GESTAÇÃO DE SUBSTITUIÇÃO: PERSPETIVAS INTERNACIONAIS

Coordenadoras
MARIA JOÃO ANTUNES · DULCE LOPES

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[Índice]

[Nota Introdutória das Coordenadoras]

A presente obra coletiva desponta, na sua origem, do II Colóquio sobre Gestação de Substituição, que teve lugar em 9 de abril de 2019 e a Coordenação Científica de Rui Moura Ramos, Afonso Patrão e Dulce Lopes. No entanto, até ao momento da presente publicação observou-se uma evolução assinalável em matéria de consideração e tratamento internacional do fenómeno da gestação de substituição, o que motivou a presente obra coletiva e a recolha de artigos que refletissem, de forma profunda, o desenvolvimento da legislação, doutrina e, sobretudo, jurisprudência sobre gestação de substituição.

Esta é uma área em que se mostra a clara intersecção entre direito internacional público, direito internacional privado e direito constitucional, bem como as tensões entre a fragmentação dos estatutos nacionais e a desejada continuidade e estabilidade das situações jurídicas internacionais, sobretudo em nome da protecção dos direitos fundamentais das crianças.

É por isso um desafio aos limites do direito que se integra inequivocamente no projeto estratégico do Instituto Jurídico e para cujo debate esperamos que a presente Obra Coletiva possa contribuir.

Maria João Antunes
Dulce Lopes

Surrogacy: Italian Controversial Issues

(https://doi.org/10.47907/clq2021_1a2)

Alfio Guido Grasso

I. Italian law no. 40\2004: the prohibition of surrogate motherhood.[1]

In surrogate maternity a woman, who is outside the couple (donor or not of the oocyte), makes her uterus available to bring a pregnancy to term, agreeing to hand over the resulting child to the commissioning couple.

Two types of surrogate maternity exist: traditional surrogacy, in which the fertilized ovule belongs to the pregnant woman, and gestational surrogacy, in which the surrogate mother, who carries the pregnancy to term, is implanted with an embryo, realized through in vitro fertilization, using samples coming from the requesting parents or from anonymous donors.

Despite the fact that surrogate maternity is considered one of the techniques of artificial insemination, it sets unprecedented problems which could justify the forecast of the prohibition: the safeguard of the dignity of the pregnant woman and the condition of the child could justify the imposition of the absolute prohibition, although the violation of the right to health and to the self-determination of the sterile or completely infertile couple.

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[1] "Contributo realizzato nell'ambito del piano per la ricerca dell'Università di Catania 2016/18".

In light of the above, it is clear that the appeal to modern biomedical technology has determined a fragmentation of the notion of maternity[2]. If in the past only one notion of maternity existed, now we have different maternal figures: a birth mother, a social mother, a genetic mother (often the genetic mother is the social mother too).

So it is evident that surrogacy raises serious issues of commodification — of childbirth, of birthmothers, and of children — by allowing contracts, sales, and money to govern these once noncommercialized areas of life[3]. Such commercialization of childbirth could profoundly affect the kind of society in which we live. Surrogacy could also exploit women instead of liberating them[4]. Accordingly, the calls to legalize surrogacy further are joined by calls to eliminate surrogacy altogether — or to restrict it as fully as possible.

Italy is one of those Countries in which surrogacy is forbidden; Art. 12, paragraph 6, law no. 40\2004 foresees remarkable sanction penalties for those people who realize, organize or publicize the substitution of maternity[5].

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[2] For more details see S. Piccinini, *Il genitore e lo* status *di figlio*, Milano, 1999, 178; S. Patti, *Verità e stato giuridico della persona,* in *Rivista di diritto civile*, I, 1988, 242.

[3] L. Del Savio – G. Cavaliere, *The problem with commercial surrogacy. A reflection on reproduction, markets and labour*, in *Biolaw Journal*, 2016, 2, 73.

[4] A. Wertheimer, *Exploitation and Commercial Surrogacy*, in *Denver University Law Review*, 74, 1997, 1215; G. COREA, *The mother machine: reproductive technologies from artificial insemination to artificial wombs*, New York: Harper & Row, 1985, 343; M.G. Radin, *Market Inalienability*, in *Harvard law review*, 100, 1987, 1849; J. Ballesteros, *Los valores femeninos en bioética*, in A. Parisi eds, *Por un femminismo de la complementariedad*, Pamplona: Eunsa, 2002, 68; M. Rizzuti, *Maternità surrogata: tra gestazione altruistica e compravendita internazionale di minori*, in *Biolaw journal*, 2015, 91.

[5] For more details on the Italian Law no. 40\2004 about assisted reproductive technology see, among others, A. Santosuosso, *La procreazione medicalmente assistita. Commento alla legge 19 febbraio 2004*, n. 40, Milano, 2004; R. Villani, *La procreazione assistita – La nuova legge 19 febbraio 2004, n. 40*, Torino, 2004; C. Casini – M. Casini – M.L. Di Pietro, *La legge 19 febbraio 2004, n. 40, "Norme in materia di procreazione medicalmente assistita". Commentario,* Torino, 2004; G. Ferrando, *La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche*, in *Corriere giuridico*, 2004, 810; E. Quadri, *Osservazioni sulla nuova disciplina della procreazione assistita*, in *Diritto e giustizia*, 2004, 224; M.R. Marella, *Esercizi di biopolitica*, in *Rivista critica di diritto privato*, 2004, 3; M. Sesta, *Procreazione medicalmente assistita*, in *Enciclopedia giuridica*, 2004, 1; T. Auletta, *Luci, ombre, silenzi nella disciplina di costituzione del rapporto genitoriale nella fecondazione assistita*, in *Annali del Seminario*

The Italian legislator, with the prohibition of surrogacy, has aligned (at least this was the intent) the legislation of our Country with the legislations of other European States, where similar prohibitions had already been introduced, as opposed to more liberal Anglo-Saxon disciplines.

The legislative effort, however, was only partial; in fact, unlike other Countries where surrogacy was just as prohibited, the law was limited only to provide the penalty, without also foreseeing the civil consequences of the possible violation of the prohibition. In addition, the Italian legislator does not define what is meant by surrogacy and, *inter alia*, does not even clarify whether altruistic surrogacy also falls within the purpose of the ban, since the wording of the prohibition lends itself to opposing interpretations.

1. The problem of recognition of the parent-child relationship established abroad in the European Court of Human Rights case law.

