[2019] C.E.L.B.

THE
CARDOZO ELECTRONIC
LAW BULLETIN

GLOBAL FRONTIERS OF COMPARATIVE LAW

"THE TRUMAN SHOW" OF SAME-SEX FAMILY. RIGHT TO FILIATION V. BEST INTEREST OF THE CHILD

Alessandra Pera

[Essay published on June 2019]

THE CARDOZO INSTITUTE
ISSN 1128-322X

The Cardozo Law Bulletin is a peer-reviewed, English and Italian language journal concerned to provide an international forum for academic research exploring the thresholds of legal theory, judicial practice and public policy, where the use of a 'comparative law and literature' approach becomes crucial to the understanding of Law as a complex order.

The Cardozo Law Bulletin, established in 1995 as one of the world first Law Journals on the Web, invites the submission of essays, topical article, comments, critical reviews, which will be evaluated by an independent committee of referees on the basis of their quality of scholarship, originality, and contribution to reshaping legal views and perspectives.

SUBMISSIONS: The Cardozo Law Bulletin only accepts submissions made in accordance with the MLA (Modern Language Association) style, the most commonly used to write papers and cite sources within the liberal arts and humanities.

http://www.jus.unitn.it/cardozo/

CHIEF EDITOR: Pier Giuseppe Monateri

I CONTRIBUTI SONO SOTTOPOSTI A REFERAGGIO DOPPIO CIECO

ISSN 1128-322X

"THE TRUMAN SHOW" OF SAME-SEX FAMILY. RIGHT TO FILIATION V. BEST INTEREST OF THE CHILD

Alessandra Pera

INTRODUCTION

This study offers a brief excursus on the adoption in Italy, focusing on the legislative choice (as ruled by the "Civil Partnership Act")[1] not to grant the stepchild adoption (SCA) to the partners of the registered partnerships, called *unioni civili*.

When the Act was discussed by the Parliament, there was an hard debate on filiation in same-sex couple: the right to be a couple for same-sex partners has been less problematic than providing for a specific right to parenthood. On such issue was not reached a majority's consent, so, in order to save the goal of *unioni civili*, the provisions on filiation and adoption for same sex couples had been set aside.

In the absence of scientific studies and evidences on the consequences for a child to live with same-sex parents and in front of a fragmented civil society's feeling on such issue, the legislative has decided to go ahead. Behind such option there is probably the fear that the child can be hurt or seriously affected in her/his personal/phycological and sexual identity, if adopted or grown up in a by an homo-parental family.

In this regard, the analysis also investigates the judiciary answer to the stepchild adoption's requests in same-sex parent families, in specific cases such as the ones of individuals, who had got married in another State or had simply opted for artificial insemination (mainly female couples) or surrogacy (mainly male ones).

The study considers if:

- in major western legal systems where the step-child adoption is generally recognized by the legislation, homo-sexual civil unions or marriage's partners are entitled to a fundamental right to become

[1] Cfr. L. 76/2016, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze. (16G00082) GU Serie Generale n. 118, 21-05-2016, available on line at http://www.gazzettaufficiale.it/eli/id/2016/05/21/16G00082/sg.

parents, that implies a right to filiation in the interest of the adopting parent;

- where the stepchild adoption has been recognised only by courts, it has been based on the continuity of the affective relationship and the best interest of the adopted child, even in cases of surrogacy and artificial insemination and sometimes even when no one of the commissioning partner is the biological parent.

The consequences of these two different approaches in terms of legal reasoning, recognition of new rights, new family bonds and respective obligations between family members will also be investigated.

Two controversial points arise. The firs point is if a legal system should provide for a right to filiation, a right to have a child in any case and to any extent (natural, through surrogacy, adopted). A sort of an egoistic right to filiation "it doesn't matter how much does it cost".

The second is if there is a right of the child to live and grow up with the persons who have commissioned her/him or a right to live and grow up in a "natural environment". But the question here is: who has the power to decide what is a "natural environment"?

Starting from such controversial issues, the paper analyses the adoption's regime in Italy, looking at statute law, court's decisions and scholarly writings, pinpointing which tools has been and can be used in order to solve "hard cases" in same sex couples. With the expression "hard cases" references are needed to surrogacy cases, step child and cross-step child adoption and the ways through which couples have skipped bans and prohibitions in order to realize their procreative programmes.

After some comparative insights, with a focus on the British surrogacy regime and some French cases decided by the ECHR, the paper presents some conclusive remarks on adoption and on surrogacy, which consider the transnational dimension of statuses, the concept of public order, trying to

offers some proposals to reform adoption in Italy and to provide for an international law intervention on surrogacy.

1. STEPCHILD ADOPTION AND AFFECTIVE CONTINUITY IN THE STATUTES

Art. 44 of the Italian "Adoption Act"[2] provides for "adoption in particular cases" (APC), which is a special (not exceptional) tool that, at the time it was enacted, was not thought for same-sex parental stepchild adoption families, but has been adapted for such situations by Courts.

The APC was introduced in order to protect the child's right to have a family even in those situations that could not lead to the ordinary and full adoption, but where the adoptive path still represents the most appropriate solution[3].

The rationale is, as in the ordinary adoption, to protect the paramount best interest of the child to grow within a family, thus ensuring her/him a healthy development and a plain equilibrium. However, the APC differs from the full adoption in its objective and subjective requirements. According to art. 44, in

[2] Art. 44, L. 184/1983, states that ‹‹1. Minors may also be adopted when the conditions referred to in paragraph 1 of Article 7 (full adoption) are not fulfilled: (a) by relatives of the minor to the sixth degree or by persons with a pre-existent stable and lasting relationship when the child is orphaned by both parents; b) by the spouse in case the child is also adopted by the other spouse; c) when the child is in the conditions specified in Article 3, paragraph 1, L. 104 (handicapped or with a severe desease), and be orphan of father and mother; d) when there is a finding that there is no margin for pre-adoptive custody. 2. The adoption, in the cases referred to in paragraph 1, is also permitted in the presence of children born from a marriage. 3. In cases referred to in subparagraphs (a), (c) and (d) of paragraph 1, adoption is permitted, in addition to spouses, to those who are not married. If the adoptive person is married and non-separated, adoption may be allowed only upon request by both spouses. 4. In the cases referred to in points (a) and (d) of paragraph 1, the age of the adopter must be at least eighteen years higher than that of the person he intends to take››. The English translation of all the articles of the civil code, statute law and of all the Italian Court's decisions cited here and below is by the Author.

[3] Bessone, M. and Ferrando, G. "Minori e maggiori di età (adozione dei)." *Noviss. Dig. It.*, V, Torino: Utet, 1984. 82 et seq.; Cattaneo, G. "Adozione.", *Dig. IV disc. priv., sez. civ.* I Torino: Utet, 1987. 116 et seq.; Tommasini, R. "Commento agli artt. 44-57 della legge sull'affidamento e adozione dei minori." *Commentario al diritto italiano della famiglia.* Ed. G. Cian et al. VI 2 Padova: Cedam, 1993. 456; Dogliotti, M. "L'adozione in casi particolari." *Trattato di diritto privato.* Ed. M. Bessone et al. IV, Torino: Giappichelli, 1990. 397 et seq.; Dogliotti, M. "Adozione di maggiorenni e minori." *Codice civile. Commentario*. Ed. F. D. Busnelli. Milano: Giuffrè, 2002. 797 et seq.; Morozzo della Rocca, P. "L'adozione dei minori e l'affidamento familiare." *Il nuovo diritto di famiglia. Trattato. Filiazione e adozione.* Ed. G. Ferrando. III, Bologna: Zanichelli, 2007. 587 et seq.; Urso, E. "L'adozione in casi particolari." *ibidem* 765 et seq..

fact, the APC is not based on the assumption of the abandonment of the child, it does not necessarily require the interruption of the relationship with the birth family (if existing) and also provides for the single individual to be an adoptive parent. It can be applied when:

a) the child is orphan and the adopting parent(s) has/have a stable and lasting relationship with her/him, deriving or not from a previous (*affidamento familiare*) family custody;
b) the child is the daughter or the son of the adopting spouse;
c) the child with handicap or affected by a serious illness or orphan of both parents;
d) pre-adoptive custody (*affidamento pre-adottivo*) is impossible.

The adopted will be considered as the child of the adopting parent and, according to art. 74 civ. cod.[4], she/he establishes a relationship with the latter's parents and/or relatives. The adopted acquires the adoptive parent's surname, which will be added to the previous one.

The APC was conceived as a subsidiary tool, based on the mutual consent of both the adopting parent and the adoptive child (artt. 45[5]-46[6]) - in the case of an adult child, capable to understand and will, and who can be heard by the

[4] After the reform of L. 219/2012, on the unique status of filiation, the ‹‹Relationship is the bond between the people who descend from the same ancestor, whether in the case where the filiation took place within the marriage, whether in the event that it was outside of it or in the event that the child is adopted. The relationship of kinship does not arise in the cases of adoption of older persons, referred to in articles 291 et seq››. For scholars' opinion on the recent reform of status of filiation, see for all, Morozzo della Rocca, P. "Il nuovo status di figlio e le adozioni in casi particolari." *Fam. dir.* 8-9 (2013): 898 et seq.

[5] Art. 45 states that ‹‹Adoption requires the consent of the adopter and the adopted. If the adopted has not reached fourteen years, consent is given by her/his legal representative. If the adoptee is twelve years old, she must be personally heard. If she has a lower age, it may, if appropriate, be heard››. The Constitutional Court, in its judgment of 10-18 February 1988, n. 182 (Official Gazette of 24 February 1988, N. 8 - Special Series), declared the constitutional illegitimacy of art. 45, second paragraph, in the part where a consent is provided instead of the hearing of the legal representative of the minor.

[6] Under art. 46 ‹‹adoption requires the consent of the parents and of the spouse of the adopter. When the consent provided for in the first paragraph is denied, the court, if the refusal as unjustified or contrary to the interest of the adopter, at the request of the adopter and having heared the interested people, may pronounce the adoption any way, with the exception in case the consent has been refused by the parents exercising the parental responsibility or spouse of the adopter, if cohabiting with her/him. Likewise, the court may state the adoption when it is impossible to obtain the consent due to the incapability or impossibility of the persons who should express it››.

judge - and on the subsequent jurisdictional control (art. 56[7]-57[8]). The personal requirements imposed on the adopting parent are less strict in comparison with the ordinary adoption, having regard to the age, the status, and the presence of other children in the adoptive family, etc…

Due to its flexibility, in the lack of specific statutory rules, such tool has been adapted by courts to answer to different needs, sometimes very far from the ones the 1983 legislator had in mind. For instance, it has been used to:

i. turn temporary custody into adoption, when the situation of temporary abandonment has become permanent and the custody family appears to be a qualified dimension, worthy of protection just as the family of origin[9];
ii. deal with situations of "partial abandonment", as a form of adoption that does not imply the permanent interruption of the relationship with the natural family[10];

Furthermore, it has been applied to familiar ties and situations far from the traditional ones, to social parenthood or *de facto* parenthood, which have a crucial role in the growth and education of the child, in cases such as:

---

[7] Under art. 56 the judge competent to rule on the adoption is Tribunale per i Minorenni of the district ‹‹where the child is located. The consent of the adopter and the adoptee, who has completed the fourteen years, and of the legal representative of the adoptee must be personally manifested to the president of the court or to a judge delegated ad hoc››. The Constitutional Court, in its judgment of 10-18 February 1988, n. 182 (Official Gazette of 24 February 1988, N. 8 - Special Series), declared the constitutional illegitimacy of art. 56, second paragraph, in the part where a consent is provided instead of hearing the legal representative representing the minor.

[8] Art. 57 states that ‹‹the court verifies: (1) whether the circumstances referred to in Article 44 apply; 2) whether adoption takes the child's preminent interest. To this end, the Tribunale per i Minorenni, hears the parents of the adoptee, provides for proper investigations to be carried out, through local services and public security organs, on the adopter, on the child and on his family. The investigation will cover in particular: a) the aptitude to educate the child, the personal and economic situation, the health, and the family environment of the adopters; b) the reasons for which the adoptant wishes to adopt the minor; c) the child's personality; d) the possibility of appropriate coexistence, considering the personality of the adopter and the minor››.

[9] Trib. Min. Genova, 14 October 1995, with a comment by Morozzo della Rocca, P. *Fam. dir.* (1996): 346; Trib. Min. Roma, 22 June 1987, reported in *Dir. fam. pers.* (1998): 947; Trib. Min. Roma, 18 March 1985, reported in *Dir. fam. pers.* (1985): 620.

[10] See Morozzo della Rocca, P. "Adozione '*plena, minus plena*' e tutela delle radici del minore." *Riv. Crit. Dir. Priv.* (1996): 683. More recently and with a interesting systematic approach, se Marella M.R., "L'adozione dei minori oltre il canone dell'imitatio naturae: l'impatto dei nuovi modelli di genitorialità sulla disciplina vigente", available on line at http://www.jus.unitn.it/cardozo/review/Persons/Marella1.html.

iii. children born through surrogacy, recognized by the father and then adopted by his wife[11];

iv. the Islamic Kafalah[12], which is close to the adoption but it is not exactly the same, and does not necessarily break the relation between the child and the family of origin;

v. the enforcement in Italy of an adoption by a single person, when the order has been issued abroad[13];

vi. the recognition of legal effects to relations arising from "reconstructed families" (when the natural parent is dead and the new partner or spouse of the surviving parent applies for the adoption of the family child)[14] or from homo-sex couples (*de facto*, civil unions or married abroad).

Recently, these efforts by the judiciary have been reflected in legislation through three different steps. The first represented by the reform on the unique status of filiation[15]; the second, modifying the rules on adoption, has expressly codified the children's right to the continuity of the affective

[11] App. Salerno, 15 November 1991, reported in *Nuova giur. Civ. Comm.* I (1994): 177, commented by Bitetti, R.; Trib. Min. Roma, 31 March 1992, reported in *Dir. Fam. Pers.* (1993): 188.

