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## **Surrogate Motherhood: Protecting the Best Interests of the Child in Light of Recent Case Law**

*Marta Picchi\**

### **Abstract**

Surrogate motherhood is a highly debated issue, and one for which there is now considerable case law. However, adequate protection for the multiple interests at stake has yet to be offered, especially in those legal systems in which lawmakers have been slow in intervening, or dig in behind absolute prohibitions unable to stem the phenomenon of procreative tourism. This contribution reconstructs the position of the ECtHR and of Italy's Constitutional Court and Court of Cassation in their most recent rulings, with the aim of understanding the diverse approaches taken to identify the best interests of the child.

**Keywords:** *surrogate motherhood, intended parents, biological and genetic truth, status filiationis, best interests of the child*

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## Introduction

Surrogate motherhood is an issue widely debated in jurisprudence, from a variety of standpoints: moral, philosophical, ethical, sociological, and juridical. In fact, surrogacy calls into question the role of women and the meaning of motherhood – which is to say the original bond between the person coming into the world, and the person bringing someone into the world (Poli 2015, 7-28).

Juridically, this phenomenon touches on various values and interests, all worthy of protection: above all, the interest of the child conceived through surrogacy in knowing his or her origins, but also in being accepted within society with no conditioning connected to his or her birth, and to the fact that his or her abandonment had already been planned prior to conception (Ergas 2013; Gerber and O’Byrne 2015).

We must then ask whether this practice may be considered compatible with full respect for women’s health and dignity: in fact, the pregnant woman is not always adequately informed of the health risks, especially in the case of people with low levels of education, or who live in developing countries (Sgorbati 2016, 111-129). Moreover, there is a clear risk of exploitation of women by partners, family members, and unscrupulous organizations: what is sometimes presented as a woman’s autonomous choice can thus become an object of exploitation and commodification of female body.

Part of the legal literature holds that not even ‘altruistic’ surrogacy respects women’s dignity: when a woman undergoes a pregnancy she is taking part in it with her own personality and intelligence that can never be surrogated, because otherwise the generative component of human nature would be degraded (Niccolai 2017, 2990-3000; Pezzini 2017 holds otherwise).

There is also the interest of those who, while unable to have children, do not wish to renounce parenthood, holding that nature cannot stand in the way of their dreams, but thus going so far as to implement behaviour in breach of the prohibitions put in place by lawmakers.

However, like all complex issues, given the multiple interests involved and its many implications, it is destined to continue prompting new reflections. It is therefore a subject that lawmakers have struggled or been slow to deal with, also because the possibilities for surrogacy that can take place differ greatly: consequently, doubts as to legitimacy would arise if a single juridical regime were adopted. On the other hand, regulations governing surrogacy might be unable to adequately cover the different cases that may take place; any preclusions that are introduced might be circumventable, or hard to prosecute, or such as to raise doubts as to their constitutionality, because they may be likened to cases that are in fact permitted.

These difficulties are heightened by the lack of regulation on an international level (Trimmings and Beaumont 2011, 633-647): even if States would maintain their freedom as to whether or not to adhere to a regulatory regime setting down at least certain common principles, it is clear that a total absence of rules raises additional complications when intended parents in a country that does not permit or that strongly limits surrogacy, in order to realize their parenthood plan, visit another country where surrogacy is allowed.

The absence of regulation (or the dearth of adequate regulation) requires case law to deal with and resolve cases that may take place with ever-increasing frequency, leading among other things to additional problems especially because, at the various levels of appeal, very different perspectives may be adopted; decisions may consequently be overturned or proceedings extended over time, with inevitable repercussions above all in terms of protecting the interests of the child.

In recent years, multiple interventions by domestic and international courts have focused increasingly, in their reconstructions and decisions, on the primacy of the interests of the child, although quite often this is invoked as irrefutable grounds, but without analysing it in its multiple components.

The latest rulings by the European Court of Human Rights and by domestic courts show the diversity in balancing the best interests of the child with the other interests and values worthy of protection. This contribution aims to examine where case law has come down on the issue of surrogacy in order to comprehend the reasons for these differences. In particular, attention will focus above all on the recent opinion expressed by the ECtHR, and the subsequent decision of the united sections of the Court of Cassation which appears in fact aimed at containing the openings provided by the former, as well as by the Constitutional Court.

Analysis of the various rulings provides the basis for seeking to define the current status of protection for the child born through surrogate motherhood, with the purpose of comprehending the necessary steps that have yet to be taken.

## 1. Surrogate Motherhood in ECtHR Rulings

Recently, the ECtHR was called upon to express an opinion<sup>1</sup> on the basis of Protocol No. 16 attached to the European Convention on Human Rights –

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<sup>1</sup> Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, of 10 April 2019, request No. P16-2018-001.

which entered force on 01 August 2018 in the States that ratified it – on the matter of surrogate motherhood.

Said Protocol (Paprocka and Ziólkowski 2015) allows the highest courts of the contracting states to ask the ECtHR for non-binding, advisory opinions on questions of principle related to the interpretation or application of the rights and freedoms defined by the Convention or by its Protocols. France's ratification allowed Protocol No. 16 to enter force, and France was the first to request an advisory opinion by virtue of a ruling of the plenary assembly of the French Court of Cassation on 5 October 2018<sup>2</sup>.