To get around the prohibition, several Italian couples, heterosexual or homosexual, unable to naturally have children, go to those Countries in which they can resort to surrogate maternity. The problems arise from the juridical impossibility for Italian registrars to give succession to the application of the intended parents to register the foreign birth certificate that recognizes them as parents of the surrogate-child.

Giuridico, vol. V, Milano, 2005; F. Gazzoni, *Osservazioni non solo giuridiche sulla tutela del concepito e sulla fecondazione artificiale*, in *Diritto di famiglia e delle persone*, 2005, I, 168; F. Consorte, *La procreazione medicalmente assistita*, in *I reati contro la persona*, I, *Reati contro la vita e l'incolumità individuale*, Torino, 2006, 215; G. Losappio, *Commento alla l. 19 febbraio 2004, n. 40 – Norme in materia di procreazione assistita*, in *Commentario breve alle leggi penali complementari,* ed. F. Palazzo – C. Paliero, Padova, 2007, II, 2060; I. Corti, *La procreazione assistita*, in *Il nuovo diritto di famiglia*, *Trattato* ed. G. Ferrando, vol. III, *Filiazione e Adozione*, Bologna, 2007, 491; M. Moretti, *La procreazione medicalmente assistita*, in *Filiazione e adozione*, vol. III, *Trattato* ed. G. Bonilini – M. Cattaneo, Torino, 2007, 251; M. Faccioli, *Procreazione medicalmente assistita,* in *Digesto delle discipline privatistiche,* sezione di diritto civile, Aggiornamento, III, Torino, 2007, 1051; G. Di Rosa, *Dai principi alle regole. Appunti di biodiritto*, Torino, 2013; U. Salanitro, *La disciplina della filiazione da procreazione medicalmente assistita*, in *Familia*, 2004, 489; ID, *Norme in materia di procreazione medicalmente assistita*, in *Commentario del codice civile Gabrielli*, ed. G. Di Rosa, vol. IV, *Leggi collegate*, *Della famiglia*, 2018, Torino, 1655.

This is a common problem in the Countries that currently have a ban on surrogacy, like in countries such as Germany, Spain or France[6].

These complex stories have been the object of manifold judicial sentences of the European Court of Human Rights (often of a contrasting nature), which has dealt on several occasions with questions relating to the recognition of the parental relationship between a child born through surrogacy and his intended parents[7].

In particular, in the Mennesson and Labassee cases the European Court of Human Rights has made clear that the domestic prohibition of surrogacy cannot prevent the child from obtaining recognition of his relationship with intended parents, since the fact that he was born thanks to a medically assisted procreation technique considered illegal by the domestic law is not in itself a sufficient reason to deprive him of the recognition of such an important bond[8].

This principle, which was also followed in subsequent European Court of Human Rights judgements, was last confirmed by a recent Advisory Opinion issued by the Court at the request of the French Court of Cassation[9].

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[6] Recently, as far as Germany, see Bundesgerichtshof 10 December 2014, XII ZB 463/13, available at *http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2014&Sort=3&anz=193&pos=1&nr=69759&linked=bes&Blank=1&file=dokument.pdf*; Bundesgerichtshof 5 September 2018, XII ZB 224/17, available at <*http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=88279&pos=0&anz=1*)>; Bundesgerichtshof, 20 March 2019, XII ZB 530/17, available at <*http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=XII%20ZB%20530/17&nr=94770)*>. As regards Spain, see Tribunal Supremo 6 February 2014 (Tol 4100882), available at <http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Noticias_Judiciales/El_Supremo_deniega_la_inscripcion_de_la_filiacion_de_dos_ninos_gestados_en_California_a_traves_de_un_contrato_de_alquiler>.

By reference to France, see Cour de Cassation 31 May 1991, no 90-20.105, available at <*https://juricaf.org/arret/FRANCE-COURDECASSATION-19910531-9020105*>.

[7] Eur. Court H.R., Mennesson v. France, Judgment of 26 June 2014, in *Foro italiano*, IV, 2014, 561, with note by G. Casaburi; Eur. Court H.R., Labassee v. France, Judgment of 26 June 2014, available at *echr.coe.int*; Eur. Court H.R., Foulon v. France, Judgment of 21 July 2016, and Bouvet v. France, both available at *echr.coe.int*; Eur. Court H.R., D and Others v. Belgium, Judgment of 8 July 2014, available at *echr.coe.int*.

[8] Eur. Court H.R., Mennesson v. France, Judgment of 26 June 2014, see above no. 7, 561.

[9] French Court of Cassation (Request no P16-2018-001) – Arrêt 5 October 2018, no. 638 (10-19.053), available at <*https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/648_4_43606.html*>.

1.1. The Advisory Opinion of the European Court of Human Rights of 10 April 2019.

The recent Advisory Opinion delivers through the European Court of Human Rights concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother[10].

According to the Advisory Opinion, the child's right to respect for private life requires that domestic legal systems provide a possibility of recognition of a legal parent-child relationship with the intended mother, even if there is no genetic link to the child; however, in order to ensure compliance with that right, the transcription of the birth certificate is not required, because another means, such as adoption of the child by the intended mother, may be provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

The Advisory Opinion confirms the principle that the child cannot be deprived of the recognition of the relationship with the intended parents by virtue of the domestic prohibition of surrogacy, because, despite its importance, the public policy cannot however affect the right to personal identity.

The European Court argued that in a situation where a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law: a) the child's right to respect for private life within the meaning of Art. 8 of the European Convention on Human Rights requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother"; b) the child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used.

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[10] Eur. Court H.R. Advisory Opinion of 10 April 2019, in *Nuova giurisprudenza civile commentata*, I, 2019, 757, with note by A.G. Grasso.

Many of the disputes which the European Court of Human Rights has ruled in recent years came from the French legal system which, for a long time, did not recognise the relationship formed abroad with the surrogate-child and the intended parents, not even to the genetic father. Recently, however, the jurisprudence of the French Court of Cassation has changed and has admitted both the transcription of the foreign birth act in the part in which it recognizes the parent-child relationship with the biological father and that the wife of the biological father adopt the child, even if not genetically related to her[11].

Finally, the French Court of Cassation, in the Mennesson case, which came to the attention of the French judges after the recent Advisory Opinion of the European Court of Human Rights, has even admitted the transcription of the American foreign birth act, even in the part where it recognized Mrs Mennesson as the legal mother of the twins[12].

