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# Foreword

Maria Caterina Baruffi* and Laura Calafà**

This special issue of the journal *Papers di diritto europeo* collects the proceedings of the conference organized within the project «Identities on the move. Documents cross borders - DxB» (selected under the call for proposals «Action grants to support judicial cooperation in civil and criminal matters» – JUST-JCOO-AG-2020, co-funded by the European Union within the Justice Programme 2014-2020). The project is coordinated by the University of Verona and the Consortium is composed of the University of Graz, the Aristotle University of Thessaloniki, the European Association of Registrars (EVS) and the Italian Association of Civil Status Officers and Registrars (ANUSCA), at whose premises the final conference took place on 23 and 24 June 2022.

The final event has provided the opportunity to deepen the analysis of Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which was at the core of the research and scientific activities of the DxB project. The idea of focusing on this Regulation comes from the limited knowledge that both practitioners and citizens still have of it, despite its being a valuable instrument to bring people closer and make the European Union more integrated thanks to the simplification of administrative formalities. The issues related to the mutual recognition of public documents and their circulation across Member States are among the most important and urgent challenges in a globalized society. The aim of the project, then, is to raise awareness among registrars and legal practitioners and gain a more extensive expertise on how and to what extent the Regulation is actually applied in national practices, ultimately ensuring a better understanding of this tool.

Against this background, the conference's speakers contributed to give an extensive overview of this EU act in the context of national civil status systems, the free movement of persons and the Charter of fundamental rights of the European Union. Presentations also provided specific information regarding how the Regulation addresses the problematic aspects and deficiencies of the current legal framework, under both interpretative and operational perspectives.

The conference has been a truly international event that effectively encouraged the development of a concrete cooperation among the participants, i.e. scholars, registrars,

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public administrators, and practitioners from all over Europe. To all of them goes our gratitude for accepting to taking part in the DxB project as well as to the authors of this special issue. We are also thankful to Alexander Schuster for his input in managing the project and organizing the conference. Thus, the proceedings collected in the following pages represent both a final output and a starting point to further debates and exchange of views on the application of the Public Documents Regulation.

Lastly, the contents of all the papers, which are published in alphabetical order, are the sole responsibility of the respective authors and do not reflect the views of the European Commission.

# The circulation of the child's legal status in Italy: open issues

Matteo Caldironi*

CONTENTS: 1. Recognition of intentional parenting relationships: a transnational problem. – 2. The decision of the Constitutional Court of 9 March 2021, no. 33. – 3. The decision of the Constitutional Court of 9 March 2021, no. 32. – 4. The ordinance of the Supreme Court of 21 January 2022, no. 1842. – 5. The judgment of the Court of Justice of the European Union of 14 December 2021, case C-490/20. – 6. Some considerations.

## 1. Recognition of intentional parenting relationships: a transnational problem.

With the emergence of new techniques that allow conception in cases where it is impossible or extremely remote there are particularly differentiated approaches among the legal systems, even if we limit our analysis to those of the European Union. Italy is undoubtedly the example of a legislation[1] which is particularly diffident with respect to these techniques that are relegated to a mere «therapeutic» tool to «facilitate the solution of reproductive problems arising from human sterility and infertility»[2]. It is no coincidence that the legislature reserves access only to couples «of different sexes, married or cohabiting, of potentially fertile age, both living»[3]. This is also confirmed by the fact that from a subjective point of view these practices – and the issue is typically relevant in the specific case of heterologous fertilization[4] – have been deemed inadmissible for couples of homosexual women. This distinguishes the «physiological» infertility of the homosexual couple from the infertility (absolute and irreversible) of the heterosexual couple suffering from reproductive pathologies (in the same way as the «physiological» infertility of the single woman and the heterosexual couple in old age). Even according to the Constitutional Court «[t]here are clearly and ontologically distinct phenomena. The exclusion of female couples from ART is not, therefore, the source of any distortion and not even discrimination based on sexual orientation» but, as

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[1] Law of 19 February 2004, no. 40, Norme in materia di procreazione medicalmente assistita.

[2] Art. 1(1) of Law no. 40/2004.

[3] Art. 5 of Law no. 40/2004.

[4] The first one (heterologous fertilization) is a technique of artificial reproductive technology that consists in the implantation in the uterus of the biological mother – which coincides with the social one – of one or more embryos formed by gametes, in part or in whole, extraneous to the commissioning couple. In the first case we will have a partial heterologous fertilization as one of the two gametes (male or female) will belong to the couple while the other will come from a third donor alien to it. In the second case we will have a total heterologous fertilization as both gametes that form the embryo to be implanted in the uterus of the pregnant woman will come from donors outside the couple.

