Surrogacy as a public order limit: is it compatible with the jurisprudence of the European Courts?

di Matteo Caldironi

Abstract: *La maternità surrogata come limite di ordine pubblico: è compatibile con la giurisprudenza delle Corti europee?* – The essay analyzes some of the issues surrounding surrogacy. In particular, it aims to frame the compatibility of the crime of surrogacy, interpreted as a public order limit, with the protection of the best interests of the child. The existing instruments in Italy to recognize the filiation relationship in cases of surrogacy (*i.e.*: adoption in "special cases") seem inadequate to guarantee sufficient protection for the child. Moreover, it aims to frame the compatibility of the proposed law to further broaden the scope of the crime of surrogacy that is being discussed in the Italian Parliament today.

Keywords: surrogacy; public order; best interests of the child; human dignity; universal criminal offense.

1. Introductory remarks

The past fifty years have witnessed a revolution in human reproduction[1]. Though, legal systems regulate reproductive practices in different ways, even within the European Union[2]. Italy has particularly strict legislation[3] that considers these practices as a tool to «facilitate the solution of reproductive problems arising from human sterility and infertility»[4].

Surrogacy is different from the other techniques[5]: in this practice, there is a woman, carrying the pregnancy for others[6], with a consequent

[1] M. Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, in *Harvard Law Review* (HLR) 2000, 837 ff.

[2] K. Trimmings, P. Beaumont, *General Report on Surrogacy*, in K. Trimmings, P. Beaumont (eds.), *International Surrogacy Arrangements. Legal Regulation at the International Level*, Oxford, 2013, 439 ff.; K. Trimmings, P. Beaumont, *Parentage and Surrogacy in a European Perspective*, in J.M. Scherpe (ed.), *The Present and Future of European Family Law*, Cambridge, 2016, 231 ff.; C. Fenton-Glynn, *Creating International Families: Private International Law and the Industry of Parenthood*, in G. Douglas, M. Murch, V. Stephens (eds.), *International and National Perspectives on Child and Family Law. Essays in Honour of Nigel Lowe*, Cambridge, 2018, 167 ff.; M. Brazier, *Regulating the Reproduction Business*, in *Medical Law Review* (MLR) 1999, 168.

[3] Law of 19 February 2004, no. 40.

[4] Art. 1, paragraph 1, Law of 19 February 2004, no. 40.

[5] E.g., from homologous fertilization or heterologous fertilization.

[6] In some cases, the commissioners are a couple (heterosexual or homosexual), in other cases it can also be a single person.

separation between parenthood and gestation[7]. In Italy, this practice is a crime (art. 12, paragraph 6 of Law no. 40/2004).

The Italian law on assisted reproduction demands that all procreative practices must protect «the rights of all subjects involved»[8]. The Italian Constitutional Court agrees, and in its decision of 18 December 2017, no. 272, it has defined surrogacy as an "*intolerable*" offense against the dignity of women becouse «undermines the depths of human relations». Also, the Court of Cassation[9] recalls how the prohibition of surrogacy is a public order limit. In fact, according to the Court, surrogacy is a criminal offense placed to protect one of the fundamental values of the Italian legal system: human dignity (in this case, the dignity of women)[10]. But there is more: as will be seen in the following pages, the fact that the crime of surrogacy is qualified by the Court of Cassation as a public order limit has implications for the recognition of some parental relationships.

1.1 The possibility of applying the crime of surrogacy to acts committed abroad

In the Italian legal system, a problem has arisen: whether the conduct of two Italian parents who travel abroad to a country where surrogacy is not prohibited has criminal relevance[11]. So, can the couple be liable for the crime of surrogacy when the procedure is carried out entirely outside Italian territory[12]?

Art. 12, paragraph 6 of Law no. 40/2004 incriminates those who «carry out»[13] surrogacy (*i.e.*, those who put in place this practice). According to the prevailing interpretation the physician, the commissioning parents, and also the surrogate mother are all responsible[14].