1.2. Paradiso and Campanelli v. Italy.

By comparison by the many disputes came from the French law system, the European Court of Human Rights has dealt only with one case coming from the Italian law system (Paradiso and Campanelli v. Italy).

Paradiso and Campanelli case deals with a legal battle of an elderly married couple who could not conceive for years (naturally or with assistance of in vitro fertilization), nor could they adopt a child in Italy (due to shortage of children eligible for adoption).

Finally, they decided to hire a company that brought them to a Moscow-based clinic for reproductive tourism, providing them with a service that was illegal in Italy but legal in Russia: conceiving an embryo from anonymous sperm and oocyte donation, carried through pregnancy and delivered by a paid surrogate woman.

Even though the outcome was such, the couple claimed that their intention had been that the spouse would be genetically related to the

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[11] See Cour de Cassation 5 July 2017, no. 824, 825, 826, 827, available at *www.courdecassation.fr*

[12] Cour de Cassation 4 October 2019, no 648, available *at <http://www.rivistafamilia.it/wp-content/uploads/2020/04/Cour-de-Cassation_Arr%C3%AAt-n%C2%B0648-du-4-octobre-2019.pdf>*, with note by A.G. Grasso.

child but due to "unknown reasons" (of which they found out only once they undertook a genetic test in Italy), the child's genetic provenance was "unknown".

Due to the non-existence of a genetic link between the spouse and the child, the Italian authorities started a formal investigation for "altering civil status" and forgery. The State Counsel's Office asked for proceedings to declare the child as abandoned and free for adoption. While the applicants protested against such measures and asked at least to be able to adopt the child, the Youth Court decided to remove the child from them. The child was placed in a children's home in a place unknown to the applicants and had no official identity for more than 2 years. Afterwards he received another name and birth certificate and was placed with a foster family which had the intention to adopt him.

The couple was now facing double illegality: forgery of the birth certificate, on the one hand, and consequently bringing a child to Italy that was not theirs, on the other. The Italian authorities considered it necessary to take rather severe urgent measures to remove the child from the intended parents regardless of their not yet proven criminal liability.

When it came to the attention of the European Court of Human Rights, the Second Section of the ECHR judged that the removal of the child from his intended parents – as a result of a (non)recognition of a foreign birth certificate – there was an interference with the applicants' private and family life enshrined in Art. 8 of the European Convention of Human Rights[13].

The Grand Chamber of the ECHR, to which the case was later referred, considered the immediate and irreversible separation of the child from his parents to be tantamount to an interference with their private life (right to personal development through their relationship with the child). Nevertheless, it also considered that the opposite scenario would have been analogous to legalizing the situation created by them in breach of important rules of the Italian law and Italy's international public policy. Overturning as a result the previous decision, the Court decided that the national interests to prevent illegality and protect public order prevailed over the applicants' right to

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[13] Eur. Court H.R., Paradiso e Campanelli v. Italia, Judgment of 25 January 2015, in *Foro italiano*, IV, 117 (2015).

private life and concluded that there had been no violation of Art. 8 of the ECHR[14].

Unlike the Mennesson and Labassee cases in Paradiso and Campanelli case neither of the parents was genetically connected to the child and to achieve the practice the intended parents had also violated the Ukrainian law, which requires that at least one of the two parents be genetically connected to the child in order to have access to surrogacy[15].

2. The recognizability of a foreign birth certificate regarding a child born through surrogacy in the recent judgements of the Italian Court of Cassation.

The Joint Divisions (*Sezioni Unite*) of the Italian Supreme Court of Cassation in judgment no. 12193/2019 denied the registration of a Canadian parental order inscribing the intended parent – i.e. the one with no biological connection to the children – as the children's legal father in their birth certificate, on the ground that such a recognition violated the Italy's international public policy[16].

Although, the *Sezioni Unite* have, however, admitted the possibility that the non-genetic parent adopts the child of his/her partner (stepchild adoption).

Finally, however, the first civil section of the Court of Cassation with the order (*ordinanza*) no. 8325/2020 has referred to the Italian

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[14] Eur. Court H.R. (GC), Paradiso e Campanelli v. Italia, Judgment of 21 January 2017, in *Nuova giurisprudenza civile commentata*, I, 495 (2017), with note by L. LENTI; also in *giustiziacivile.com*, July 6 2017, 1-8, with note by A.G. Grasso.

[15] See Art. 123 of the Ukrainian Family Code (amended 22 December 2006, no 524-V).

[16] Corte di Cassazione-Sezioni unite 8.5.2019, no. 12193, in *Nuova giurisprudenza civile commentata*, 2019, I, 737, with note by U. Salanitro; also in *Foro italiano*, 2019, I, 1951, with note by G. Casaburi; *Familia*, 2019, 345, with note by M. Bianca; *Famiglia e diritto*, 2019, 653, with notes by M. DOGLIOTTI and G. FERRANDO; *Corriere giuridico*, 2019, 1198, with notes by D. Giunchedi and M. Winkler. For more details on this recent ruling see G. Perlingieri, *Ordine pubblico e identità culturale. Le Sezioni unite in tema di cd. maternità surrogata*, in *Diritto delle successioni e della famiglia*, 2019, 337; V. Barba, *Gestación por sustitución y orden público internacional en el ordenamiento jurídico italiano*, in *Revista de derecho civil*, 2020, 7, 69; M. Winkler – C.T. Schappo, *A Tale of Two Fathers*, in *Italian Law Journal*, 2019, 5, 559; M.C. Venuti, *Le sezioni unite e l'omopaternità: lo strabico bilanciamento tra il best interest of the child e gli interessi sottesi al divieto di gestazione per altri*, in *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 2019, 1.

Constitutional Court the question of whether the interpretation accepted by the Joint Divisions in sentence no. 12193/2019 does not conflict with the already mentioned Advisory Opinion of 10 April 2019 of the European Court of Human Rights.

According to the first civil section of the Court of Cassation the only instrument capable of safeguarding the rights of the child, as protected by the Italian Constitution and the Art. 8 of the European Convention on Human Rights, is the transcription of the foreign birth certificate in the registers of civil status[17].

II. Is a narrow interpretation of the Italian prohibition of surrogate maternity possible?

There is an alternative which makes it possible to satisfy the interests of the infertile couple to have a child without violating the dignity of women and without creating a hideous surrogacy market.

The alternative is represented by altruistic surrogacy, which means when the surrogate mother does not receive any other compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy-related expenses.

