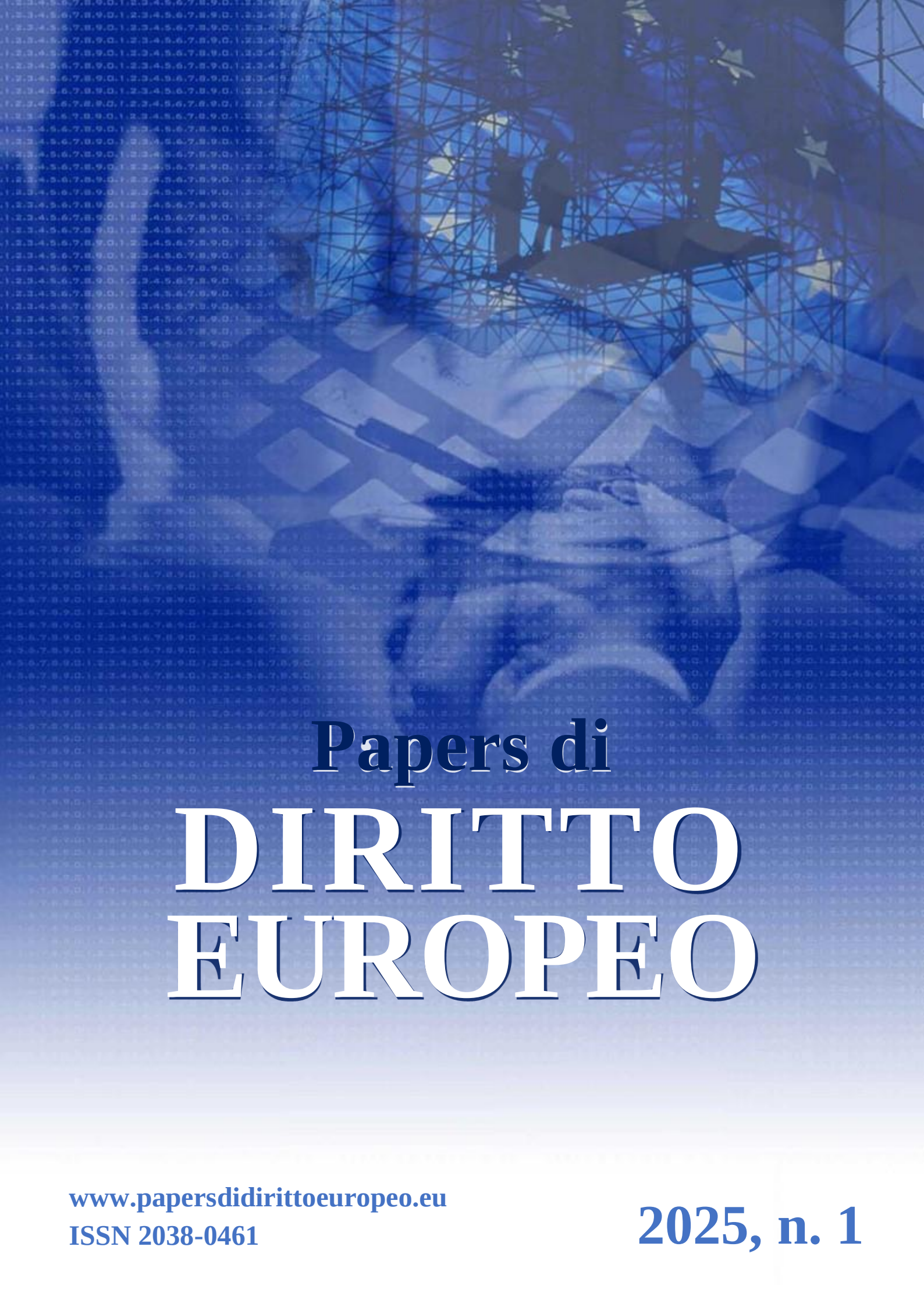

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INDICE

Surrogacy and circulation of family relationships: which role for the best interests of the child?

Ilaria Queirolo[*], Francesca Maoli[**]

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1. Access to alternative reproductive technologies abroad and recognition of the parent-child relationship in Italy: different perspectives on the best interests of the child.

In the contemporary context, the concept of «family» has undoubtedly become complex and heterogenous: we are witnessing a plurality of social formations that the legal system traces back to the family and to which protection is recognised – or at least invoked[1]. These pluralities of phenomena include the use of new ways of accessing parenthood, such as medically assisted procreation and surrogacy[2]. In those cases, the position of the child should assume the utmost relevance: the principle of the child's best interests, as transversal to all situations in which a vulnerable person of minor age is involved or affected, should be used as a main parameter to any decision-making process[3].

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[1] K. DUDEN, D. WIEDEMANN (eds.), *Changing Families, Changing Family Law in Europe*, Antwerp-Oxford-New York, 2024.

[2] This is a phenomenon of no small importance: according to the Council of Europe, already in 2019 it was estimated that more than 8 million children were born thanks to assisted reproductive technologies, and in particular through the donation of genetic material: Parliamentary Assembly of the Council of Europe, Recommendation 2156 (2019), *Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children*, 12 April 2019, available online.

[3] Among the numerous contributions on the principle of the child's best interests, see E. DI NAPOLI, *La dimensione internazionale e sovranazionale del superiore interesse della persona minore d'età*, in E. CECCHERINI, F. BRUNETTA D'USSEAUX (edited by), *Best interest(s) of the child: una delicata e controversa declinazione*, Napoli, 2023, pp. 67-89.

Is the best interests of the child effectively assumed as a main parameter? What is certain is that the variety of alternative reproductive technology is also reflected in the variety of legislative policy choices that characterise the different national systems, which notoriously adhere to (very) restrictive, permissive or even neutral approaches when it comes to *i)* granting access to those technologies within their territories, or *ii)* recognizing parent-child relationships created abroad.

The present contribution's main focus lies on surrogacy, under the perspective of the Italian legal system. Hence, the current position of the Italian legislation and case law is taken into consideration in examining the role played by the best interests of the child's principle. At the same time, it is well-known that the topic has necessarily assumed a supra-national perspective, which interacts with the national one. However, as it will be seen, this contamination has not yet conduced to a comprehensive inclusion of the principle of the child's best interests in the decision-making processes on parenthood matters.

In Italy, Law No 40 of 19 February 2004[4] regulates access to medically assisted procreation (PMA) and surrogacy. With regard to the former, the current regulatory framework is the result of important interventions by the Constitutional Court, which opened the way to heterologous fertilisation in cases where a pathology has been diagnosed as causing absolute and irreversible sterility or infertility[5]. The Court also sanctioned the constitutional illegitimacy of the prohibition of medically assisted reproduction for couples who are carriers of serious hereditary genetic pathologies liable to transmit to their unborn child significant anomalies or malformations and meeting the criteria of gravity established for access to abortion[6]. These interventions follow the judgment of the European Court of Human Rights (ECtHR) on the *Costa and Pavan* v. *Italy* case[7], in which Italy was found to have violated Art. 8 ECHR[8] when Law 40/2004 allowed access to homologous PMA techniques only to fertile and infertile couples. In any case, PMA remains accessible only to «couples of different sexes, married or cohabiting, of potentially fertile age, both living»[9].

On the other hand, Art. 12(6) of the Law 40/2004 sanctions with imprisonment from three months to two years, as well as with a fine ranging from six hundred thousand to

[4] Law 19 February 2004, n. 40, Norme in materia di procreazione medicalmente assistita.

[5] Corte costituzionale, judgment of 10 June 2014, n. 162.

[6] Corte costituzionale, judgment of 14 March 2015, n. 96.

[7] ECtHR, judgment of 28 August 2021, application n. 54270/10, *Costa and Pavan* v. *Italy*.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and entered into force on 3 September 1953, ETS No 005, available *online*.