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mentioned, a choice to recognize the ART as a purely and exclusively therapeutic purpose. However, the case of surrogacy[5] is different: prohibited – and criminally sanctioned – by Art. 12(6) of Law no. 40/2004. In fact, in the declared intentions of the legislator of 2004 the use of procreation practices must respect conditions and modalities that ensure «the rights of all subjects involved, including the conceived». The Constitutional Judge is of the same opinion that, albeit in an *obiter dictum*, in the decision 18 December 2017, no. 272[6] has defined the practice of «uterus for rent», in its provision for gestation and the subsequent transfer by contract of the born to the commissioning couple, as an «intolerable» offense of the dignity of women that «undermines the depths of human relations». The aforementioned judgment no. 221/2019[7] recalls how this prohibition is considered by the case law expressive of a principle of public order. According to this interpretation, it is not permissible for a woman to undertake and carry a pregnancy to term on behalf of others: in fact, the need to guarantee and protect the dignity of women comes into play in this case, as will be clarified shortly.

The main problem, however, is represented by the lawfulness of this practice in other countries where heterosexual or homosexual couples often go to realize their dream of parenthood, with the result that often there have been questions about the recognition in Italy of administrative or jurisdictional measures that recognize the parenthood of the parent (only) of intention. This problem would directly affect the legal status of the child. As a matter of fact, in some legal systems the child would be guaranteed in their relations with both parents, while in others (as in the case of Italy), they would not have full recognition of their relationship with the intended parent due to the existence of limits preventing transcription. The minor would then see his/her status change with the change of the legislation that he would «meet» in the exercise of his/her right to free movement between the different States, guaranteed by EU law.

Recently, the issue has been the subject of two pronouncements of the Constitutional Court and an ordinance of the Court of Cassation which, among the various issues addressed, have deepened the various existing possibilities – but also suggested solutions that can be implemented in the near future – to stem these phenomena of the downgrading of the legal status of the child, which deserve to be analyzed in more detail.

## 2. The decision of the Constitutional Court of 9 March 2021, no. 33.

[5] Surrogacy refers to all those cases in which a woman carries out an artificially induced pregnancy on behalf of another woman, who, after the birth, will assume the legal (and of course social) role of mother, with a consequent separation between motherhood and gestation. The absolute prohibition of this practice is inserted, as anticipated, in an organic Law of 2004, which regulates and represses a whole series of conducts related to artificial procreation.

[6] Available *online*.

[7] Constitutional Court, decision of 23 October 2019, no. 221.

With ordinance of 29 April 2020, no. 8325, the first civil section of the Court of Cassation raised a question of constitutional legitimacy with reference to the rules on the recognition of the child born (abroad) through the procedure of «surrogacy»[8]. In particular, there were doubts as to the compatibility with Arts. 2, 3, 30, 31, 117(1) of the Constitution – the latter in relation to Art. 8 of the European Convention on Human Rights, to Arts. 2, 3, 7, 8, 9 and 18 of the Convention on the Rights of the Child[9], and Art. 24 of the Charter of Fundamental Rights of the European Union – of Art. 12(6) of Law no. 40/2004, of Art. 64(1)(g) of Law of 31 May 1995, no. 218 and Art. 18 of Presidential Decree of 3 November 2000, no. 396 insofar as they do not allow, according to the current interpretation of the «living law» (United Civil Sections, decision of 8 May 2019, no. 12193), «that it can be recognized and declared enforceable, for contrast with public order, the foreign judicial measure relating to the inclusion in the act of civil status of a child procreated with the methods of gestation for others (otherwise known as "surrogacy") of the so-called non-biological intended parent»[10].

The contrast with European legislation would be insuperable in light of the above-mentioned opinion of 10 April 2019, of the *Grande Chambre* of the European Court of Human Rights (the so-called *Mennesson* case), in which it recognized that in the case of recourse to surrogacy techniques abroad, the State of origin must recognize the filiation relationship in order to protect the best interests of the child, even if such technique is prohibited by national laws. As to the instrument that can be used, the Court reiterates that individual States enjoy wide margins of discretion – both the transcription of the certificate and adoption procedures by the non-biological parent are explicitly considered equivalent – but warns that adoption proceedings can be considered an instrument that respects Art. 8 of the Convention only if there is effective recognition of the filiation bond, and the procedure is rapid and does not expose the child to a prolonged situation of uncertainty.

[8] The case that gave rise 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 – by a deed later transcribed in Italy in the register of civil unions – to another man, also of Italian citizenship, with whom he had shared the parental project. At the time of the child's birth, the Canadian authorities had drawn up a birth certificate indicating only the first parent as the parent, while neither the so-called intended parent nor the surrogate mother who had given birth to the child (nor the egg donor) were mentioned. Subsequently, the Supreme Court of British Columbia ruled that both plaintiffs should be considered parents of the child and ordered the corresponding rectification of the birth certificate in Canada. The two men then asked the Italian registrar to rectify the child's birth certificate in Italy, based on the decision of the Supreme Court of British Columbia. Following the refusal of this request, they asked the Court of Appeal of Venice to recognize the Canadian measure in Italy pursuant to Art. 67 of Law no. 218/1995. In 2018 the Court of Appeal of Venice had accepted the appeal, recognizing the effectiveness of the measure in Italy. However, the *Avvocatura dello Stato* appealed to the Court of Cassation in the interest of the Ministry of the Interior and the Mayor of the municipality where the original birth certificate of the minor had been transcribed.