[12] Trib. Min. Trento, 10 September 2002, reported in *Nuova giur. civ. comm.* (2003): 149, with a comment by Long, J.; *contra* Trib. Min. Brescia, 12 March 2010, reported in *Riv. dir. int. priv. proc.* (2010): 770; Clerici, R. "La compatibilità del diritto di famiglia mussulmano con l'ordine pubblico internazionale." *Fam. e dir*. 15 (2009): 208; Orlandi, M. "La kafala islamica e la sua riconoscibilità quale adozione." *Dir. Famiglia* 2 (2005): 635 ss.; Corte di Cassazione, 2 February 2015, n. 1843, with a comment by Di Masi, M. "La Cassazione apre alla kafalah negoziale per garantire in concreto il best interest of the child." *Nuova giur. civ. comm.* I (2015): 707; Duca, R. "Family reunification: the case of the Muslim migrant children." *European Journal of Social Science Research* 1 (2014); PERARO, C. "Il riconoscimento degli effetti della kafalah: una questione non ancora risolta." *Riv. dir. int. priv. proc.* (2015): 541 et seq.; TOMEO, T. "La kafalah, Comparazione e diritto civile", May 2013, available on line at http://www.comparazionedirittocivile.it/prova/files/ncr_tomeo_kafala.pdf.

[13] Corte di Cassazione, 14 February 2011, n. 3572, reported in *Foro it.* I (2011) c. 728, with a comment by De Marzo, C.; with a comment by Astone, M. A. in *Fam. Dir.* (2011): 697.

[14] Trib. Min. Milano, 28 March 2007, reported in *Fam. e min.* (2007): 83; App. Firenze, 4 October 2012, reported in *Minorigiustizia* (2013): 366.

[15] The reform has been enacted through the L. 219/2012 and the d. Lgs. N. 154/2013, *Revisione delle disposizioni vigenti in materia di filiazione, a norma dell'articolo 2 della legge 10 dicembre 2012, n. 219*. (14G00001) GU Serie Generale n.5 del 08-01-2014, available on line at http://www.gazzettaufficiale.it/eli/id/2014/01/08/14G00001/sg. For a complete and interesting analysis see Ferrando, G. "Stato unico di figlio e varietà dei modelli familiari." *Fam. Dir.* 10 (2015): 952 et seq., who highlights the plurality of affective relationships, where the child's personality development finds place, regardless of the form of family, but just because of filiation and parenthood themselves.

relationships[16]; and the third represented by the Act on same-sex civil partnerships (*unioni civili*) and same or hetero-sexual *de facto* relationship[17].

The first two reforms explicitly recognize that filiation gives rise to a unique status, without any relevance to the way (natural, adoptive, under wed lock, out of wed lock) the bond was originated. Regardless of the formal qualification of the parents' relationship with respect to the family model the child is part of, expressly together they introduce in the civil code[18] the right to moral assistance, to be loved and to grow up in a family, to have qualified and stable relationships with relatives etc...

What seems crucial in the recent reforms on filiation is the intention to protect the interest of the child (even if born and grown up in a family founded on a same-sex union) to live stable affective relations, to have recognized a legal status that is respectful of the concrete form and way in which such filiation has been construed across the years. Indeed, it may be dangerous for the psychological development of the child to be moved from a family to another.

Actually, before the entry into force of the statute on civil partnerships (L. 76/2016), many Courts' decisions on adoption by the partner (even in same-sex couples)[19] aim at protecting values such as affection, assistance and care of the child, ensured by the adopter, who behaves in the couple and in the family

---

[16] See the *L. n. 173/2015, Modifiche alla legge 4 maggio 1983, n. 184, sul diritto alla continuità affettiva dei bambini e delle bambine in affido familiare*, (15G00187) GU Serie Generale n. 252 del 29-10-2015, available at http://www.gazzettaufficiale.it/eli/id/2015/10/29/15G00187/sg.

[17] Again see the L. 76/2016.

[18] Cfr. Artt. 315 and 315-bis cod. civ.

[19] Corte di Cassazione, 22 June 2016, n. 12962, reported in *Dir. Fam. Pers.* 4 (2016): 1014. And before, in the same direction, Trib. Min. Roma, 30 July 2014 n. 299, reported in *Nuova Giur. Civ. Comm.* I (2015): 109 et seq., with a comment by LONG, J. "L'adozione in casi particolari del figlio del partner dello stesso sesso."; for a disagreeing point of view see the comments by Carrano, R. and Ponzani, M. "L'adozione del minore da parte del convivente omosessuale tra interesse del minore e riconoscimento giuridico di famiglie omogenitoriali." *Dir. Fam.* (2014): 1550 et seq. The decision has been confirmed by App. Roma, Sez. Min., 23 December 2015, n. 2015, reported in *Dir Fam. Pers.* 3 (2016): 806, with a comment by Menichetti, S.. On the crossing adoption by each single member of the homo-sexual couple, who apply for the adoption of their respective children, see App. Napoli, 30 March 2016, in www.dirittoegiustizia.it, which has recognised legal effects in Italy to a French court decisions on *plena* adoption. Against these solutions and with a restrictive interpretative attitudes, see Trib. Min. Piemonte e Valle d'Aosta, 11 September 2015, n. 258 e n. 259, reported in *Nuova Giur. Civ. Comm.* I (2016): 205 et seq., with a comment by NOCCO, A. "L'adozione del figlio di convivente dello stesso sesso: due sentenze contro una lettura "eversiva" dell'art. 44, let. d), L. n. 184/1983.".

as a parent, even if biologically he/she is not. In those cases, the judges, as it will be pointed out in details in the next paragraph, when the affective relation is stable and worth of protection, make recourse to the best interest of the child's argument, consenting the request of APC under art. 44, lett. d), para. 1, L. 184/1983[20].

As said above, the enforcement of 2016 Registered Partnership Act provides for the formal recognition of the same-sex unions and partners' status similar to marriage. The *unione civile*, even though formally conceived as a separate institution from marriage, shares many essential features, with regard to the constitutive moment (the act), to the interpersonal rights and obligations (relationship) and to the relevance of such relation for third parties and the community.

The main difference with marriage regards the children. In fact, the Act no longer includes the possibility for the partners to adopt the other's child, as provided instead for the spouse by article 44, letter b) of the L. n. 184/1983 on adoption[21].

Article 1 of the 2016 Act establishes the applicability of all the provisions ‹‹relating to marriage›› or that contain ‹‹the words 'spouse', 'wife and husband' or similar expressions, recurring everywhere in the laws, in the acts having the force of law, regulations and administrative measures or collective agreements›› to unioni civili, but excludes ‹‹expressly the provisions of the Act, 4 May 1983, n. 184››, which refer to those same figures. Therefore, the provisions of the Adoption Act containing the word "spouse" or similar words do not apply to *unioni civili* between same sex people. This excludes the eligibility for full adoption of couples of *unioni civili*, which remains reserved to spouses.

[20] *Id est* when d) the pre-adoptive custody (*affidamento pre-adottivo*) of the child is impossible.
[21] *Id est* when b) the child is the daughter or the son of the adopting spouse.

As said above, the parliamentary debate, instead, has focused on the parents' behaviour and on the necessity to strengthen the penalty for the recourse to surrogacy motherhood abroad[22], especially in case of male homo-sexual couples, and to limit and/or avoid the recourse to heterologous artificial insemination for female ones. The proposed model implies that the right of children to the status and the relationship with their parents is conditioned by the supposed need to punish and/or prevent the parents' behaviours deemed "deviant" or criminally relevant[23]. This approach, anyway, is far from the Court's attitude, as we will see in the next pages.

In fact, the legislative silence on the stepchild adoption and the missed recognition of the right of the same-sex couple to become parents have been skipped by the courts, which, remaining inside the guidelines of the legal system, recurring at the principles of unique status of filiation and consequent rights, provide to give juridical effects to such situations.

3. Social change and Court rulings. Continuity of the affective relationships and best interest of the child in non-married and same-sex couples

The Constitutional Court set clearly the relationship between full adoption and special adoption: only the first presumes a permanent state of abandonment. The latter, however, seeks to realize the child's right to have a family in cases where, although the conditions for the full adoption are not

[22] The penalty is provided by art. 12, c. 6, L. 40/2004 on artificial insemination and reproductive techniques, which states that «anyone who, in any form, realizes, organizes or promotes the commerce of gametes or embryos or surrogacy is punished with imprisonment from three months to two years and with a fine of 600,000 to one million euros».

[23] Such approach is very far from the social conscience and from other solution already adopted by the legal system, for example with reference to incest, where the parents' behaviour causes social disapproval, but this does not affect the child's position and her/his filiation status. Cfr. Corte Cost., 28 November 2002, n. 494, reported in *Giur. cost.* I (2002): 4058 and commented by Bianca, C.M.; reported also in *Foro It.* I (2004): 1053; *Dir. Fam.* (2003): 622 et seq.; *Dir. Fam.*(2004): 879 et seq.; *Fam. e dir.*(2004): 96, with a comment by Renda, A..

satisfied, it is necessary or appropriate to adopt, giving a legal status to *de facto* existing family's relationships. In this perspective, then, the role of article 44 is of *"a kind of residual clause"* for ‹‹special cases that do not fit in the discipline of ordinary and full adoption, when the conditions mentioned in the first paragraph of art. 7 are not occurring››. In this context, letter d) of art. 44 ‹‹provides a further 'valve' for cases that do not fit into those more specifically referred to in subparagraphs a) and b)››. Unlike the full one, the former adoption under art. 44 ‹‹does not cut the ties of the child with his family of origin, but it offers him the opportunity to remain part of the new family that welcomed him, formalizing the affective relationship established with specific individuals who are actually taking care of him››. According to the Court is not necessary anymore ‹‹the prior declaration of the state of abandonment of the child neither the formal declaration of adoptability or the aforementioned pre-adoptive custody (*affidamento pre-adottivo*)››[24].

Also the European Court of Human Rights (ECHR) recognizes the right to "family life", stated in Art. 8 of the Convention, also to *de facto* family relationships in adoption's cases, where the existing emotional relationship within a family deserves consideration and protection even if it has no correspondence with the relationships legally recognized through a formal procedure[25].

Such recognition of the parent-child relationship by the parent's partner has the function of securing both the legal status and the rights of the child. For example, in case of death of the biological parent or separation of the couple

[24] Corte Cost., 7 April 2016, n. 76, on the compatibility of a judgement of the Spanish Court - concerning a stepchild adoption by the female partner of the child's mother - with the Italian legal system, commented by Billotti, E. "Riconoscimento in Italia di un provvedimento di *stepchild adoption*: la Corte Costituzionale ritiene inammissibile la questione di legittimità costituzionale degli art 35 e 36 della legge 184/1983." *Dir. civ. contemporaneo* 2016, available on line at http://dirittocivilecontemporaneo.com/2016/04/riconoscimento-in-italia-di-un-provvedimento-straniero-di-stepchild-adoption-la-corte-costituzionale-ritiene-inammissibile-la-questione-di-legittimita-costituzionale-degli-artt-35-e-36-d/.

[25] Moretti e Benedetti v. Italy 27.4.2010 (R. n. 16318/2007); Paradiso e Campanelli v. Italy 27.1.2015 (R. n. 25358/2012); Zhou v. Italy 21.1.2014 (R. n. 33773/2011); S.H. v. Italy 13.10.2015 (R. n. 52577/2014), all available at www.udhoc.eu.

and to safeguard him in the relations towards third parties, such as the educational or health institutions. It aims at ensuring the stability of the affections and the continuity of existing affective relationships.

The protection of the best interests of the child has been used as a tool of judicial legal arguing to justifies this interpretation of letter d), since it would not be fair for the child to receive less protection just because the parents live together without being married. Once verified the interests of the child and the adoptive eligibility, adoption must be granted not only to the spouse of a parent, but also to the partner. The adoption under art. 44, letter d), is declared because of the impossibility of pre-adoptive custody before the law, for the absence of the conditions required for the full adoption[26].

According to the *Corte di Cassazione* ‹‹ at the base – of a denial - there are not scientific certainty or data of experience, but the mere prejudice that is detrimental to the balanced development of the child the fact of living in a family centred on a homosexual couple››. It is not admissible to ‹‹assume as obvious and assessed something that instead has to be demonstrated›› *id est* ‹‹the harmfulness of that family environment for the child››[27].

The *Cassazione* concluded that adoption under art. 44 can concern both single individuals and unmarried couples, as the examination of requirement and conditions imposed by the law, in terms of ‹‹the acknowledged impossibility of pre-adoptive custody›› and ‹‹the investigation on the interest of the child (art. 57[28]), (…) cannot be based - neither indirectly - on the sexual orientation of

[26] Reference is needed to art.7 of the 1983 Adoption Act.

[27] Corte di Cassazione, 11 January 2013, n. 601, reported in *Giur. It.* (2013): 1038 with a note by Winkler, M.. More recently, in the case of a same-sex couple married abroad, has been recognized the eligibility for adoption in particular cases to the spouse of the biological parent. The court has argued using legal reasoning of the social relevance of the parenthood by "habits and repute", as lived for years by the minor child and both the spouses, see Tribunale di Bologna, 4 January 2018, reported in *Guida al Diritto* 18 (2018): 60-65.

[28] Art. 57 states that ‹‹the court verifies: (1) whether the circumstances referred to in Article 44 apply; 2) whether adoption takes the child's preminent interest. To this end, the Tribunale per I Minorenni, hears the parents of the adoptee, provides for proper investigations to be carried out, through local services and public security organs, on the adopter, on the child and on his family. The investigation will cover in particular: a) the aptitude to educate the child, the personal and economic situation, the health, and the

the applicant and the consequent nature of the relationship established by him with his partner››[29].

Recently, in a case of stepchild adoption by the female partner of the mother, the same Court[30] has clarified that there are ‹‹two patterns of adoption, the full one, founded on the abandonment of the child, and the simple, based on different requirements with regard both to the factual situation in which the child live and to the relation with the adopting applicant››.