[9] Art. 5 of the Law 40/2004. It is worth mentioning that the Presidential Decree (Decreto del Presidente del Consiglio dei Ministri) of 17 January 2017 has included PMA among the services granted by the National Health Service. The Decree of the Ministry of Health of 20 January 2024 has approved the «Guidelines containing indications of medically assisted procreation procedures and techniques», providing operational details on PMA services, which are operative from 1 January 2025 after the approval of a separate Decree of 25 November 2024 establishing the official tariffs.

one million euro, «anyone who carries out, organises or publicises the commercialisation of gametes or embryos or maternity surrogacy». Recently, an amendment has been introduced to the aforementioned provision, according to which «If the facts referred to in the previous sentence, with reference to surrogacy, are committed abroad, the Italian citizen shall be punished according to Italian law»[10]. The sanctions include fines ranging from EUR 600,000 to EUR 1 million and imprisonment for up to two years.

The restrictive attitude of the national legal system fuels what is known as «procreative tourism», whereby would-be parents decide to travel abroad to countries where surrogacy is permitted, naturally favouring those legal systems in which the intended parents are also considered to all intents and purposes – either automatically or by judicial ascertainment – parents of the newborn child. The problems arise when parents ask for the recognition in Italy of the parental relationship established abroad, on which the attitude of the Italian courts (in the absence of *ad hoc* legislation) has evolved over time, but is still particularly conservative.

European institutions seem to take a different view: other than enhancing the recognition of parent-child relationships for the sole purposes of the exercise of EU free movement rights[11], the Commission has launched a proposal for a EU Regulation on the recognition of parenthood between member States[12]. The initiative is in line with the approach that characterises the exercise of EU competences in the field of civil judicial cooperation, in the direction of establishing, maintaining and developing an area of freedom and justice in which the free movement of persons, access to judicial protection and full respect for fundamental rights are guaranteed[13]. The regulation, in essence, aims to contribute to the realisation of the now well-known statement - with important political

[10] On the subject M. PELLISSERO, *Surrogazione di maternità: la pretesa di un potere punitivo universale*, in F. PESCE (edited by), *La surrogazione di maternità nel prisma del diritto*, Napoli, 2022, pp. 139-154, available *online*.

[11] Reference is made to the landmark decision of the Court of Justice, judgment of 14 December 2021, case C-490/20, *V.M.A.* v. *Stolichna obshtina, rayon "Pancharevo"*, EU:C:2021:296.

[12] 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, COM(2022) 695 final of 7 December 2022. Commenting on the proposal, among others, C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The Marburg Group's Comments on the European Commission's Parenthood Proposal*, Cambridge-Antwerp-Chicago, 2024; S. ARMELLINI, B. BAREL, *La proposta di regolamento europeo in materia di filiazione e il problema del riconoscimento dello* status filiationis *in situazioni transfrontaliere*, in this *Journal*, 2023, n. 2, pp. 1-39, available *online*; M.C. BARUFFI, *La proposta di Regolamento UE sulla filiazione: un superamento dei diritti derivanti dalla libera circolazione*, in *Famiglia e diritto*, 2023, pp. 535-549; S. DE VIDO, *Il riconoscimento delle decisioni in materia di filiazione nella proposta di Regolamento del Consiglio del 2022: oltre Pancharevo verso un ordine pubblico "rafforzato" dell'Unione europea*, in *Eurojus*, 2023, n. 1, pp. 35-57, available *online*; L. VÁLKOVÁ, *The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood*, in *Rivista di diritto internazionale privato e processuale*, 2022, n. 4, pp. 854-899. See also the focus *La proposta di regolamento europeo in materia di filiazione (COM(2022) 695 final, del 7 dicembre 2022)*, in *Freedom, Security and Justice: European Legal Studies*, 2024, n. 2, pp. 20-190, available *online*.

[13] For an overview on EU private international law in family matters I. QUEIROLO, *Profili di diritto europeo*, in S. PATTI (a cura di), *Il nuovo diritto della famiglia*, Torino, 2024, pp. 35-92.

significance - of the President of the European Commission, Ursula von der Leyen: «If you are parent in a country, you are parent in every country»[14]. A stance that has characterised the European Commission's approach to the proposed piece of legislation, which has inevitably awakened the concerns of some Member States[15].

This complex picture is completed by the positions expressed by the European Court of Human Rights, which has ruled on individual complaints lodged against the contracting States for violations of Art. 8 ECHR, placing the emphasis on the child, understood as the most vulnerable subject in that kind of situations and as such most in need of protection. In fact, the right to respect for private and family life requires a careful consideration on the individual positions of the persons involved, in the perspective of family relations and in particular of the *status filiationis* that has arisen as a result of the use of surrogacy or medically assisted procreation techniques. However, as it will be seen, providing for an adequate protection does not necessarily mean guaranteeing the automatic recognition of parenthood: it is sufficient for States to provide adequate mechanisms for the protection of the family relationship[16].

The perspective adopted by the ECtHR is focused on the central position that should be guaranteed to the best interests of the child. Indeed, the latter is undoubtedly the subject which is most at risk when deciding on sensitive issues like the one under examination. Policy considerations on the possibility to allow or prohibit the constitution of parenthood through alternative procreation techniques should indeed be based on the best interests of the children involved. At the same time, regardless of the position adopted by each legal system on the matters, the same principle should inspire States in deciding their approach in recognizing forms of parenthood constituted abroad. This has been highlighted by the so called «Verona Principles» developed by the International Social Services (ISS), whose preamble states that «All States have an obligation to uphold the rights of children born through surrogacy. The Principles are intended to apply regardless of whether any form of surrogacy is permitted or prohibited in the corresponding State of birth and/or the State of destination, or any other implicated State»[17]. Although not legally binding, but rather having a soft law value, the Verona Principles highlight the fact that «the

[14] Statement made on the occasion of the State of the Union Address on 16 September 2020, as set out in COM(2022) 695 final, p. 1.

[15] See G. BIAGIONI, *Il parere motivato del Senato italiano sulla proposta di regolamento UE in tema di filiazione*, in *Quaderni di SIDIBlog*, 2023, pp. 443-457, available *online*.

[16] Among the numerous judgments of the ECtHR – which will be covered in detail by paragraph 3 below – see ECtHR, judgments of 26 June 2014, application n. 65192/11, *Mennesson* v. *France*; 26 June 2014, application n. 65941/11, *Labassee* v. France; 24 January 2017 (Grand Chamber), application n. 25358/12, *Paradiso and Campanelli* v. *Italy*; 16 July 2020, application n. 11288/18, *D.* v. *France*; 30 May 2023, application n. 10810/20, *Bonzano and Others* v. *Italy*; 30 May 2023, application n. 59054/19, *Modanese and Others* v. *Italy*; 31 August 2023, application n. 47196/21, *C.* v. *Italy*.

[17] International Social Service, *Principles for the protection of the rights of the child born through surrogacy (Verona principles)*, May 2021, available *online*.

perspective of the rights of children born from surrogacy is often overshadowed», if compared with all the other interests and considerations surrounding the topic.

2. The 'Italian way': the position of the *Corte di cassazione*.

As mentioned, the position of Italian law in respect to surrogacy, even when performed abroad, is very strict and oriented towards the prohibition of the practice, which – in the words of the Constitutional court – «intolerably offends the dignity of women and deeply undermines human relations»[18]. The latest legislative reforms, criminalizing surrogacy even when performed abroad, confirm the attitude of the legal system, but may also add challenges upon the recognition in Italy of the legal status of children[19].