Altruistic surrogacy does not raise the same issues of commodification as the commercial surrogacy for the absence of an economic benefit, therefore the same demands for the safeguard of surrogate mother's dignity and the condition of the child could not justify an equal ban on altruistic surrogacy.

The majority of States permits altruistic surrogacy; among these Countries in which it is permitted, most allows for a gestational surrogacy only with genetic material that is 50% or 100% from the buyers, and only in a few other, traditional surrogacy is also admitted[18].

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[17] Corte di Cassazione 29 April 2020 no. 8325, in *Famiglia e diritto*, 675 (2020), with notes by G. Ferrando and G. Recinto; soon to be published also in *Corriere giuridico*, with note by U. Salanitro.

[18] Permanent Bureau of The Hague Conference on Private International Law (HCCH), Directorate-General for Internal Policies – Policy Department, Citizens' rights and constitutional affairs *"A comparative study on the regime of surrogacy in EU member States,* 2013, available at <*http://www.europarl.europa.eu*>. See also for a more complete framework of comparative law: K. Trimmings – P. Beaumont, *International Surrogacy Agreements: Legal Regulation at the International Level*, Oxford, 2013.

But in Italy altruistic surrogacy seems to be equally prohibited, in line at least to the case-law and to the current prevailing view among the scholars, according to which Art. 12, paragraph 6, law n. 40\2004 must be interpreted as an absolute prohibition, that bans any form of surrogate maternity, including the altruistic surrogacy: also the Italian Supreme Court (*Sezioni Unite*) seems to consider that altruistic surrogacy is prohibited[19].

Even though the positions of the *Sezioni Unite*[20], may still be doubts about the opposition of altruistic surrogacy to the dignity of women.

Last but not least, these doubts were last shared by the first civil section of the Court of Cassation in order no. 8325/2020 with which the Supreme Court has referred to the Italian Constitutional Court the question whether the interpretation accepted by the Joint Divisions in the sentence no. 12193/2019 does not conflict with the already mentioned Advisory Opinion of 10 April 2019 of the European Court of Human Rights[21].

In this second part of the article we consider this narrow interpretation of the Italian ban on surrogacy, according to the motivations used by the Italian constitutional judges in the sentence no. 162/2014, to declare illegitimate the prohibition of heterologous fertilization.

1. Judgment no. 162\2014 of the Italian Constitutional Court: when the heterologous fertilization ban was declared unconstitutional.

Law no. 40\2004, in subject of medically assisted reproduction, has seen, over the years, different interventions demolished by the Italian Constitutional Court[22].

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[19] Corte di Cassazione-sezione penale VI, 20.12.2018, no. 2173, available at *www.italgiure.giustizia.it*; Corte di Cassazione-Sezioni unite 8.5.2019, no. 12193, see no. 15 above, 737.

[20] In Canada it is forbidden to pay the surrogate mother: see Assisted Human Reproduction Act - S.C. 2004, c. 2 (Section 6).

[21] Corte di Cassazione 29 April 2020 no. 8325, see no. 16 above.

[22] In addition, see: Italian Costitutional Court., 9.11.2006, n. 369; Italian Costitutional Court, 8.05.2009, n. 151; Italian Costitutional Court, 5.6.2015, n. 96; Italian Costitutional Court, 11.11.2015, n. 229, all available at <*http://www.giurcost.org/*>.

The most important of these mentions above all sentence no. 162\2014[23], with which the Judges of the laws have constitutionally pronounced illegitimate Art. 4, paragraph 3, law no. 40\2004, in the part in which it forbade the appeal to heterologous fertilization[24].

The judges believed that this prohibition violated the right to the self-determination and the health of the couple. The determination of the sterile or completely infertile couple to have a child, pertaining to the most intimate and intangible sphere of the human being, should not be repressed, if other constitutional values are not violated.

On the other hand, the notion of health referred to in Art. 32 Cost. must also be intended in the comprehensive meaning of psychological health, corresponding to the notion enacted by the World Health Organization (WHO). The impossibility to form a family with children,

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[23] Corte costituzionale 10 June 2014, no. 162, in *Corriere giuridico*, 2014, 1062, with note by G. Ferrando.

[24] For more details on sentence no. 162\2014 of the Italian Constitutional Court see: G. Casaburia, *«Requiem» (gioiosa) per il divieto di procreazione medicalmente assistita eterologa: l'agonia della l. 40/04*, in *Foro italiano*, 2014, I, 2326; C. Castronovo, *Fecondazione eterologa: il passo (falso) della corte costituzionale*, in *Europa e Diritto Privato*, 2014, 1117; G. Ferrando, *Autonomia delle persone e intervento pubblico nella riproduzione assistita. Illegittimo il divieto di fecondazione eterologa*, in *Nuova giurisprudenza civile commentata*, 2014, II, 396; U. Salanitro, *I requisiti soggettivi per la procreazione assistita: limiti ai diritti fondamentali e ruolo dell'interprete*, in *Nuova giurisprudenza civile commentata*, 2016, 1362; V. Carbone, *Sterilità della coppia. fecondazione eterologa anche in Italia*, in *Famiglia e diritto*, 2014, 753; L. Violini, *La Corte e l'eterologa: i diritti enunciati e gli argomenti addotti a sostegno della decisione*, in *Rivista AIC*, 2014, 1; P. Veronesi, *La legge sulla procreazione assistita perde un altro "pilastro": illegittimo il divieto assoluto di fecondazione eterologa*, in *Istituzioni del federalismo*, 2015, 1; V. Baldini, *Diritto alla genitorialità e sua concretizzazione attraverso la PMA di tipo eterologo (ad una prima lettura di Corte cost., sent. n. 162/2014)*, 2014, 1, available at <*www.dirittifondamentali.it*>; A. Morrone, *Ubi scientia ibi iura*, in *ConsultaOnline*, 2014, 1; G. Sorrenti, *Gli effetti del garantismo competitivo: come il sindacato di legittimità costituzionale è tornato al suo giudice naturale (a margine di Corte cost., sent. n. 162/2014)*, in *ConsultaOnline*, 2014, 1; V. Tigano, *La dichiarazione di illegittimità costituzionale del divieto di fecondazione eterologa: i nuovi confini del diritto a procreare in un contesto di perdurante garantismo per i futuri interessi del nascituro*, in *Diritto penale contemporaneo*, 13.6.2014, 1; M. D'Amico, *L'incostituzionalità del divieto assoluto della c.d. fecondazione eterologa*, in *BioLaw Journal*, 2014, 2, 13; M. Casini – C. Casini, Il *dibattito sulla PMA eterologa all'indomani della sentenza costituzionale n. 162 del 2014. In particolare: il diritto a conoscere le proprie origini e l'"adozione per la nascita"*, in *BioLaw Journal*, 2014, 2, 135; A. Pioggia, *La disciplina in materia di procreazione e la riconquistata legittimità della fecondazione eterologa: un altro passo avanti per una legge che resta indietro*, in *GenIus*, 2014, 2, 85.

together with one's partner, through the appeal to the heterologous fertilization, can have even remarkable negative effects on the health of the couple.