The ECtHR's opinion further defines the principles to be taken into account in dealing with the issue of surrogate motherhood, and takes on importance for all the state parties<sup>3</sup> that cannot ignore this new ruling, because it is the ECtHR that is responsible for interpreting the Convention, making it a living instrument to be applied in light of the needs of a modern democratic society and of scientific and social evolution<sup>4</sup>.

Before examining the content of the opinion, account must briefly be taken of past ECtHR case law in the matter of surrogate motherhood, in order to better understand the reasons for this new *arrêt* by the Strasbourg Court.

## 1.1. Some Recent ECtHR Decisions

### 1.1.1. *The Mennesson and Labassee Decisions*

The first decisions to take into consideration are those relating to the *Mennesson v. France*<sup>5</sup> and *Labassee v. France*<sup>6</sup> cases (d'Avout 2014). In both rulings, the ECtHR dealt indirectly with the issue of surrogate motherhood, having to pronounce its opinion on the refusal in France to register birth certificates drawn up abroad. The events regarded two French couples who had used surrogacy in the United States and were unable to enter the foreign birth certificates into the French registers of births, marriages and deaths, as

<sup>2</sup> The request was judged admissible on 03 December 2018, and the question was thus assigned to the Grand Chamber.

<sup>3</sup> The interest of certain states – the United Kingdom, the Czech Republic, and Ireland – other than France, that have yet to ratify Protocol No. 16, is shown by the fact that they (like other parties) have submitted some observations in the context of this procedure.

<sup>4</sup> 'The Convention is a living instrument which [...] must be interpreted in the light of present-day conditions' (ECtHR, Tyrer v. The United Kingdom, decision of 25 April 1978, Application No. 5856/72, § 31) and 'the notions currently prevailing in democratic States' (ECtHR, Guzzardi v. Italia, decision of 6 November 1980, Application No. 7367/76, § 95). 'The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments' (ECtHR, Rees v. The United Kingdom, decision of 17 October 1986, Application No. 9532/81, § 47).

<sup>5</sup> ECtHR, sect. V, decision of 26 June 2014, Application No. 65192/11.

<sup>6</sup> ECtHR, sect. V, decision of 26 June 2014, Application No. 65941/11.

a result of the prohibition against surrogacy established in their country. In both cases, the egg was from an anonymous donor, while the male gametes were from the spouse.

The Court found this refusal to be illegitimate interference, because it was disproportionate to the purpose of safeguarding the principle of non-disposability of the person upon which the express prohibition of gestational surrogacy is based. In fact, refusing to enter the birth certificate brings very serious consequences: the situation of *juridical clandestinity* prevents the child from acquiring a French passport and nationality. It also raises risk in connection with the ability to stay on the State's territory, and a whole series of potentially highly damaging civil-law consequences.

In examining the legitimacy of the interference of French authorities within a democratic society, the ECtHR – while recognizing the broad margins of appreciation available to the individual States – found it had to protect the parent-child relationship as an expression of the children's private life, thereby affirming the primacy of biological parenthood as an inescapable component of the identity of each individual.

The Strasbourg Court therefore established the obligation for the contracting states to recognize the status of a child born legally abroad through a surrogacy arrangement by virtue of the right to respect for private life pursuant to art. 8 of the European Convention on Human Rights (but not also the right to respect for family life), since this prerogative implies the right of each individual to establish the details of his or her own identity as human being, including the parent-child relationship. This is to say the Court accorded a broad discretionary margin of appreciation to the individual States on the issue of surrogate motherhood given the delicate ethical content, while recognizing, however, that this margin was exceeded in the event of refusal of legal recognition of the parent-child relationship between the child and the intended father when the latter is also the biological father.

### 1.1.2. *The Paradiso/Campanelli Decisions*

In *Paradiso and Campanelli v. Italia*<sup>7</sup>, however, the ECtHR dealt with the issue of surrogacy in the absence of a biological link between the intended parents and the child. In fact, the proceedings arose from the refusal to register the birth certificate of a child born in Russia following a surrogacy arrangement, on the grounds of violation of public law due to alteration of registry status, since the two applicant spouses were falsely registered as the child's parents on the birth certificate.

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<sup>7</sup> ECtHR, sect. II, decision of 27 January 2015, Application No. 25358/12.

In deciding the case, the Court devoted particular attention to the interests of the child and to protecting his personal identity. The Court dwelled on the child's removal from the aspiring parents, ordered by the Italian judges, confirming the importance of *de facto* family bonds in the context of the protections established by art. 8 of the European Convention on Human Rights which, in this case, was violated by the Italian authorities despite this being a case of surrogacy. Moreover, the Court underscored that the child's right to have his identity recognized was strongly compromised by the fact that he remained without identity for more than two years, which is to say until the Court of Appeal – ruling on the refusal to register the foreign birth certificate, and having found said refusal legitimate given the falsity of said certificate – upheld the prosecutor's application to draw up a new birth certificate in which the child was to be indicated as the child of unknown parties, and was to be given a new name. Precisely this situation brought very serious consequences in terms of nationality and the right to a name, of fundamental importance for the individual's identity.

Going on to examine the child's removal from his intended parents, the Court affirmed that this solution must always be considered an extreme measure to which recourse only where the child is faced with grave and immediate danger, as account must also be taken of the removal's effects on the parents' private and family life (§ 80). In particular, the judges considered unjustified, especially in the absence of a definitive decision in a criminal court setting, the opinion of the Italian authorities which, without any technical verification, deemed the applicant spouses unable to raise and love the child because, although they had been granted authorization to adopt in 2006, they had acted in violation of the relevant regulations (§§ 83-84). The Court, in this part of its decision, reveals its view that the Italian authorities should have permitted adoption by the applicant couple (Lenti 2015, 473).