The coherence of Italian law and practice is reflected in the attitude of the case law in civil matters: ruling on the effects of parent-child relationships established abroad through surrogacy, the Italian case law has concluded that the biological parent alone may usefully obtain the transcription of the foreign birth certificate by the civil registrar[20]. On the contrary, the recognition of the parental bond with the intended (not genetic) parent tends to be denied on the grounds of public policy. In order to reconstitute his or her parental bond in Italy, the intended parent is given the possibility of applying to the Italian judicial authorities for «adoption in particular cases», which is an institute provided by Art. 44 (d) of the Law No 184/1983. In the Judgment No 38162 of 2022, the Italian *Corte*

[18] Corte costituzionale, judgment of 22 november 2017, n. 272, par. 4.2. Indeed, in this decision the Cort had to evaluate on the balance between the principle of *favor veritatis*, fostering the biological truth on who is the mother of a child, and the principle of the best interests of the child, which may prevail over the latter and may sustain the maintenance of parenthood against the absence of a biological link. The Court stated that the biological truth of procreation constitutes «an essential component» of the child's personal identity, but it does not necessarily override any other consideration: it is up to the judge to assess the best solution in the specific case, keeping in mind the best interests of the child, but also «the consideration of the high degree of disvalue that our legal system attaches to surrogacy of motherhood, which is prohibited by a special criminal provision». Comments the decision A. SCHILLACI, *Oltre la "rigida alternativa" tra vero e falso: identità personale, verità biologica e interesse del minore nella sentenza n. 272/2017 della Corte costituzionale*, in *Giurisprudenza costituzionale*, 2018, pp. 385-393.

[19] Broadly on the topic M. GIACOMINI, M. VIVIRITO PELLEGRINO, *Recognition of a status acquired abroad: Italy*, in *Cuadernos de derecho transnacional*, 2022, n. 1, pp. 1044-1061.

[20] On the subject, M.C. BARUFFI, *Gli effetti della maternità surrogata al vaglio della Corte di Cassazione e altre corti*, in *Rivista di diritto internazionale privato e processuale*, 2020, pp. 290-324; S. TONOLO, *Lo* status filiationis *da maternità surrogata tra ordine pubblico e adattamento delle norme in tema di adozione*, in *GenIUS*, 2019, n. 2, pp. 1-9, available *online*; F. MARONGIU BUONAIUTI, *Il riconoscimento della filiazione derivante da maternità surrogata – ovvero fecondazione eterologa* sui generis *– e la riscrittura del limite dell'ordine pubblico da parte della Corte di cassazione, o del diritto del minore ad avere due madri (e nessun padre)*, in E. TRIGGIANI *et al.* (a cura di), *Dialoghi con Ugo Villani*, Bari, 2017, pp. 1141-1150.

di cassazione (Sezioni Unite) has set a milestone on the issue[21], confirming the conclusions of a previous decision of 2019[22].

In its most recent judgment, the Court has emphasised the absence, in the Italian legal system, of any legal provision governing the status of a child born as a result of surrogacy practices: in fact, the proposed solution is the product of a hermeneutic activity at judicial level, based on the use of an instrument (adoption in particular cases) not originally intended to apply to situations of this kind. On the other hand, «once the child is born, there is a need to protect his or her fundamental right to the continuity of the affective relationship with both parties, who have shared the decision to bring him or her into the world, without the procreative technique being an obstacle»[23].

Thus, by confirming that the recognition of parenthood with respect to the intended parent is irretrievably contrary to international public policy, recourse to adoption in particular cases appears to be the only suitable instrument to protect a *de facto* family bond that has nevertheless been consolidated and needs to be protected by the legal system[24].

In confirming the (provisional) suitability of adoption in particular cases, the *Corte di cassazione* had to overcome some obstacles and provide some clarifications. In fact, the Italian Constitutional Court had already observed that recourse to this form of adoption constituted «a form of protection of the child's interests that is certainly significant, but still not entirely adequate to the standard of constitutional and supranational principles»[25]. At that time, it was argued that adoption in particular cases could be inadequate because *(i)* it required an overly lengthy procedure; *(ii)* it did not establish a full parenthood relationship, as well as a kinship relationship between the adoptee and the adopter's relatives, and *(iii)* it required the consent of the biological parent, which could bring some risks especially in situations of crisis of the couple.

However, the *Corte di cassazione* did not consider those drawbacks to be an obstacle. Firstly, it has been observed that the aforementioned inadequacies had been partially resolved by the subsequent intervention of the Constitutional Court itself, as a

[21] Corte di cassazione, Sezioni Unite, judgment of 30 December 2022, n. 38162, commented by R. CALVIGIONI, *Le sezioni unite della Cassazione tra ordine pubblico e tutela del minore. Il ruolo dell'ufficiale di stato civile nella trascrizione dell'atto di nascita formato all'estero*, in this *Journal*, 2023, n. 1, pp. 1-22, available *online*.

[22] Corte di cassazione, Sezioni Unite, judgment of 8 May 2019, n. 12193.

[23] Corte di cassazione, Sezioni Unite, judgment 38162/2022, cit. Translations provided by the Author.

[24] On adoption in particular cases see A. GIUSTI, *L'adozione di minori di età in casi particolari*, in *Trattato di diritto di famiglia*, diretto da G. BONILINI, vol. IV, *La filiazione e l'adozione*, Torino, 2016, p. 3967.

[25] Corte costituzionale, judgment of 9 March 2021, n. 33, commented by F. RIMOLI, *Diritto all'omogenitorialità,* best interests of the child *e famiglia 'naturale': un problema ancora irrisolto*, in *Il Giurisprudenza costituzionale*, 2021, I, pp. 339-357; V. TIGANO, *Il delitto di surrogazione di maternità come limite di ordine pubblico al riconoscimento dei provvedimenti stranieri in materia di* status filiationis, in *Rivista italiana di diritto e procedura penale*, 2021, pp. 1043-1070.

result of which even the adoption of a child in particular cases produces full effects and establishes kinship relations between the adoptee and the adopter's relatives, exactly as ordinary adoption[26]. Secondly, the problem concerning the necessary consent of the biological parent, provided for by Art. 46 of Law No 184/1983, had been solved by a restrictive and child-oriented interpretation by case-law, according to which the dissent to adoption should only be taken into account if expressed by a parent who does actually exercise parental responsibility over the child and enjoys an effective emotional relationship with the latter[27].

In light of these findings, the *Corte di cassazione* has confirmed the applicability of adoption in particular cases in order to reconstitute a family relationship between the intended parent and the child born abroad through surrogacy techniques. At the same time, the judgment very clearly highlights the need for intervention by the lawmaker, confirming that this solution cannot in any case be considered definitive and suitable for guaranteeing the full satisfaction of the protection needs of the children involved[28]. As appropriately observed, the circumstance that adoption cannot be activated through the initiative of the adoptee, who does not have the legal means to demand the establishment of the status, is particularly critical. Consequently, the establishment of parenthood will always depend on the will of the adult: a circumstance that stands in contradiction to the need to give central importance to the child's position, rights and interests[29].

On the other hand, while it is true that adoption in particular cases does not appear to be the solution that best serves the best interests of the child, it is equally true that the principle cited above does not make it possible to overcome the legal system's absolute disvalue of surrogacy practices. The prohibition of the latter, which is also criminally sanctioned in Italy, is a principle of international public order, a circumstance that prevents full recognition of the relationship established abroad with the non-biological parent. As emphasised by the Supreme Court, «the interests of the child certainly cannot represent a tyrant right in relation to other subjective situations that are constitutionally

[26] The reference is to Corte costituzionale, judgment of 28 March 2022, n. 79.

[27] Corte di cassazione, judgment of 21 September 2015, n. 18575; Corte di cassazione, judgment of 16 July 2018, n. 18827.

[28] On this subject, E.A. EMILIOZZI, *La proposta di regolamento in materia di filiazione e la sua incidenza sul diritto di famiglia italiano*, in *Freedom, Security and Justice: European legal Studies*, 2024, n. 2, pp. 138-162, available *online*.

[29] On the criticalities surrounding adoption in particular cases, see E. BAZZO, *I figli nati da maternità surrogata: questioni giuridiche aperte*, study No 102-2022/A, 2022, commissioned by the Consiglio Nazionale del Notariato, available *online*.

recognised or protected, which together constitute an expression of the dignity of the person»[30].