The prohibition of surrogate maternity could also turn out to be injurious to the right to the health and the self-determination of the couple and, as such, be unconstitutional, because it prevents the couples, in which the woman cannot have a child – since she no longer has a uterus or because she is sick and she cannot carry the pregnancy to term –, to become parents.

2. THE RIGHTS OF THE INFERTILE COUPLE: THE RIGHT TO HEALTH

When the Italian Constitutional Judges, in sentence no. 162\2014, considered the heterologous fertilization as an instrument to safeguard the well-being of the infertile couple and, therefore, as a therapy that allows those who are unable to have children to become parents, they adopted a broad interpretation of the concept of health[25].

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[25] Doing so the Italian Constitutional Court has overcame the traditional vision according to which the heterologous fertilization cannot be regarded as a therapy because does not remove the infertility problem: M. Mori, *Nuove tecnologie riproduttive ed etica della qualità della vita*, in *La procreazione artificiale fra etica e diritto*, ed. G. Ferrando, Padova, 1989, 274; M. Sesta, *La filiazione,* in *Trattato di diritto privato Bessone*, vol. IV, *Filiazione, Adozione, Alimenti,* ed. T. Auletta, Torino, 2011, 355; M. SBISA', *La riproduzione artificiale fra filiazione sociale e filiazione biologica*, in *La famiglia moltiplicata. Riproduzione umana e tecnologia tra scienza e cultura*, ed. C.Ventimiglia, Milano, 1988, 144; S. Novaes, *Procreazione e tecnologia medica: incrocio di biologico, sociale ed etico*, in *La famiglia moltiplicata. Riproduzione umana e tecnologia tra scienza e cultura*, ed. C.Ventimiglia, Milano, 1988, 247; A. Fiore, *Intervento*, in *Verso nuove forme di maternità?*, Milano, 2002, 83; F. CASSONE, *La surroga materna tra tutela dell'integrità fisica e diritto alla salute,* in *Rivista critica di diritto privato*, 2008, 119; G. Rocchi, *Il divieto di fecondazione eterologa viola il diritto costituzionale alla salute?*, in *Rivista AIC*, 2012, 8; I. Rapisarda, *Il divieto di fecondazione eterologa: la parola definitiva alla Consulta*, in *Nuova giurisprudenza civile commentata,* 2013, 933; C. Cicero – E. Peluffo, *L'incredibile vita di Timothy Green e il giudice legislatore alla ricerca dei confini tra etica e diritto; ovverosia, quando diventare genitori non sembra (apparire) più un dono divino*, in *Diritto di famiglia e delle persone*, 2014, 1316; A. Vallini, *Sistema e metodo di un biodiritto costituzionale: l'illegittimità del divieto di fecondazione "eterologa"*, in *Diritto penale e processuale*, 2014, 836; A. Morrone, *Ubi scientia ibi iura*, in *Consulta OnLine*, 11 giugno 2014, 10. For other authors, to the contrary, the heterologous fertilization is a therapy for psychological health problems of the infertile or sterile couple: see G. Ferrando, *Autonomia delle persone e intervento*

This concept is not only limited to the physical sphere but is also related to the psychological and relational aspects[26]. This broad interpretation of the concept of health corresponds to the notion enacted by the World Health Organization (WHO), for which health represents *"a complete physicial, mental and social well-being"*, *"not merely the absence of disease or infirmity"*[27].

This notion of health testifies the profound changes taking place, mainly in the past few centuries, in the meaning of health and illness concepts[28].

In this context, when there is a problem of infertility or sterility, the health injury does not only affect the person directly interested, but also his/her partner: on the one hand, because in certain cases the sensitive issue of infertility depends on the biological incompatibility between the partners of the couple[29]; on the other hand, because the social, relational and psychological consequences arising from the permanent impossibility to have children affect them both[30].

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pubblico nella riproduzione assistita. Illegittimo il divieto di fecondazione eterologa, see no. 14 above, 401; G. Casaburi, *"Requiem» (gioiosa) per il divieto di procreazione medicalmente assistita eterologa: l'agonia della l. 40/04"*, in *Foro it.*, 2014, I, 2337; A. Musumeci, *"La fine è nota". Osservazioni a prima lettura alla sentenza n. 162\2014 della Corte costituzionale sul divieto di fecondazione eterologa*, in *Rivista AIC*, 2014, 7.

[26] M. Foucault, *Maladie mentale et personnalité*, Paris, 1954, 62.

[27] Some authors have criticised this definition of health: D. Callahan, *The who definition of health*, in *Contemporary issues in Bioethics*, 3 ed., 1989, 80; D. Callahan, *What kind of life. The limits of medical progress*, Washington, 1990, 34; M. Mori, *La fecondazione artificiale: una nuova forma di riproduzione umana*, Roma, 1995, 31; G. Berlinguer, *Etica della salute*, Milano, II, 1997, 19.

[28] P. Sgreccia, *La dinamica esistenziale dell'uomo*, Milano, 2008, 26; AA.VV., *Filosofia della medicina*, Milano, 2008, 235; G. Canguilhem, *Il normale e il patologico*, Torino, 1998, 9; L. Nordenfelt, *La natura della salute. L'approccio della teoria dell'azione*, Milano, 2003, 24; J. C. Lennox, *Health as an objective value*, in *The journal of medicine and philosophy*, 1995, 20, 499; A. Bowling: *Measuring health. A review of quality of life measurement scales*, Milton Keynes, UK: Open University Press, 1991, 1; E. Sgreccia, *Manuale di bioetica*, I, *Fondamenti ed etica biomedica*, Milano, 2007, 165.