The Italian Criminal Code establishes the conditions for the applicability of Italian criminal law to acts committed entirely[15] abroad in Articles 7 *et seq.* Those acts must constitute crimes that offend fundamental public legal goods (e.g., the personality of the State), political crimes, or common crimes committed by the Italian citizen provided that life imprisonment, or imprisonment of not less than a minimum of three years,

[7] M. Brazier, *Regulating the Reproduction Business*, cit., 179 ff.
[8] Art. 1, Law of 19 February 2004, no. 40.
[9] Court of Cassation, United Civil Section, decision of 8 May 2019, no. 12193.
[10] I. Kriari, A. Valongo, *International Issues regarding Surrogacy*, in *The Italian Law Journal* (ILJ) 2016, 331 ff.
[11] M.M. Winkler, *Same-Sex Families Across Borders*, in D. Gallo, L. Paladini, P. Pustorino (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, New York, 2014, 381 ff.
[12] If even a part of the act had taken place in Italy, there would be no doubt as to the applicability of Italian law under Article 6, paragraph 2 of the Italian Criminal Code, which considers the criminal act to have taken place in the national territory if all or part of the act or omission took place there or if the event occurred there.
[13] As well as those who «organize» or «publicize».
[14] T. Trinchera, *Limiti spaziali all'applicazione della legge penale italiana e maternità surrogata all'estero*, in *Riv. it. dir. proc. pen.*, 2017, 1402 ff.
[15] So for the crime of surrogacy the birth and delivery of the child to the intending parents are both necessary to consider the crime accomplished.

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is provided for them. Or, if the term of imprisonment is less, there is a request of the Minister of Justice or a complaint of the offended person.

The crime of surrogacy is punishable with a prison sentence of three months to two years (with also a fine of 600,000 to 1 million euros). Thus, the criminal liability of the act committed abroad depends on the request of the Minister of Justice for the prosecution of this crime.

However, the most problematic point is the necessity of the requirement of so-called "double criminality". In other words, the question is whether the act must constitute an offense under both Italian and foreign state law.

The Italian Criminal Code does not expressly require such a prerequisite for criminal liability. On the contrary, only for extradition, double criminality is expressly required under Art. 13 para. 2 of the Criminal Code. However, the theory of the necessity of dual criminality has been supported by invoking two arguments. First, the preparatory works of the Criminal Code expressly mention this prerequisite. Second, double criminality would be necessary to comply with the principle of foreseeability of the legal consequences of one's actions. Indeed, it is necessary to investigate in the "concrete case" the individual's awareness of the applicability of Italian criminal law to acts performed outside the national territory[16].

As a result, two antithetical case law orientations have been formed: one considers dual criminality a prerequisite for the prosecution of crimes committed abroad[17]; the other, on the other hand, remains faithful to the wording of the law that does not require that the acts also be criminally relevant in the territory of the state where they are committed[18].

Because of the existence of such a radical case law conflict, the Court of Cassation has held, that the couple who resorts to surrogacy abroad is certainly in a state of *uncertainty* about the criminal consequences, incurring an unavoidable error about the applicative scope of the criminal offence[19]. As of today, in essence, the couple cannot predict whether it will run into a conviction or acquittal due to the absence of the dual criminality requirement. Therefore, the conduct held abroad would not be punishable for the uncertainty of the consequences.

[16] And, one can well imagine that the couple chose to practice surrogacy in a country where such practice is not a crime, in the full belief that they were not violating Italian law.

[17] Court of Cassation, First Criminal Section, decision of 15 November 2002, no. 38401: «On the subject of crimes committed abroad, outside the cases peremptorily indicated in Article 7 of the Italian Criminal Code it is an indispensable condition for the prosecution of offenses committed abroad by the foreigner that they are punishable as criminal offenses not only by Italian criminal law but also by the law of the place where they were consummated albeit with different "*nomen iuris*" and sanctions (in application of this principle, the Court annulled without referral the contested coercive measure concerning the transfer of weapons of war that took place exclusively on foreign territory in violation of the embargo established by UN resolutions, which, moreover, did not translate within the Italian legal system into binding rules)».

[18] Court of Cassation, Second Criminal Section, decision of 23 April 1991 no. 2860.

[19] Court of Cassation, Fifth Criminal Section, decision of 5 April 2016, no. 13525.

1.2. Surrogacy as a transnational problem

The second issue has to do with the recognition of the birth certificate of the foreign-born via surrogacy. In fact, in some jurisdictions, such as Italy, the birth certificate in which the intended parent is present could not be recognized. The problem would be that the criminal prohibition of surrogacy would constitute a public order limit preventing the recognition of the birth act. Then the child would not be fully guaranteed, and its legal status would be downgraded.