[9] The New York Convention of 20 November 1989, ratified and made executive by Law of 27 May 1991, no. 176.

[10] In the operative part of Court of Cassation, ordinance no. 8325/2020 (translation mine).

In substance, the questions of constitutionality which the Constitutional Court has been called to analyze concern the civil status of children born through the practice of surrogacy (prohibited in the Italian legal system by Art. 12(6) of Law no. 40/2004), and more specifically the possibility to transcribe the birth certificate of the child procreated through such a procedure in which not only the name of the biological parent (*i.e.* the parent who provided their own gametes) appears, but also the name of the so-called «social» parent (Art. 65 of Law no. 218/1995), who has shared the parental project although not participating biologically in procreation.

Therefore, the Constitutional Court is called to provide an answer to the question whether what has been established by the United Civil Sections in the exercise of their nomophilaptic function is compatible with the rights of the child enshrined in the constitutional and supranational rules invoked by the judge *a quo*.

The Court, at the beginning, in its decision no. 33/2021[11], recognizes that the prohibition of surrogate motherhood has been correctly qualified by the jurisprudence of legitimacy as a principle of public order[12] (and therefore hostile to the recognition of the foreign measure in the domestic system), as placed to protect fundamental values, including the human dignity of the pregnant woman. In fact, the practice of surrogacy «intolerably offends the dignity of women and deeply undermines human relations»[13]. In addition, surrogacy agreements entail a risk of exploitation of the vulnerability of women in socially and economically disadvantaged situations; situations that, if they exist, would heavily influence their decision to undertake the path of a pregnancy in the sole interest of third parties to whom the child must be delivered immediately after birth. In addition, it should be noted that these concerns have also been expressed by the European

[11] Decision of 9 March 2021, no. 33.

[12] On the limit of public order in relation to issues concerning filiation-parenting relationships see at least: C. TRIPODINA, *C'era una volta l'ordine pubblico. L'assottigliamento del concetto di "ordine pubblico internazionale" come varco per la realizzazione dell'"incoercibile diritto" di diventare genitori (ovvero, di microscopi e di telescopi)*, in S. NICCOLAI, E. OLIVITO (eds.), *Maternità filiazione genitorialità. I nodi della maternità surrogata in una prospettiva costituzionale*, Napoli, 2017, pp. 119-129; F. ANGELINI, *Il divieto di maternità surrogata a fini commerciali come limite di ordine pubblico e strumento di tutela della relazione materna: storia di un percorso giurisprudenziale irragionevolmente interrotto*, *ivi*, pp. 31-53; J. LONG, *Di madre non ce n'è una sola, ma di utero sì. Alcune riflessioni sul ruolo dell'ordine pubblico internazionale nelle fattispecie di surrogazione di maternità*, *ivi*, pp. 145-159; O. FERACI, *Ordine pubblico e riconoscimento in Italia dello "status" di figlio "nato da due madri" all'estero: considerazioni critiche sulla sentenza della Corte di Cassazione n. 19599/2016*, in *Rivista di diritto internazionale*, 2017, n. 1, pp. 169-181, spec. p. 171 ff.; S. TONOLO, *Ordine pubblico internazionale e atti di nascita stranieri in caso di gravidanza per altre*, in *www.articolo29.it*, 31 October 2018, available *online*; A. SASSI, S. STEFANELLI, *Ordine pubblico differenziato e diritto allo stato di figlio nella g.p.a.*, in *www.articolo29.it*, 21 September 2018, available *online*; F. ANGELINI, *L'ordine pubblico come strumento di compatibilità costituzionale o di legalità internazionale? Le S.U. della Corte di cassazione fanno punto sull'ordine pubblico internazionale e sul divieto di surrogazione di maternità. Riflessioni intorno alla sentenza n. 12193 del 2019 e non solo*, in *Rivista AIC*, 2020, no. 2, pp. 185-211, available *online*.

[13] Constitutional Court, decision no. 272/2017, cit. (4.2. *Considerato in diritto*) (translation mine).

Parliament, which has expressly condemned «any form of surrogacy for commercial purposes»[14].

While recognizing all this, the Court identifies the main focus of the issue in the interests of the child born through surrogacy in his/her relationship with the couple which has from the beginning shared the path that led to its conception and birth in the territory of a State where surrogacy is not contrary to the law; and who has then brought the child to Italy, to then take care of him/her on a daily basis. The principle emphasized by the Constitutional Judge is that in all decisions concerning minors falling within the competence of public authorities, primary importance must be given to safeguarding the «best interests» or «intérêt supérieur» of the child[15]. In fact, in decisions concerning the child, «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"».