3. The human rights perspective: the ECtHR's case law.

As clearly emerging from its case-law, the ECtHR takes the perspective of the child to assess whether there has been a violation of Art. 8 ECHR by the contracting States called upon to recognise a parenthood relationship established abroad. The Court tried to establish the standards of protection that the contracting States must respect, albeit within a certain margin of discretion[31]. On this basis, there is a need to recognise parenthood if there is a genuine biological bond. Where, on the other hand, this link is lacking, it will be necessary to proceed with the protection of the relationship only if it takes the form of an emotional link and thus a «family life» has actually been consolidated.

One of the first cases brought to the attention of the ECtHR resulted in the 'twin' judgments *Mennesson* v. *France* and *Labassée* v. *France*[32]. In both situations, a married heterosexual couple had resorted to surrogacy in the United States, where their children were conceived with the use of an oocyte from an anonymous donor, implanted in the uterus of another woman, and the husband's gametes. There was, therefore, a genetic link with the intended father. The Court established that France had the duty to recognise the status legitimately constituted abroad by virtue of the right to respect for the private life of the child involved. At the same time, the Court recognised that States hold a wide

[30] Corte di cassazione, Sezioni Unite, judgment 38162/2022, cit.

[31] On the subject R. SABATO, *Riconoscimento della filiazione e tutela del superiore interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo*, in *La cittadinanza europea*, 2024, n. 1, pp. 7-12; A. MARICONDA, *Lo "*status filiationis*" del nato da maternità surrogata nel prisma della giurisprudenza di Strasburgo: bilanci e prospettive*, in *Rassegna di diritto civile*, 2022, pp. 1507-1556; F. PESCE, *Gestazione per altri e discrezionalità nazionale "depotenziata" nella prospettiva della CEDU*, in F. PESCE (a cura di), *La surrogazione*, cit., pp. 155-168; O. LOPES PEGNA, "Mater (non) semper certa est"! *L'"impasse" sulla verità biologica nella sentenza D. c. Francia della Corte europea*, in *Diritti umani e diritto internazionale*, 2021, pp. 709-716; L. POLI, *Il primo (timido) parere consultivo della Corte europea dei diritti umani: ancora tante questioni aperte sulla gestazione per altri*, in *Diritti umani e diritto internazionale*, 2019, pp. 418-426; L. RICCARDI, *Il primo parere consultivo della Corte europea dei diritti dell'uomo tra maternità surrogata e genitorialità "intenzionale": il possibile impatto nell'ordinamento giuridico italiano*, in *Freedom, Security & Justice: European Legal Studies*, 2019, n. 2, pp. 160-183, available *online*; S. TONOLO, *Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo*, in *Diritti umani e diritto internazionale*, 2015, pp. 202-209.

[32] Judgments *Mennesson* v. *France*, cit.; *Labassee* v. *France*, cit.

margin of appreciation on the issue of surrogacy: in fact, automatic recognition should only be carried out with respect to the biological father[33].

In its subsequent advisory opinion of 10 April 2019[34], the ECtHR Grand Chamber clarified that the child's right to respect for private life has different consequences for the relationship with the biological father and the intended (no-biological) mother. In particular, domestic legislation must allow, for the benefit of the biological father, the transcription in the civil status register of the birth certificate issued abroad. The position of the intended mother is different, in respect of whom it must allow the possibility of recognising a parent-child relationship that has actually been created. However, this recognition does not need to take the form of automatic transcription in the civil status register, as it may also be realized through adoption.

In contrast, in the case of *Paradiso and Campanelli* v. *Italy*, the Grand Chamber of the Court concluded that there was no violation of Art. 8 ECHR and held that the Italian authorities had correctly balanced the interests at stake[35]. This was, however, a very different case from the previous ones, in that the spouses – also a heterosexual couple united in marriage – had no genetic link with the child, who was born in Russia following a gestational surrogacy contract. The child had been placed in social service care when he was nine months old by the Italian authorities. Indeed, the proceedings before the ECtHR were characterized by a misalignment between the first judgment of the Second Section and the subsequent one of the Grand Chamber. In 2015, the Second Section held that there had been a violation of Art. 8 ECHR, having the Italian authorities failed to strike a fair balance between the interests at stake when deciding to apply the «extreme measure» to remove the child from the family setting[36]. On the contrary, the Grand Chamber – by eleven votes to six – had excluded any violation of Art. 8 ECHR. The judges considered the absence of any biological link between the child and the parents,

[33] On the other hand, the violation of the right to respect for family life was not recognised, since the *de facto* enjoyment of that right had not been prevented. The same principles were reiterated in subsequent judgments: ECtHR, judgment of 19 January 2017, application n. 44024/13, *Laborie* v. *France*; judgment of 21 July 2016, applications n. 9063/14 and 10410/14, *Foulon and Bouvet* v. *France*.

[34] ECtHR (Grand Chamber), *Avis consultatif relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention*, application n. P16-2018-001, 10 April 2019.

[35] Judgment *Paradiso and Campanelli* v. *Italy*, cit. On the case, see E. FALLETTI, *Vita familiare e vita privata nel caso Paradiso e Campanelli di fronte alla Grande Camera della Corte di Strasburgo*, in *Famiglia e diritto*, 2017, nn. 8-9, pp. 729-739; M. GERVASI, *Vita familiare e maternità surrogata nella sentenza definitiva della Corte europea dei diritti umani sul caso Paradiso et Campanelli*, in *Osservatorio costituzionale*, 2017, n. 1, pp. 1-16; C. HONORATI, *Paradiso e Campanelli c. Italia: atto finale*, in *Quaderni Costituzionali*, 2017, pp. 438-442; S. TONOLO, *L'evoluzione dei rapporti di filiazione e la riconoscibilità dello "status" da essi derivante tra ordine pubblico e superiore interesse del minore*, in *Rivista di diritto internazionale*, 2017, pp. 1070-1102.

[36] ECtHR, judgment of 27 January 2015, application n. 25358/12, *Paradiso and Campanelli* v. *Italy*. It should be highlighted that the decision was taken with a majority of five votes to two. On this decision S. TONOLO, *Identità personale*, cit.

as well as the short duration of the relationship and the legal uncertainty of the family tie, to held that the conditions to conclude the existence of a *de facto* family life had not been met.

The subsequent judgments of the European Court of Human Rights have substantially confirmed the approach crystallised in the aforementioned judgments[37]. With specific reference to the Italian legal system, the Court held that the partial prohibition of the transcription of the intended parent, on the basis of birth certificates drawn up abroad that mention both the intended parent and the biological parent, is not in itself incompatible with Art. 8 ECHR. This is against the possibility of the intended parent, made available by the legal system, to have recourse to the institution of adoption in particular cases under Art. 44 of Law No 184/1983, when a family bond has actually been created. These principles were expressed in *Bonzano and Others* v. *Italy*, which stemmed from a request by same-sex male couples to obtain the transcription in Italy of birth certificates, drawn up abroad, of children born through surrogacy[38]. The ECtHR reiterated that the States' margin of appreciation does not concern the protection of family life but rather the manner in which it is implemented. Therefore, the Court held that the Italian authorities' refusal did not constitute a violation of Art. 8 ECHR because the intended parent had the possibility of resorting to adoption in particular cases. In other words, a violation of the right to respect for family life is ruled out if the intending parents do not initiate the adoption procedure, but request the transcription in Italy of the foreign court order or the birth certificate issued abroad. The applicants should have first applied for partial transcription of the birth certificate, in favour of the biological parent only, and then proceeded to adopt the child by the intended parent. Of the same opinion was the judgment in *C.* v. *Italy*[39], where the Court condemned the Italian State for violation of Art. 8 of the European Convention on Human Rights, in respect of the radical refusal to

[37] Particularly noteworthy are the ECtHR, judgments *D.* v. *France*, cit.; 19 November 2019, applications n. 1462/18 and 17348/18, *C. and E.* v. *France*; 18 May 2021, application n. 71552/17, *Valdís Fjölnisdóttir and others* v. *Iceland*. The ECtHR, on the other hand, found a violation of Art. 8 ECHR by Switzerland due to the absence (at least at that time) in the legal system of any instrument enabling the recognition of the family link between the child and the intended parent: ECtHR, judgment of 22 November 2022, applications n. 58817/15 and 58252/15, *D.B. and Others* v. *Switzerland*. Similarly, ECtHR, judgment of 6 December 2022, application n. 25212/21, *K.K. and others* v. *Denmark*.