It is no coincidence that just recently there have been several decisions at both the national and European levels dealing with this issue.

Here we will focus on: a decision of the Constitutional Court, an ordinance of the Court of Cassation, a decision of the United Sections of the Court of Cassation, a decision of the Court of Justice of the European Union, and three decisions of the European Court of Human Rights

All of them delved into the existing possibilities – but also suggested solutions that can be implemented soon – to curb the downgrading of the child's legal status.

2. The public order limit in the Italian case law

2.1 …of the Constitutional Court

The First Civil Section of the Court of Cassation[20] raised a constitutional issue on[21] the legislation[22] that, according to the interpretation given by the Court of Cassation, do not allow the recognition of the foreign court order concerning the inclusion in the civil status record of a child procreated through surrogacy of the non-biological parent, for contrast to public order[23].

[20] Court of Cassation, First Civil Section, ordinance of 29 April 2020, no. 8325.

[21] The case that led to the judgment concerned a child born in Canada to a woman who had implanted an embryo formed with the gametes of an anonymous donor and a man of Italian citizenship married in Canada to another Italian man.
Surrogacy in Canada is regulated by the Assisted Human Reproduction Act of 2004 and is permitted insofar as the surrogate mother does not receive any compensation or reimbursement. See on this S. Carsley, *Reconceiving Quebec's Laws on Surrogate Motherhood*, in *Canadian Bar Review* (CBR) 2018, 125 ff.; A. Cattapan, *Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation*, in *Canadian Journal of Law and Society* (CJLS) 2014, 361 ff.
On the possible role of criminal law in the regulation of reproductive technologies in Canada see A. Campbell, *A Place for Criminal Law in the Regulation of Reproductive Technologies*, in *Health Law Journal* (HLJ) 2002, 77 ff.

[22] Art. 12 paragraph 6 of the law of February 19, 2004, no. 40; art. 64 paragraph 1 letter g) of the law of May 31, 1995, no. 218; and art. 18 of the Presidential Decree no. 396 of November 3, 2000.

[23] Court of Cassation, United Civil Sections, decision of 8 May 2019, no. 12193 (note that the "non-biological" parent is the parent that has shared the parental project but has not participated biologically in procreation).
See M. Winkler, K. Trilha Schappo, *A Tale of Two Fathers*, in *The Italian Law Journal* (ILJ) 2019, 359 ff.; F.M. Buonaiuti, *Recognition in Italy of filiation established abroad by*

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The problem is that there would be a contrast with European law[24], at least after the April 10, 2019, opinion of the European Court of Human Rights[25]. Indeed, the *Grande Chambre* ruled that in the case of surrogacy procedures carried out abroad, the "home State"[26] must recognize the filiation relationship[27] even if such techniques are prohibited by national laws. The recognition can take place by a plurality of "instruments", but must be *effective*[28] and the procedure must be sufficiently *rapid* so as not to leave the child in a situation of uncertainty.

The Constitutional Court reiterates that the ban on surrogacy is a public order limit[29] because it «intolerably offends the dignity of women and deeply undermines human relationships»[30]. Indeed, such practice risks exploiting vulnerable situations of socially and economically disadvantaged women[31]. At the same time, the Court notes the importance of safeguarding the child's interest[32], which also corresponds with the recognition of ties with both parents (thus including the so-called intended parent)[33].

However, these different interests must be balanced against each other[34].

surrogate motherhood, between transnational continuity of personal status and public policy, in *Cuadernos de Derecho Transnacional*, 2019, 294 ff.

[24] More generally, doubts have been raised about the compatibility with articles 2, 3, 30, 31, and 117 paragraph 1 of the Constitution (the latter about art. 8 of the ECHR, to articles 2, 3, 7, 8, 9, and 18 of the New York Convention on the Rights of the Child and art. 24 of the Charter of Fundamental Rights of the European Union.

[25] *Mennesson v. France*, Application no. 65192/11, Judgement 26 June 2014.
The legal base is Article 8 ECHR, entitled "Right to Respect for Private and Family Life", stating:
«1. Everyone has the right to respect for his/her private and family life, home, and correspondence.
2. There shall be no interference by a public authority with the exercise of such right unless such interference is provided for by law and constitutes a measure which, in a democratic society, is necessary for national security, public safety, the economic well-being of the country, the defense of order and the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others».