The Court thus found that the removal ordered by the Italian authorities contravened art. 8 of the European Convention on Human Rights, because it was a case of illegitimate interference prohibited by that provision, given the harmful consequences to the child's personal identity. This confirmed its orientation towards considering *de facto* family bonds (regardless, then, of biological ones) as subject to the guarantees established by the cited article, because it is an orientation functional to and consistent with the principle of the best interests of the child.

Italy then requested to refer the case to the Grand Chamber of the European Court, which overturned the outcome of the judgment<sup>8</sup>. In fact, the Grand Chamber ruled out that the bond established between the applicant couple

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<sup>8</sup> ECtHR, Grand Chamber, decision of 24 January 2017, Application No. 25358/12.

and the child born to a surrogate mother was *de facto* 'family life' for the purposes of application of art. 8 of the European Convention on Human Rights on two grounds: the lack of a biological tie between the spouses and the child, and the short duration of the relationship with the child, marked also by legal uncertainty due to the two spouses' unlawful behaviour (§§ 151-158).

The Grand Chamber then deemed art. 8 of the Convention applicable with a view to protecting the applicants' 'private life' by virtue of the spouses' precise intention to become parents and the legitimate expectation for the applicants' personal development (§§ 161-165). From this perspective, the measures to remove the minor child adopted by the Italian authorities constituted interference in the applicants' private life unless this interference could be justified as expressly provided for by law for pursuing one or more of the aims listed in paragraph 2 of art. 8 of the Convention.

The Grand Chamber thus held that in the case in point, the immediate and irreversible separation from the minor child certainly had an impact on the applicants' private life. However, this interference was justified since it was provided for by law and necessary for the protection of a higher interest, identified as the priority need to protect the child, and there was therefore no breach of art. 8 of the Convention. The measures taken by the Italian authorities were deemed proportionate to the child's priority interest and indispensable to avoid considering as legitimate a situation created in breach of important rules of domestic law: therefore, the Italian judges guaranteed a fair balance between the different interests at stake, while remaining within the limits of the wide margin of appreciation available to them in the present case (§ 215).

### ***1.1.3. The Primacy of the Best Interests of the Child***

These recent rulings all revolve around the principle of the best interests of the child, recognizing that this principle prevails over the collective interest, over the certainty of family ties, and ultimately over biological ties as well.

There are certain aspects that I think bear stressing: the ECtHR, although it had to rule on the practical case, in referring to the principles and interests to be protected, always considers those of the intended parents and the best interests of the child, but without taking account of the protection of the woman bringing the pregnancy to term, and of her dignity. It is as if this aspect were included in the assessments of the individual States at the moment when each decides, at its own discretion, whether to forbid or allow surrogacy, and were then of no relevance whatsoever once the child was born and his or her status was to be decided upon.

Moreover, the best interests of the child are continuously invoked for their value prevailing over the other principles, and are used as a counter-limit to public order (Tonolo 2015, 207), but without seeking to define their particularly complex content.

The case law of the European Court of Human Rights during the 2014-2017 period therefore seems to arrive at these conclusions: the minor child's higher interest may be deemed as met when a biological tie with at least one parent and a well-established parental relationship coexist, since in this case the parent-child relationship may also be recognized for the intended mother with whom there is no biological tie with the child. Conversely, in the absence of a genetic tie between the adults and the child, also taking account of the brief duration of the relationship and of the uncertainty of the legal relationships arising from unlawful conduct, no *de facto* family life based on art. 8 of the European Convention on Human Rights may be recognized.

The referral for consultation brought by the French Court of Cassation rests on these bases.

## **1.2. The First Opinion Rendered by the ECtHR Based on Protocol No. 16**

### ***1.2.1. The Question Raised by the French Court of Cassation***

The French Court of Cassation, with the request for an opinion addressed to the ECtHR, intended to urge the latter court to make some specifications on the effects of past rulings in the matter of surrogate motherhood. The opinion, moreover, was requested precisely in the context of the re-examination of the *Mennesson* case made possible by virtue of an intervention by French lawmakers allowing the judgments to be reviewed following a ruling against the State by the ECtHR.

After the *Mennesson* and *Labassee* decisions, the national case-law orientation changed because the existence of a surrogacy arrangement was no longer understood as an absolute impediment to entering a foreign birth certificate into the French registers of births, marriages and deaths, provided that the certificate was not forged or irregular, and that the facts declared therein corresponded with biological reality. Therefore, the intended father – when he is also the biological father – may ask for the registration of the birth certificate of the child born through surrogacy, stating the parent-child relationship with the father.

However, according to the French Court of Cassation, the ECtHR provided no indications on the position of the intended mother with whom there is no

biological link, and above all on the State's obligations. In other words, the French Court of Cassation asked to define the State's margin of appreciation with regard to two choices: permitting the registration of the foreign birth certificate of the child conceived through surrogacy, or implementing the principle of *mater semper certa*, especially when there is no biological link between the intended mother and the child.

The French Court therefore brought two requests before the ECtHR: in the first place, it asked whether the margin of appreciation available to the State pursuant to art. 8 of the European Convention on Human Rights included the possibility of refusing to register a birth certificate of a child born abroad through surrogacy, when the intended mother is indicated as legal mother, while accepting registration insofar as the certificate designates the father with whom there is a biological link. In this case, it found it necessary to clarify whether distinctions ought to be made depending on whether or not the intended mother's genetic material is used in the fecundation process.