The simple adoption is regarded as a tool to ensure the continuity of the child's emotional relationships and enables its formalization, giving relevance to the existing family's relationship between the adopter and the adopted. In this regard, the Court points out that the *Tribunale per i Minorenni* has the competence to check the existence of the abstract requirements provided by the regulatory framework and the effective compliance of the request of adoption. In doing so, it ‹‹must make a specific assessment of the 'emotional suitability' of the adoptive parent››. Such ‹‹evaluation can only be done on the basis of a pre-existing relationship between the adopting parent and the child›› and this is obviously irreconcilable with a situation of abandonment (pre-requisite for the full adoption).

The Court highlights that this interpretation is consistent with the recent statutes on filiation and adoption, *id est*:

- the 2012 reform of filiation, that recognizes significant relevance to the relations between the parent and the child which have been consolidated by time;
- the L. 40/2004 on artificial procreation techniques, which excludes the right of the husband to contest his paternity, if he has given consent for the heterologousartificial insemination of his partner;

---

family environment of the adopters; b) the reasons why the adoptant wishes to adopt the minor; c) the child's personality; d) the possibility of appropriate coexistence, taking into account the personality of the adopter and the minor››.

[29] Again Corte di Cassazione, 11 January 2013, n. 601 reported in *Giur. It.* (2013): 1038.

[30] Corte di Cassazione, 22 June 2016, n. 12962 reported in *Dir. Fam. Pers*. 4 (2016): 1014.

- the reform on adoption, carried out by L. n. 173/2015, aimed at granting the children's right to the continuity of their emotional relationships, favouring the full adoption by those who had welcomed the children in foster care.

Furthermore, following the *Corte Costituzionale* and the *Corte di Appello di Roma*, in its recent trend the *Corte di Cassazione* has recognized the right to adoption by the mother's same-sex partner, who has been exercising *de facto* parental responsibility for years.

Such interpretative choice has been neglected by *Tribunale per i minorenni di Milano*[31], which has decided, respectively, a case of APC of a child by the mother's partner and a case of crossed adoption by two co-mothers. Both the decisions have been oriented by a strict literal interpretation of art. 44, which does not take enough into account the evolution of such peculiar institution and, in general, the evolution of family law, also in the light of the Constitutional and European case law. Moreover, they are founded on two misleading premises.

The first is that the APC is allowed only in cases of abandonment, intended by the court (this being again questionable) not in the sense indicated by art. 8 L. 183/1984[32], but as ‹‹serious lack of parental figures››, which obviously does not occur in the case of a child grown up and educated by a parent and her/his partner.

[31] Trib. Min. Milano, 17 October 2016, n. 261, which denied the cross-step child adoption of the respective children in a female couple; Trib. Min. Milano, 20 October 2016, n. 268, that refused the step child adoption by the male partner of the mother of the child (not in a homosexual couple). Both decisions are available for free and commented at www.Ilfamiliarista.it, 2016, 22 November.

[32] Under art. 8, minor children ‹‹are declared to be adptable by the Tribunale per i Minorenni of the district in which they are located, when they are abandoned because they have no moral or material assistance from the parents or relatives required to provide them, unless the lack of assistance is due to temporary force majeure. 2. The situation of abandonment exists, in the presence of the conditions referred to in paragraph 1, even when the children are in public or private or family-run institutions. 3. There is no force majeure when the subjects referred to in paragraph 1 refuse the support measures provided by local social services and such refusal is deemed unjustified by the court. 4. The adoptability procedure must be carried out with a legal assistance for the child and for the parents or other relatives referred to in paragraph 2 of Article 10››.

However, in same-sex couples' cases there is no situation of abandonment, not even in the literal or technical meaning of the words; there is no lack of moral or material assistance (neither temporary) by the parent or the relatives, who are obliged by law to grant it. These perfectly fit with the circumstances requested by the APC, which does not presume the status of abandonment of the child.

The second is that the Courts have considered the APC in both cases not admissible, because the exclusive model for the APC is the "traditional family founded on marriage". But such solution can be criticised, as the legislative reserves the full adoption to the abandoned child and to a couple of spouses in order to ‹‹place the child in a family that give sufficient guarantees of stability, and (…) to assure the presence, under the affective and educational profile, of both parental figures››[33], while in the APC the family founded on marriage is not the only model to refer to. In fact, art. 44, for cases under letters a), c), d), admits the adoption even by a single.

Furthermore, the *Tribunale per i minorenni di Milano* seems to forget to protect the affective relationships through their formal recognition, just as if the decision concerned the equal treatment between a family founded on marriage and para-matrimonial partnership and not (as it is instead) the best interest of the child, regardless of the fact that the adopter is or not married with the child's parent.

The reform of filiation has clearly affirmed the equal opportunity of the child in the paramount position, in the sense that the child must be granted the exact same rights, regardless of the way this family is organized and the model it can or cannot be referred to.

---

[33] See Corte Cost., n. 198/1986, reported in *Nuova giur. civ. commentata* (1988): 57 and commented by Dogliotti, M. and Ansaldo, A.; and Corte Cost., n. 183/1994, commented by Bonamore, D. "L'adozione speciale da parte del singolo nei meandri dell'opposizione." *Giust. civ.* 5 (1995): 1355A; Manera, G. "Se il nostro ordinamento giuridico consenta l'adozione legittimante d'un minore anche alle persone singole." *Giust. civ.* 5 (1995): 1355B**.**

Not by chance, the *Corte di Cassazione* has underlined that the judge - whenever the pre-adoptive custody circumstances are not occurring and the child is already living a *de facto* family relationship with the adopter - has the duty to ascertain the presence of:

1) a negative element, consisting in ‹‹the absence of the full adoption pre-requisites›› stated in the incipit of art. 44, i.e. an obstacle under the law;

2) a positive element, a *de facto* relationship that, after an attentive and adequate scrutiny, can be considered, in concrete, the best interest of the child (art. 57). Such test can give a negative result, even if the adopter is the spouse of the parent when her/his relationship established with the son of the spouse is not stable, deep, equilibrated or, for any reason, worthy of protection and formal recognition by the legal system[34].

4. POLICY CHOICES ON SAME-SEX COUPLE'S PARENTHOOD. HETEROLOGOUS ARTIFICIAL INSEMINATION AND SURROGACY'S FORUM SHOPPING CASES

According to the above analysis, the strict interpretative option offered by some courts and the legislative voluntary omission on the stepchild adoption in *unioni civili* exclude the right to parenthood for the members of a same-sex couple (*de facto* or "unione civile" one).

On my opinion, if the Italian legal system wants to promote effectively parenthood as a project of the couple, as a life project, the eligible ways should be the full adoption of an abandoned minor, the heterologous artificial insemination (female couple) and the surrogacy (male couples). But neither of those options is contemplated by the statute law. The full adoption request

[34] See Miotto, G. "Stepchild adoption omoparentale ed interesse del minore." *Diritto civile contemporaneo*, 5 giugno 2015, available on line at http://dirittocivilecontemporaneo.com/2015/06/stepchild-adoption-omoparentale-ed-interesse-del-minore/; Cipriano, N. "Coppie omosessuali, affidamenti e adozioni di minori." *Dir. succ. fam.* (2015): 25 et seq., who expresses some doubts on the constitutional legitimacy of the prohibition of APC for non-married couples in general (homo or heterosexual oriented).

must originate from a married couple[35]. The access to heterologous artificial insemination is reserved to two individuals of different sex, married or cohabitant[36]. Surrogacy is absolutely banned and criminally prosecuted[37].

These elements must be read together, as they point out a crucial controversial issue: the way in which parenthood is conceived is connected to the way politicians, members of the legislative, and civil society feel about the relation between marriage and *unioni civili* and the idea of parenthood for same sex couple. As a matter of fact, during the drafting phase stepchild adoption was included in the reform on *unioni civili*, but during the parliamentary debate it was set aside, because, otherwise the *unioni civili* "would never have seen the light".

It is worth mentioning that a parliamentary stable majority in the last 20 years in Italy is to be considered an exceptional fact. To the point that, when ethical issues, fundamental rights and contrasting essential values are involved in the political debate, it is hard to maintain a strong consensus on a Act. This implies the choice to drop out that part of the draft upon which there are dissenting or contrasting opinions, in order to ensure a minimum goal. Such a political choice affects civil society and, in particular, those citizens who ask the judges to protect their own rights and interests in the absence - and sometimes in contrast - with the legislative framework of reference.

Recently, in 2017, even after the entry into force of L. 76/2016, some *Tribunali per i Minorenni* (Trento, Torino and others) have recognized the APC for female-same-sex couples, where the child is the product of a heterologous artificial insemination, has the genetic heritage of one of the women and the pregnancy has been conducted by the other woman of the couple, so that the latter is the natural mother and the first is biologically linked with the child.

[35] See art.6, para. 1, L. 184/1983.
[36] See art. 5, L. 40/2004.
[37] See art. 12, L. 40/2004.

The real controversial issue is that in cases of male couples the interests involved are not considered rights, because L. 40 prohibits the recourse to surrogacy on assisted procreation, so that the parents' joint life project is illegal already at its first step.

In particular, the current ban gives rise to interpretative contrasts and uncertainties of law, while the best interest of the child risks to be neglected when an Italian couple (hetero or homosexual, as the prohibition is not based on gender or sexual grounds) returns to Italy with a child born abroad through surrogacy.

In fact, despite the prohibition, surrogacy is quite spread, as demonstrated by the increasing number of cases brought in front of the Italian civil and criminal courts. Couples use to travel abroad to more permissive States in order to overcome their impossibility to conceive and to fulfil their desire to become parents. Cases involve gestational surrogacy (total or full surrogacy), where the commissioning couple provides for the genetic material (heterosexual couples), or when this is offered by a donor (hetero-sexual or homo-sexual couples); and traditional surrogacy (partial surrogacy), when the eggs are provided by the surrogate mother her self (hetero-sexual or homo-sexual couples). Both are illegal[38]. Such prohibition has different rationales. First of all, the legal system wants to protect children and to avoid them being intended as goods susceptible of merchandising[39]. Secondly, there is also the need to ensure a degree of certainty on motherhood, which, in the case of surrogacy, can be split having regard to the various mother figures[40]. This is

[38] See art. 12, para. 6, L. 40/2004. The text of this paragraph has been already cited and translated into English above.

[39] On the different - and sometimes contrasting interests of the child and the parents – see, Browne-Barbour, V.S. "Bartering for Babies: are preconception agreements in the best interest of children?" *Whittier Law* 26 (2004): 429; Reich, J.B. and Swink, D. "Outsourcing human reproduction: embryos and surrogacy services in the cyberprocreation era." *Journal of Health Care Law & Policy* 14 (2011): 241.

[40] The theme is analysed in depth by Wallbank, J. "Too many Mothers? Surrogacy, Kinship and the welfare of the child." *Medical Law Review* 10 (2002): 271; Achmad, C. "Protecting the Locus of Vulnerability: Preliminary Ideas for Guidance on Protecting the Rights of the Child in International

supposed to have negative consequences on the psychological and social development of the child. Thirdly, looking at the position of the surrogate mother, the State wants to avoid the economic or social exploitation of women[41], especially when the choice to act as a surrogate mother is determined by the relevant amount of compensation offered by the commissioning couple, so it is not a free decision nor a voluntary helpful choice, but it has only economic reasons[42].

The Italian law anyway recognises the paternity only if there is a genetic link with the commissioning father, which is easily verifiable through a DNA test, so he can formally recognise the child and can be registered as the father in the birth certificate. However, if the child is born from a married surrogate mother, a presumption of paternity operates in the sense that he is considered as child of the husband; yet such presumption can be rebutted again with a DNA test.

The research of maternity is more complex, as, under art. 269, para. 2, of the Italian civil code, the "mother" is the woman who gave birth to the child. Actually, the Italian legal framework is not able, at the moment, to follow social changes and to answer questions such as who should care for and bring up the child after birth. However, in my opinion, not only the national legal tradition should be considered, but also a new concept of parenthood (motherhood and fatherhood), which is "knocking at our doors" with great force.

Commercial Surrogacy." *The United Nations Convention on the Rights of the Child. Taking Stock after 25 Years and Looking Ahead.* Ed. T. Liefaard and J. Sloth-Nielsen. Leiden:Brill, 2016. 513-540.

[41] The literature of the last two decades on the various ethical issues involved is wide. For all, see Shalev, C. *Birth power. The case for surrogacy*, New Haven-London: Yale University Press, 1989; Coleman, M. "Gestation, Intent, and the Seed: Defining Motherhood in the era of assisted human reproduction." *Cardozo Law Review* 17 (1996): 497; Baughman, M. H. "In search of common ground: One pragmatist perspective on the debate over contract surrogacy." *Columbia Journal of Gender and Law* 10 (2001): 263.

[42] For a comprehensive insight in the Italian literature, see, Kriari, I. and Valongo, A. "International Issues Regarding Surrogacy" *The Italian Law Journal* 2 (2016): 331 ss. For an overview on Court's rulings, see Turlonm, F. "Nuovi Scenari procreativi: rilevanza della maternità sociale, interesse del minore e favor veritatis." *Nuova Giurisprudenza civile commentata* (2013): 712; Di Masi, M. "Maternità surrogata: dal contratto allo status." *Riv. Crit. Dir. Priv.* 4 (2014): 515.

The controversial issues, upon which there is not a general consensus neither among the Italian public opinion nor among the European countries and those falling into the western legal tradition, are: is the commissioning parents' desire unlawful if it is satisfied by the surrogate mother? Is it reasonable to presume *iuris et de jure*, without looking at the particular circumstances of the case, that the woman is unable to decide freely to become a surrogate mother? Is it possible to consider surrogacy as a lawful mean, comparable to blood donation?

All the answers to those questions are tied to the concept, of course culturally connoted, of parenthood and references are needed, both, to the notions of procreative choice (artt. 2[43] and 32[44] of the Italian Constitution) and of procreative responsibility (art. 30[45], para. 1, of the Italian Constitution).

