the assessment in terms of the unlawfulness or illegality of the medically assisted procreation technique and of the conduct of those who allow its access or application, could certainly not be reflected, in negative, on the minor and on the whole complex of the rights recognizable to him*”⁷.

⁶ “In uno scenario, nel quale, come si è detto in precedenza, la genitorialità spesso va staccandosi dal nesso col matrimonio e dalla famiglia, declinandosi in una molteplicità di contesti prima ritenuti inediti, è, allora, necessario porsi in un'altra prospettiva, dove il rapporto familiare non si pone più in termini convenzionali, in cui nuove ipotesi di relazioni intersoggettive calzano la scena della famiglia, che non può più essere solo quella che il codice civile ha previsto nel 1942. Il fenomeno dell'emersione di diverse relazioni intersoggettive nelle relazioni affettive è, del resto, in progressiva evoluzione, così da richiedere una tutela sistematica (e non più occasionale) dei fenomeni prima sconosciuti o ritenuti minoritari, imponendo soluzioni capaci di emanciparsi da quei modelli tradizionali che rischiano, ormai, di rivelarsi inadeguati rispetto ai primi.” Cass. 13000/2019, cit..

⁷ “Qualsivoglia considerazione riguardante la valutazione in termini di illiceità/illegittimità, in Italia, della tecnica di P.M.A. in precedenza specificamente richiamata, oltre che, eventualmente, delle condotte di coloro che ne consentono l'accesso o l'applicazione, non potrebbe certamente riflettersi, in negativo, sul nato e sull'intero complesso dei diritti a lui riconoscibili” Cass. 13000/2019, cit..

This decision and the similar ones are inspired by cases decided by the European Court of Human Rights⁸, and the Italian Constitutional Court⁹, the last one which clearly states that in the Constitution there isn't an opposite sign or a preclusion regarding the matter, but this cannot automatically give rise to legitimacy in the absence of an express legislative provision¹⁰.

This is just one of the many issues resulting from this Act of 2016 and another matter, as said, regarding the protection of unmarried couples, which are not defined as a form of family nor as a social formation worthy of protection. The Act indicated the essential elements of this category of couples and extends to them only a few of the rights and prerogatives of married couples, leaving the rest to their contractual autonomy by giving them the freedom to conclude a contract to regulate their property relations.

This Act is not as innovative as it may seem because the rights granted to unmarried couples are nothing more than a fragmentary reformulation of those already consolidated by the Courts in the past years and, furthermore, many gaps of protection remain and the problem of the regulation of property relations of unmarried couples is solved only in appearance. In fact, the partnership agreement which specifies the property regime of the couple and the contribution to family life of its members must have precise form requirements and must be registered on a

⁸ Between the most famous cases of the European Court of Human Rights there are *Mennesson vs. France* (26 June 2014, n. 65192/11) and *Labassee c. France* (26 June 2014, n. 65941/11). One of the most recent decisions of the European Court of Justice is n. 490 of 14 December 2021, which underlines the necessary primacy of the child's interest.

⁹ One of the most recent is Corte Costituzionale n. 230/2020, in www.dejure.it.

¹⁰ “Se, dunque, il riconoscimento della omogenitorialità, all'interno di un rapporto tra due donne unite civilmente, non è imposto dagli evocati precetti costituzionali, vero è anche che tali parametri neppure sono chiusi a soluzioni di segno diverso, in base alle valutazioni che il legislatore potrà dare alla fenomenologia considerata, non potendosi escludere la capacità della donna sola, della coppia omosessuale e della coppia eterosessuale in età avanzata di svolgere validamente anch'esse, all'occorrenza, le funzioni genitoriali (sent. nn. 162 del 2014, 84 del 2016, 221, 237 del 2019)”, Corte Cost. 230/20 in www.dejure.it.

special list at the municipal offices. These formalities make those kinds of contracts poorly applied in practice, as shown by statistics.

It's quite odd, in fact, that a couple which doesn't want to formalize its union with marriage, needs to be formally registered in order to obtain some rights and their protection, and, once again, the Act of 2016 has proven to be a wasted opportunity to respond to the needs of protection felt by people by providing a more comprehensive set of regulations.