[38] ECtHR, judgments of 30 May 2023, applications n. 47998/20 and 23142/21, *Nuti and Others* v. *Italy*; judgment *Bonzano and Others* v. *Italy*, cit.; 30 May 2023, application n. 59054/19, *Modanese and Others* v. *Italy*.

[39] ECtHR, judgment of 31 August 2023, application n. 47196/21, *C.* v. *Italy*.

register the foreign birth certificate of a child born through surrogacy, preventing legal recognition of the parenthood relationship also with the biological father.

4. The European approach: between functional and full recognition of parenthood.

4.1. Functional recognition: the *Pancharevo* ruling.

Despite not ignoring the possible harmful consequences of surrogacy, especially under the perspective of possible exploitations of human lives for economic purposes[40], the European Union has recognized the need for a uniform approach when speaking of circulation of family status, even in the context of alternative procreation techniques. The reason for the EU's interests was mainly focused on the removal of obstacles that parents and children, as EU citizens, may face when exercising their right to free movement. In fact, notwithstanding the absence of competences in material family law and therefore in parenthood matters, the EU has started to intervene in this area from the perspective of the exercise of the rights deriving from EU citizenship.

In the *Pancharevo* decision[41], which does not concern surrogacy, nevertheless the Court of Justice of the European Union (CJEU) had the opportunity to address the obstacles that EU citizens may encounter because of the limping situations which may be created as an effect of non-recognition of a parent-child relationship constituted abroad. The case concerned the daughter of a same-sex female couple (a Bulgarian citizen and a

[40] Reference is made to the recently adopted Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024, amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. One of the most significant innovations is the inclusion of the exploitation of surrogacy in the list of crimes related to human trafficking, insofar as the constituent elements of these crimes are met. See F. ROLANDO, *L'evoluzione della normativa dell'Unione europea sulla tratta degli esseri umani e sul favoreggiamento dell'immigrazione illegale, tra lotta al crimine internazionale e tutela dei migrant*, in *Quaderni AISDUE*, 2024, n. 4, pp. 1-24, available *online*.

[41] Judgment *"Pancharevo"*, cit. The decision has been commented by E. DI NAPOLI, G. BIAGIONI, O. FERACI, R. CALVIGIONI, P. PASQUALIS, *La circolazione dello status dei minori attraverso le 'frontiere' d'Europa: intersezioni tra diritto dell'Unione e diritto internazionale privato alla luce della sentenza Pancharevo*, in this *Journal*, 2023, special issue, pp. 67-91, available *online*; M. POLI, Quo vadis mater? *Motherhood, freedom of movement, and the circulation of documents*, in this *Journal*, 2023, special issue, pp. 229-245, available *online*; M.C. BARUFFI, *Il riconoscimento della filiazione tra persone dello stesso sesso e la libera circolazione delle persone nell'Unione Europea*, in *Famiglia e diritto*, 2022, pp. 1098-1103; C. DE CAPITANI, *Rainbow families and the right to freedom of movement – the V.M.A. v Stolichna obshtina, rayon 'Pancharevo' case*, in *EU Law Analysis*, 11 January 2022, available *online*; O. FERACI, *Il riconoscimento 'funzionalmente orientato' dello status di un minore nato da due madri nello spazio giudiziario europeo: una lettura internazionalprivatistica della sentenza Pancharevo*, in *Rivista di diritto internazionale*, 2022, pp. 563-579; M. GRASSI, *Riconoscimento del rapporto di filiazione omogenitoriale e libertà di circolazione all'interno dell'Unione europea*, in *Rivista di diritto internazionale privato e processuale*, 2022, pp. 591-609; E. GUALCO, *Habemus Pancharevo*¸ cit.; J. MEEUSEN, *Functional Recognition of Same-sex Parenthood for the Benefit of Mobile Union Citizens – Brief Comments on the CJEU's Pancharevo Judgment*, in *EAPIL Blog*, 3 February 2022, available *online*; A. TRYFONIDOU, *The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: a Critical View of the ECJ's V.M.A. Ruling*, in *European Law Blog*, 21 December 2021, available *online*.

UK citizen) resident in Barcelona. When the child was born in Spain, the birth certificate issued by the competent Spanish authorities showed both women under the heading «mother». One of the parents asked the Bulgarian authority to release another birth certificate, on the basis of the Spanish one, in order to obtain a Bulgarian identity document for the child. The request (accompanied by a legalized and notarized Bulgarian language translation of the extract from the Barcelona Civil Status Registry regarding the child's birth certificate) was based on the child's Bulgarian citizenship, acquired *iure sanguinis* under Bulgarian law. However, the Sofia Municipality had refused to issue the document on the grounds that the Bulgarian birth certificate model prevented the inclusion of more than one person as the «mother»; at the same time, the very certification of a maternity relationship depended, under Bulgarian law, on proof of a biological link, which the applicant had refused to provide.

The decision of the CJEU – in the form of a preliminary ruling requested by the Sofia Administrative Court – highlights the delicate balance between the national identity of Member States (protected by Art. 4(2) TEU) and the respect for fundamental rights (in particular Arts. 7, 24 and 45 of the EU Charter), with a particular attention for the principle of the best interests of the child[42]. The Court has stated that the exercise of the right of free movement – provided by Art. 21 TFEU and disciplined by the Directive 2004/38/EU[43] – may imply the need to recognize a parent-child relationship: especially when the EU citizen is a child, national authorities should undertake the necessary measures in order to facilitate free movement, such as the release of an identity document and the acknowledgment of the fact that a person of minor age needs to be accompanied by a holder of parental responsibility. Most importantly, the issuance of an identity card or passport stating nationality must be based on the information contained in the birth certificate formed in the country where the child was born, being not necessary for the requested Member State to release another certificate[44].

At the same time, the fact that the underlying family relationship is not admitted or recognized in the Member State of citizenship should not prevent the exercise of the rights provided by Art. 21 TFEU or the Directive 2004/38. In fact, the latter does not undermine the public policy or the national identity of the country concerned: member States cannot unilaterally justify a derogation from the fundamental rights provided by EU primary law on the basis of the aforementioned limits, since they are not obliged to provide same-sex parenthood in their domestic law or to recognize such a parent-child relationship for

[42] M.C. BARUFFI, *Cittadinanza dell'Unione e maternità surrogata nella prospettiva del mercato interno alla luce della giurisprudenza della Corte di giustizia*, in F. PESCE (a cura di), *La surrogazione*, cit., pp. 13-34.

[43] Directive (EU) 2004/38 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.

[44] Judgment *"Pancharevo"*, cit., para. 45.

purposes other than the exercise of rights under EU law. The recognition that member States must provide is «functional» and limited to what is necessary to enable the rights arising from EU citizenship to be respected, starting with freedom of movement.

Most importantly, the CJEU has stated that «the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions»[45]. In other words, EU primary law precludes the justification of a measure of domestic law – capable of restricting one of the fundamental freedoms enshrined in the Treaties – if it does not comply with the fundamental rights enshrined in the EU Charter, especially if the case involves children, whose best interests must be taken into primary consideration.

In making reference and giving substance to Art. 7 EU Charter, the CJEU refers to the case law of the ECtHR on Art. 8 ECHR, according to which the existence of family life is a question of fact, the protection of which undoubtedly includes the possibility for parents and children to be together[46]. This applies both to families in which the parents are of different sexes and to same-sex families[47]. On the other hand, with regard to Art. 24 EU Charter, the CJEU reads the principle of the best interests of the child in the light of the well-established normative framework of the 1989 United Nations Convention on the Rights of the Child (UNCRC), from which the above-mentioned Art. 24 is inspired[48]. It is made clear that, in accordance with the right to non-discrimination laid down in Art. 2 UNCRC, no child may be discriminated against in the exercise of his or her fundamental rights solely on the ground that his or her parents are of the same sex. In other words, denying a child who is a EU citizen the opportunity to move freely with either parent within the territory of the Union on the basis of their sexual orientation would result in unjustified discrimination against a child born to parents of different sexes[49].