The impossibility to find unambiguous and reliable answers, under the present national legal framework, is demonstrated by the different decisions of the Courts in cases of heterosexual couples, who travel abroad, conclude surrogacy agreements under foreign laws and return to Italy with the children. Those children are not considered children of the commissioning couple and may also end up not holding Italian citizenship or becoming adoptable. In particular, the main problems arise in front of the civil registry office, when the couples present foreign documents (a judicial decision or a simple birth certificate, depending on the foreign State rules), where they are stated as legal parents, but also the surrogate mother is mentioned. Such documents are not

[43] With art. 2, ‹‹The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled››.

[44] Under art. 32, ‹‹The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the most deprived. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by the respect for the human person››.

[45] Art. 30 states that ‹‹it is the duty and right of parents to support, raise and educate their children, even if born out of wedlock. In the case of incapacity of the parents, the law provides for the fulfilment of their duties. The law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to any children born out of wedlock. The law shall establish rules and constraints for the determination of paternity››.

valid and cannot be accepted by the civil registry office because they attest a status of the child that cannot be recognised under Italian law since it is in contrast with public policy and in violation of L. 40/2004. So the status of child and the status of citizen are both denied.

4.1 SURROGACY IN THE ITALIAN CASE LAW

In dealing with such cases, the Courts have assumed different positions. The trend of the *Tribunali* is to endorse the acceptance of the commissioning couple as the legal parents if, at least, one of them has a genetic link with the child. The *Corte di Cassazione* has stressed that no parenthood can be recognized if there is no genetic link between the couple and the child.

Such solutions, of course, affects the area of stepchild adoption, because the recognition of a filiation relationship between one of the members of the couple and the child is the pre-requisite for the SCA or our APC.

If what we have said above is true (i.e. that the protection of the best interest of the child cannot be sacrificed by contrasting decisions, which jeopardise the right of all children to have recognized the same legal status, with no regard to the sexual orientation of the members of the couple), then it is necessary to respect the principle of non-discrimination on the basis of the circumstances of conception or birth, in order to grant the child fundamental rights such as privacy, identity, citizenship, to love and care…[46]

According to an interesting analysis, the legal recognition of the parenthood between the intended parents and the child should be granted when the surrogacy procedure has been completed in accordance with the law of the state where the surrogacy agreement has been concluded and executed, so

[46] Stefanelli, S. "Procreazione e diritti fondamentali." *La filiazione e i minori. Trattato di diritto civile.* Ed. A. Sassi ed al. Turin: Utet, 4 (2015): 112 et seq.; Ferrando, G. "Stato unico di figlio e varietà dei modelli familiari." *Fam. Dir.* 10 (2015): 952 et seq.; Bianca, M. "Tutti i figli hanno lo stesso stato giuridico." *Nuove leggi civili commentate* 1 4 (2013): 507; Palazzo, A. "Unicità dello status *filiationis* e rilevanza della famiglia non fondata sul matrimonio." *Riv. crit. dir. priv*. (2013): 273 ss.

that the child has the right to continue in Italy the family relationship previously established with the intended parents[47].

Bringing this reasoning at the extreme consequences, in the case of a male homosexual couple the father, having (which is preferable, according to the Italian court's rulings) or not the genetic link with the child (depending on the foreign law), and resulting as the father according to the foreign birth certificate or the court's decision, should be considered "the father of the child" under the Italian law. The civil registry office should consent the registration of the birth document (certificate or court's decision) and the other partner is eligible for the adoption in particular cases.

The same hypothesis can be made in case of a female homosexual couple, with the specific differences in terms of roles in the couple, of the participation with genetic material, in conceiving and giving birth and adopting.

However, if we look at the European continent, the margins for the application of such scholarly proposal could be limited, as surrogacy is banned in several European countries, such as France, Germany, Spain, Austria, Sweden and Denmark, while it is permitted in Greece, Great Britain, Russia and Ukraine.

Anyway, the Courts have followed many different paths on surrogacy in cases involving heterosexual couples, responding to different instances: to protect the identity of the child born from the surrogate mother, in particular if there is a genetic link with the commissioning father and an affective relationship with him; to test the incompatibility of the agreement with public policy, considering the principle of *favor minoris*.

---

[47] See Kriari, I. and Valongo, A. "International Issue Regarding Surrogacy" quoted. 336; Baratta, L. "Verso la comunitarizzazione dei principi fondamentali del diritto di famiglia." *Riv. dir. int. priv. proc.* (2005): 591-601; Palazzo, A. *Eros et ius*, Milan: Mimesis, 2015. 67; Bellelli, A. "La filiazione nella coppia omosessuale." *Giur. It.* (2016): 1819-1823.

The first case dates back to 1989. The *Tribunale di Monza*, after considering the best interest of the child, allowed the commissioning father, who supplied the gametes, to recognise the child, and the commissioning mother to adopt[48].

After a decade, in the 2000, the *Tribunale di Roma* ruled that when surrogacy is supported by an altruistic choice and not by commercial reasons, it is ethically acceptable and does not infringe any law or general principle, not even, in particular, *"the prohibition on permanent reduction of physical integrity"* under art. 5 cod. civ., as the pregnancy status is temporary. In the concrete case the surrogate mother had acted only for humanitarian reasons and had no genetic link with the child[49].

More recently, in 2009 the *Corte di Appello di Bari*[50] recognised the enforceability in Italy of two parental orders from the United Kingdom, which attributed maternity to the commissioning mother rather than to the biological one. In particular, the case involved a married couple, a British man and an Italian woman, who, for a serious illness, could not have children and could not turn to homologous insemination with her own ovules. In execution of an altruistic surrogacy agreement with another British woman, two children were born and immediately handed over to the commissioning couple; the commissioning mother became the mother in all respects for the purposes of the UK civil status records, as the surrogate one formally renounced to maternity.

Once the parental orders had become definitive, the couple moved to Italy with the children. After a certain period of time, they separated by mutual agreement. During the separation proceedings, there were problems with

---

[48] This first decision, Tribunale di Monza, 27 October 1989, has been reported and commented by Ponzanelli, G. in *Foro It.* I (1990): 298.

[49] Tribunale di Roma, 17 February 2000, reported and commented by Cassano, G. in *Fam. e Dir.* (2000): 165.

[50] Corte di Appello di Bari, 13 February 2009, reported in *Famiglia e Minori* (2009): 50; commented by Dell'Utri, M. "Maternità surrogata, dignità della persona e filiazione." *Giur. merito* 2 (2010): 349; Campiglio, C. "Lo stato di figlio nato da contratto internazionale di maternità." *Riv. dir. int. priv. proc*. 3 (2009): 589.

respect to the status of the two children, as the Municipality of Bari rejected the mother's request to recognise the British parental orders. She then applied to the Court of Appeal, which ruled in her favour on the grounds that a refusal of recognition would certainly be detrimental to the two children and would have adverse consequences for their stability and development. From the time of their birth, the children had lived, for nearly ten years, stably and happily in Italy with the commissioning couple and for this reason the recognition of legal effects in Italy of the parental orders was in their interests. Hence, the *Corte d'Appello di Bari* ordered the transcription of the British parental orders in the Italian registers of civil status.

Two years later, the *Tribunale di Forlì*[51] ruled exactly in the opposite direction. Also in this case, twins born abroad from a foreign surrogate mother, with a genetic link with the commissioning father, were involved. The father's request for recognition was accepted by the Italian authorities, but the commissioning mother's one was not, because it would had been in contrast with public policy. More specifically, it was held that a woman, who had not given birth to the children, could not be their legal mother. The solution adopted by the Court of Forlì is strictly rooted in the traditional notion of purely biological parenthood and affects the children's rights to personal identities and to a stable and on-going relationship with both parents.

On such premises a system can build a discipline on ACP or SCA, but it has to be clear that the genetic link element, which is indispensable according to the case law, is possible also for same-sex parental couples.

The absence of such link excludes itself any form of parenthood and any possibility to recognise filiation links between the child and one of the

[51] Tribunale di Forlì, 25 October 2011, reported in *Dir. Fam. Pers.* (2013): 532.

members of the couple, as ruled recently by the *Corte di Cassazione*, even in a case involving a heterosexual couple[52].

The Italian commissioning parents had concluded a contract with a Ukraine surrogate mother and paid twenty-five thousand euros for her to give birth to the child and decline maternity by omitting her name from the birth certificate. When the couple later returned to Italy, with the three-year-old child, they did not disclose the truth concerning the birth and were criminally prosecuted.

Despite the Attorney General (*Pubblico Ministero*) argued that the child should remain in the couple's care, the Supreme Court held that no regulatory framework allowed to recognize them as the parents, because none of the commissioning parents had a biological link with the child. Therefore, the child should have been given up for adoption.

According to the *Cassazione* the surrogacy practice, as conducted in the concrete case, was actually prohibited both by Italian and Ukrainian law. The first criminalizes any kind of surrogacy agreement, while the latter only allows it when ‹‹the woman who carries out the gestation does not provide her ovules and at least fifty per cent of the genetic heritage of the child comes from the commissioning couple. Thus, the surrogacy agreement was illegal››. The birth certificate attesting that family status was false and the child could not be recognised as the son of the commissioning couple. The Italian Court attested its position in line with other countries, which accept surrogacy to a certain extent, but require the biological link with at least one of the commissioning partner, as the determination of blood relatives is functional to ensure the child's personal identity and the right to know his origins. These values are fundamental for the Italian legal system, together with the general principle of *favor veritatis.* Neglecting such hard-core values collides with public policy.

[52] Corte di Cassazione, 11 November 2014, n. 24001, reported and commented by Casaburi, G. "Sangue e suolo: la Cassazione e il divieto di maternità surrogata." *Foro It.* I (2014): 3414-3416.

Moreover, in that particular case, the couple in the previous years to the surrogacy had applied for national adoption and they were considered not fit to adopt. Their request had been turned down three times, so the *Corte di Cassazione* focused on such negative evaluations and stressed on the need to guarantee the child's best interest.

However, it has to be underlined that all these procedures and judgements ended up after three years, during which the child had lived in the family home, where he had been raised by the intended parents - fit or not they might have been for such mission. So, in any case, the real damaged person is the child: or as he has lived for three years with parents who are not adequate or his parents are adequate, but in any case, the child must be adopted by another couple following the judgement.

4.2 LOSS OF PARENTAL RESPONSIBILITY IN CASES OF SURROGACY

Criminal Courts case law has also to be examined, in order to understand if and to what extent - in cases of forgery of family status, under Art 567(2) of the criminal code[53] - the decision of the Court entails a loss of parental responsibility (civil-family court competence).

Generally speaking, the legal system has been oriented in the direction of excluding a significant interaction between the criminal and private law jurisdictions, but in this specific field, which involves ethical issues, criminal decisions can anyway exert an indirect pressure on the development of case law in the civil court.

[53] Art. 567 states that «Anyone who, by replacing an infant, changes his civil status, is punished with imprisonment from three to ten years. The imprisonment from five to fifteen years can be applied to anyone who, in the formation of an act of birth, alters the civil status of a newborn by false certifications, false attestations or other falsehoods». The exchange, as a necessary element of the crime, must take place after both newborns have been enrolled, if the conduct is not due to what is provided in the second paragraph. This conduct is characterized by the falsehood, which must be fulfilled at the time of the formulation of the act. These are two autonomous hypotheses of crime according to doctrine, while case law considers that the two paragraphs refer to different forms of manifestation of the same offense.

The orientation of the criminal court is to preserve those legal relationships that have already been established between the commissioning couples and their children in accordance with foreign law, as demonstrated by some decisions. In doing so, the Italian courts have adopted a case by case evaluation approach, looking at the situation of the child in the specific individual case[54], which seems coherent both with the national legal framework and with art 6(1)(a) of the European Convention on Children's Rights[55].

The *Tribunale di Pisa*[56] decided a case of an Italian commissioning couple, which was accused of forgery of family status after having returned to Italy with their two sons, born in Ukraine in execution of a surrogacy agreement, involving a donation of ovules. The woman's position was considered to be the same as the man, even though she had contributed to the reproduction process. The Court of Pisa rejected the Public Prosecutor's request, ruling that the facts alleged did not constitute a criminal offence. In fact, in plain compliance with the Ukrainian law, the commissioning spouses were defined as the legal parents in the birth certificates released by the Ukrainian authorities. According to the judge, they would have violated the law in Ukraine only if they had specifically mentioned the woman who had carried the children or the woman who had donated her ovules as the 'mother' (!)**.**

---

[54] Tribunale di Brescia, Criminal Division, 26 November 2013, available at http://www.penalecontemporaneo.it/upload/1394865082TRIBUNALE_BRESCIA_FECONDAZIONE.doc .pdf

[55] Art. 6 of the 1996 European Convention on the Exercise of Children's Rights states that: "In proceedings affecting a child, the judicial authority, before taking a decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; b) in a case where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information; – consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; – allow the child to express his or her views; c) give due weight to the views expressed by the child". The Convention is available on line at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cdaf.

[56] Tribunale di Pisa, Criminal Division, 19 June 2015, commented by Trinchera, T. "Profili di responsabilità penale in caso di surrogazione di maternità all'estero: tra alterazione di stato e false dichiarazioni al pubblico ufficiale su qualità personali." *Riv. It. Dir. Proc. Pen.*, 1, 2015, p. 418.

The *Tribunale di Milano*[57], in a surrogacy agreement case involving a donation of ovules, signed by an Italian couple in Kiev, stated that the commissioning couple was not guilty because the family status of the child had been determined in accordance with art. 15, President of the Republic's Decree, 3 November 2000, n. 396 (Regulation concerning the Review and Simplification of the Legislation on Civil Status), which provides that declarations of birth made by Italian citizens abroad 'must be made on the basis of the law in force where the birth takes place'. So, the circumstances that the intended parents had paid a fee to the clinic and had covered the expenses incurred by the surrogate mother, for a total amount of 30.000 Euros, had no relevance. Even the *Corte di Cassazione*[58], more recently, has confirmed this trend.

Clearly, the Courts choice is to enforce in Italy the foreign birth certificates, as they are not in contrast with 'public policy', with the best interest of the child or with any other fundamental principle of the Italian legal system. In other words, surrogacy does not collide with a certain definition of public policy, in the light of an international and super-national framework. According to this concept of public policy, the interpreter should consider these other levels in order to characterize the legal system in a certain historical period, in the face of provisions coming from different countries and in relation to the society as a whole, resulting primarily from the European Convention on the Protection of Human Rights and Fundamental Freedoms and other international conventions.