[29] In these cases, although the two partners are fertile individually, together suffer a biological – reproductive incompatibility, which does not permit them to become parents: see PL. Righetti, M. Galluzzi, T. Maggino, A. Baffoni, A. Azzena, *La coppia di fronte alla Procreazione Medicalmente Assistita*, Milano, 2009, 35.

[30] A. Trounson – C. Wood, *Extracorporal fertilization and embryo transfer. Clin Obstet Gynecol*, 1981, 8(3), 681; S.R. Leiblum – E. Kemmann – M.K. Lane, *The psychological concomitants of in vitro fertilization. J. Psychosomatic Obstetrics Gynecol*, 1987, 6, 165; D. Baram – E. Tourtelot – E. Muechler – K. Huang, *Psychosocial*

Once the therapeutic nature of heterologous artificial fertilization has been accepted, we may now ask if surrogate maternity may be considered a medical treatment for the psychological discomfort of the couple[31] – who are unable to have children since the woman no longer has a uterus or because she is sick and she cannot carry the pregnancy to term – and, consequently, if the absolute prohibition which bans any form of surrogate maternity, including altruistic surrogacy, could be considered as an undue state interference with the right to health of the infertile couple[32].

2.1. The right to self-determination in the procreative sphere.

According to the Constitutional Judges, the decision to give life to a child, even when it is exercised by heterologous artificial fertilization, is incoercible, because it constitutes the expression of the general and basic principle of self-determination.

The right of self-determination is a right quite difficult to define because it translates, in legal matters, the existential importance that individual decisions and choices hold.

The legal origins of this right can be found in the American right of privacy[33], which in the case law protects a citizen's *"sphere of sanctified*

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adjustment following unsuccessful in vitro fertilization, in J psychosom obestet gynecol, 1988, 9,181; PL. Righetti, *I vissuti psicologici nella procreazione medicalmente assistita: interventi e protocolli integrati medico-psicologici*, in *Contraccezione Fertilità Sessualità*, 2001, 163.

[31] Some authors, to the contrary, have supported that surrogacy cannot be considered as a medical treatment for the psychological discomfort of the couple: A. Trabucchi, *Procreazione artificiale e genetica umana nella prospettiva del giurista*, in *Rivista di diritto civile*, I, 1986, 510; G. Ferrando, *Libertà, responsabilità e procreazione*, Padova, 1999, 312; M. SESTA, *Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?,* in *Nuova giurisprudenza civile commentata*, 2000, II, 21; D. Vincenzi Amato, *Libertà della persona e intervento pubblico nella procreazione*, in *La procreazione artificiale fra etica e diritto*, ed. G. Ferrando, Padova, 1989, 185.

[32] In this way, see B. Liberali *Problematiche costituzionali nelle scelte procreative*, Milano, 2017, 140; M. Di Masi, *Maternità surrogata: dal contratto allo* "status", in *Rivista critica di diritto privato*, 2014, 642.

[33] S.D. Warren e L.D. Brandeis, *The right to privacy*, in *Harvard law review*, IV, 1890, 193.

isolation"[34] from the public authority[35], into the innermost and deepest dimension of existence[36]; an area within which the citizen can avoid any potential interference in decisions regarding the framework of reproduction as well[37].

In spite of its Anglo-Saxon origin, the right of self-determination does not come to Europe directly from the American judicial culture, but rather indirectly, through the decision of the European Court of Human Rights.

In particular, in Pretty case, the judges underlined that, *"although no previous case has established as such any right to self-determination as being contained in Art. 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees"*[38].

The European Court of Human Rights, which, on several occasions, has dealt with the problems related to appeals concerning modern biomedical technology[39], has also argued that *"the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Art. 8, as such a choice is an expression of private and family life"*[40].

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[34] C.A. Mackinnon, *Reflections on Sex Equality Under Law*, 100 Yale LJ. 1281, 1311 (1991) [hereinafter MacKinnon, *Reflections*]; see also, L.C. Mcclain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, on *Yale Journal of Law & the Humanities*: Vol. 7: Iss. 1, Art. 9, 196.

[35] AA. VV., *The evolution of the right to privacy after Roe v. Wade*, in *American journal of law and medicine*, 1987, 13(2, 3), 365; L. Miglietti, *Il diritto alla privacy nell'esperienza giuridica statunitense ed europe*a, Napoli, 2014, 109.

[36] E. Shils, *Privacy: its constitution and vicissitudes*, on *Law and contemporary problems*, 1966, 31, 281.

[37] R. Dworkin, *Life's domination*, London, 1993, 148. See also: *Skinner v. State of Oklahoma,* ex. rel. *Williamson*, (1942) 316 U.S. 535; *Griswold v Connecticut*, (1965) 381 U.S. 479; *Eisenstadt v. Baird*, (1972) 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349; *Roe v. Wade*, (1973) 410 U.S. 113; *Casey v. Population Services International*, (1977) 431 U.S. 678; *Davis v. Davis*, (Tenn. 1992) 842 S.W.2d 588, 597, in *Foro it.*, 1991, IV, 205; *Goodridge v. Department of Public Health*, (2003) 798 N.E.2d 941; *Lifchez v. Hartigan*, (1990) 735 F. Supp. 1361.

[38] European Court of Human Rights, Pretty c. United Kingdom, 29.4.2002, available at <*www.echr.coe.int*>.

[39] European Court of Human Rights, Evans c. United Kingdom, 10.04.2007, available at <*www.echr.coe.int*>; European Court of Human Rights, Dickson c. European Court of Human Rights, 4.12.2007, available at <*www.echr.coe.int*>.

[40] European Court of Human Rights, S.H. and Others c. Austria, 1.4.2010, available at <*www.echr.coe.int*>.

It appears that when the Italian Constitutional Court constitutionally pronounced illegitimate Art. 4, para. 3, law no. 40\2004, in the part in which it forbade the appeal to heterologous fertilization, it also shared this European Court perspective that human procreation does not require naturality[41].

Once this point of view had been accepted, the antecedent conditions were established for the recognition of the possibility of the right to appeal to surrogacy in Italy as well: not only because surrogate maternity is included among the artificial procreation techniques[42], but also because, at least whenever one of the two partners has a genetic link to the child, it might be argued that through surrogate maternity the couple will continue to exercise its right to procreate[43].

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[41] E. La Rosa, *Il divieto "irragionevole" di fecondazione eterologa e la legittimità dell'intervento punitivo in materie eticamente sensibili*, on *Ragiusan*, 2014, 141; A. Vallini, *Sistema e metodo di un biodiritto costituzionale: l'illegittimità del divieto di fecondazione "eterologa"*, see no. 16 above, 834.