In the second place, the French Court of Cassation asked whether, in the event of an affirmative answer, the possibility for the intended mother to establish a mother-child relationship by adopting the child of her spouse – the biological father – might allow the State to comply with art. 8 of the European Convention on Human Rights.

As may be noted, the French court, most likely lacking adequate domestic regulation, asks for guidance and poses these very stringent queries, also with a view to possible new and different real-life cases, as if wishing to encourage the ECtHR to provide a clear definition of the boundaries of the domestic margin of appreciation. It is as if the French Court of Cassation wished to entrust the definition of the practical case to the Strasbourg Court. In fact, in its response, although the Court seeks to contain its opinion within the boundaries outlined by Protocol No. 16, it is not always successful in doing so.

### ***1.2.2. The ECtHR's Opinion***

Before dealing with the issue, the ECtHR reconstructs the situation existing in forty-three States Parties to the European Convention on Human Rights (not including France), and notes that surrogacy arrangements are permitted in nine of them, and tolerated in a further ten, while they are explicitly or implicitly prohibited in twenty-four States. In most countries (thirty-one, including twelve where the practice is prohibited), the father's paternity may be recognized when his biological material has been used. In nineteen countries (including seven that prohibit surrogacy arrangements), the intended mother can establish maternity even if there is no genetic link:

however, the procedure for establishing this status varies in the various legal systems (§§ 23-24)<sup>9</sup>.

Moreover, the ECtHR specifies that, following the entry into force of Protocol 16, it is now allowed to express an opinion with reference to questions of principle relating to the interpretation or application of the European Convention on Human Rights, without transferring the domestic dispute to the Court. Consequently, it has no jurisdiction to assess the facts or the parties' arguments, since it is for the domestic courts to draw from the opinion the conclusions necessary for resolving the case (§25). In fact, the Court stresses that the opinions it delivers must be confined to points that are directly connected to the proceedings pending at domestic level (Protocol No. 16, art. 1, § 2); the added value of the opinions lies in offering an interpretative aid to the domestic court – and in my opinion to any State Party – for similar cases as well (§ 26).

After this, the ECtHR goes on to define the scope of the opinion, observing that the dispute before the court regards a case of surrogacy in which the intended mother's biological material was not used. As a consequence, the Court restricts the sphere of its own ruling because the opinion cannot address the case – additionally set out in the first query – of using the intended mother's biological material in the gestational surrogacy arrangement (§§ 27-30). The Court's specification gives reason to believe that, in the event of surrogacy arrangements using the intended mother's gametes, the conclusions might be different: in any event, as we shall see, although the Court declares it cannot rule on this case, it then manages to refer to it, thereby providing an additional opening.

The response to the first query focused on two elements deemed fundamental by the Court: the best interests of the child and the margin of appreciation available to the States (§ 37). As regards the first parameter, the Court refers to its own case law, in which it affirmed that this value is paramount (§ 38).

First of all, the Court refers to the *Mennesson* and *Labassee* decisions, in which it had the opportunity to observe that a State might wish to deter its nationals from going abroad to take advantage of methods of assisted

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<sup>9</sup> Registration of the foreign birth certificate is possible in sixteen of the nineteen states that permit or tolerate surrogacy arrangements, and in seven of the twenty-four countries that prohibit it, provided that the certificate indicates an intended parent with a biological link with the child. A parent-child relationship can be established or recognized in court proceedings not involving adoption in the nineteen countries that permit or tolerate surrogacy arrangements, and in nine of the twenty-four countries that prohibit them. Moreover, adoption by the parent with no genetic links with the child is possible in five of the countries that permit or tolerate surrogacy arrangements, and in twelve of the twenty-four countries that prohibit them.

reproduction that are prohibited on its own territory. Nevertheless, it observed that the effects of the non-recognition of the parent-child relationship between children thus conceived and the intended parents were not limited to the parents alone, but they also affected the children themselves, whose right to respect for their private life was substantially impacted, with negative effects especially on respect for their private life; if the parent-child relationship were to remain uncertain, the children would encounter difficulties, for example, in accessing their own nationality, in maintaining residence with the mother, and in inheritance rights (§§ 39-40).

The Court holds that the best interests of the child do not reside only in the protection of the right to private and personal life, because account must be taken of other elements – such as the right to know one's origins and the need to be protected from abuse – that do not weigh in favour of recognition of the parent-child relationship with intended parents (§ 41). Nevertheless, giving primary importance to the interests of the child also involves identifying persons responsible for his or her growth and upbringing, as well as the possibility for the child to live and develop in a stable environment.

In light of all these considerations, the Court finds that a general and absolute impossibility of establishing the parent-child relationship with the intended mother is in fact incompatible with the best interests of the child. A careful examination must therefore be made in the light of the particular circumstances of the case (§ 42).

As to the margin of appreciation, the Court observes – as already specified in the *Mennesson* and *Labassee* decisions – that these are sensitive ethical and moral issues involving multiple interests: for these reasons, the margin of appreciation must be wide, also because there is no consensus on the issue of surrogacy (§ 43). However, when a particularly important facet of a person's identity is at stake, such as when legal parent-child relationship is concerned, the margin must be restricted (§ 44): this applies with greater force in this case because other essential aspects of personal identity come into play, such as determining the environment in which the child must live, and the persons responsible for his or her development (§ 45).