And there is no doubt that the interest of a child cared for since birth by a couple that has shared the decision to bring them into the world is to obtain legal recognition of the ties that already unite them to both members of the couple. Therefore, the child's interest in legal recognition of these ties is unquestionable, for all the purposes that are relevant to the child's life[16]; but also, and even more importantly, in order to be identified by law as a member of that family or nucleus of affection, made up of all the people who are actually part of it.

Precisely for these reasons, the well-established jurisprudence of the European Court of Human Rights affirms the need, on the basis of Art. 8 ECHR[17], that children born through surrogacy, even in States that prohibit the use of such practices, obtain legal

[14] Resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009 INI) (para. 82).

[15] Constitutional Court, decision no. 102/2020. On this subject see L. VINCENZO, L'*evoluzione gurisprudenziale del "best interests of the child" tra Corte costituzionale e Corte europea dei diritti dell'uomo,* in *I Diritti dell'uomo: cronache e battaglie*, 2014, no. 2, pp. 343-362.

[16] From caring for his health, to his schooling, to protecting his property interests and his own inheritance rights.

[17] Entitled «Right to Respect for Private and Family Life» and which states: «1. Everyone has the right to respect for his or 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».

recognition of the *lien de filiation* with both[18] the members of the couple that wanted their birth and then actually took care of him/her[19].

However, according to the Constitutional Court, the interest of the child cannot be considered to automatically override any other counter-interest at stake[20].

Its «pre-eminence» indicates its importance, and its special «weight» in any balancing[21]; but also with respect to the interest of the child, it must be remembered that all «[t]he fundamental rights protected by the Constitution are in a relationship of mutual integration and it is therefore not possible to identify one of them that has the absolute prevalence over others»[22].

The interests of the child must then be balanced, in the light of the criterion of proportionality, with the legitimate purpose pursued by the system to discourage the use of surrogate motherhood, criminally sanctioned by the legislature. The United Civil Sections of the Court of Cassation are responsible for this purpose, when they deny the recognition of a foreign court order, in the part where it gives the status of parent to the member of the couple who participated in surrogate motherhood, without providing his/her gametes.

On the other hand, the Constitutional Court has acknowledged that the interests of the child can be balanced with the legitimate aim of discouraging recourse to surrogacy. It has also pointed out that the European Court of Human Rights itself does not impose the automatic recognition of any foreign judicial measures recognizing dual parenthood on the members of the couple who have resorted to surrogacy abroad. In such a case, however, it will be necessary to ensure the protection of the child's interests in the

[18] Constitutional Court, decision no. 33/2021, para. 5.4. *Considerato in diritto*: «Neither the interest of the child could be considered satisfied by the recognition of the relationship of filiation with only the "biological" parent, as happened in the case which gave rise to the judgment *a quo*, in which the original Canadian birth certificate, which designated as parent only P. F., had been transcribed in the Italian civil status registers. Where, in fact, the child lives and grows up within a nucleus composed of a couple of two persons who have not only shared and implemented the project of his conception, but have then continuously taken care of him, exercising in fact joint parental responsibility, it is clear that he will have a specific interest in the legal recognition of his relationship with both, and not only with the parent who has provided his gametes for the purpose of surrogacy» (translation mine).

[19] European Court of Human Rights, judgment of 26 June 2014, application no. 65192/11, *Mennesson* v *France*, para. 100; judgment of 16 July 2020, application no. 11288/18, *D.* v *France*, para. 64.

[20] The literature on the subject of «balancing the rights» is endless, but limiting our analysis to the case of medically assisted procreation see at least: S. FABIANELLI, F. MINNI, *Diritti e scienza medica: procreazione medicalmente assistita*, in A. MORRONE (ed.), *Il diritto costituzionale nella giurisprudenza*, Padova, 2020, pp. 200-214 which focus in detail on decisions nos. 151/2009, 162/2014, 96/2015, 221/2019; and even more specifically on the problem of the *status filiationis* in case of surrogacy see: A. CHIUSOLO, F. MINNI, *Maternità surrogata e* status filiationis: *quale bilanciamento tra interesse del minore e tutela dell'identità genetica?*, in A. MORRONE (ed.), *Il diritto costituzionale nella giurisprudenza,* cit., pp. 215-222 who examine Constitutional Court, decisions nos. 272/2017 and 237/2019.

[21] On this point see L. LENTI, *Note critiche in tema di interesse del minore*, in *Rivista di diritto civile*, 2016, no. 1, pp. 86-111, and E. LAMARQUE, *Prima i bambini. Il principio del* best interests of the child *nella prospettiva costituzionale*, Milano, 2016, p. 77 ff.