The criminal court trend proves that the absolute ban of surrogacy is far from the actual social context. We are assisting a schizophrenic patient: surrogacy is banned, but commissioning couples are not guilty of the criminal offence; the commissioning father with a genetic link can be recognized as such; the

[57] Tribunale di Milano, Criminal Division, 13 January 2014 reported in *Foro It.* II (2014): 371and commented by Casaburi, G.

[58] Corte di Cassazione, Criminal Division, 10 March 2016, n. 13525, reported in *Foro It.* II (2016): 286.

commissioning mother cannot at the first step, but only in some cases she has been admitted to the adoption of the child.

This situation calls for an evident intervention in terms of uniformity. The criminal case law can have an impact on private law, suggesting that, if at least one of the partners of the commissioning couple is genetically related to the child, the couple can continue to bring up such child, when a surrogacy agreement has been lawfully concluded abroad and the family life has already been established. In such a case, the family should not be broken up, because the paramount interest of the child should be to maintain the relationship with the intended parents, the affective continuity. It would be desirable, in such cases, to recognize effects to the birth certificate/judicial decision formed abroad and, eventually, to recur to SCA or APC.

The latter hypothesis can occur when it would be impossible to recognise the mother-hood or father-hood of the intended parent, according to the foreign law and/or the birth certificate or judicial decision.

The solutions proposed here are in line with a sensitive scholarly position[59], which opens to the notion of family in many different shapes, underlining the rising of new interests, rights and status coming from new forms of parenthood in favour of a method based on continuous reference to the fundamental principles of international public policy - as described above - and to the specific circumstances of individual cases. These solutions, drafted by the scholarly and judiciary legal formants, might circulate and may lead future legislators to intervene and review their currently restrictive positions[60].

[59] Ferrando, G. "Le nuove realtà familiari nell'ordinamento interno." *Le nuove famiglie tra globalizzazione e identità statuali*. Ed. I. Queirolo et al. Rome: Aracne, 2014. 75 ss.

[60] It is necessary to give space also to the different position of some scholars, followed also by some courts, who think that the protection of the child does not necessary imply the recognition of illegal conduct by the commissioning couples. For all, see Berti De Marinis, G. "Maternità surrogata e tutela dell'interesse superiore del minore: una lettura critica alla luce di un recente intervento della Corte EDU." *Actualidad Jurídica Iberoamericana* 3 (2015): 287.

5. SOME COMPARATIVE INSIGHTS

The analysis is dealing with many socially typified relationships, which although not provided for by the statute law, are eventually close to the traditional family founded on marriage. At the same time, there are many other different family models, that deserve to be recognized as places where, under art. 2 of the Italian Constitution, human dignity and personality both find expressions.

According to the Constitutional Court, there is a place among these models for the non-married (same sex or not) couples, which have *"the right to live freely their condition of couple (…), obtaining the juridical recognition of those rights and obligations connected to their situation and status"* [61]. Such recognition was the competence of the legislative, also with regard to its political discretion in terms of times, forms and contents. The Constitutional Court indeed invited the legislative to intervene in order to ensure dignity and protection to same-sex unions as well as to the *de facto* families.

Such intervention has been just partly realized through L. 76/2016 on *unioni civili* and *convivenze di fatto*, mainly in its provisions concerning reciprocal rights and duties of the partners and their relationships with third parties and institutions. As said above, the filiation and parenthood sphere is missing for *unioni civili* partners and this choice surprises if we consider the European framework of reference.

In particular, the EU position[62] has been clear in motivating the member States to recognise and regulate same-sex unions, without neglecting aspects

---

[61] Corte Cost., April 15, 2010, n. 138, reported in *Foro It.* I (2010): 1361 et seq., commented by ROMBOLI, R. "Il diritto «consentito» al matrimonio ed il diritto «garantito» alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice «troppo» e «troppo poco»." *Giur. Cost.* 2 (2010): 1629; Pezzini, B. "Il matrimonio same sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sent. n. 138 del 2010 della Corte costituzionale." *Giur. Cost.* 3 (2010): 2715.

[62] See European Parliament resolution of March 13, 2012 on equality between women and men in the European Union - 2011 (2011/2244(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0069+0+DOC+XML+V0//EN.

involving filiation, child protection and forms of adoption, which are obviously tied to the idea of family.

The ECHR has stigmatized any discrimination based on sex in cases of co-parental adoption, stating that if such form of adoption is admitted for a *de facto* co-habiting partner, it cannot be banned only because of the homosexuality of the applicant, because such solution would violate artt.8 and 14 of the European Convention, the rights to private and family life and the principle of non-discrimination[63].

Such position seems coherent with, and the natural evolution of, the principles already expressed by the Court in 2008 in *E.B. v. France*[64], where it had condemned the sexual discrimination occurred in the case of adoption by a homosexual single person.

Furthermore, there are other social factors that have to be considered, which attest that parenthood is no longer just based on genetic links.

In particular, in Italy, on the one hand, the increase of step-families, enlarged families…, has been registered also by the Courts' case law, where the figure of the "social parent" has been pointed out as the person who takes moral and material care of the child, playing a parental role and function, representing for the minor an educational and affective giver.

On the other hand the decision[65] of the Constitutional Court has declared the illegitimacy of the ban (provided by L. 40) of heterologous artificial

---

[63]ECHR, X and Others v. Austria, 19 February 2013, n. 19010/07, in http://www.echr.coe.int/Documents/Case_law_info_training_outreach_2013_ENG.pdf. For scholarly first comments, see Kathleen, A. "Doty Introductory Note to X and Others v. Austria." *International Legal Materials* 53 IV (2014): 620 et seq. In the Italian literature, see Fatta, C. and Winkler, M. "Le famiglie omogenitoriali all'esame della Corte di Strasburgo: il caso della *second parent adoption*" *Nuova Giur. Civ. Comm.* I (2013): 519 et seq.

[64]ECHR, E.B. v. France, 22 January 2008, n. 43546/02, in http://hudoc.echr.coe.int/eng#{"appno":["43546/02"],"itemid":["001-84571"]}. For an Italian scholarly analysis, see Faletti, E. "La Corte Europea dei diritti dell'uomo e l'adozione da parte del single omosessuale." *Fam. e Dir.* I 3 (2008): 221 et seq.

[65] Corte Cost., 10 June 2014, n. 162, commented by Tigano, V. "La dichiarazione di illegittimità costituzionale del divieto di fecondazione eterologa: i nuovi confini del diritto a procreare in un contesto di perdurante garantismo per i futuri interessi del nascituro.", available at http://www.penalecontemporaneo.it/d/3141-la-dichiarazione-di-illegittimita-costituzionale-del-divieto-di-fecondazione-eterologa-i-nuovi-conf..

insemination for infertile couples, consenting the recourse to a donor in such hypothesis.

With such steps, the split between the genetic filiation and the juridical one, conceived before only in the adoption framework, is the result and evidence of a more complex evolution process, affected by (although not only by) the new procreative techniques. As long as the heterologous artificial insemination is admitted in the Italian legal system, it would become impossible to deny the recourse to such procreative method to same-sex female couples and Italy could be condemned by the Strasbourg Court, because "out of the marriage umbrella" no different treatment between the homosexual and the heterosexual couple can be justified.

In Italy marriage remains an area that should be protected and reserved only to heterosexual couple, as stated by the *Corte di Cassazione*[66], which has ruled that - even if the homo-affective union is directly protected under art. 2 of the Constitution in a way equivalent to marriage in cases of violation of fundamental rights – the civil officer's refusal to give legal knowledge in the public register to the same-sex couple's intention to celebrate their marriage is legitimate. This solution is in line with a previous decision, where the Court had ruled that the act, certifying a marriage celebrated abroad, cannot be enforced in Italy and the public officer refusal to register it is legitimate[67].

The Italian *Corte di Cassazione* position is respectful of the EU policy to maintain the power to decide which forms of recognition ensure to same-sex couples in the competence of the single member state, as the right enforced by

---

[66] Corte di Cassazione, 9 February 2015, n. 2400, commented by Auletta, T. "Ammissibilità nell'ordinamento vigente del matrimonio fra persone del medesimo sesso." *Nuova Giur. Civ. Comm.* I (2015): 649 et seq.; Cariola, A. "Famiglie e convivenze: il rilievo costituzionale comporta la giuridicizzazione dei rapporti interni." *Dir. Fam. Pers.* 3 (2015): 1025.

[67] Corte di Cassazione, 15 March 2012, n. 4184, commented by Angelini, F. "La Corte di cassazione su unioni e matrimoni omosessuali: nell'inerzia del legislatore la realtà giuridica si apre alla realtà sociale" *Giur. Cost.* 2 (2012): 1520; the same decision has been reported in *Nuova Giur. Civ. Comm* II (2012): 588 et seq. In the same direction, Cons. di Stato, 26 October 2015, available at www.giustizia-amministrativa.it.; reported also in *Foro It.* 1 III (2016): 6, commented by Casaburi, G.; and in *Foro It.* 5 III (2016): 263, commented by P. Travi.

art. 12 ECHR cannot be intended to the extent of ensuring them the right to marry: such choice, or any other form of protection for such unions should remain in the national margin of appreciation, as marriage has social and cultural connotations that can vary widely from one State to another[68].

In some EU countries, where homosexual couples have access to marriage or to PACs or forms of civil unions, adoption - and by this mean the right to filiation - is recognized as a right for the spouses or the partners, both in the forms of the stepchild and full adoption, as long as it involves heterosexual couples.

For example, in Holland the joint and full adoption by same-sex couples is admissible since 2011, the year when the right to marriage was recognized.

In Belgium the adoption has been opened to same-sex couples since 2006, while the homosexual marriage had been introduced three years before, in 2003.

In 2006, with a complete statutory reform, Norway has recognized the rights to marry, to adopt and to make recourse to artificial procreation techniques also to same-sex individuals.

In some cases, the adoption was introduced prior to same-sex marriages: in Sweden the adoption for same-sex couples, even if not married, was introduced in 2003; the right to marry instead was recognized in 2009, with the *placet* of the Lutheran Church.

In the UK, the Adoption and Children Act 2002 introduced the adoption for same-sex couples in England and Wales[69], and in 2013 also the right to marry for same-sex couples was recognized. Even Scotland (2006) and Northern Ireland (2013) have followed the same choice. In any case the stepchild

---

[68] ECHR, Schalk and Kopf v. Austria, 24 June 2010, n. 30141/04 , reported in *Nuova Giur. Civ. Comm.* I (2010): 1137 et seq; Paladini, L. "Le coppie dello stesso sesso tra la sentenza della Corte costituzionale n. 138 del 14 aprile 2010 e la pronuncia della Corte europea dei diritti dell'Uomo del 24 giugno 2010 nel caso Schalk and Kopf v. Austria." *Diritto pubblico comparato ed europeo* 1 (2011): 137-151.

[69] See Hitchings, E. and Sagar, T. "The Adoption and Children Act 2002: A Level Playing Field for Same Sex Adopters?" *Child & Family Law Quarterly* 19 (2007): 60.

adoption had already been recognised, even before the legislative reforms, by the courts.

In Austria the full adoption for homosexual couples of civil unions has formally entered in force in January 2015. Before, the stepchild adoption was admitted anyway.

Germany does not provide for joint full adoption, but since 2005 the stepchild adoption is allowed and since 2013 also the stepchild adoption of the adoptive child (not only the natural-biologic one) of the partner is admissible.

In Spain, since 2005 it is possible for homosexual couple to marry and to adopt. In particular, adoption has been opened also to single individuals (same-sex or heterosexual) and to non-married couples (same-sex or heterosexual).

France has given citizenship to same-sex marriage and adoption with an Act in 2013. Generally speaking, adoption is possible also for singles and PACs couples. Mere cohabitants cannot adopt, but in these cases the discipline on the delegation of parental responsibility from the parent to the partner, provided by the civ. cod., can be applied.

In Croatia, statutory law provides for a peculiar mechanism, similar to the stepchild adoption, called "partner guardianship", which allows the biological parent, joint in a civil union, to transfer all or part of her/his parental responsibility to the partner.

As far as surrogacy is concerned, the heterogeneous approaches followed by the various States reflect the combinations of legal values linked to the cultural, historical and social characteristics of the single national heritages[70].

[70] For the huge debate on the diffusion of family law models in Europe and for the eventual desirability of harmonisation of family laws, see for all Bradley, D. "A family law for Europe? Sovereignty, political, economy and legitimation." *Perspective for the unification and harmonisation of family law in Europe*. Ed. K. Boele Woelki. Oxford-New York: Intersentia, 2003. 65-104; Antokolskaia, M. "The better law approach and the harmonisation of family law." *Perspective for the unification and harmonisation of family law in Europe*. Ed. K. Boele Woelki. Oxford-New York: Intersentia, 2003. 159-183; Jantera-Jareborg, M. "Unification of international family law in Europe – A critical perspective." *ibidem*, 2003. 194-216; McGlynn, C. "A family law for the European Union." *Social law and policy*. Ed. J. Shaw. Oxford: Oxford University Press,

At the European level, analysing the existing legal approaches, it is not possible to identify a common core of rules[71], even if the single Member States as well as the EU agree on the need for a clear definition of parenthood and the status of the child. This also in consideration of the fast blow-out of surrogacy agreement within the EU area that has affected deeply the free movement of people, modifying the parental models spread also at a national level.

Even if it is impossible to talk about a common core of rules, a shared core of general principles or, at least, a convergence towards some tendencies can be identified: the right to decide freely to become a parent, the state control over the access to the available techniques of medically assisted reproduction, the protection of the participants' health during such procedures, the idea of a procreative responsibility functional to the child's welfare and subordinated to the principles of solidarity and human dignity[72].