[42] In this way: I. Corti, *La maternità per sostituzione*, in *Il governo del corpo*, vol. II, t. 2, in *Tratt. Biodiritto,* ed. S. Rodota' – P. Zatti, Milano, 2011, 1481; L. Lorenzetti, *Maternità surrogata*, in *Digesto discipline privatistiche*, Torino, 2011, 617; G. Casaburi, *Osservazioni a Corte costituzionale n. 162\2014*, in *Foro italiano*, I, 2341; to the contrary, S. Niccolai, *Alcune note intorno all'estensione, alla fonte e alla ratio del divieto di maternità surrogata in Italia*, in *GenIUS*, 2017, 2, 52; C.C.W. Chan, *Infertily, assisted reproduction and rights*, *best practice & research clinical obstetrics and gynaecology*, 2006, 20, 377; C. Straehle, *Is there a right to surrogacy?*, in *Journal of applied philosophy*, 2016, 33, 150.

[43] In the American doctrine, on the one hand some authors believe that the right to appeal to surrogacy is protected by the constitutional right of privacy, in the context of Amendment XIV: J. Robertson, *Procreative liberty and the control of conception, pregnancy, and childbirth*, in *Virginia law review*, 1983, 69, 405; C. Spivack, *The law of surrogate motherhood in the United States*, in 58 *American Journal of Comparative Law,* 2010, 109; P. Nicolas, *Straddling the Columbia: a constitutional law professor's musings on circumventing Washington State's criminal prohibition on compensated surrogacy*, in 89 *Washington Law Review*, 2014, 1279; on the other hand, instead, some authors tend to exclude the constitutional relevance of the right to surrogacy: L. Gostin, *A civil liberties analysis of surrogacy arrangements*, in *Surrogate motherhood*, Indiana University Press, 1990, 3; M. Schultz, *Reproductive technology and intention-based parenthood: an opportunity for gender neutrality*, in *Wisconsin law review*, 1990, 297; S. B. Rae, *Parental rights and the definition of motherhood in surrogate motherhood*, in *Southern California review of law and women's studies,* 1994, 3, 219; R.J. Chin, *Assisted reproductive technology legal issues in procreation*, in *Loyola Consumer Law Reporter*, 1996, 8, 214; S. Ferguson, *Surrogacy contracts in the 1990s: the controversy and debate continues*, in 33 *Duquesne Law Review*, 1995, 922; M. Field, *Compensated surrogacy*, in 89 *Washington Law Review*, 2014, 1178.

3. Restrictions to the altruistic surrogacy right: the polysemic concept of dignity.

Despite the fact that the debate around the concept of dignity characterizes all of human history[44], it was precisely with Kant that the dignity also took a weighty legal meaning[45], which will result in the national constitutions that arose after the Second World War in the recognition of a privileged legal status.

In the Italian Constitution an explicit mention of dignity is made in two articles: Art. 3 and Art. 4; if we compare this with the majority of the national constitutions[46], we can form an idea of radical irrelevance of the concept of dignity in the Italian Constitution[47]. That conclusion would, however, be erroneous since the preparatory work and the entire system of the Italian Supreme Law shows the central role of dignity, understood as respect for any human being [48].

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[44] F. Viola, *Dignità umana*, in *Enciclopedia filosofica*, III, Milano, 2006, 2863; P. Becchi, *Il principio di dignità umana*, Brescia, 2009, 10; U. Vincenti, *Diritti e dignità umana*, Roma, 2009, 7; A. Abignente – F. Scamardella, *Dignità della persona*, Napoli, 2013; AA. VV., *The Cambridge handbook of human dignity: interdisciplinary perspectives*, Cambridge University, 2014; C.M. Mazzoni, *Dignità*, in *Rivista critica di diritto privato*, 2016, 157; V. SCALISI, *L'ermeneutica della dignità*, Milano, 2018, 57.

[45] I. Kant, *The Metaphysics of Ethics*, trans. J.W. Semple, ed. with Introduction by Rev. Henry Calderwood (Edinburgh: T. & T. Clark, 1886) (3rd edition). 29.3.2019, available at <*https://oll.libertyfund.org/titles/1443*>.

[46] See the artt. 13 and 24, para. 2, of the of the Japanese Constitution; art 10 of the Spanish Constitution; Art. 23 of the Belgian; Art. 13 of the Portuguese Constitution; artt. 2 and 7 of the Greek Constitution; Art. 1 of the Czech Constitution; Art. 30 of the Polish Constitution; Art. 54 of the Hungarian Constitution; Art. 12 of the Slovak Constitution; artt. 1, 7, 10, 25, 36 of the South African Constitution. Moreover, we find additional references to the value of dignity almost in all the Latin American Constitution: see G. Rolla, *Profili costituzioni della dignità umana*, in *La tutela della dignità dell'uomo*, Napoli, 2008, 61.

[47] It deserves special attention the German Constitution and, in particular, Art. 1: see F. Berardo, *"La dignità umana è intangibile": il dibattito costituente sull'Art. 1 del* Grundgesetz, in *Quaderni costituzionali*, 2006, 2, 387. This Art. recognizes the dignity not as a fundamental right, but an objective law which is not subject to comparisons or obligations, unlike fundamental rights; such differentiation has also brought a change of terminology, in fact, if the fundamental rights in the German Constitution are classified as *unverletzlichen und unveräußerlichen* (inviolable and inalienable, the dignity, instead, is *unantastbar* (untouchable). Moreover, the German constituents has strengthened this provision by excluding it from the constitutional review (Art. 79, para. 3).

[48] V. Marzocco, *La dignità umana tra eredità e promesse*, in *Dignità della persona*, see no. 35 above, 22; A. Ruggeri – A. Spadaro, *Dignità dell'uomo e giurisprudenza costituzionale (prime notazioni)*, in *Politica del diritto*, 1991, 347.

Oversimplifying a bit, we can argue that two different conceptions of dignity exist: on the one hand, there is a subjectivist view of dignity and, on the other hand, an objectivist view of dignity[49]. These two different conceptions correspond to different ways to conceive dignity in the American tradition and in the European tradition[50].

If we want to describe, even in a broad outline, the main features of these different conceptions of dignity, we might say that, according to the first view, we cannot consider acts of limitation on someone's functional liberties as legitimate if done in the name of that person's dignity or a superior interest: this view is fruit of the American tradition in the field in which the concept of dignity is connected to, not to mention that it overlaps with, the notion of privacy[51].