The subject certainly deserves a more profound study, but even these few nods are enough to show the inadequacy of the current family law system, which must be rethought in order to be less disorganized and closer to the new social needs, overcoming the traditional obsolete legal categories and their socio-cultural substrate and giving and effective protection to the rights of the different forms of family that are currently in existence.

New issues, in fact, are on the horizon, such as the regulation of surrogate motherhood, that is currently forbidden in Italy but, as it happened a few years ago with medical assisted procreation, is widely used abroad by Italian couples, and raises many questions, recently addressed by Italian Courts.

Until a few years ago, in fact, the prevailing orientation was the one stated by the Italian Corte di Cassazione in the decision nr. 12193 of 2019¹¹ which, talking about surrogacy, affirmed that the recognition of the effectiveness of the order of a foreign court establishing the relationship of sonship between a child born abroad by recourse to surrogacy and the intentional parent who is an Italian citizen, finds an obstacle in

¹¹ See Corte di Cassazione SS. UU., n. 12193 of May 8th 2019, in www.dejure.it, which states: "Il riconoscimento dell'efficacia del provvedimento giurisdizionale straniero con cui sia stato accertato il rapporto di filiazione tra un minore nato all'estero mediante il ricorso alla maternità surrogata ed il genitore intenzionale cittadino italiano trova ostacolo nel divieto di surrogazione di maternità previsto dall'art. 12, 6° comma, della l. 19 febbraio 2004 n. 40. Tale divieto costituisce, infatti, un principio di ordine pubblico, essendo posto a tutela di valori fondamentali, quali la dignità umana della gestante e l'istituto dell'adozione. La tutela di tali valori, non irragionevolmente ritenuti prevalenti sull'interesse del minore nell'ambito di un bilanciamento effettuato direttamente dal legislatore, al quale il giudice non può sostituire la propria valutazione, non esclude peraltro la possibilità di conferire rilievo al rapporto genitoriale, mediante il ricorso ad altri strumenti giuridici, quali l'adozione in casi particolari, prevista dall'art. 44, 1° comma, lett. d), della l. 4 maggio 1983 n. 184."

the prohibition of surrogacy of motherhood enacted by Article 12, 6 of the Act nr. 40 of 2004 on medical assisted procreation. According to the decision, this prohibition constitutes a principle of public order, to protect fundamental values such as the human dignity of the pregnant woman and the institution of adoption, that shall be deemed to prevail over the interests of the child as a result of a balance of interests made directly by the legislator, which in order to give importance to the parental relationship between the child born after surrogacy and the intentional parent already provides other legal institutions, such as the special hypothesis of adoption regulated by Article 44 of the Act nr. 184 of 1984 on Adoptions.

Later, the Italian Constitutional Court¹² finally disclosed a gap in the protection of child's interest, inviting the legislator to provide a regulation of the subject that organically identifies the most appropriate ways of recognizing the stable affective bonds between the child born from medically assisted procreation and the intentional parent.

The change of trend between the two decisions has not gone unnoticed, and last January the Italian Corte di Cassazione referred to the United Sections a question regarding surrogate motherhood asking, in light of the decision of the Constitutional Court, whether the right to life represented by the previous decision of 2019 has been overturned, and whether this has led to a regulatory gap, to be filled by way of interpretation, pending a reform of the regulation¹³.

The Court already suggests some principles for the interpretation of future cases, also noting the opportunity for a concrete assessment to find the optimal balance between

¹² See Corte Costituzionale n. 32 of march 9th 2021, in www.dejure.it, which states: “Le questioni sollevate rivelano un vuoto di tutela dell'interesse del minore che questa Corte ritiene di non poter ora porre rimedio. Il legislatore, nell'esercizio della sua discrezionalità, dovrà al più presto colmare il denunciato vuoto di tutela, a fronte di incompressibili diritti dei minori. Si auspica una disciplina della materia che, in maniera organica, individui le modalità più congrue di riconoscimento dei legami affettivi stabili del minore, nato da Procreazione medicalmente assistita praticata da coppie dello stesso sesso, nei confronti anche della madre intenzionale”.

¹³ See: Corte di Cassazione, ordinanza n. 1842 of January 21st 2022, in www.dejure.it.

the interests involved: those of the child and the intentional parent, and those of the biological mother.