[26] In that case: France.

[27] See P. Alston (ed.), *The Best Interests of the Child. Reconciling Culture and Human Rights*, Oxford, 1994.

[28] By 'effective recognition', the Court means the recognition that creates a parental relationship equivalent to that in the case of "natural" filiation.

[29] On the public order limit, let us refer to the references in M. Caldironi, *The circulation of the child's legal status in Italy: open issues*, in *Papers di diritto europeo*, special issue, 2023, 18, footnote 12.

[30] Constitutional Court, decision of 18 December 2017, no. 272 (4.2. *Considerato in diritto*).

[31] Also the European Parliament, condemned «any form of surrogacy for commercial purposes [Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009 INI) (para. 82)]».

[32] Constitutional Court, decision of 29 May 2020, no. 102: «the best solution "concretely" for the child's interest must always be sought, that is, the one that best guarantees, especially from the moral point of view, the best "care of the person"».

[33] Including caring for his/her health, schooling, protecting his/her property interests and his/her own inheritance rights.

[34] Constitutional Court, decision of 9 May 2013, no. 85.

Back in 2019[35], the United Sections of the Court of Cassation had already spoken out on what was then the ideal balancing point between recognizing the filiation bond in cases of surrogacy and the legitimate goal of disincentivizing couples from accessing this technique: the institution of "adoption in special cases". Through this instrument, there could be a recognition of these ties, but avoiding automatic recognition mechanisms that could bring into the domestic system "families" born through the exploitation of vulnerable women.

On the contrary, according to the Constitutional Court, adoption in special cases «constitutes a form of protection of the child's interest that is certainly significant, but still not fully adequate to the standard of constitutional and supranational principles»[36], because it requires the consent of the biological parent. But there is an additional problem: with adoption in special cases, the intentional parent might decide to no longer take on the responsibilities associated with parenting[37]. Indeed, if the social parent changed his/her mind before the adoption was accomplished, both the child and the biological parent could not force him/her in any way to take on this responsibility[38].

For these reasons, this type of adoption could not be considered a "full adoption", equated with "ordinary" adoption.

2.2 … and the Court of Cassation

The First Civil Section of the Court of Cassation referred[39] to the United Civil Sections the question regarding the scope of the public order clause[40] to address the deficit of protections for the child born through surrogacy. According to the prospect of the First Section of the Cassation, such reconsideration would be indispensable following the Constitutional Court's decision no. 33/2021.

The First Civil Section notes that with the recognition of foreign judgments (*i.e.*: the transcription) and the civil status documents (*i.e.*: the exequatur), the surrogacy contract is not transposed in Italy, but rather, (it's transposed) «the act of assumption of parental responsibility by the person who has decided to participate in the procreative project, by giving his/her consent»[41].

[35] Court of Cassation, United Civil Section, decision of 8 May 2019, no. 12193.
[36] Constitutional Court, decision of 9 March 2021, no. 33, § 5.8. *Considerato in diritto.*
[37] M. Garrison, *Law Making for Baby Making*, cit., 872 ff.
[38] Constitutional Court, decision of 9 March 2021, no. 33, § 5.4. *Considerato in diritto.* For a similar emphasis, see Constitutional Court, decision of 26 September 1998, no. 347.
[39] Court of Cassation, First Civil Section, ordinance of 21 January 2022, no. 1842
[40] Court of Cassation, United Civil Sections, decision of 8 May 2019, no. 12193.
[41] Court of Cassation, First Civil Section, ordinance of 21 January 2022, no. 1842, but see also: M. Garrison, *Law Making for Baby Making*, cit., 892 ff.
Note that is not in question here a right of parenthood or a right to procreate (on this see: M. Eijkholt, *The Right to Found a Family as a Stillborn Right to Procreate?*, in *Medical Law Review*, 2010, 127 ff.).

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However, the automatic nature of these instruments[42] is inadequate to capture the peculiarity of concrete cases[43]. According to the Court, a case-by-case assessment with public order would be necessary instead. And this is to verify that there are "*in concreto*" no violations of the public order limit. This assessment should then be carried out taking into consideration all the values involved, balancing them without a rigid, and aprioristic evaluation.