What one may ask is whether it is actually possible, in an area as sensitive as family status, to distinguish a person's legal position according to the impact that status has on the enjoyment of the rights deriving from EU citizenship. National legal systems are required to partially recognize parenthood, depending on the rights whose respect is invoked. A child which is a citizen of a member State and residing in another EU country may be considered the son/daughter of a person in certain circumstances and not in others. While a partial or functional recognition is certainly to be welcomed from the point of

[45] Judgment *"Pancharevo"*, cit., para. 55.

[46] Judgment *"Pancharevo"*, cit., para. 61.

[47] See P. PUSTORINO, *Il diritto alla vita privata e familiare in relazione alle questioni di orientamento sessuale (artt. 8 e 14 CEDU)*, in A. DI STASI (a cura di), *CEDU e ordinamento italiano. La giurisprudenza della Corte Europea dei diritti dell'uomo e l'impatto nell'ordinamento interno (2016-2020)*, Padova, 2020, pp. 679-692.

[48] Judgment *"Pancharevo"*, cit., paras. 63-64.

[49] A. TRYFONIDU, *EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?*, in *Yearbook of European Law*, 2019, pp. 220-266.

view of non-discrimination in the enjoyment of EU fundamental freedoms, there is also the risk that family life could nevertheless be compressed in the hosting member State.

Moreover, it is precisely the outcome of the *Pancharevo* case that exposes the inherent weaknesses of functional recognition: when the case was resumed before the national courts in Bulgaria, the Supreme Court ultimately upheld the refusal to issue a birth certificate on the grounds that the child in question was deemed not to possess Bulgarian citizenship. The fact that the appellant (a Bulgarian national) had always refused to provide any evidence about her biological connection to her daughter made it impossible for the Bulgarian authorities to ascertain possession of *iure sanguinis* citizenship on the basis of domestic law.

4.2. Full recognition: the proposal for a EU regulation on parenthood.

While ensuring the respect of EU primary law and fundamental rights in that kind of situations, the EU institutions are also promoting a higher degree of integration among member States, to be realized through the introduction of uniform rules of private international law in parenthood matters. The proposal for a EU regulation on the recognition of parenthood between the member States lies on the legal basis of Art. 81(3) TFEU, which – with specific reference to legislative instruments in the field of private international family law – requires unanimity in the Council.

It is worth highlighting that the proposal expressly confirms the milestones reached in the *Pancharevo* ruling and does not set aside functional recognition. According to Art. 2(1), the future regulation «[...] shall not affect the rights that a child derives from Union law, in particular the rights that a child enjoys under Union law on free movement, including Directive 2004/38/EC. In particular, this Regulation shall not affect the limitations relating to the use of public policy as a justification to refuse the recognition of parenthood where, under Union law on free movement, Member States are obliged to recognise a document establishing a parent-child relationship issued by the authorities of another Member State for the purposes of rights derived from Union law». With a clear reference to CJEU's case law, the position of the European Commission seems to be in favour of confirming and safeguarding functional recognition, independently from any impediment which full recognition may encounter[50].

With regard to the scope of application of the proposed regulation, from an objective point of view, the proposal intends to introduce rules of private international law and procedural law in civil matters, which will apply to cross-border cases concerning

[50] On the interplay between the right to free movement, fundamental rights and public policy see H. LUKU, *Free movement, children's rights and national identity in the EU parenthood proposal*, in *Yearbook of Private International Law*, 2022/2023, pp. 345-366.

the establishment or contestation of parenthood[51]. In particular, common rules on jurisdiction and applicable law for establishing parenthood in a Member State are envisaged, as well as rules on the recognition of judicial decisions and authentic instruments having binding legal effects, as well as on the acceptance of authentic instruments (without binding legal effects, but) having evidentiary effect in the Member State of origin. Lastly, a European certificate of parenthood is established[52].

The scope of application of the future regulation, as set out in the proposal, is of particular importance. It is specified, in Art. 3, that the regulation will relate exclusively to cases in which parenthood must be established in a Member State, with the consequent exclusion of all situations in which the relationship has originated in a third country (where national law will be relevant)[53]. More specifically, recognition of judicial decisions or public acts establishing parentage issued in a third country is excluded, as well as the acceptance of public acts having probative value in relation to parentage drawn up or registered outside the EU[54]. Therefore, a relevant threshold is designed as per the definition of the relationships falling into the common discipline of private international law, which will constitute an inclusive approach towards parenthood, independent from the method of conception or birth of the child, the type of family of origin, the citizenship of the parents and the child[55].

From the perspective of its personal scope of application, the regulation will apply to persons who, in respect of minor or adult «children»[56], including dead or not yet born

[51] Art. 1 of the proposal. Art. 4, for its part, defines the establishment of parenthood as «the determination in law of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting a parenthood established previously».

[52] On the European Certificate of Parenthood, see F. MAOLI, *The European Certificate of Parenthood in the European Commission's Regulation Proposal: on the 'Legacy' of the European Certificate of Succession and Open Issues*, in *The European Legal Forum*, 2024, n. 1, pp. 26-33; O. FERACI, *I 'controlimiti' al funzionamento del limite del ordine pubblico nella proposta di regolamento europeo in tema di filiazione*, in *Rivista di diritto internazionale*, 2023, pp. 779-796.

[53] As specified in recital 32. In the proposal, the Commission states that «the proposal applies to the recognition of the parenthood of all children, regardless of their nationality and the nationality of their parents, provided their parenthood has been established in a Member State and not in a third State».

[54] Art. 3(3) of the proposal. In this context, it should also be considered that birth certificates may be issued in a member State after the recognition or acceptance of a decision or document issued in a third country. The issue has been raised in the context of the Expert Group assisting the Commission in the preparation of the proposal: see the Minutes of the 6th Meeting of the Expert Group on the recognition of parenthood between Member States, of 9 February 2022, p. 2, available *online*.

[55] On this aspect see T. EL HAJ, *I rapporti tra la disciplina contenuta nella proposta di regolamento in materia di filiazione e gli ordinamenti dei paesi terzi*, in *Freedom, Security & Justice: European Legal Studies*, 2024, n. 2, p. 163-175, available *online*; D. DANIELI, *"Third-State connections" in the proposal for an EU regulation on parenthood: more than a regime of circulation of the status between Member States?*, in *Cuadernos de Derecho Transnacional*, 2023, n. 2, pp. 1387-1399, available *online*.

[56] Art. 4 of the proposal, in providing a series of definitions of certain key terms, qualifies a «child» as a person «of whatever age whose filiation is to be established or acknowledged or proved». In the English language version, the same definition refers to the term «child». This choice suggests that the proposal, while applying irrespective of the age of the persons involved in the question of filiation, is nonetheless inspired by the primary intention of protecting the position of minor persons and their best interests.

children, wish to ascertain or contest the status of biological, genetic, adoptive legal parenthood established in a Member State, irrespective of the nationality of parent and child, to which, as mentioned, no importance is attached.

With regard to jurisdiction, the proposal draws extensively from other European regulations on family and succession matters[57], although it results in a rather fragmented set of provisions. First of all, Art. 6 of the proposal introduces a number of alternative, mandatory and objective grounds of jurisdiction, the existence of which must be verified by the court of its own motion: there is the possibility to institute proceedings, alternatively, before the court of the place: a) of the child's habitual residence; b) of the child's nationality; c) of the habitual residence of the defendant; d) of the habitual residence of one of the parents; e) of the nationality of one of the parents; f) of the child's birth. All the above-mentioned criteria are inspired, in various ways and with different gradients, by the principle of proximity[58] and must be assessed at the time in which the court is seized (with the exclusion, without any doubt, of the one referring to the State of birth).