5.1 THE BRITISH SURROGACY REGIME

As it has been done for the Italian legal system, in this paragraph it is analysed the British surrogacy regime. Such step is needed because, as said above, sometimes – especially for male-same-sex couples – surrogacy agreements are obliged tools to realize their procreative projects, which comes before any

2000. 223 et seq.; McGlynn, C. "The Europeisation of family law." *CFLQ* 13 (2001) 35 et seq.; Ninatti, S. and Rovagnati, A. "Verso un diritto europeo delle relazioni familiari." *Quaderni costituzionali* 28 (2007): 425-428; Patti, S. "Il "principio famiglia" e la formazione del diritto europeo della famiglia." *Familia* I (2006) 529-544; Patti, S. *Diritto privato e codificazioni europee*. Milan: Giuffrè, 2007. 231et seq.; Patti, S., "Il diritto di famiglia nei paesi dell'Unione Europea: prospettive di armonizzazione.", *Bilanci e prospettive del diritto di famiglia a trent'anni dalla riforma*. Ed. T. Auletta. Milan: Giuffrè, 2007. 15 et seq.

[71] See the Parliamentary Assembly of the Council of Europe (PACE) report, 12 October 2016, where the Assembly voted against the proposal by the Health Parliamentary Commission of 21 September 2016 to fix certain guidelines to ensure children's rights in relation to surrogate agreements, available at http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6316&lang=2&cat=133.

[72] Torino, R. "Legittimità e tutela giuridica degli accordi di maternità surrogata nelle principali esperienze straniere e in Italia." *Familia* 1 (2002): 179; Tobin, J. "To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy?"*International and Comparative Law Quarterly* 63 2 (2014): 317-348.

subsequent step child adoption. The British experience can be considered a (consolidated) model for those legal systems who want to legislate on such issue, but, at the same time, represents also one of the choice, in terms of forum shopping, practiced by Italian couples.

In the UK, the Surrogacy Arrangements Act 1985 consented the altruistic surrogacy agreement and punished as an offence any payment from the commissioning couple to the surrogate mother for the service, aside from the "reasonable expenses".

The artificial insemination must take place in a clinic licensed by the Human Fertilisation and Embryology Authority. Before starting the treatment, the physicians must ponder the welfare of any future child and of the surrogate's existing children, who may be affected by the birth. An independent ethics committee is competent to manage with hard cases and, eventually, to indicate peculiar terms and conditions for the surrogacy procedure[73].

When these prerequisites and procedure are accomplished, the surrogacy agreement can be considered legitimate and respectful of the human dignity of those involved.

In any case, the agreement is non-enforceable by the parties, as none of the them is bound by any obligation: the commissioning parents cannot compel the surrogate mother to hand over the child and the latter cannot force them to take the child after birth if they refuse. In brief, agreements relating to surrogate motherhood are considered to be admissible under UK law, but the same agreements are unenforceable in the event of non-compliance by the parties[74]. These obligations may only arise after a court ruling on the matter.

---

[73] Criscuoli, G. "La legge inglese sulla «surrogazione materna» tra riserve e proposte." *Dir. Fam. Pers.* (1988): 1029-1047; Horsey, K. "Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements" *Child and Family Law Quarterly* 22 (2010): 449; Burton, F. *Family Law*. London-New York: Routledge, 2012. 300; Vijay, M. "Commercial Surrogacy Arrangements: The Unresolved Dilemmas" *UCL Journal of Law and Jurisprudence* 3 (2014): 200.

[74] Kriari I.and Valongo A., cit. 338.

This framework has been partially modified by the Human Fertilisation and Embryology Act 1990, the Adoption and Children Act 2002 and the Human Fertilisation and Embryology Act 2008. These reforms are all oriented by a main stream, consisting in balancing the different interests involved: on one side, the wish to become a parent; on the other side, the child's right to a stable family, to moral and material assistance and care; and, in the middle, the rights of the surrogate or natural mother.

As in many other legal systems, under UK law the woman, who has carried the gestation, after the implantation of an embryo, is considered the mother of the child (natural mother), whether or not she is genetically related to the child. However, legal motherhood can be formally transferred to the commissioning woman through parental orders or adoption. In particular, Section 54 of the 2008 Human Fertilisation and Embryology Act, gives the Court the competence to issue a parental order, if requested by the parties within six months from the birth, when the child is already living with the applicants.

In a case of a child born in 2011 from a cross-border surrogacy arrangement between a British couple and an Indian surrogate mother, where the commissioning man was genetically related to the child, while the ovules were supplied by an unknown third donor, the High Court[75] authorised the recording of a parental order even though the statutory time limit had expired.

The particular circumstances of the case were relevant, according to the High Court's opinion, who focused in particular on: the good faith of the commissioning couple; their UK nationality; the free and informed consent of the surrogate mother and her husband; the report of social services attesting that there was no alternative way to legally establish the parental relationship,

[75] High Court, 3 October 2014: X A Child [2014] EWHC Fam 3135, available at https://www.judiciary.gov.uk/judgments/family-court-judgment-re-x-a-child-surrogacy-time-limit/.

as the children did not have any family other than the commissioning couple in the receiving State.

The UK couple was mentioned as the legal parents on the Indian birth certificate and they declared to the court that they were unaware of the time limit in which they were supposed to apply.

The High Court recognised the interest of the child in continuing the relationship already established with the couple as preeminent and held that the time limit was too strict.

Generally speaking, it is consolidated in the case law through a certain number of binding precedents that, when deciding whether or not to grant a parental order, the court must consider all the relevant circumstances in order to safeguard and promote the welfare of the child.

The courts can modulate the response, according also to the Social Services Department reports, and are entitled to issue an alternative order, such as a residence order or an additional order, under which the child should continue to have contact with the surrogate mother and the commissioning couple will not formally acquire to a certain extent legal parenthood. Once the child reaches adulthood, she can access the original birth certificate, after receiving specific counselling.

Having regard to the criminal law issues, the UK courts may uphold a substantial payment that has been made illegally, if it considers that it is in the child's best interest to remain with the commissioning couple and such a payment will make this possible. The jurisdiction abdicates its punitive function, even if the agreement is not fully altruistic, as prescribed by the Act, and the UK courts consider the best interest and welfare of the child as pre-eminent and not consisting in the removal from a settled family home. This legal reasoning is not far from the above illustrated Italian criminal courts trend. Thus, even if an unlawful payment has in fact been made (UK) or even if the violation of the absolute ban of surrogacy and forgery of family status

occur (IT), the child's interest may still be best served by upholding the contested conducts as lawful.

In the UK framework, the ban on the commercialisation has determined a non-qualified market, with relevant adverse consequences on professional expertise and legal advice granted (or not) to all persons involved. Actually, at the present stage, reforms have allowed non-profit organisations to connect the demand and offer of such services and to charge a reasonable fee to cover their expenses. This arises, as it is imaginable many problematic issues on the role of such non-profit bodies, which act as intermediates, but we will not address the topic since it deserves a complete and detailed analysis which is not the part of the present study. What we can affirm, tough, that directly interest this study, is that the surrogacy in the United Kingdom may be a solution for male homosexual couples and, more in general, for those men who do not have a female partner.

Also in other legal systems, the courts feel the need to find a reasonable balance between the conflicting interests: on the one side, the child's right to identity, which includes parentage, origins and citizenship, and, on the other side, the commissioning couple's rights. These rights can also tend to opposite directions and the output of the balancing work determines different decisions on the registration of birth's certificates/judicial orders and on the recognition of child's parents, which affects both the private and the family life.

The analysis here conducted suggests the opportunity to find the instruments in order to recognise the birth certificates issued by a foreign state, attesting that a surrogacy agreement has been concluded and executed abroad.

Looking at the Italian position and summarizing the results, in the absence of a legislative framework on surrogate motherhood and in front of the criminal law ban, the specific cases will be resolved differently by courts, depending: firstly, on whether or not there is a genetic link between the child and at least

one of the intended parents; secondly, upon the effects of the foreign document (judicial order or birth certificate).

In any case, as shown by the Italian criminal court permissive approach, punitive policy cannot neglect a family status to the child, whose affective continuity with the persons that have been identified as her/his parents since the birth should be granted.

According to this position, when a person lawfully acquires the status of legal child in a foreign country, such legal situation should be recognised by the home state of the family once the family returns there, regardless of any prohibitions under the law of the latter state. This theory has its basis on the principle of unity of status for the European Union citizens and on the idea that free movement of people implies the expansion of the principles of mutual recognition of civil status documents between Member States and non-discrimination within the European Union[76].

Since all children have the right to a unique status wherever they live, they must be treated equally before the law, even if they are born abroad from surrogate mothers[77].

The fragmentation of different national disciplines and their difficult coordination, the increasing number of forum shoppers, both singles and couples, and the consequent distortions are the evidences of the need for a common European perspective. Thus, the harmonisation of different legal

---

[76] The French *Cour de Cassation*, reversing its previous trend, recently has decided for the transcription in the French birth registers of foreign birth certificates concerning children born abroad to a surrogate mother. See *Cour de Cassation*, 3 July 2015 n. 619 and n. 620, available at https://www.courdecassation.fr/cour_cassation_1/in_six_2850/english_2851/the_transcription_7252/press_release_32236.html.

[77] In this direction the High Court of Justice (UK) issued a parental order to ensure the best interests of the minor born in execution of a commercial surrogate motherhood agreement stipulated abroad (because it is banned in UK). The case is X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam), available for free at http://www.familylaw.co.uk/news_and_comment/re-x-and-y-foreign-surrogacy-2008-ewhc-3030-fam#.WSfaKDNaaRs, commented by Bednall, L. "Distant relatives", in https://www.newlawjournal.co.uk/content/distant-relatives; and also Trimmings, R. and Beaumont, P. *International Surrogacy Agreements*. New York: Hart Publishing, 2013. 210; Wrigley, A. and Priaulx, N. *Ethics, Law and Society*. vol. 5. Aldershot: Ashgate Publishing, 2013. 140; Horsey, K. *Revisiting the regulation on human fertilization and embryology*. New York: Routledge, 2015. 160.

rules could be achieved through an international convention on the recognition of foreign judgements and birth certificates, with the goal of promoting both the evolution of legal systems and the protection of children's fundamental rights.

6. THE STRASBOURG COURT CASE LAW

Even the ECHR offers different readings and solutions to the issues pointed out in the present article. In particular, this paragraph will analyse the decisions and the opinions of the Court in the case Paradiso Campanelli v. Italy.

In particular the Grand Chamber of the Court[78], overruling its precedent decision (same case, Second Chamber)[79], has stated that the relationship between the applicants (commissioning parents of a surrogate agreement) and the child they had tried to adopt, couldn't be protected under the umbrella of "family life" or the one of "private life". In the Court's legal reasoning the "best interests of the child" appear to play a decisive role, as an element orienting the decision, even if it is not one of the disputed rights.

Moreover, the "concurring and dissenting opinions" clearly point out the urgent need for an international legislation to regulate such discipline, as underlined also in the conclusive remarks of this paper.

The case involved an Italian couple, unable to conceive a child naturally, that decided in 2010 to try assisted reproduction techniques in a Russian clinic, where they concluded a gestational surrogate agreement with a Russian company (cost € 49,000). In February 2011, after the artificial insemination and the pregnancy, a Russian woman became the surrogate mother of a child.

[78] ECHR, Paradiso Campanelli v. Italy, 24 January 2017, n. 25358/12, available at www.hudoc.echr.coe.int.

[79] ECHR, Paradiso Campanelli v. Italy, 27 January 2015, n. 25358/12, available at www.hudoc.echr.coe.int.

Two months later, the spouses Paradiso and Campanelli moved back to Italy with that child. The Italian Consulate in Moscow informed the national authorities that the birth certificate of the child, issued in Russia, reported false information on the identity of the child's parents. So, the national authorities refused the transcription of the certificate in the civil office register.

The spouses were criminally prosecuted and during the proceeding a DNA test revealed that there was no genetic link between the assumed parents (Paradiso and Campanelli) and the child, as both gametes were of unknown origin.

The child was considered in abandonment, so eligible for adoption.

The spouses recurred to all the internal judiciary means in order to be recognised parents and to have the child back, but they failed; so they took the case in front of the European Court for the violation of their rights to private life and family life.

The Court accepted their recourse and stated that the protection of public policy can not be intended by Italy as an argument that can justify any measure, since the State has the obligation to take in due consideration the interests of the child, irrespective of the nature of the parental bond, genetic or other, between the child and the couple[80]. In other words, according to the Court, the need to respect public order and internal criminal and family law rules could not, in this case, prevail over the protection of a *de facto* family life construed between the baby and the pair of prospective parents, even if for a short period.

The issue is very controversial, as demonstrated by the dissenting opinions by judges Raimondi and Spano, who stigmatized the practice to create illegally a parenthood relationship abroad and to pretend that such bond should be

[80] ECHR, Paradiso Campanelli v. Italy, 27 January 2015, n. 25358/12, para. 80. For favourable comments to this first decision, in the Italian literature, see WINKLER, M. "Senza identità: il caso Paradiso e Campanelli c. Italia." *GenIUS* 1 (2015): 243-257. The decision is reported in *Foro It.* IV (2015) 117 and commented by Casaburi, G.; for a critical position see Lenti, L. "Paradiso e Campanelli c. Italia: interesse del minore, idoneità a educare e violazioni di legge." *Quaderni costituzionali* 2 (2015): 472-474.

recognized by the Italian State. Such behaviour cannot be protected, especially when the State has decided, in the full exercise of its sovereignty, to forbid surrogate maternity. Moreover, justifying such behaviour would also mean replacing – by the assessment of the EU Court – the position of the national authority, undermining the principle of subsidiarity and the doctrine of "fourth instance".

All these contrasting values concurred to the overruling of the Court, just one year later, when the Grand Chamber changed totally its position, also defining the boundaries of the case with respect to others decided before[81]. In particular, the Courts stressed that the controversial issue was not the refusal to transcript the birth certificate in the public register, but the declaration of abandonment and the consequent adoption procedure. The Court highlighted the juridical uncertainty and the absence of genetic bond between the child and the couple and moreover that the "family life" had lasted just six months. All these elements evaluated together excluded that such relationship can be qualified as family life under the Convention.