The values to be balanced would then be the dignity of the pregnant woman and the protection of the best interest of the child. As to the first value, it has already been said[44] that the dignity of the woman is harmed in cases where her choice was not free, conscious, revocable until the birth of the child, and independent of economic compensation. However, this would not be the case[45] if instead these guarantees were provided for the pregnant woman. Then an automatic denial of recognition of the foreign measure would not protect the dignity of the pregnant woman (already guaranteed by the foreign legal system).

Not giving any possibility of recognition «would end up instrumentalizing the person of the child in the name of the legitimate goal of discouraging the use of surrogacy»[46]. This would thus result in an automatism that, moreover, is not even provided for filiation resulting from other crimes, including incest[47].

The First Section of the Court of Cassation proposes that it should be left to the single judge hearing the request for exequatur to assess the conflict between the interest in the recognition of parenthood and the limits of international public order limit.

The arguments of the First Civil Section of the Court of Cassation regarding the need to review the scope of the public order limit are based on some apparent contradictions.

It has been mentioned elsewhere[48] that the public order limit seems to affect some individuals more than others without clear normative support to make this distinction. Indeed, the biological parent who provides gametes seems to have more relevant conduct than the intentional parent, whose only "crime" would be to have assumed all parental responsibilities without direct involvement in procreation. Then, the public order limit should apply to all parental relationships or none, but in any case, not only to the intentional parent.

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[42] Acquired in a process of rapprochement between state legislations.
[43] Court of Cassation, First Civil Section, ordinance of 21 January 2022, no. 1842.
[44] M. Caldironi, *Surrogazione di maternità e ordine pubblico: verso un cambio di rotta?*, in BioLaw Journal, n. 2/2022, 323; Idem, *Lo* status *giuridico del minore: la necessità di una ricostruzione unitaria all'interno dell'Unione*, in BioLaw Journal, n. 1/2023, 134-135.
[45] Or at least it would have to be assessed in concrete terms.
[46] Court of Cassation, First Civil Section, ordinance of 21 January 2022, no. 1842.
[47] This automatism was declared unconstitutional in the Contitutional Court, decision of 28 November 2002, no. 494. Next, the filiation reform that rewrote Article 251 of the Civil Code, which now allows the recognition (with the Court's authorization) of a child born out of an incestuous relationship, having regard to the child's interest and the avoidance of prejudice to the child (see also: U. Majello, *Della filiazione naturale*, Bologna, 1969, 52 ff.; M. Giorgianni, *La filiazione fuori dal matrimonio*, in *Scritti minori*, 1988, 815 ff.; G. Sbisà, *Riforma del diritto di famiglia*, in *NDI*, Milano, 1986, 815 ff.).
[48] M. Caldironi, *Surrogazione di maternità e ordine pubblico: verso un cambio di rotta?*, in *BioLaw Journal*, n. 2/2022, 324-327.

Moreover, as argued in the preceding pages, the public order limit is justified only to protect the dignity of the pregnant woman, so this would be the criterion that should define its scope. And then, perhaps it would be more correct to treat differently those cases in which surrogacy is altruistic[49]. In other words, the public order limit should hinder entry into our legal system *only* for those relationships born through the exploitation of women's vulnerable situations[50].

In the extreme, perhaps it would be more correct to rethink the scope of the public order limit. Indeed, it would also be more correct to rethink whether criminal sanction is the best tool to deter couples from traveling abroad to engage in surrogacy. Perhaps, the instrument of criminal law could remain residual: the last resort for only those cases in which there is a concrete injury to the interests of the pregnant woman.

However, this does not seem to be the direction indicated by the recent law proposal "A.C. 887" (Varchi) being debated today before the Chamber of Deputies, which would extend the limits of the application of Italian criminal law to acts committed abroad to the cases of surrogacy[51].

3. The "Varchi" bill: a future European problem?

The bill aims to extend the scope of the surrogacy crime to include acts committed by Italian citizens abroad to hinder so-called procreative tourism[52].