[22] Constitutional Court, judgment of 9 May 2013, no. 85 (translation mine).

recognition of his/her legal relationship also with the «intended» parent «through an effective and speedy adoption procedure, which recognizes the fullness of the filial bond between the adopter and the adoptee when the correspondence with the child's interests has been ascertained in concrete terms».

In this regard, the Court has pointed out that recourse to adoption in special cases[23], which has already been considered practicable by the Supreme Court, «constitutes a form of protection of the child's interests that is certainly significant, but still not fully adequate to the standard of constitutional and supranational principles»[24]. Adoption in special cases (so-called «non-legitimating adoption») does not, in fact, attribute parenthood to the adopter. Moreover, this form of adoption is still subject to the consent of the «biological» parent, which may also be lacking in the event of a relationship crisis. In conclusion, the legislator shall have to take charge of a discipline that ensures full protection of the child's interests, in a manner that is more in keeping with the peculiarities of the situation, which are quite different from those of «non-legitimating» adoption.

## 3. The decision of the Constitutional Court of 9 March 2021, no. 32.

It is precisely with decision no. 32/2021[25] that the Constitutional Court deepens its analysis of the institution of adoption in particular cases. According to the Padua's Tribunal, Arts. 8-9 of Law no. 40/2004 and 250 of the Civil Code do not allow the child born through heterologous fertilization, carried out by a same-sex couple[26], the attribution of the status of recognized child also by the intended mother, where there are no conditions to proceed to adoption in special cases even though the interest of the child has been judicially ascertained[27].

The interests of the child would be left unprotected by the lack of the consent of the biological-legal parent, which is an insuperable condition for adoption in special cases. Thus, there would be an unjustified disparity of treatment with respect to those born from heterosexual couples' (in deference to the conditions set forth in Law no. 40/2004, which permit their recognition), and with respect to those born from same-sex couples', who can have access to adoption in special cases by virtue of the biological mother's consent. According to the referring Court's view, in this case, the children born «would be destined forever to a status of children with only one parent, not recognizable by the other person who has intentionally contributed to the procreative project. They would find themselves in a legal situation inferior to that of all other children (including those born of incestuous

[23] Provided for by Art. 44(1)(d) of Law no. 184/1983.
[24] Constitutional Court, decision no. 33/2021, par. 5.8. *Considerato in diritto* (translation mine).
[25] Decision of 9 March 2021, no. 32.
[26] In the present case, two women.
[27] Therefore, in this case, the problem of the contrast between surrogacy and public order did not arise, nor the problem of balancing the rights of the child and the public need to contrast surrogacy.

relationships), for the sole reason of the sexual orientation of the persons who shared the choice to procreate through recourse to the above-mentioned techniques»[28].

In the present case, both mothers exercised parental functions jointly for a sufficiently long period of time to create a community of affection and care with their daughters. However, the biological mother's decision to sever such a bond with the intentional mother has also severed the bond between the latter and her daughters, making evident a gap in protection. In fact, even in the presence of an effective filial relationship, consolidated in the practice of daily life with the same intentional mother, no instrument can be used to enforce the rights of the children – such as maintenance, care, education, succession, but also the continuity and comfort of shared habits – with the intentional mother.

This issue reveals in a tangible manner the insufficiency of recourse to adoption in particular cases, which is «impracticable precisely in the most delicate situations for the well-being of the child, such as, undoubtedly, the crisis of the couple and the denial of consent by the biological/legal parent»[29]. So, it is clear that those born as a result of heterologous fertilization practiced by two women are in a worse condition than all other children, only because of the sexual orientation of the people who have put in place the procreative project, being destined to remain hinged in the relationship with a single parent[30].

The Constitutional Court, also in this case, considers an injury to the legal sphere of the child incompatible with the constitutional provisions. Nevertheless, it considers that it cannot intervene directly with a declaration of unconstitutionality, since no solution is imposed as constitutionally obligatory, but, on the contrary, there would seem to be a wide range of possible options, all compatible with the Constitution.

## 4. The ordinance of the Supreme Court of 21 January 2022, no. 1842.

With the interlocutory ordinance of 21 January 2022, no. 1842, the First Civil Section of the Court of Cassation has questioned the need for a new ruling of the United Civil Sections following the decision of the Constitutional Court, since the balance between the protection of the child and the limits of public order in the recognition of filiation relationships with the intentional parent with particular regard to surrogacy[31].

[28] Constitutional Court, decision no. 32/2021, para. 1. *Considerato in diritto* (translation mine).

[29] *Ivi*, para. 2.4.1.3. *Considerato in diritto* (translation mine).

[30] The same Court recognizes that a similar «*capitis deminutio* perpetual and irremediable», affects the right to formal recognition of their *status filiationis* in a manner substantially similar to what happened in the past for the children born from incestuous relationships (see on this point Constitutional Court, decision of 28 November 2002, no. 494).