The ECtHR, after these premises with which it intended to establish a clear primacy of the interests of the child, goes on to examining the two queries. As to the first, it finds that, given the best interests of the child and the reduced margin of appreciation available to the State, domestic law must provide a possibility of recognition of the parent-child relationship of a child born abroad through a surrogacy arrangement with the intended mother, designated in the foreign birth certificate as the 'legal mother' (§ 46). After

this, not taking account of what was preliminarily declared, the Court states that although this is not the case in this matter, the possibility of recognizing this relationship appears even more necessary when the surrogacy procedure has used the intended mother's biological material (§ 47).

As to the second query, it is certainly in the child's interests for the uncertainty surrounding the legal relationship with his or her intended mother to be as short-lived as possible, because otherwise the child is in a vulnerable position with regard to several aspects of his or her right to respect for private life (§ 49). However, according to the Court, this does not mean that States are obliged to opt for registration of the details of birth certificates established abroad (§ 50).

The Court observes that the procedures, where the establishment of a relationship between the child and the intended parent is possible, vary from one country to another, and finds that the choice of permitting this recognition falls within the States' margin of appreciation (§ 51). Therefore, art. 8 of the European Convention on Human Rights does not impose an obligation to recognize *ab initio* a parent-child relationship between the child and the intended mother, but only when this becomes a practical reality, and it is for the national authorities to make this judgment (§ 52). One solution for recognizing this relationship is, for example, adoption (§ 53), provided that the procedure enables a decision to be taken rapidly, and the competent national authority assess the child's best interest in the light of the circumstances of the case (§§ 54-55). In particular, the Court does not require an *ad hoc* procedure introduced to regulate these cases connected to surrogacy: what is important is for the procedure to be carried out promptly to reduce the time of uncertainty in the relationship between the child and the intended mother, and at the same time for it to permit practical appreciation protecting the overarching interests of the child.

The Court is aware that this procedure cannot cover all the practical cases because, for example, French law only allows adoption to parents who are married. In addition, margins of uncertainty remain in adoption procedures, relating to other interests worthy of protection: for example, as the French Ombudsman observed, the prior consent of the surrogate mother must be obtained (§ 57). However, the Court does not intend to dwell on whether French adoption law satisfies the principles set forth (§ 58), and expresses its hope, given the complexity of the issues raised by surrogacy arrangements, that the States will conclude international agreements to reach uniform regulations allowing these issues to be overcome, making reference in this regard to the draft developed by the Hague Conference on Private International Law (§ 59).

### 1.3. Brief Reflection: the Absolute Primacy of the Best Interests of the Child

The Strasbourg Court's effort to give a content to the principle of the best interests of the child is quite clear, especially when it specifies that decisions must have the purpose of giving the child a stable environment in which to develop with persons who take on responsibility for raising and loving him or her. The child must be able to receive everything that he or she expects from a '*traditional*' family, so to speak, and that is essential even for those families that have a different origin.

## 2. The Constitutional Court's Position on Surrogate Motherhood

The Constitutional Court's decision No. 272 of 18 December 2017 originates from a question of constitutionality raised with regard to art. 263 of the Italian Civil Code in the part where it does not establish that the challenge to recognition of the minor child on the grounds of untruthfulness can be upheld only when it is in response to the best interests of the child.

However, the Constitutional Court used the occasion to advance deeper examination and also to set out its own position in the matter of surrogate motherhood<sup>10</sup>, given that the case originated from the registration – challenged by the public prosecutor<sup>11</sup> – of the birth certificate established abroad and regarding a child born to Italian nationals who had resorted to this procedure through egg donation, and then obtained a birth certificate attesting to the legal parent-child relationship with both intended parents.

The Court observed that although the Italian legal system expresses a marked emphasis favouring the parent-child relationship's conformity with the reality of procreation, ascertainment of the individual's biological and genetic truth does not constitute 'a value of absolute constitutional relevance that is such to be exempted from any balancing' (§ 4.1). The interventions made by lawmakers, and the European and international framework in the matter of protecting the rights of children, emphasize the central importance of assessing the child's interests when making choices regarding him or her. The Constitutional Court, citing its own case law, emphasized that it had to assess the child's interests in the sphere of actions demolishing the parent-child relationship.

<sup>10</sup> That is to say the court, unlike what it had done in decision No. 162/2014, went beyond merely noting and confirming the surrogacy prohibition.

<sup>11</sup> The appeal regarded only the recognition of maternity, while paternity raised no problems because the DNA test had confirmed the biological tie.

From this perspective, the biological truth of procreation is an essential component of the child's personal identity, that joins other components in defining the content of said identity: although a tendential correspondence between formal certainty and natural truth would be hoped for, the ascertainment of biological truth is part of the overall assessment brought before the judge, on a par with all the other elements that, along with it, contribute towards defining the child's overall identity. Among the multiple components, it is also necessary to assess the interest in conserving the status already acquired.

On the other hand, genetic provenance is not an inescapable requirement of the family itself: that is to say, the gap between genetic identity and legal identity lies at the basis of adoption law, as an expression of a principle of responsibility of those who choose to be parents, giving rise to legitimate confidence in the continuity of the relationship. It is therefore necessary to look to the 'concrete interests of the child' (§ 4.2): the balancing between the need for truth of the *status filiationis* and the interests of the child requires making a comparative judgment between the interests underlying ascertainment of the truth of the status, and the consequences that this ascertainment may bring as to the child's legal position. This is also the case when the question arises from a case of surrogate motherhood – forbidden in our legal system – because the unlawfulness of surrogacy does not on its own erase the interests of the child.