First, a clarification is necessary. The legislature may extend the application of Italian criminal law in broader terms than those outlined in Article 9 of the Criminal Code. However, this should happen only for particular crimes, to protect specific interests. This is confirmed by two extensions that the Criminal Code already provides: the general discipline under Articles 7 and 8 of the Criminal Code, and some very particular crimes such as sexual violence, slavery, human trafficking and child pornography[53]. The crimes that are subject to these forms of broad extension of Italian jurisdiction respond to two different purposes. The first is the protection of fundamental State interests[54]. The second, of more recent emergence, concerns the protection of universal values, concerning which the principle of universality expresses international solidarity among States relating to goods whose protection is everywhere recognized as being of common

[49] Indeed, it should be noted that the principle of social solidarity, which could be a justification for solidarity surrogacy, has a constitutional basis: Article 2 Const.
[50] M. Winkler, K. Trilha Schappo, *A Tale of Two Fathers*, cit., 376.
[51] About the Meloni (no. 306) and the Carfagna (no. 2599) proposals, with substantially similar content, see: M. Pelissero, *Surrogazione di maternità: la pretesa di un potere punitivo universale. Osservazioni sul d.d.l. A.C. 2599 (Carfagna) e 306 (Meloni)*, in *Sistema Penale*, 2021, 30 ff.
[52] A. Vallini, *La schiava di Abramo, il giudizio di Salomone e una clinica di Kiev: contorni sociali, penali e geografici della gestazione per altri*, in *Diritto penale e processo*, 2017, 901 ff.
[53] Which include slavery, trafficking, child pornography (art. 604 of the Italian Criminal Code).
[54] Crimes against the personality of the State, forgery of money and state seals, and crimes with political connotations.

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interest.[55] In both cases, these crimes are sanctioned with particularly severe penalties.

In contrast, the crime of surrogacy carries a short prison sentence of three months to two years which is the range in which conditional suspension apply[56]. Therefore, it is unreasonable to derogate from the discipline of Article 9 of the Criminal Code. The sanctions, which are not severe, do not seem to demonstrate a particular disvalue of this crime.

For the crime of surrogacy, the broadening of the scope of application of criminal law to acts committed abroad seems to respond more to an ethical need that is not reflected in social sentiment. Gestation for others is widespread, and the international community does not give a uniform judgment on it.

At the supranational level, important suggestions are provided which it seems essential to take into account. Indeed, the Court of Justice of the European Union, in a recent decision[57], stressed the importance of protecting the inviolable rights to personal identity and private and family life of the child. This would be confirmed by the correspondence to European Union law on the preservation of personal statuses and freedom of movement and residence, and the close correlation of these principles with the expression of family life.

4. European Court of Justice, *V.M.A./Stolichna obshtina, rayon 'Pancharevo'*

The Court of Justice of the European Union recently ruled on the issue of recognition of the parental relationship between the child and the intended parent. More specifically, it ruled that a child who has a document or birth certificate issued by the country in which he/she was born through surrogacy attesting to parenthood with both the biological parent and the intended parent must have these relationships recognized in all Member States[58]. All Member States, including the country of origin, must therefore recognize these relationships even if the practice by which this child was born is prohibited in the State.

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[55] Genocide, piracy, terrorism.

[56] Non-punishability due to the particular tenuousness of the act, the suspension of trial with probation, the suspended prison sentence.

[57] *European Court of Justice* (ECJ) 14.12.2021, case 490/2020, (*V.M.A./Stolichna obshtina, rayon 'Pancharevo'*).
For a more in-depth study, including bibliography, on this decision, see: M. Caldironi, *Lo status giuridico del minore: la necessità di una ricostruzione unitaria all'interno dell'Unione*, in *BioLaw Journal*, n. 1/2023, 138, but also A. Stamatopoulos, *La reconnaissance des actes de naissance mentionnant comme parents deux personnes de mêmes sexe dans l'Union européenne: analyse à la lumière de la jurisprudence de la Cour de justice (commentaire de l'arrêt C-490/20 V.M.A. contre Stolichna obshtina, rayon «Pancharevo»)*, in *Cahiers de l'EDEM*, 2022; S. Progin-Theuerkauf, M. Berger, *Personenfreizügigkeit von Regenbogenfamilien*, in *sui generis*, 2022, 35 ff.

[58] A national measure capable of hindering the exercise of the right of free movement of persons could only be justified if it complied with the fundamental rights enshrined in the Charter.

More properly, the State of origin must issue an identity document to the child that allows him or her to move. The document must allow the child to move with his or her parents, already recognized (as parents) by another Member State during a stay that complies with Directive 2004/38.