Those heads of jurisdiction explicitly respond to the aim of «facilitating the child's access to justice in a Member State»[59]. At the same time, the presence of a large number of alternative grounds – which also counterbalances the impossibility of concluding agreements on jurisdiction – could bring the risk of *forum shopping* practices or potentially harmful procedural strategies, only partially mitigated by the standardisation of the conflict rules for identifying the applicable law[60]. Moreover, the attribution of jurisdiction to the authorities of the child's place of birth does not appear to express, in itself, a significant connection with the case, given that it is not even limited to proceedings taking place immediately after the birth. As has already been pointed out by authoritative doctrine, the imposition of a time limit would be advisable in order to avoid

[57] No particular novelty concerns the provisions devoted to the coordination between the authorities of the Member States in the exercise of jurisdiction (Arts. 11, 12, 13 and 14 of the proposed regulation) or the rules on incidental jurisdiction (Art. 10): the latter specifies that the authorities of a Member State shall not be prevented from ruling incidentally on a matter relating to filiation, even if they do not have jurisdiction under the regulation. The effects of the decision will be limited to the main proceedings.

[58] See European Commission report accompanying the proposal COM(2022) 695 final, p. 13. As is clear from recital 39, the principle of proximity - of which the criterion of residence is the highest expression - is declined above all in function of the protection of the interests of the child. Therefore, it is suggested that, 'where possible', it should be the habitual residence of the latter that determines the competent authority.

[59] Recital 39 of the proposal.

[60] Moreover, especially with reference to the jurisdictional titles provided for in subparagraphs (d) and (e), there are potentially numerous parties involved in the dispute. Indeed, the term 'parent' could include the legal parent, the intending parent or even any person seeking recognition of parentage or against whom the child claims the establishment of the relationship. On this point C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The Marburg Group's Comments*, cit., p. 21.

the use of this title of jurisdiction in circumstances where there is no effective connection[61].

The fragmentary nature of the abovementioned rules is further confirmed by the grounds of jurisdiction that come to the rescue when Art. 6 cannot find application. Firstly, international competence is attributed to the courts of the Member State where the child is present (Art. 7). Secondly, it is provided that jurisdiction may be determined in each country on the basis of its national law (Art. 8). If even in this case a EU court does not have jurisdiction, jurisdiction may still exceptionally lie with the authorities of a Member State with which the dispute is sufficiently connected: it is however necessary that the proceedings cannot reasonably be brought or conducted or prove impossible in a third country with which the case is closely connected (Art. 9). The simultaneous provision of a residual jurisdiction criteria and a *forum necessitatis* represents an unusual choice, which has no precedent in other EU instruments of private international law[62].

With regard to the law applicable to the parent-child relationship, the EU lawmaker aims to introduce conflict-of-law rules of a universal character, which will leave no residual application space for the rules of domestic source[63]. It has already been observed in the legal doctrine that the proposal does not pursue the objective of the coincidence of *forum* and *ius*, admitting a possible disconnection[64]. Rather, the intention is to achieve the establishment of the *status filii* by opting for a ranking of subsidiary connecting factors[65]. The first one is the habitual residence of the person who gives birth at the time of the birth (which, moreover, may not coincide with the State where this event occurred)[66]. Only if it is not possible to determine such an habitual residence[67], the child's State of birth subsequently comes into play.

The first connecting factor has many advantages: for instance, it is undoubtedly easier to ascertain the habitual residence of an adult than of an infant. At the same time, this choice has been criticised with reference to cases where parenthood is to be

[61] C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The Marburg Group's Comments*, cit., p. 20.

[62] L. VÁLKOVÁ, *The Commission Proposal*, cit. p. 890.

[63] Art. 16 of the proposed regulation. This is a well-established choice in European private international law, as is the exclusion of the renvoi mechanism (Art. 21).

[64] F. PESCE, *La legge regolatrice del rapporto di filiazione nella proposta di regolamento della Commissione europea*, in *La cittadinanza europea*, 2024, n. 1, pp. 37-47.

[65] See also C. GRIECO, *La disciplina della legge applicabile nella proposta di regolamento in materia di filiazione*, in *Freedom, Security and Justice: European legal Studies*, 2024, n. 2, pp. 69-93, available *online*.

[66] Art. 17 (1) of the proposal.

[67] Recital 51 refers by way of example to the case of a mother who is a refugee or an internationally displaced person.

established after birth, in respect of which it would perhaps be more appropriate to apply the law of the child's habitual residence[68].

Art. 17(2) introduces a further subsidiary connecting factor, stating that «Notwithstanding paragraph 1, where the applicable law pursuant to paragraph 1 results in the establishment of parenthood as regards only one parent, the law of the State of nationality of that parent or of the second parent, or the law of the State of birth of the child, may apply to the establishment of parenthood as regards the second parent». The favour emerges for the establishment of parenthood in respect of both parents: if this result is not possible on the basis of the law identified pursuant to paragraph 1, a further subsequent cascade of connecting factors is introduced, with the scope of establishing the second family bond. The last-mentioned connecting factor, in particular, will be particularly useful in those cases in which the national law of the parent would not allow parenthood as originally constituted at the moment of birth to be recognised: this is the case of surrogacy, at least with respect to the (non-biological) intended parent.

The proposal's objective of ensuring that «children enjoy their rights and maintain their legal status in cross-border situations, without discrimination»[69] is, finally, pursued through uniform rules on the recognition of decisions and authentic instruments with binding legal effects, as well as the acceptance of authentic instruments without such effects[70].

Following a well-established model in EU civil judicial cooperation, the proposal provides for the automatic recognition of decisions among member States[71], provided that they are accompanied by the appropriate certificate issued pursuant to Art. 29 and drafted according to a standard model[72]. One of the most important effects of recognition is the capacity of the judgment - if it has acquired the authority of *res judicata*[73] - to serve as a basis for updating the civil status records of a member State, without the need to any further proceedings[74].

Recognition of a decision may only be refused by virtue of one of the grounds for refusal exhaustively listed in Art. 31 of the proposal. These grounds are not significantly different from those provided for by the other EU regulations in family matters[75].

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[68] C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The Marburg Group's Comments*, cit., p. 37.

[69] Recital 21 of the proposal.

[70] See M.C. BARUFFI, *La proposta di Regolamento UE sulla filiazione*, cit., p. 545, and L. VÁLKOVÁ, *The Commission Proposal*, cit. p. 893.

[71] Art. 24(1) of the proposal.

[72] Annex I to the proposal.

[73] Art. 24(2) of the proposal.

[74] Consistent with the regime of the Brussels *II-ter* Regulation, and more specifically with its rules on the recognition of status judgments, the draft regulation on parenthood does not speak of 'enforcement', as no *exequatur* mechanism needs to be triggered for the updating of civil status registers (which exhausts the 'enforcement' phase of the foreign judgment).

[75] For a more in-depth analysis of these obstructive grounds, see G. BIAGIONI, *La circolazione delle decisioni e degli atti pubblici nella proposta di regolamento in materia di filiazione*, in *Freedom, Security*

Moreover, it is provided that «any interested party» may also request a decision stating that there are no grounds for refusal of recognition[76].

As mentioned above, the proposal extends the rules on the circulation of decisions to authentic instruments with binding legal effects in the member State of origin. As noted by the legal doctrine, it is quite rare for authentic instruments establishing parenthood to have legally binding effects[77]. Therefore, it is more relevant to regulate public documents with evidentiary effect only, for which Art. 45 provides for «acceptance»: such documents will have the same evidentiary effects extraterritorially, with the only limit of public policy[78]. However, there is an obvious overlap with the rules provided by Regulation (EU) 2016/1191 on the simplification of the requirements for the presentation of certain public documents in the EU: better coordination between the two regulatory texts would therefore be desirable[79].