The Constitutional Court thus adopted an interpretative decision of dismissal, holding that the legal system already permits the judge to assess the interests of the child in maintaining his or her status when he/she is called upon to rule pursuant to art. 263 of the Italian Civil Code. In particular, the judge, in making his or her decision, must take account of a multitude of variables that the Constitutional Court made reference to: duration of the relationship established with the child, and the condition of identity already acquired; mode of conception and gestation; and the existence of legal instruments permitting the establishment of a legal bond with the contested parent and guaranteeing adequate protection for the child, for example through the institution of adoption in special cases.

The Constitutional Court therefore ruled out any automatic mechanism in the prevalence of one interest over the other, and confirmed the need for a careful assessment of the multiple values in play: nevertheless, it took pains to remark that the balancing must at any rate take account of the 'high degree to which our legal system frowns upon surrogacy, which is prohibited by specific provision under criminal law' (§ 4.3) since, shortly earlier, in an aside, the Court stressed that this practice 'intolerably offends the dignity of the woman and profoundly undermines human relationships' (§ 4.2).

This pronouncement is absolutely in line with ECtHR case law, and in fact, in certain aspects, anticipated what the ECtHR expressed in its recent opinion, because if the judge's evaluation does not lead to dismissing the challenge of the recognition of the child born through surrogacy, a path is pointed to – one that is certainly more articulated, and that may lead to establishing a parent-child relationship with the intended mother when the intended father is also the biological one. This latter solution does not permit automatic recognition of the relationship between the child and the intended mother, as it must pass through the adoption procedure that, however, allows a case-by-case verification of the solution that best responds to the higher interests of the child. However, it is a procedure that can also give rise to new problems if the mother is deemed unfit upon the outcome of the verifications that are carried out, or if the surrogate mother refuses to grant the necessary consent.

Nevertheless, the Constitutional Court's ruling may also appear hypocritical (Pozzolo 2016, 107) or schizophrenic, in the sense that, although providing indications as to the legal instruments to be resorted to and thus making it possible to circumvent the prohibition on surrogacy, it is at the same time absolutely clear in frowning upon all forms of surrogacy (Angelini 2018). In fact, the final sentence of the ruling reaffirms – as if to make sure it is impressed in the reader's mind – the great degree to which our legal system frowns upon surrogacy.

A reconstruction restoring consistency to the Constitutional Court's arguments might be possible. In the child born through surrogacy, two dimensions of personal identity coexist: on the one hand, that connected to awareness of having been given birth to by a mother who began the gestation with the intention of renouncing her role. From the psychological standpoint, this is preordained abandonment (Salone 2016) and its explanation and acceptance therefore become even more complex for the child. On the other hand, there is the dimension that is more properly social: in the cultural and social setting (Ergas 2013, 120-121), this practice is frowned upon to a high degree, making it particularly complex to construct the inner ego, because the individual must grapple with the projection of his or her own image in the social environment. Therefore, the judge, in resolving the practical case, will have to consider whether the intended parents are actually able to help the child understand and accept his or her own complex identity (Matucci 2018). It is as if the Constitutional Court had wished to give accountability to the judge who, in taking a decision, will have to carefully assess this complexity, since it is necessary to safeguard the child's construction of a balanced inner ego.

The Court thus shows that it fully agrees with the prohibition of this practice under criminal law, given the values at play: however, it also manifests the

burden of having to grapple with the regulatory void. In fact, Law No. 40/2004 neglected to deal with the problems arising in the event of violation of the prohibition, and, as a consequence, the task of bridging this gap falls upon the judges, at first instance, and then upon the Constitutional Court when doubts arise as to compatibility with the Constitution's values.

Precisely the absence of an adequate regulation can explain the reason behind the choice of an interpretative sentence of dismissal instead of a decision of upholding or manipulation: the topic is quite complex and the Constitutional Court intended to solve the individual practical case before it, pending the intervention of lawmakers to balance and deal with the multiple related issues.

### **3. The Recent Decision of the United Sections of the Italian Court of Cassation Regarding Homosexual Couples Making Recourse to Surrogacy**

The recent ruling of the united sections of the Italian Court of Cassation<sup>12</sup>, while adopting a more cautious and restrictive interpretation, is most certainly in line with the ECtHR's rulings and the indications of the Constitutional Court.

#### **3.1. Background**

The question arose from the refusal to recognize the validity of a measure issued by a court in a foreign country that attributed to two minors the status of children of a member of a homosexual couple with whom they had no biological relationship. The two children were generated from gametes supplied by the other member of the couple – who was already declared their parent with a prior measure duly registered in Italy – with the cooperation of two women, one of whom had donated her eggs while the other, by virtue of an agreement validly executed in accordance with the foreign country's law, had carried the children, waiving in advance any rights over the children.

#### **3.2. The Intended Parent with No Biological Link to the Child Can Resort Only to Adoption**

The Italian Court of Cassation affirms that surrogacy prohibition expressed in art. 12, paragraph 6, of Law n. 40/2004, constitutes the balancing point currently achieved at the legislative level in protecting the different

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<sup>12</sup> Court of Cassation, united sections, decision of 08 May 2019, No. 12193.

fundamental interests taken into consideration in this matter. Therefore, it cannot be simply held that the consequences of violating the prescriptions and prohibitions imposed by the aforementioned law, attributable to adults who have made recourse to this fecundation procedure that is unlawful in Italy, cannot be borne by the child.