[31] The United Civil Sections, decision of 8 May 2019, no. 12193.

In order to identify possible solutions adequate to respond to the lack of protection highlighted by the Constitutional Judge, the First Section begins its reasoning by focusing its analysis on the institutions of the deliberation of foreign judgments and the transcription of civil status documents. It points out that the deliberation, of course, does not transpose the surrogacy agreement into domestic law (nor does it legitimize this practice in Italy) but, rather, «the act of assumption of parental responsibility by the person who has decided to be involved, by giving his consent, in the decision of his partner to use the technique of medically assisted procreation in question»[32].

It is not a question of a claimed right to parenthood, but only of the minor's interest to see the recognition of that bundle of duties of both parents who have shared the procreative project. Only in this way would it be possible to give that essential continuity to the status of the child – and to the related rights – already recognized in the system where he/she was born, without questioning the illegality of the practice of surrogacy in our country.

The Court identifies, however, a critical issue of the existing instruments to achieve the recognition of filiation (*i.e.* transcription and deliberation): it is the (tendentially) automatic character that these instruments have gradually acquired «as a result of a greater internationalization of both economic and personal relationships and the increased mutuality of recognition that state systems are gradually increasing»[33], while a sensitive issue such as the one under consideration would require a «case by case» assessment. The assessment of compatibility with public order must therefore not be made in the abstract, but – albeit in the light of general criteria – with reference to individual concrete cases. This assessment must be guided by the criteria of reasonableness and proportionality between the constitutional values in potential conflict, without an *a priori* definition of the prevalence of one interest over the other (although «not disregarding the principle reiterated by the Constitutional Court of the pre-eminence of the interests of the child declined in the direction of the constant search for the best solution in practice to be preferred»[34]).

The most important of the values protected by the criminal prohibition of surrogacy identified by constitutional and legitimacy jurisprudence is essentially the dignity of the pregnant woman (followed by the preservation of the institution of adoption). In the first place, it is at least plausible that the woman who agrees to carry a pregnancy to term for others is in a condition of subjection and that her dignity is not impaired unless such a choice has been free, conscious, revocable until the birth of the child and independent of economic compensation. In case of lack of such guarantees in the country where the surrogacy takes place it is likely to assume that the dignity of the woman is not respected,

[32] Court of Cassation, Sec. I, ord. no. 1842/2022 (translation mine).
[33] *Ibidem* (translation mine).
[34] *Ibidem* (translation mine).

and therefore the protection of this value in our system prevents the deliberation and the transcription of the act of recognition of the filiation relationship with the intended parent. Of course, in a perspective of evaluation of the specifics of each case, it is important to always find a solution that respects the interests of the child. If, on the contrary, these conditions were present, an *a priori* denial of the recognition of the foreign measure certifying the *status filiationis* would seem illegitimate, since it is not necessary to protect the dignity of the pregnant woman already guaranteed by the foreign law.

In a nutshell, the First Section asks whether it is possible to entrust to the individual judge invested with the request for deliberation the assessment of the conflict between the interest in the recognition of parenthood and the limits of international public order. This assessment is based on the criteria of relevance, proportionality and reasonableness stated by the Constitutional Court in the search for the solution better protecting the interests of the child. More specifically, the question is whether the criteria of free and informed consent, not determined by the financial situation of the woman, the revocability of consent until the birth of the child, as well as the need for a genetic contribution to procreation by one of the two parents[35], can be considered valid guidelines for the decision of the judge in cases submitted to his examination.

But there is more: the Court of Cassation wonders whether «it derives also from the law of the European Union a limit to the possibility of not recognizing the *status filiationis* acquired abroad by a minor Italian citizen born from the gestation for others legally practiced in the State of birth insofar as such disallowance leads to the loss of the status and limits his freedom of movement and expression of his family ties in the territory of the Union»[36].

Also, in the perspective of the law of the European Union, the interest of the minor in the protection of his/her inviolable rights to personal identity and private and family life takes on greater importance with reference to the specific importance in the European Union law[37] of the preservation of personal statuses and freedom of movement and residence and the close correlation of these principles with the expression of family life as the Court of Justice of the European Union recently affirmed[38].

## 5. The judgment of the Court of Justice of the European Union of 14 December 2021, case C-490/20.

[35] To avoid possible circumvention of the institution of adoption.

[36] Court of Cassation, Sec. I, ord. no. 1842/2022 (translation mine).

[37] Art. 4(2) TEU; Arts. 20-21 TFEU; Arts. 7, 24 and 25 of the Charter of Fundamental Rights of the Union.

[38] Court of Justice (Grand Chamber), judgment of 14 December 2021, case C-490/20, *VMA* v *Stolichna obshtina, rayon Pancharevo*, EU:C:2021:1008.