One of the most delicate aspects concerns the limit of public policy. The proposal admits that the application of the foreign law designated by its conflict-of-law rules may be excluded where the consequences would be manifestly incompatible with the public policy of the forum[80]. Similarly, public policy becomes a ground for preventing recognition of a judgment given in another Member State[81]. While these provisions are not surprising, the further limitation of Art. 22(2) – reproduced in Art. 31(2) with reference to the recognition of decisions – is quite peculiar, according to which «Paragraph 1 shall be applied by the courts and other competent authorities of the Member States in observance of the fundamental rights and principles laid down in the Charter, in particular 21 thereof on the right to non-discrimination». This is a pleonastic clarification, which is nevertheless particularly relevant in the delicate context of cross-border recognition of family status[82]. It is precisely on the basis of public policy that member States could prevent the recognition in their legal system of relationships formed after recourse to alternative procreation techniques. The express reference to the principle of non-discrimination could then have the consequence of making a legitimate invocation

and Justice: European Legal Studies, 2024, n. 2, pp. 94-116, available online; S. DOMINELLI, *Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood under the Commission's 2022 Proposal*, in *The European Legal Forum*, 2024, n. 1, pp. 11-25.

[76] Art. 25 of the proposed regulation.

[77] C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The Marburg Group's Comments*, cit., p. 78.

[78] As is the case for decisions, this cross-border effect is conditional on the use of a uniform *standard* form which should facilitate its reading by other authorities (Art. 45(3)).

[79] C. BUDZIKIEWICZ, K. DUDEN, A. DUTTA, T. HELMS, C. MAYER, *The Marburg Group's Comments*, cit., p. 87.

[80] Art. 22(1) of the proposal. On the other hand, the framework does not contain any mention of necessary implementing rules.

[81] Art. 31(1)(a) of the proposed regulation.

[82] *See amplius* on this point O. FERACI, *I 'controlimiti' al funzionamento del limite dell'ordine pubblico*, cit.; S. DE VIDO, *Il riconoscimento delle decisioni in materia di filiazione nella proposta*, cit.

of public policy complex in practice, at least in cases where it would result in discrimination between children based on how they were conceived[83].

It is no coincidence that the remarks expressed by the national parliaments of some Member States (including the Italian one), called upon to express their views on the respect of the principles of subsidiarity and proportionality in the context of the proposal, have precisely focused on the limit of public policy. In a resolution adopted on 14 March 2023[84], the Commission for European Policies of the Italian Senate expressed its concerns with regard to the narrowing of the area of operation reserved for the public policy limit, both in the context of the recognition of decisions and with regard to the application of a foreign law. As mentioned, the critical position of Italy is not an isolated one: the proposal has provoked other critical reactions from national parliaments, such as the French Sènat[85], the Senate of the Czech Republic[86] and (with a more nuanced approach) the Senate of Romania[87].

5. Conclusions: which role for the best interests of the child?

With regard to the recognition of parenthood established abroad through alternative procreation techniques and, in particular, surrogacy, the above analysis highlights the different approaches existing at the national and supranational level[88]. Each of the different contexts presents a various degree of impact over (and consideration of) the best interests of the children involved[89].

The Italian approach has survived the scrutiny of the ECtHR. The latter has recognized that States hold a certain margin of discretion within the framework of Art. 8 ECHR. Without prejudice to the fact that the child must be guaranteed full recognition of his or her relationship with the biological parent, adoption in special cases is considered to be – at least for the time being –the most suitable instrument at disposal to guarantee the protection of the family bond established with the person who, although not sharing

[83] Art. 21 of the proposal also includes «birth» among the possible grounds for unlawful discrimination.

[84] Available *online*.

[85] Available *online*.

[86] Available *online*.

[87] Available *online*.

[88] For a comprehensive comparative analysis on how the national law, courts and other authorities deal with the question of recognition of status and the corresponding obligations and challenges imposed by the CJEU and ECtHR, see S. GÖSSL, M. MELCHER, *Recognition of a status acquired abroad in the EU – a challenge for national laws from evolving traditional methods to new forms of acceptance and bypassing alternatives*, in *Cuadernos de derecho transnacional*, 2022, n. 1, pp. 1012-1043, available *online*.

[89] A further relevant aspect, which is not subject of the present contribution, is the issue of the child's right to identity, which is being analysed by the legal literature. On the topic M. WELLS-GRECO in M. FREEMAN *et al.* (edited by), *Children's Right to Identity, Selfhood and International Family Law*, forthcoming.

a genetic heritage, is considered to be the father or mother because he/she has established a family life with the child.

Nevertheless, it is necessary to question the real extent of the margin of appreciation given to States to establish parenthood as an alternative to direct recognition of the status (legally) acquired abroad, as well as the effective protection of the child's best interests through the use of such alternative forms. The *Corte di cassazione* has correctly highlighted the persisting drawbacks surrounding adoption in particular cases. Above all, the institution – despite being invoked precisely to ensure adequate protection for the child through the formal establishment of an effective family bond – cannot be activated at the child's initiative. The latter's protection, therefore, is necessarily subordinate to the will of the intended parent, as well as to the biological parent's consent, which can only be overcome following a judicial assessment of the child's best interests.

Moving to a supranational context, the EU has activated different instruments. Firstly, functional recognition of parenthood – aimed at granting the enjoyment of rights deriving from EU primary law – represents the European alternative to the full recognition of the status. At the same time, the proposed EU regulation on parenthood aims at a different and more evolutionary approach: the intention of the European lawmaker is to achieve the continuity of family status through the (tendentially) automatic recognition of the parent-child relationship, eliminating any discrimination based on the characteristics of the family and the way in which conception and/or birth occurred. From this perspective, any policy choice of the domestic legal system should be respected, irrespective of its way of pursuing the best interests of the child, which ultimately coincides with the portability of the status. The position expressed by the European Parliament within the legislative proceedings, through the amendments proposed in December 2023[90], emphasizes in several passages the need to guarantee the legal status of all persons of minor age, resulting from parenthood, in cross-border situations regardless of the characteristics of the family and without any form of discrimination.

The position of the EU, starting from the more evolutive amendments proposed by the Parliament, is still incompatible from that of some member States. In light of the critical points that have emerged already from the early stages of the legislative proceedings, it cannot be ruled out that the proposal will result in enhanced cooperation between some EU countries. At the same time, it will have to be ascertained whether the «downgraded» public policy limit, as currently disciplined in the proposal, will actually

[90] European Parliament legislative resolution of 14 December 2023 on the 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 COM(2022)0695, P9 TA(2023)0481.

be able to prevent member States from recognising parenthood relationships constituted abroad through surrogacy.

Regardless of the outcome of the European legislative initiative, currently in progress, an intervention by the Italian lawmaker (such as other national lawmakers) remains desirable, given that the legal system's disvalue of procreative techniques such as surrogacy does not exclude the duty to ensure full realisation of the principle of the best interests of the child.

Indeed, finding the best solution for the child in surrogacy cases presents inherent criticalities and easily results in a loophole. Conceptually, pursuing the best interests of children encounters a first difficulty: any legislation aiming at regulating surrogacy would be based on the purpose of protecting a child that does not yet exist but may be born. This could be the reason why any consideration concerning the child's best interests comes into play when it is necessary to recognize or protect a parent-child relationship already existing, as an *ex-post* remedy. Even in this phase, the evaluation is yet fragmented and there is no broad consensus on what is the best solution for the child. Taking the ECtHR case law as an example, how much time should be enough to state that a family life has been consolidated?

Legal professionals should rely on a coherent and comprehensive assessment of the child's best interests in that kind of situations, on the basis of clear indicators. The risk is that the persistence of a case-by-case approach, which remains more focused on the balance between the interests of the parents and national public policy rather than the well-being of the most vulnerable subjects, is not effectively achieving a full realization of children's rights.

ABSTRACT: This brief analysis has the objective to highlight the different approaches adopted at the national and supranational level with reference to the circulation of family status created through the recourse to alternative procreation techniques, through the lenses of the best interests of the child. The contribution focuses on maternal surrogacy and analyses the solutions adopted by the Italian case law, as well as by ECtHR, the CJEU and the European Commission, in order to understand whether and how the best interests of the child hold a relevant space.

KEYWORDS: parenthood; surrogacy; best interests of the child; circulation; status.