In fact, according to the Court, this interest is destined to weaken in the event of recourse to surrogacy because the prohibition of this procreative technique becomes the necessary link in the chain between the regulations governing medically assisted procreation and the general ones governing the parent-child relationship, marking the limit beyond which the principle of personal responsibility founded upon the consent given to the aforementioned practice ceases to act, and the *favor veritatis* justifying the primacy of genetic and biological identity becomes once again operative.

However, according to the Italian Court of Cassation, this primacy does not necessarily result in cancelling the interests of the child, because his/her protection, as the Constitutional Court<sup>13</sup> has specified, requires moving beyond the rigid true/false dichotomy, with more complex variables to be taken account of, such as for example the existence of legal instruments suitable for permitting the establishment of a legal bond with the intended parent that, although different from that of art. 8 of Law No. 40/2004, guarantees the child adequate protection. In this regard, the Court makes reference to its own case law in the matter of adoptions in special cases, pursuant to art. 44, Law No. 184/1983: starting from the interests of the child in having his or her bonds with other parties recognized, this institution makes it possible in fact to safeguard the continuity of the relationship of affection and upbringing.

According to the Italian Court of Cassation, this solution is absolutely in line with the principles enshrined by international conventions in the matter of protecting children's rights. In fact, the ECtHR has for some time affirmed that States enjoy a wide margin of appreciation both for the purposes of deciding whether or not to authorize this practice, and as concerns determining the effects to be legally attached to it, noting that an essential facet of individuals' identity is in play, while at any rate recognizing the legitimacy of the aims of protecting the child and the birth mother pursued by imposing the prohibition in question.

Referring to the *Mennesson* and *Labassee* decisions, the Court of Cassation underscores how the failure to recognize the parent-child relationship is inevitably destined to impact the child's family life. However, as the ECtHR specified, there is no violation of the right to respect for family life where the possibility of leading an existence comparable to that of other families

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<sup>13</sup> Constitutional Court, decision of 18 December 2017, No. 272 (§ 4.3).

is tangibly ensured, finding only a violation of the right to respect for their private life, in connection with the harm to personal identity, that may derive from one of the intended parents coinciding with the child's biological parent.

The Italian Court of Cassation consequently deduces that these violations are not committed when, as in this case, the parent-child relationship with the biological parent is not questioned, but only the one with the intended parent, the refusal to recognize which does not preclude the child's introduction into the parent couple's family unit, or his or her access to the legal treatment attributable to the legal parent-child relationship accorded without dispute with regard to the other parent (§ 13.3).

In other words, the Italian Court of Cassation aligns with the ECtHR's case law and finds that the existence of a genetic or biological link with the child is the limit beyond which the identification of the instruments most suited for granting legal significance to the parental relationship is remitted to the discretion of the State's lawmakers, compatibly with the interests involved in the case, and without prejudice to the obligation to ensure protection comparable to that ordinarily attributable to the legal parent-child relationship. In our legal system, this need can be met by the institution of adoption in special cases, since the provisions of Law No. 184/1983 equate the adopted child's position with the status of the child born from wedlock.

The Italian Court of Cassation concludes by finding, therefore, that recognition of the effectiveness of the foreign judicial measure accepting the parent-child relationship between a child born abroad through surrogacy and the intended parent with Italian nationality is not possible given the prohibition against surrogacy (art. 12, paragraph 6, Law No. 40/2004), which must be qualified as a principle of public order because it is established to protect such fundamental rights as the human dignity of the surrogate mother and the institution of adoption. According to the Court, these values, in the balancing made by lawmakers, are not unreasonably held to prevail over the interests of the child, and the court cannot replace them with its own assessment, also because the legal system affords the possibility of giving importance to the parental relationship through recourse to such other legal instruments as, for example, adoption in special cases (§ 13.4).

### **3.3. Some Reflections: the Caution of the Italian Court of Cassation**

Examination of case law shows differences with regard to reconstructing the relationship between the best interests of the child and the principle of public order for the purposes of defining the parent-child relationship.

The ECtHR considers the best interests of the child as a counter-limit to the principle of public order – a reconstruction that may also be understood given this court’s function. For the Constitutional Court, the public order limit is an element that joins others in contributing to the complex definition of the best interests of the child: therefore, violation of mandatory rules of domestic law does not necessarily imply losing the status recognized abroad. Lastly, for the Italian Court of Cassation, the protection of public order, in the case of violating the surrogacy prohibition, results in weakening the interest in maintaining the legal parent-child relationship lawfully acquired abroad. While *favor veritatis* is again operative, it is also necessary to safeguard the best interests of the child in preserving the established bonds of affection.

In spite of its reference to the decision by the Constitutional Court, the united sections thus expressed a greatly different and more restrictive interpretation.

In fact, the Constitutional Court, by remitting the assessment of the practical case to the judge, found that the challenge of the recognition of the child born through surrogacy could be dismissed when, while taking account of a multitude of data – including the unlawfulness of this procreative method –, the child’s interest in conserving the acquired legal parent-child relationship appears to prevail. The Italian Court of Cassation, however, states that, in the event of surrogacy, the interest in conserving said status acquired abroad is destined to weaken, due precisely to the absolute prohibition established in our legal system. For the intended parent, when no biological link can be asserted, the only possible way is adoption in special cases – an instrument that, as the ECtHR confirms, still makes it possible to safeguard the child’s interest and the established bond of affection, in full compliance with the margins of discretion available to each State.