Indeed, the rights accorded to citizens of Member States in Article 21(1) TFEU includes the right to lead a normal family life both in the host member state and in the member state of which they possess the nationality[59]. And for this right to be fulfilled they must be able to be accompanied by their family members.

According to the Court's perspective, this obligation does not violate national identity or threaten the public order of that Member State. Indeed, recognition of the parental relationship does not imply recognition of same-sex marriage or the legitimacy of surrogacy. But it does require that there be a "minimum" recognition to enable the child to exercise at least the rights it derives from EU law. So, the recognition of the document, and thus of the parental relationship, is limited. In fact, recognition is valid only to enable the child to exercise the right to move and reside freely in the territory of the European Union. Recognition is then limited to the exercise of only those rights guaranteed by European Union law.

In other words, the existence of prohibitions in Member States, and thus public order limits, do not apply to derogate from a freedom guaranteed by the European Union[60]. Social parenthood then, at least for Union law, can be considered recognized.

5. The latest determinations of the European Court of Human Rights

In two recent judgments[61], the European Court of Human Rights has reiterated the importance that States recognize the parental relationship between the child and both parents, even in cases of surrogacy carried out abroad.

In the first one, it recognised a violation of Article 8 of the ECHR for the period from the application for recognition of *status filiationis* until the date on which the adoption was then pronounced. In fact, under Swiss law, the foreign act in which both the biological parent and the intended parent were present could not be recognized because of the existence of the public order limit. So, the recognition of the parental relationship was possible only after the reform of the Swiss Civil Code. Previously, Swiss law did not allow same-sex couples (as was the case here) to adopt. Therefore, recognition of the filial relationship was not guaranteed for all this time. As a result, the

[59] Upon return to that Member State.

[60] European Court of Justice, (ECJ) 5.6.2018, case 673/16, (*Coman and Others*), [2018], margin no. 44, in which the Court has stated that the concept of '*public order*', as a justification for a derogation from a fundamental freedom, must be understood in a restrictive sense, and therefore its scope cannot be determined unilaterally by each Member State without the control of the institutions of the Union.

[61] *D.B. and others v. Switzerland*, Application no. 58817/15-58252/15, Judgement 22 November 2022; *K.K. and others v. Denmark*, Application no. 25212/21, Judgement 6 December 2022.

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child suffered a situation of legal uncertainty, affecting his social identity and the possibility of living and growing up in a stable environment.

Even in the second case, the existence of public order limit prevented recognition of the intentional parent. So, the Court found the instrument used by the Danish government inadequate, because only granted the intentional mother "shared custody" of the children. Indeed, this did not guarantee recognition of the parental relationship with repercussions, for example, on their inheritance rights. Thus, the Court found that the Danish authorities had not adequately balanced the children's right to have their bond with their intended mother recognized and society's interests in limiting the phenomenon of commercial surrogacy.

In light of these two decisions, it would also have been expected that Italy would later be condemned. This is because, on 30 December 2022, the Court of Cassation[62] reiterated that, in the absence of intervention by the legislature, the only tool in Italy for recognizing the parental relationship with the intended parent in the case of surrogacy abroad remains "adoption in special cases". Indeed, while recognizing the limits of this institution, the "United Sections" reaffirmed that the crime of surrogacy is a public order limit.

However, this did not happen. In fact, in its decision of June 22, 2023, The European Court of Human Rights held that the instrument of adoption "in special cases" could be deemed appropriate for the recognition of the relationship with the "intended parent"[63]. The European Court of Human Rights notes that on February 24, 2022, the Constitutional Court declared unconstitutional the provisions on adoption "in special cases" insofar as they excluded the creation of the same family relationship that is established with other types of adoption between the adopted child and the adoptee's parents[64]. Therefore, according to the European Court of Human Rights, in the current state of case law development, adoption would be the instrument to obtain legal recognition of the *de facto* bond between the child and the person who shared the procreation project with the biological parent. For these reasons, the European Court of Human Rights then rejected the claims: it recognized that in both cases submitted to its judgment, it was possible to access the institution of "adoption in special cases".

However, there seem to remain two critical issues to which the European Court of Human Rights may not have given a comprehensive answer. First, it is still debated that adoption in special cases is assimilable to other (ordinary) adoptions, even after the Constitutional Court's decision, which ruled only on one specific profile (the relationship with the adoptee's relatives). Second, the adoptee's request is still necessary, without which the child (but neither the biological parent) cannot activate the procedure for the adoption "in special cases". In short, the intending parent could change his/her mind and shirk the bundle of duties that would come with having shared the parental project from which the child was born.