The matter is open, but only with the intervention of the Parliament can there be a decisive turning point.

These and other phenomena which are overturning family law and its traditional categories are not a peculiarity of our legal system but, as said, are the result of a general and widespread situation and are common to different countries. An analysis of those systems that are similar to our own in social, economic and political structures and which consequently go through a comparable ideological upheaval and have needs similar to the Italian ones may be particularly interesting, especially if we consider countries with a different legal system, like Britain.

The British government has dealt longer with the legal issues connected with medical assisted procreation, since the birth of the first child born after conception by an *in vitro* fertilization experiment, Louise Brown, in 1978.

The public opinion was “*divided between pride in technological achievement, pleasure at the new-found means to relieve, at least for some, the unhappiness of infertility, and unease at the apparently uncontrolled advance of science, bringing with it new possibilities for manipulating the early stages of human development*”¹⁴, and for this reason a few years later, in 1982, a special investigative committee was appointed in order to consider the potential developments in medicine and science related to human fertilization and embryology and the policies and safeguards which should be applied, including consideration of the social, ethical, and legal implications of these developments, and to make recommendations thereon.

In 1984, the Committee released a report known as “*Warnock report*”, from the name of the philosopher Mary Warnock who chaired it, and on its basis, albeit with some

¹⁴ See Warnock Report, 1984, available at:

<https://webarchive.nationalarchives.gov.uk/ukgwa/20101007182820/http://sen.ttrb.ac.uk/attachments/21739b8e-5245-4709-b433-c14b08365634.pdf>.

divergence, was drafted the Surrogacy Arrangements Act of 1985 and, later, the Human Fertilization and Embryology Act of 1990.

Already in 2005, the House of Commons Science and Technology Select Committee published another report on Human Reproductive Technologies and the Law, which led to a reform of the Act of 1990 and to the enactment of the Human Fertilization and Embryology Act of 2008, which is currently in force. It also amends the Surrogacy Arrangements Act of 1985, regulating surrogate motherhood which is prohibited when it is the result of an economic arrangement but is legal otherwise.

This Act states the main principles on this subject, even regarding issues related to parental orders and same sex parenting, and expressly states the need to consider primarily the welfare of the child, taking into account his need for supporting parenting¹⁵. Furthermore, the Act gives the definition of the most important concepts, starting from the meaning of mother, which is, according to the Human fertilization and embryology Act of 2008, “*the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child*”¹⁶. This clarification gives a certain starting point: in fact the mother is considered and remains such, unless an application for a parental order is made by the intentional parents, under certain conditions.

Section 54 of the Act states that a couple of married or unmarried people or of civil partners who are in an enduring relationship, or even a single person, who have attained the age of 18 and are domiciled in England, may apply when the child has been carried by a woman who is not the applicant or one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, or the gametes of the applicant or one of them were used to bring about the creation of the embryo. Furthermore, is necessary that the application is made no later than 6

¹⁵ Section 13 of the 1990 Act, subsection 5, as amended by the 2008 Act, states that: “a woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting and of any other child who may be affected by the birth”.

¹⁶ Human Fertilization and Embryology Act, 2008 sect. 33.

months after the child's birth, that the child lives with the applicants at the time of the application and that the surrogate mother or any other person different from the applicants and who is a parent of the child (for example the husband of the surrogate mother), have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order. Finally, it is necessary to prove that there was no economic arrangement between the surrogate mother and the applicants and that no money or other benefit has been given or received by them, in accordance with the prohibition of economic surrogacy arrangements.

When the parental order is granted, the parental relations between the applicants and the child is legally recognized and the child is treated in law as the child of the applicants; the decision issued takes into account the welfare of the child and his best interest, which is considered prominent over the other interests involved. Since the first surrogacy case¹⁷, in fact, has been stated that “*morals and ethics are irrelevant, what matters is what is in the child's best interest*”, and since the enactment of the first Act on medical assisted procreation and surrogacy, in 1990, section 33 of which draws attention to “*the welfare of any child who may be born as a result of the treatment*”, a stand is clearly taken to protect the child's best interest, anticipating the conclusions reached much more recently by the Italian Courts.