In its judgment, delivered in Grand Chamber, the Court interpreted Art. 4(2) TEU, Arts. 20-21 TFEU, Arts. 7, 24 and 25 Charter of Fundamental Rights of the Union, as meaning that, in the case of a child EU citizen, whose birth certificate was issued by the competent authorities of the host Member State designates two persons as their parents, the Member State of their citizenship, is obliged: a) to issue them with an identity card or passport without requiring the prior issue of a birth certificate by its national authorities; b) to recognize, like any other Member State, the document issued by the host Member State allowing the child to exercise, with each parent, his/her right to move and reside freely within the territory of the Member States (thus going beyond the explicit recognition of the parental relationship with both parents)[39].

In order to reach that conclusion, the Court recalls first of all that, to enable nationals of the Member States to exercise their right to move and reside freely within the territory of the Member States, which is conferred on every citizen of the Union by Art. 21(1) TFEU, Directive 2004/38[40] requires the Member States, in accordance with their

[39] The case involved: V.M.A., a Bulgarian citizen, and K.D.K. have resided in Spain since 2015 and married in 2018. Their daughter, S.D.K.A., was born in 2019 in Spain. The birth certificate of the daughter, issued by the Spanish authorities, mentions the two mothers as her parents.

V.M.A. requested the Sofia City Hall to issue her a birth certificate for S.D.K.A., since such a certificate issued by the Bulgarian authorities was necessary in order to obtain a Bulgarian identity document. In support of her application, V.M.A. submitted a legalized and notarized translation into Bulgarian language of the extract from the Spanish civil status register concerning the birth certificate of S.D.K.A.

The Municipality of Sofia invited V.M.A. to provide evidence regarding the filiation of S.D.K.A., in relation to the identity of his biological mother. In fact, the model birth certificate in force in Bulgaria provides only one box for the «mother», and another for the «father», and only one name can appear in each of these boxes.

Since V.M.A. considered that she was not obliged to provide the requested information, the Sofia Municipality refused to issue the birth certificate in view of the lack of information regarding the identity of the biological mother of the child concerned and in view of the fact that the mentioning of two female parents in a birth certificate was contrary to Bulgarian public order, which does not authorize marriage between two persons of the same sex.

V.M.A. appealed against this rejection decision before the *Administrativen sad Sofia-grad* (Administrative Court of Sofia, Bulgaria), the referring court.

The latter asks whether the refusal by the Bulgarian authorities to register the birth of a Bulgarian national, which took place in another Member State and was attested by a birth certificate designating two mothers, issued in the latter Member State, infringes the rights conferred on that national by Arts. 20-21 TFEU and Arts. 7, 24 and 45 of the Charter of Fundamental Rights of the European Union. Indeed, such a refusal could make it more difficult to issue a Bulgarian identity document and, consequently, hinder the exercise by the child of his right to freedom of movement and thus the full enjoyment of his rights as a citizen of the Union.

This court has therefore decided to ask the Court about the interpretation of Art. 4(2) TEU, Arts. 20-21 TFEU and Arts. 7, 24 and 45 of the Charter. In essence, he asks whether those provisions require a Member State to issue a birth certificate, for the purpose of obtaining an identity document, for a child who is a national of that Member State, whose birth in another Member State is attested by a birth certificate drawn up by the authorities of that other Member State in accordance with its national law, and which designates, as the child's mother, a national of the first of those Member States and his wife, without specifying which of the two women gave birth to the child.

[40] Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC,

legislation, to issue to their nationals an identity card or passport indicating their nationality.

Therefore, since in the present case the child had Bulgarian citizenship, the Bulgarian authorities were obliged to issue her with a Bulgarian identity card or passport, indicating her surname as it results from the birth certificate issued by the Spanish authorities (where the ART took place), regardless of the issuance of a new birth certificate.

That document, alone or in combination with a document issued by the host Member State, must enable the minor to exercise his/her right to free movement with each parent (in this case, with each of their two mothers) whose parental status has been established by the host Member State during a stay in accordance with Directive 2004/38. The rights conferred on nationals of the Member States by Art. 21(1) TFEU include the right to lead a normal family life both in the host Member State and in the Member State of which they are nationals, on their return to that Member State, and to benefit from the presence there of their family members at their side. Since the Spanish authorities have legally established the existence of a filial relationship, biological or legal, between the minor and their two parents, as attested by the birth certificate issued for the minor, both of them, as parents of a Union citizen who is a minor and for whom they have actual custody, must therefore be recognized by all Member States, pursuant to Art. 21 TFEU and Directive 2004/38, as having the right to accompany the latter in the exercise of their rights.

It follows that Member States are obliged to recognize this filiation relationship in order to allow the child to exercise, together with each of their two parents, his/her right to free movement[41].