Therefore, a question arises: what justifies this apparent *revirement* of the Court from its precedents? The Court did not delve into the analysis of

[62] Court of Cassation, United Civil Sections, decision 30 December 2022, no. 38162.
[63] *Modanese v. Italy*, Application no. 59054/19, Judgement 22 June 2023.
[64] Constitutional Court, decision of 28 March 2022, no. 79.

the institution of adoption in special cases in its arguments. The Court did not address in detail the differences that exist between this institution and full adoption, but merely asserted that in the individual cases submitted to its judgment, it would be possible to access adoption in special cases. In a sense, the Court was entrenched behind the solution of the individual case in order not to address the issues that still seem to be unresolved in the Italian legal system.

Why is this? Apparently, the answer might be more political than legal. Perhaps the Court did not feel it was the time to condemn Italy at such a sensitive time, during which the actual Government seems particularly oriented against these practices (*i.e.:* surrogacy). The Court may have been afraid of triggering a "rebound effect" from the Government and public opinion, perhaps unnecessary given that the individual cases submitted to its judgment lent themselves to being resolved without taking firm positions to the still open issues.

Of course, these are only suggestions that do not pretend to justify a precise and punctual answer on the reasons that led the European Court of Human Rights to reject the claims against Italy. It can only be said that with the Court's meager arguments, however, it seems complex to reconstruct precisely the logical process that led to this result. Put another way, even beyond the final outcome, a more articulate argumentation could have given a better understanding of why such a decision was made.

6. Conclusion

In conclusion, we can say that the Court of Justice[65] has ruled that children should be able to have their relationships with their parents recognized in all Member States, regardless of how they came into the world. However, although these extensions of protection can be seen positively, it does not seem sufficient to affirm that, as of today, full protection for minors is effectively guaranteed throughout the territory of the EU. In fact, this recognition applies only to the exercise of rights guaranteed by EU law: in particular, freedom of movement and residence. There are still many areas outside the scope of direct application of EU law in which the phenomenon of *downgrading* is still present. This applies in particular to the whole area of family law, which has always been considered the exclusive competence of the individual Member States.

The European Court of Human Rights[66], on the other hand, has repeatedly reiterated the need for full recognition of these relationships that also applies to the exercise of those rights that are provided in individual national laws for children. However, it has left discretion to individual States that do not seem to have been properly exploited by them. Much more often States have entrenched themselves behind this freedom, to avoid intervening substantially with disciplines capable of actually guaranteeing the interests of children. In all this, probably Italy is no exception. Under current legislation, it is not possible to guarantee the legal status of children born

[65] *ECJ, V.M.A./Stolichna obshtina, rayon 'Pancharevo'* (fn. 59).
[66] *ECtHR, D.B. and others v. Switzerland*, (fn. 64); *ECtHR, K.K. and others v. Denmark*, (fn. 64).

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by surrogacy except through "adoption in special cases"[67]. But this solution seems already been declared inadequate by both the Constitutional Court[68] and the Court of Cassation[69].

It is no coincidence then that this need for uniformity in the protections of children prompted the European Commission to submit a proposal for a Regulation[70] to ensure that parenting established in one EU member State is recognised in all other member States without any special procedure. This would allow children to automatically benefit from the rights arising from the parental relationship under national law. It would not change national regulations in the area of family law, which would remain the responsibility of individual States, but would extend their applicability to children whose parental relationship has been recognized in any other Member State.

Perhaps, this is the only way to address the phenomenon of legislative *inertia* that still characterizes many States due to the controversial and sensitive nature of these issues.

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[67] Court of Cassation, United Civil Section, decision of 8 May 2019, no. 12193; Court of Cassation, United Civil Sections, decision 30 December 2022, no. 38162.
[68] Constitutional Court, decision of 9 March 2021, no. 33.
[69] Court of Cassation, First Civil Section, ordinance of 21 January 2022, no. 1842; Court of Cassation, United Civil Sections, decision 30 December 2022, no. 38162.
[70] "*Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood*" (7 December 2022, COM(2022) 695 final).