It does not appear that this restrictive interpretation has been conditioned by the fact that the events involved a homosexual couple<sup>14</sup>: in any event this cannot be gleaned from the ruling, which speaks of intended parent with or without a biological link to the child.

Rather, it would appear that the Italian Court of Cassation has wished to reduce the weight of the decisions that would otherwise have fallen to the individual judges and, in the presence of an absolute prohibition present in our legal system that does not allow being overcome by pure interpretation, has opted for an already time-tested institution that, by its own articulation,

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<sup>14</sup> On the contrary, Winkler and Schappo (2019, 384-387) believe that the Court of Cassation failed to give voice to children born via surrogacy abroad and living with parents of the same sex.

permits the necessary case-by-case ascertainment pending the necessary intervention by lawmakers.

## Final Observations

Developing case law shows how biological truth is an essential component of the individual<sup>15</sup>, but not the only one, because other components must also be considered.

Precisely this evolution marks an increasingly clear difficulty in bringing ‘new families’ within the ‘traditional’ one – the family unified in linear descent – because the inviolable rights of individuals may inevitably be deprived of adequate protection, or be sacrificed.

Beyond the need for common principles at the international level, this makes it increasingly clear that our lawmakers must deal with the theme of surrogate motherhood because an absolute prohibition, established incidentally in the sphere of regulating medically assisted procreation, may also raise doubts as to constitutionality.

The uniform regulation of all cases of surrogacy raises doubts as to compliance with the principle of equality, not only in the case in which lawmakers might, in the future, opt for full legitimacy, but also in the present time, because, for example, there is no distinction between paid surrogacy and unpaid, purely altruistic surrogacy, that is to say when this practice does not result in commodifying the human body, but is a procedure concretely expressing the solidarity of one person towards another or others.

Clearly, an opening in this sense requires a regulation governing the many interests worthy of protection: first of all those of the child because, for example, his or her interest in seeking his or her own identity cannot be offset by the fact that he or she could be born only through the surrogacy procedure that was carried out.

In any event, the opening to altruistic surrogacy would raise problems given that it might not be easy to verify the exchange of compensation between the parties beyond bearing expenses. Moreover, even in countries where altruistic surrogacy is allowed, we have inevitably witnessed the rise of a market connected to brokers, agencies, and clinics that may end up debasing the surrogate mother’s dignity through the commodification of her role.

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<sup>15</sup> In this regard, it suffices to consider Italian Constitutional Court decision of 22 November 2013, No. 278, in the matter of adoption, which recognized the adopted person’s right of access to his or her origins even in the case in which the mother has expressed her desire to remain anonymous. In fact, the need to know one’s origins, as the ECtHR has stated, is one of the facets of personality that can condition a person’s intimacy and relational life (§ 4).

To thwart this, there are those (Sgorbati 2016) who suggest limiting this possibility only to cases in which the intended couple and the surrogate mother have a family relationship or at least a bond of affection. While containing (but not totally excluding) the risk of commodification, possible doubts of constitutional legitimacy would still be raised, because it would preclude those who, for mere altruistic purposes, wish to perform this gesture of solidarity. However, the most adequate form of protection appears to be requiring that the child be made aware of his or her origins, thus excluding the possibility for the surrogate mother to remain anonymous. In this way, full respect would be shown for the generative component of human nature, and for that bond that is still established between the surrogate mother and the child during pregnancy, and that will then have to be processed by the child in building his or her own ego.

Moreover, in spite of the altruistic spirit, it would be necessary to fully define the entire procedure, taking all the possibilities into account: from the surrogate mother changing her mind by wishing to interrupt the pregnancy or to recognize the child as her own after the pregnancy is brought to term, to one or both intended parents changing their mind during gestation, or after it, or if the child suffers from some disease.

In any event, lawmakers must necessarily deal – in this case as well through a non-uniform regulation differentiated with respect to the diversity of situations that may take place – with the consequences of paid surrogacy for the child, the mother who carried the child to term, and the intended parents.

In fact, it must also not be forgotten that the principles currently stated in case law in many instances make it possible to circumvent the regulations governing adoption. We may consider the cases in which a married couple does not possess the prerequisites (even only the age requirements) for undertaking this process, and consequently decides to rely on surrogacy using the male spouse's gametes, thus increasing the growing phenomenon of procreative tourism, often to countries poorer than that of the intended parents (Bromfield and Smith Rotabi 2014).

Moreover, the possibility of being able to become parents of a new-born baby instead of an abandoned child who already has traumas to process may be seen as an easier solution to deal with, in the belief that the right to identity of the child born through surrogacy, and the difficulties he or she will have to process during growth, connected with the complexity of his or her own status, are something that is not current, or at any rate easier to deal with.

In other words, the current situation already risks affording protection to the 'right to have a child at all costs,' thus transforming the child born

through surrogacy from a subject of rights to an object of a right belonging to others.

All these indicators confirm the need for an intervention by lawmakers aimed not only at regulating the consequences of surrogacy carried out in violation of the prohibitions established in the legal system, but also at preventing these cases and, at any rate, revising the regulations governing adoption in such a way as to facilitate access to it, in order to protect the interests – no less worthy of protection – of abandoned children.

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