The “*paramount concern*”¹⁸ of British Courts regarding parental orders and cases connected to surrogacy is, in fact, the child's welfare, as shown by many decisions¹⁹, and by the related, not uncommon flexible application of the Act, even in more complicated situations, like international surrogacy cases.

¹⁷ Re C (A Minor) (Wardship: Surrogacy) (Baby Cotton Case) [1985] F.L.R. 846

¹⁸ Re X (A Child) (Surrogacy: Time Limit) [2014] E.W.H.C. 3135 (Fam)

¹⁹ Among others: A and A v P, P and B [2011]; X (A Child - foreign surrogacy) [2018] EWFC 15; X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam); L (A Minor) [2010] EWHC 3146; IJ (A Child) [2011] EWHC 921; Re C (A Child) [2013] EWHC 2408 (Fam); JP v LP & Others [2014] EWHC 595 (Fam).

In *Re X (A Child) (Surrogacy: Time Limit)* [2014] E.W.H.C. 3135 (Fam), for example, the Court states that the time limit of six months imposed by section 54 of the Act is not absolute, and applies a purposive interpretation to the Act, granting a parental order after two years and a half from the birth of the child. The Court states that it could not have been the intention of Parliament to place an ultimate bar on the grant of parental orders where applications were made after the expiry of the six months period and gives an interpretation consistent with the precedent established by *Theis J in A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145 and the European Convention on Human Rights, stating the need to “*read down*” to the statute in such a way as to ensure the protection of the rights involved, first of all those of the child.

Even according to the British family law, like the Italian law mentioned above, the alternative to a parental order is adoption, but its lower correspondence to the child’s interest instead of a parental order is unquestionable for the British Courts, and it would be even more so in Italy, considering that the particular kind of adoption that would be applicable in Italy is a peculiar, “weakened” kind of adoption, whose effects cannot be compared with a parental relationship.

Nevertheless, the limit of public policy operates in England too, and is mainly connected to cases of commercial surrogacy, as in *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam), where a surrogacy arrangement was made in the U.S. under American law, but the payments were unlawful in Britain under the Act of 2008: the decision was in favor of the child’s welfare, stating that only in the clearest case of the abuse of public policy the Court could withhold a parental order, whenever welfare considerations suggested otherwise.

The abundance of case law shows how the mechanism of parental orders, while helping intentional parents with the recognition of their rights, is not free of issues; for this reason the framework is going to change again, since the Law Commissions of England, Wales and Scotland completed their consultation in October 2019, in order to put together a proposal for a reform of the regulation of surrogate motherhood.

Unlike in the United States, in England the arrangements made before or after the birth in order to transfer parenthood are unlawful, and obtaining a parental order is not immediate. During the time necessary to obtain it, children are in a difficult situation, between their legal surrogate parents wanting to give them away, and their genetic intentional parents who are not yet recognized as their true legal parents.

This situation of temporary uncertainty can last six weeks minimally, as parental orders cannot be granted without the consent of the surrogate mother, which is considered invalid if given at any point up to six weeks after birth; furthermore, the child must live with the applicants at the time of the application, and it is complicated in case of international surrogacy, because often the country where the birth take place recognizes the intentional parents as the legal ones, then the birth certificate bears their names, but in England they are not legally considered such before the granting of the parental order, creating complications for the child's entry in the country.

Other issues arise from the unenforceable nature of the surrogacy agreements, and from the prohibition of economic arrangements, unless the payments made to the surrogate mother are qualified as reasonable expenses. This ambiguous formulation is not enough to regulate the matter, and currently, even when large sums are paid to the surrogate, in the balance made by the Courts, the child's welfare cannot but prevail. This exposes to the risk of speculation and compromises the position of the surrogate mother and her dignity and rights, and for this reason it was considered necessary to intervene, planning a reform that would better regulate the point.

Interventions of the Courts mitigate the issues and protect children's interests by granting parental orders; once again, this peculiar role of the Courts distinguishes the British legal system: even in family law, decisions inserted within the regulatory framework give relevance to the specific features of singular concrete cases, without being trapped in the immutability of the literal formulations of the statutes.

This guarantees a more effective protection even in transitional periods and avoids the premature obsolescence of the law, interpreting it in order to keep it adherent to its functions, and lighting up its dark side.

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