The Court specified that only the private life of the recurring spouses was involved, clarifying that they were suing just on their behalf and not in the interest of the child since the concept of parental responsibility is here very controversial. However, according to art. 3 of the UN Convention on Children Rights ‹‹in all action concerning children (…) the best interest of the child shall be a primary consideration››, even if the child is not a part of the proceeding[82].

In the balancing of the conflicting rights, the judges affirmed that the Convention does not provide any right to become parents, a right to filiation,

[81] Such as ECHR, Mennesson v. France, n. 65192/14 and Labassee v. France, n. 65941/11 available at www.hudoc.echr.coe.int. The first commented in the Italian literature by Casaburi, G. *Foro It.* IV (2014): 561.

[82] On the use and misuse of best interests of the child's argument in judicial decisions, which involve directly and indirectly minor children see, Eekelaar, J. "The role of the best interest principle in decisions affecting children and decisions about children." *International Journal of Children Rights* 23 (2015): 3–26.

but, at the same time, seems to be sensitive about the emotional distress deriving from the unrealized desire of parenthood. Despite of this, the existence of a significant and relevant public interest justifies the sacrifice of the plaintiffs' right to continue a relationship with the child, because the persistence of such relationship would be founded on a conduct evidently violating both the Italian and international legislation[83].

Such decision is more respectful of the principle of subsidiarity and of the State margin of appreciation, in a field where there is no common consensus.

Moreover, in its comparing and balancing work, the Court refers to the evidences, coming from the procedure in front of the *Tribunale per i Minorenni di Campobasso*, where social services and the psychologist consultant had ascertained that ‹‹the separation of the minor child from Mr Campanelli e Mrs Paradiso thus corresponds to the best interest of the child››*[84]*, which overrides any eventual right to filiation, that is not recognised by any Italian and international law rules.

Following this way of reasoning, the argument of public policy can prevail on the best interest of the child only if the latter is not sacrificed in the concrete case. In fact, in this occasion ‹‹the Court attaches importance to the Government's argument that the Minor Court is a specialised court which sits with two professional judges and two expert members››, chosen among biologists, psychiatrists, criminal anthropologists, pedagogists or psychologists[85].

In this decision the best interest of the child acts as a *tertium comprationis*[86] among the parts' arguments and the public policy issues, determining an overruling by the Court under the light of the peculiar circumstances of the

[83] ECHR, Paradiso Campanelli v. Italy, 24 January 2017, n. 25358/12, para. 210-215, available at www.hudoc.echr.coe.int.

[84] Ibidem, para. 37.

[85] Ibidem, para. 69.

[86] On the idea of the *tertium comparationis* see, Lorubbio, V. "L'interesse superiore del minore come overruling occulto?" *Diritticomparati* 1 (2017), available at http://www.diritticomparati.it/autore/vincenzo-lorubbio/.

case. So that the principle of the best interest of the child, which is not provided by the ECHR but is maintained by the Convention of New York, has been used to validate or not positions assumed by the Court itself and to ascertain the existence of a violation. Such interest has been invoked not because it was at the disposal of one of the parties, but as an external parameter useful in the balancing between the right to family life and private life of the parents and the public policy of the Italian legal system[87].

6.1 Distinctions in the rationale of the French cases and protection of the child

The approach of the European Court of Human Rights to the issue of the family status of the minor is peculiar: in fact, even though it often refers to the wide margin of appreciation of the Contracting States when making decisions relating to surrogacy, it limits this margin having regard to the registration of the documents establishing parentage, which constitutes a key aspect of the personal identity.

This approach is evident in the above mentioned French cases (*Mennesson v France* and *Labasse v France*)[88], the Court had made reference to in *Paradiso Campanelli*. However, there were different circumstances to be considered, that justified the distinctions operated by the judges.

The cases involved two French commissioning couples, who were legally entitled as parents by two different judicial decisions, attesting the status of children born to surrogate mothers, respectively, in California and Minnesota.

---

[87] On the various function of the principle of the best interest of the child, see the various contributions to the book edited by Alston, P. *The Best Interests of the Child*. Oxford: Oxford University Press, 1994; Breen, C. *The Standard of the Best Interests of the Child*: *A western traditon in international and comparative law*. The Hague: Kluwer Law International 2002; Freeman, M. *Article 3 – The best interests of the child*. Leiden-Boston: Martinus Nijhoff, 2007.

[88] ECHR, Mennesson v Francia, 26 June 2014, n. 65192/11 and ECHR, Labassee v Francia, 26 June 2014, n. 65941/11, available at www.hudoc.echr.coe.int.

The cases were similar, as both the commissioning women were suffering from infertility, so they needed a female donor, while the sperms were of the commissioning men. The children were born, respectively, in 2000 and 2001. The commissioning mothers were mentioned in the birth certificates as the mothers, even though they did not have any biological links to the new-borns.
The French authorities refused to register the birth certificates in the French register of civil status and, after the first and the second instance's decisions, the commissioning couples appealed to the *Cour de Cassation*. The French Supreme Court dismissed their claim, because the registration would have been in contrast with public policy, as it would have had the effect of enforcing a surrogacy agreement that was forbidden under French law.
The cases were brought in front of the European Court of Human Rights, which stated that France exceeded its margin of appreciation and that the denial of legal recognition to a parent-child relationship, lawfully constituted abroad, violated the children's right to private life (art 8).
The Court stressed that the child's right to identity is closely related to genetic parentage and origins and that, in order to avoid a violation of art 8 of the Convention, every national authority is obliged to recognise parentage established abroad between a child born through surrogacy and his genetic parent.
The denial of such recognition determines disproportionate prejudice to the children's private life under different points of view. First of all, concerning origins, on the American birth certificates the applicants (fathers) were mentioned as the children's parents, while in France the commissioning fathers were not reported, despite their genetic link with the children. Secondly, concerning citizenship, which is another component of personal identity, the intended parents were French while their children were American. As a result, the best interests of the children were violated because it was impossible to obtain the French citizenship.

For all these reasons, the European Court of Human Rights condemned France to pay compensation for the damage suffered by the children, because of the discriminatory treatment.

The same legal reasoning and rationales are expressed in *Foulon v France*[89] and *Bouvet v France*[90], where the Court protected the children rights to their relationships with the biological fathers, even if they were born through surrogacy.

The applicants were, respectively, Mr. Foulon and his daughter and Mr. Bouvet and his twin sons. In both cases, the parties (fathers and children) were not granted recognition for their biological relationship as established lawfully abroad, because the French authorities had refused the transcription of the Indian birth certificates into the civil status registers, considering that the surrogacy agreements occurred and the indicated mother was the surrogate one. The Strasbourg Court unanimously stigmatized the refusal of the French authorities as a violation of art. 8 and, in particular, of the children's right to privacy, while the violation of the same art. 8 was excluded with reference to the biological parents' right to respect of the family life.

Differently from other cases examined above, here the Court did not deal with the issue of the transcription of a filiation established abroad with respect to the intended parents, but only with respect to the genetic parents, as Mr. Foulon was single and Mr. Bouvet had concluded a registered same-sex-partnership. These leading cases, in fact, have had a great importance in the later evolution of the Court case law, because they have expressly admitted that family life exists in contexts involving surrogacy and, more in general, in non-traditional families.

[89] ECHR, Foulon v France, 21 July 2016, n. 9063/14, available at www.hudoc.echr.coe.int.
[90] ECHR, Bouvet v France, 21 July 2016, n. 10410/14, available at www.hudoc.echr.coe.int.

7. FINAL REMARKS ON ADOPTION

As illustrated above, the right to parenthood and filiation is not recognised by the Italian statutory law, that provides instead expressly the right of a minor child to a legal status correspondent to the *de facto* relationship arising from the same-sex parental family and founded on affection, even in the absence of a genetic link. The child's right finds its rationale in the principles expressed by the reform on filiation and has been recognised also by the courts especially through the recourse to APC, which has been always applied in the exclusive interest of the minor child, who is going to be adopted, an interest that has to be examined in the concrete case.

According this study, arises the key distinction between the right of the homosexual couple to parenthood, not recognized by statutory regulation, and the minor's right, effectively enforced by judges, to a juridical status correspondent to the factual situation lived within a homo-parental family, founded on affections, moral and material assistance and care of the child.

The fact that the law does not expressly regulate the child's adoption by the partner of the parent has led the Courts to give answers to the cases and to ensure the right of children to legal certainty and stability of the relationships with those who actually exercise the parental function.

At the same time, part of the case law reasoning and part of the scholars' opinions underline that the legal systems should promote the stability of the bonds created between the individuals involved, but without neglecting their public function consisting in evaluating the "ways" through which these ties have been established, especially if they are illegal.

In particular, a minority of the European Court judges[91], in their dissenting opinions, have argued in different occasions that nobody can sue for a right based on an illegal action and the law cannot offer protection to people who

[91] ECHR, Grand Chamber, Paradiso and Campanelli v. Italy, n. 25358/12, opinion by judges De Gaetano, Pinto De Albuquerque, Wojtyczec and Dedov, para. 3

have acted in clear violation of the legal rules and of the fundamental principles: conceiving a child with a technique which is forbidden in their country of origin and transferring the child from one country to another.

These two approaches consider very differently also the parenthood's project, as the first conceives it as a value that has to be enhanced, while the second stigmatizes the project as the evidence of a premeditation of a criminal fact, of the voluntary and willed strategy to obtain a result illegally.

In the latter reasoning, the extreme consequences are that there is no illegitimate intervention of the State authorities in the family or private life of the individuals involved, as the intervention is not directed to stop their wish to become parents, but to stop and eventually punish the way through which they want to obtain such result.

The restrictive position, moreover, considers the child as a victim of human trafficking, as it is commissioned and acquired by the "eligible parents", in violation of national and international provisions[92] and condemns surrogate maternity practice, especially when paid, as an inhumane practice, which violates the dignity of both the woman and the child. Those vulnerable individuals are used as tools to satisfy third persons' need and desire in plain contrast with the values promoted by the European Convention.

On the opposite side, the other interpretative option stresses the importance of the family life lived, even if for a short period, by the couple and the child. According to this opinion, the Court must have maximum consideration for the impact that the separation has on the welfare of the child. This principle implies, on the one side, that the bonds between the minor and the family must be preserved and protected, with some exceptions if the family is patently inadequate; and, on the other side, that this choice guarantees the child's safe and healthy development.

[92] The references are the Hague Convention 1993 on children rights and cooperation in international adoption; the UN Convention on children rights (art. 35).

It seems that the judges following the "recently merging position" have taken this task very seriously, as demonstrated by a recent ruling of the *Corte di Cassazione*, consenting the recognition and transcription of the birth's certificate formed abroad, indicating that the two women parents have contributed to the generation: one with the help of her ovules and the other with the pregnancy and the childbirth[93].

In post-modern legal theories a change of perspective in the relationship between legal categories and social facts has been stressed, underlining the strong trend towards the "factuality of the law"[94]. The facts assume a central function and can affect the law modifying it, while the legal system is trying to read such facts under the light of the interests and values involved.

In Italy, the existence of children inside same-sex families has urged forms of protection for minors and has found answers by the judiciary and not by the legislative. Of course, the effects of a legislative intervention and of a case by case approach are not exactly the same, but if possible, considering certain aspects, they are even of wider relevance, because in the cases above examined the APC, when admitted, is not linked to the constitution of a *unione civile*, but recognized as a tool to protect the personality and the development of the child.

However, in Italy, which is a civil law system not based on the judicial binding precedent, entrusting the Courts with the role to rule, in the absence of a legislative framework, has created inconsistencies and contrasting decisions. As long as ethical issues are involved, political choices are needed and choices concerning values have to be taken by the parliament.

---

[93] Corte di Cassazione, 30 September 2016, n. 19599, available on line at http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/10/Cass.-30-settembre-2016-n.-19599.pdf.

[94] The reference is to Grossi, P. "Sulla odierna fattualità del diritto." *Giust. civ.* 1 (2014): 10 ss.. The translation of the expression "fattualità del diritto" is literal in order to remain (hopefully) faithful to the Italian extraordinary author's intention.

The judge must not and cannot take the place of the legislator and the latter cannot be afraid to exert its function, in accordance with the electors' mandate, yet protecting at the same time the interests of the weak individuals, governing social needs, mediating between the instances of minorities and the majority.

In a future perspective (and looking at present facts), even for the full adoption, the option of enlarging the sphere of eligible parents could be considered, abandoning the "pre-requisite of the married couple" and opening to non-married couples, stably living together, and even to a single person. Such widening perspective cannot exclude cohabitant couples of the same sex, *unioni civili* couples and homosexual singles, because of their sexual or gender orientation, otherwise the Act would be in violation of art. 3 of the Constitution[95], i.e. of the principles of equality and non-discrimination. Obviously, all these elements must be considered by the judge competent for the "case by case scrutiny" in order to ensure the best interest of the child in the concrete case.

Since 1994 the Constitutional Court, in a case in which it was asked to decide on the constitutional legitimacy of the exclusion of the single individual among the eligible adopters, in an *obiter dictum* argued that there are no constitutional obstacles to the Legislative, if in the future It will find it ‹‹appropriate to expand the scope of eligibility for adoption of a child by a single adoptive parent››[96].

Moreover, it has to be remembered that the Strasbourg Convention on minor child adoption of 7th May 2008 obliges contracting states to provide for

---

[95] According to art. 3, ‹‹All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country››.

[96] Corte Cost., 16 May 1994 n. 183, available on line at www.giurcost.org/decisioni/1994/0183-94.html, commented in Ed. Cendon P., *Commentario al Codice Civile*, artt. 231-314, L. 4 maggio 1983 n. 184, "Filiazione legittima e naturale. Adozione." Milan: Giuffrè, 2010. 792-794.

adoption by a single person and by homosexual couples[97].

In drafting the reform on adoption, the deep contrast on filiation in the homosexual couple cannot be overtaken if the attention will remain focused - directly and only - on homosexual rights to parenthood. As demonstrated by the above analysis and results, the perspective must be reversed and the drafting work must be conducted looking at the children rights and the statuses.

What has come into light is the distinction between the couple's right to parenthood, not provided by the legislative in Italy, and the minor child's right to a juridical status corresponding to the factual situation (even in a homosexual family), founded on affection, moral and material assistance and care among the members (adults and child).