## 6. Some considerations.

What emerges is that the legal status of the child must necessarily have a minimum recognition in all Member States in order to grants the rights guaranteed by EU law. With reference to freedom of movement and residence, the child must have his/her parental relationship recognized with those who have already been recognized as parents by another Member State, regardless of the existence of national public order limits existing in each State. In fact, the Court has stated[42] that the concept of «public order», as a justification for a derogation from a fundamental freedom, must be understood in a

68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

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

[42] Court of Justice (Grand Chamber), judgment of 5 June 2018, case C-673/16, *Coman and Others*, EU:C:2018:385, para. 44.

restrictive sense, and therefore its scope cannot be determined unilaterally by each Member State without the control of the institutions of the Union. As Advocate General Kokott also pointed out[43], this does not violate the national identity or threaten the public order of that Member State, since such an obligation (of recognition) does not require the Member State of which the child concerned is a national to provide in its national law for same-sex parenthood or to recognize, for purposes other than the exercise of the rights which that child derives from Union law, the filial relationship between that child and the persons indicated as their parents in the birth certificate issued by the authorities of the host Member State. Thus, it seems that relationships resulting from parental projects based not (only) on biological or genetic ties are to be considered existing and «valid», even if only for the purposes of EU law.

However, although this extension of protection can be seen as positive, it does not seem sufficient to affirm that, as of today, full and effective protection (*i.e.: homogeneous*) for minors is effectively guaranteed throughout the territory of the EU. In fact, 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.

Perhaps the best tools to guarantee the legal status of those born through ART could be the classic tools of international law, namely the negotiation at the multilateral level of conventions that approximate the legislation of states on this matter[44].

It is worth noting, however, that on the level of European law seems to exist an instrument abstractly suitable to respond to this end, (albeit with the inevitable adjustments of the case): the «Regulation (EU) 2016/1191 promoting the free movement of citizens by simplifying the requirements for the presentation of certain public documents in the European Union». Through the regulation, one could in fact hypothesize the creation of a common European civil status framework, thus guaranteeing a legal status for all citizens, including children born from ART, with equal guarantees with respect to all parental relationships already recognized by (at least) one Member State[45]. In this way, there would be a potential positive impact not only on the freedom of movement of minors, but also on the enjoyment of their fundamental rights, responding to all those critical issues that still remain in the current legal framework. This could represent an appropriate opportunity to reinforce the principles and values of the European Union, especially on particularly sensitive issues that deserve a response that is as homogeneous as possible, at least within the European Union.

[43] Advocate General Kokott, opinion delivered on 15 April 2021, case C-490/20, paras. 150-151.

[44] Thus, see also Court of Cassation, Sec. I, ordinance no. 1842/2022.

[45] Of course, this remains only a preliminary suggestion, which of course cannot be developed and deepened here. But rather one that arose precisely from the discussion at the conference «*Identities on the move – Documents cross borders*» where this work was discussed.

ABSTRACT: The essay aims to deepen the theme of the circulation of the legal status of minors, with reference to those conceived using ART (artificial reproductive technologies). It will focus on the prejudice to the rights of minors and the downgrading of their status caused by the lack of homogeneous recognition of the phenomena of social parenthood in EU countries. The analysis will start with two pronouncements of the Italian Constitutional Court (nos. 32 and 33 of 2021) that have dealt with the recognition of the parental relationship with the intentional parents in two cases of ART carried out abroad, where the practices are prohibited in our country. The first case involved the practice of heterologous fertilization carried out by a female couple and the second involved surrogacy. Among the many issues addressed, it is particularly interesting that it was found impossible to recognize the foreign provision of the filiation relationship due to the existence of public order obstacles presented by the criminal prohibition of surrogacy in Italy. However, also due to the lack of other adequate instruments of recognition under domestic law, the Court finds a void of protection that, even if «intolerable», must be resolved by the national legislator. In other words, the Constitutional judge notes that the «best interest of the child» cannot be automatically prejudiced by the other interests at stake, but the most appropriate balance is left to the exercise of legislative discretion.

It will then be shown how an attempt has been made at a European level to respond to the same problems. In its recent judgment (14 December 2021) the Court of Justice ruled that Member States (MS) are required to recognize the filiation relationship with both parents (even if the parental relationship with the intended parent is not recognized by the MS) at least to allow the child to exercise, together with each of their two parents, their right to free movement. On the other hand, both parents must have a document authorizing them to travel with that child. Indeed, while it is true that the status of persons falls within the competence of the MS, they are free to provide or not, in their national law, for same-sex marriage and social parenthood. However, in exercising this competence, each Member State must respect Union law and the provisions of the Treaty relating to freedom of movement and residence for citizens of the Union, recognizing, to this end, the status of persons established in another Member State in accordance with the law of that State.

In conclusion, the paper will show how Regulation (EU) 2016/1191 can eventually hypothesize an alternative instrument such as common European civil status framework to recognize a «unique» legal status that thus best protects the best interest of the child in a broader context.

KEYWORDS: *Status filiationis*; best interest of the child; downgrading; Italian Constitutional case law; social parenthood.