Adoption has also an international private law dimension, which can affect the "municipal" regime of the institution, as demonstrated by two recent decisions issued by the *Tribunale per i Minorenni di Firenze*, which have enforced in Italy two foreign decisions on adoption involving two men couples[98].

It has to be underlined that the *thema decidendum* does not affect the stepchild adoption and the step-parent adoption (art. 44, lett. d), L. 184/1983)[99], but the recognition of an adoption certificate (formed abroad, when the adopting couple is homo-parental) and the subsequent transcription in the civil status

[97] See art. 7, which states that «1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations».

[98] See Winkler, M. M. "Riconoscimento di sentenza di adozione straniera e nozione "perimetrata" di ordine pubblico internazionale: le due decisioni del Tribunale per i Minorenni di Firenze" available on line at www.diritticomparati.it /2017/03/riconoscimento-di-sentenza-di-adozione-straniera-e-nozione-perimetrata-di-ordine-pubblico-internazio.html; Schillaci, A. "*Una vera e propria famiglia: da Firenze un nuovo passo avanti per il riconoscimento dell'omogenitorialità*", available on line at www.Articolo29.it, 13.3.2017.

[99] Art. 44, lett. d), deals with the adoption in the particular case when the pre-adoptive custody (*affidamento pre-adottivo*) of the child is impossible.

register, which is essential for the children in order to obtain the Italian citizenship[100].

In one case two Italian citizens, who had lived for a long time in the UK, had got married and had adopted two children, as provided by the Civil Partnership Act 2004, which has extended the right to adopt, jointly or through the co-parental adoption, to registered partners. Those rights are recognised, indifferently, to UK citizens and to foreign couples, as no restriction are connected to the citizenships or to the domicile of the applicants[101].

Another case concerned a family of two Italian-Americans, who in 2014 had adopted a girl, in compliance with the foreign applicable law, which provides an authorized agency to evaluate the family of birth, the adoptive parents, and the welfare conditions of the target families, before and after the insertion in the adoptive family.

In the Italian legal system, art. 36, para. 4, L. 184/1983[102] allows the recognition of the adoption by Italian citizens resident abroad if it is coherent

---

[100] Art. 34 L. 184/1983, states that «1.The minor who entered the territory of the State on the basis of a foreign adoption or custody measure for adoption purposes enjoys, from the time of entry, all the rights attributed to the Italian minor in family custody. 2. From the time of entry into Italy and for at least one year, in order to ensure a proper family and social integration, the social welfare services of the local authorities and the authorized bodies, at the request of the persons concerned, assist the carers, adoptive parents and the minor. In any case, they report to the Tribunale per i Minorenni on the progress of the placement, indicating any difficulties for the appropriate interventions. 3. The adopted child acquires Italian citizenship as a result of the transcript of the adoption order in the civil status registers». The third paragraph, in particular, deals with the citizenship status.

[101] The Section 79 of the above-mentioned Act has, in fact, amended the Adoption and Children Act 2002 in such direction.

[102] Art. 36 states that «1. The international adoption of minors from States, which have ratified the Convention or which have entered into bilateral agreements in the spirit of the Convention, may only take place through the procedures and the effects provided for in this Act. Adoption or temporary custody on a fictitious purpose, issued in a country not party to the Convention or signatory to bilateral agreements, may be declared effective in Italy only if: a) there is certanty on the condition of abandonment of a foreign child or on the consent of natural parents to an adoption, which determines for the minor adopted the acquisition of the son of the adopters and the termination of legal relations between the child and the family of origin of the child; b) the adopters have obtained the decree, which rules on their eligibility as adoptive parents, provided for in Article 30, and the adoption procedures have been carried out with the assistance of the Commission referred to in Article 38 and by an authorized body; c) the instructions contained in the eligibility decree have been complied with; d) the authorization provided for in Article 39 (1) (h) has been granted. 3. The relevant measure is taken by the Tribunale per i Minorenni that issued the decree of eligibility for adoption. This measure shall be notified to the Commission, which shall provide for the provisions of Article 39 (1) (e). 4. The adoption decided by the

with the principles settled by the Hague Convention[103]. In particular, art. 24 of the Convention states that ‹‹the recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child››. Thus, the only impediment to the recognition of the foreign adoption is international public policy, which is an argument that preserves fundamental values of a given legal tradition in a specific historical moment, founded on common needs of protection of human rights.

On such principle, many court rulings[104], at different levels, have considered same-sex parenthood not in contrast with international public policy, as we have seen also in the part of the essay dedicated to the other legal systems and to the European Court of Human Rights case law.

In Italy, the *Corte di Cassazione*[105] has traced the boundaries of public international policy in the subject matter involved, having regard to four keystones: a) the respect for human fundamental rights, b) the legislative discretion, c) the interest of the child, and d) the requisite of the patent contrast with the legal order[106].

---

competent authority of a foreign country at the request of Italian nationals, who demonstrate at the time of the pronouncement that they have been permanently resident in the same country and have been resident for at least two years, shall be recognized in all respects by a statement of the competent Tribunale per I Minorenni, if it complies with the principles of the Convention››.

[103] The reference is at the Hague Convention of 1993 on Protection of Children and Cooperation in the Field of International Adoption. According to the Tribunale, art. 41 of the L. 218/1995, which reforms international private law, is not applicable. This article, in fact, states the automatic recognition of the foreign decision on adoption, but, on the court's opinion it is reserved only to the decisions which involve foreign adoptive parents and foreign adoptive children, or children who are not in an abandonment state. On the debate on such interpretation, see Corte Cost., 24 February 2016, n. 76, commented by Marongiu Bonaiuti, F. "Il riconoscimento delle adozioni da parte di coppie di persone dello stesso sesso: la Corte costituzionale "risponde" al tribunale per i minorenni di Bologna" *Osservatorio su diritto internazionale privato e diritti umani* 2 (2016), available on line at http://www.rivistaoidu.net/content/osservatorio-su-diritto-internazionale-privato-e-diritti-umani-n-22016.

[104] See Corte di Appello di Napoli, ord. 30 March 2016, which recognised legal effects in Italy to the French crossed *adoption plénière*; see Corte di Appello di Milano, ord. 16 October 2015, which upholds the Spanish adoption of the spouse's daughter by the same sex consort.

[105] Corte di Cassazione, 30 September 2016, n. 19599, on line available at http://dirittocivilecontemporaneo.com/wp-content/uploads/2016/10/Cass.-30-settembre-2016-n.-19599.pdf.

[106] All these parameters have to be evaluated through a constitutional oriented hermeneutic work, as suggested also by Corte Cost., ord. 1 July 1983, n. 214, available on line at www.giurcost.org/decisioni/1983/0214s-83.html.

Such parameters draw an open legal system, which, in compliance with artt. 10, 11 e 117 Constitution and with the international private law framework of reference, is tolerant towards unknown or differently regulated models, where the interpreter has to consider the real effects produced in Italy by such legal model more than its diversity[107].

On the first parameter, the *Tribunale per i Minorenni di Firenze* has considered the adoption that violates the standards of protection of fundamental rights in contrast with the public international order, as it can be argued from Nice Convention and EHRC.

On the legislative sovereignty, in order to preserve the constitutional dimension of public policy, the *Corte di Cassazione* has ruled that, when a constitutional provision (implicit or explicit) does not exist, it is impossible to use the public policy argument.

According to such judge made law, the international public policy limit can operate only out of the areas of law, where the ambit of the national legislative choices is wide. In particular, the areas of surrogacy and medical assisted reproductive techniques are not as wide, so that personal statuses acquired abroad as a result of such practices cannot be cut through the scissor of the international public policy argument.

The same legal reasoning can be applied to adoption, moreover because here comes into light the further fundamental value of the best interest of the child not to be involved in limping parenthood relationships, which would affect her/his right to personal identity (origins, citizenship) as well as the following: free movement of people and statuses (lawfully acquired abroad) in the EU area; the right not to be discriminated because of her/his parents' sexual orientation; the right to affective continuity, which necessarily implies the recognition of the link with both the parents; succession rights...and other

[107] Corte di Cassazione, 18 April 2013, n. 9483, reported in *Dir. e Giust.,* cited, commented by R. Tantalo.

rights that we have seen promoted in the European Court of Human Rights case law.

As far as the check on patently contrast with the legal order is concerned, the *Tribunale per i Minorenni di Firenze* has ruled that the judge should simply analyse the elements of the single case. Thus, it considered sufficient the numerous documents offered by the applicants on the children's health conditions, which gave the evidences of a ‹‹life happily conducted in a stable family››, of positive relationships with parents, relatives and friends, of a social habitat where the children practised sports, went to top schools and expressed their personal attitudes with adults and other children. After these acknowledgements, the Court stated that ‹‹it is a real and genuine family (…) it is a plain relationship between children and parents and as such it has to be treated and protected›› and upheld the full adoption, with the consequence that the family lawfully built abroad was fully recognised by the Italian legal system.

Any other decision, limiting the effects of the adoption to some aspects of the parental responsibility or limiting children rights in front of the parents and their family, would be in contrast with many constitutional principles and the recent reform on the unique status of children[108].

7.1. FINAL REMARKS ON SURROGACY.

Surrogacy is considered as a crime and at the same time is perceived as an exemplary act of social solidarity. Waiting for the dilemma to be solved (if ever it will be possible), the starting point for a *pars construens* might be a specific assessment of the impact that an internal measure has on the right to private or family life of the individuals involved.

[108] The reference is to due to a certain restrictive interpretative option on art. 44 lett. d), L. 184/1983 in combination with art. art. 300, para. 2, civil code, according to which the APC does not imply any civil effects between the adopted and the adopting parents' relatives. But such solution is no more compatible with the doctrine and legislation on the unique status of the child (2012).

Some legal systems consider surrogacy as contrary to their basic principles of public policy and to the common sense of morality, but part of the civil society and some scholars (and judges) think that the gestational surrogacy agreements should be enforceable with the aim of protecting both the parents and the children.

The trends within the case law outlined in this essay are expressions of a partial opening to the phenomenon: civil courts sometimes allow the *de facto* relationships created in the family group to continue, deciding for the legal acknowledgement of parentage and the adoption of the child, while the criminal courts acquit the intended parents of criminal offences.

The main controversial issue remains the altruistic or the economic function of the agreement, having regard to the surrogate mother's intentions, because it raises serious concerns over the commercialisation of conception and the reproductive black market, with dangerous consequences and risks for both mothers and children.

The diffusion of different bonds of affection and the challenges posed by medicine and biotechnology impose to the Italian legislator an intervention in order to protect all the new forms of family centered on the welfare of individuals, as suggested by the most recent legal literature and case law, possibly by adopting an interdisciplinary perspective[109]. It is indeed a fact that some Italian citizens go abroad in order to realize their procreative project and come back home with their aspiration accomplished, with the only result that the Italian policy has been unable to govern the process, to protect the values and the individuals involved (Italian citizens), demanding everything to other States' policy choices and to Court's decision, when the legal irritants[110] have occurred patently.

---

[109] See Kriari, I. and Valongo, A. "International Issue Regarding Surrogacy", quoted, p. 340.

[110] On the concept of *legal irritant*, coined when dealing with the circulation of models in contract law, but later used in various areas of law, see Teubner, G. "Legal irritants: good faith in British law or how unifying law in ends up." *Modern Law Review,* I 16 (1998): 11 et seq., where it is shown how, as a result of a

The current confused situation requires, as suggested above, also an action at the European, or better, at the international level to trace precise limits to surrogacy, in order to avoid wild drifts.

The European Parliament[111], evaluating the state of the art in such field of law and the fragmentation of the legal framework, has indicated different possible options: a new common legislative regime or "soft law" common guide-lines.

However, it has to be said that a regulation at the EU level is desirable in terms of general and common consensus of the member States, but not sufficient to manage with a phenomenon that has a worldwide dimension, as demonstrated by the case law's analysis.

It could be more appropriate to modify and integrate the already existing international convention on children rights and international adoptions[112] or to stipulate a new Convention on surrogacy, filiation…, with a systematic approach[113].

This essay has shown that rules vary considerably in the legal systems investigated, with the evident consequent lack of uniformity, as demonstrated by the occurred hard cases involving the recognition in one state of the personal status created abroad.

The development of the international cooperation among the states in the form of an international convention on surrogacy is to be hoped for, in order

---

legal transplantation of a model from one system to another, an active reaction, both direct or indirect, of "irritation" is possible, which may be more or less deep and affect the outcome of the legal transplant in auspicious or inauspicious ways or with the emergence of a model which has so much deviated from the original to the point of becoming original.

111 European Parliament, PE 571.368 *Regulating international surrogacy arrangements - state of play*, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf

112 Wells-Greco, M. *The Status of Children Arising from Inter-Country Surrogacy Arrangements*. The Hague: Eleven International Publishing, 2015.

113 See Blauwhoff, R. and Frohn L. *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, *Fundamental Rights in International and European Law – Public and Private Law Perspectives*. The Hague: Springer, 2016. 211-241; see also Trimmings, K. and Beaumont, P. "International Surrogacy Arrangements: An urgent need for Legal Regulation at the International Level" *Journal of Private International Law* 73 (2011): 627-647; Choudhury, C.A. "The Political Economy and Legal Regulation 1 of Transnational Commercial Surrogate" *Vanderbilt Journal Transnational Law* 48 (2015) available at: http://ecollections.law.fiu.edu/faculty_publications/125.

to determine the applicable law, to ensure the coordination between different jurisdictions and the recognition of birth certificates.

The main objective should be to avoid the children from becoming victims twice: first of a birth in circumstances that are debatable from both a juridical and ethical point of view; second of the inefficiencies of a multilevel legal system and of the uncertainty of the law.

In an international framework, the precondition for the recognition of cross-border surrogacy should be the respect of the legal requirements of the foreign country. This presumes that states' public bodies should have access to uniform mechanisms to find solutions to the hard cases they are faced with, in order to ensure certainty of the law and, at the same time, protect the free movement of people, statuses and, at the last stage, the human rights.