In the European view, instead, the person's intention and the right of self-determination, however important they are, are subject to, like all other rights, some limits[52]. In the European Constitutions at the

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[49] Some authors, mostly American, consider dignity as a useless concept: H. Khuse, *Is there a tension between autonomy and dignity?*, in *Bioethics and BioLaw*, ed. P. Kemp, Copenhagen, 2000, 2, 74; J. Aldergrove, *On dignity*, in *Why we are not obsolete yet. Genetics, algeny, and the future*, ed. J. Aldergrove, Burnaby, 2000; R. Macklin, *Dignity is a useless concept (it means no more than respect for persons or their autonomy)*, in 327 *British medical journal*, 2003, 1419; S. Pinker, *The stupidity of dignity: conservative bioethics' latest, most dangerous play*, in *New republic*, 2008, 1; C. Mccrudden, *Human dignity in human rights interpretation*, in 19 *European journal of international law*, 2008, 655; J. Smits, *Human dignity and uniform law: an unhappy relationship,* in *Ticom working paper on comparative and transnational law*, 2008, 2; A. Cochrane, *Undignified bioethics*, in 5 *Bioethics*, 2010, 234.

[50] B. Edelman, *La dignité de la personne humaine, un concept nouveau*, in *La personne en danger*, Paris, 1999, 504; E.J. Eberle, *Dignity and liberty: constitutional visions in Germany and the United States (issues in comparative public law)*, Taschenbuch, 2011, 963; V.L. Raposo, *O direito à imortalidade*, Coimbra, 2014, 333; V. Scalisi, *L'ermeneutica della dignità*, Milano, 2018, 31; E. Poddighe, *Comunicazione e "Dignità della donna"*, Roma, 2018, 42.

[51] *Casey v. Population Services International*, (1977) 431 U.S. 678; *Lawrence v. Texas*, (2003) 539 U.S. 558. See also v. G. Bognetti, *The concept of human dignity in European and US constitutionalism*, in *European and U.S. constitutionalism*, ed. G. Nolte, Cambridge, 2005, 85; N. Rao, *On the use and abuse of dignity in constitutional law*, in *Columbia journal of European law*, 2008, 14, 201.

[52] G. Resta, *La dignità*, in *Ambito e fonti del biodiritto*, vol. I, in *Trattato di Biodiritto*, ed. S. Rodota' – P. Zatti, Milano, 2011, 290; P. Zatti, *Maschere del diritto*, Milano, 2009, 46; A. Ruggeri, *Appunti per uno studio sulla dignità dell'uomo, secondo diritto costituzionale*, in *Rivista AIC*, 2011, 6; J. Reis Novais, *A dignidade da pessoa humana*, I, Coimbra, 2015, 78.

top of the scale of values there is not the right to personal autonomy, but rather, there is the principle of solidarity which, insofar as they conflict, could even override upon the private autonomy[53].

If the dignity is an attribute of liberty, the individual can determine autonomously what is "dignified" for him or herself[54]: dignity cannot be placed as a limit in that the individual defines it him or herself[55]. If, on the contrary, we believe that liberty is an attribute of dignity, then dignity of man can be used as a limit to oppose an individual's behaviour as established by a universal value[56].

It was considered appropriate to set the wider issue of the conflict between the private autonomy and the objectivist view of dignity, because it is from this point of view that we will clearly look into the issue of the admissibility of surrogate motherhood in the Italian legal system[57].

If in our legal system, which embraces the European conception of dignity, the legalisation of commercial surrogacy was not at all

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[53] F.D. Busnelli, *Quali regole per la procreazione assistita?*, in *Rivista di diritto civile*, 1996, I, 583.

[54] For Pico della Mirandola it is for the individual alone to up to determine autonomously what is "dignified" for him or herself: G. Pico Della Mirandola, *Oratio de hominis dignitate*, Firenze, 1942, 103.

[55] X. BIOY, *La dignité: questions de principes*, in *Justice, ethique et dignité: actes du colloque organisé à Limoges Le 19 et 20 novembre 2004*, Limoges, 65.

[56] B. Mathieu, *La dignité de la personne humaine: Quel droit? Quel titulaire?*, in *Dalloz*, 1996, 285.

[57] Within the framework of the conflict between the private autonomy and the objectivist view of dignity we can consider most well-know Court Cases such as the French story regarding the "Dwarf tossing": for more details see A. Massarenti, *Il lancio del nano e altri esercizi di filosofia minima*, Parma, 2006, 7; E. Ripepe, *La dignità umana: il punto di vista della filosofia del* diritto, in *La tutela della dignità dell'uomo*, Napoli, 2008, 35; G. Cricenti, *Il lancio del nano. Spunti per un'etica del diritto civile*, in *Rivista critica di diritto privato*, 2009, 21; M. Rosen, *Dignity. Its History and Meaning, Cambridge, Cambridge University Press,* 2012, 70; X. Bioy, *La dignité: questions de principes*, see no. 46 above, 83; the German Court decisions: "Peep-Show Fall" and "Telefonsex"; and the French Court decisions: SIDA-Benetton and "Loft Story": see G. Resta, *La disponibilità dei diritti fondamentali e i limiti della dignità (Note a margine della Carta dei Diritti)*, in *Rivista di diritto civile*, 2002, 836; M.R. Marella, *Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti*, in *Rivista critica di diritto privato*, 2007, 74; M. Gennusa, *La dignità umana e le sue anime. Spunti ricostruttivi alla luce di una recente sentenza del Bundesverfassungsgericht*, in *Le Corti dell'integrazione europea e la Corte costituzionale italiana*, ed. N. Zanon, Napoli, 2006, 203.

admissible – legalisation which was considered, instead, consistent with the American traditional values[58] – we could instead admit the altruistic surrogacy. Some human behaviour, in fact, if committed for profit-making, runs contrary to the human dignity value; whereas, if based on solidarity, it could be recognised as worthy and can be protected: the typical example concerns organ and blood donation.

We could repeat the same kind of reasoning for surrogacy, although there is no specific law which allows it: in this respect, we spoke about the logic of gift, of solidarity which rises up as a sort of fraternity[59]. This logic of gift would remain outside of the *ratio legis* of the ban, because the lack of a payment and the spontaneity of the gesture rules out an attack on the human dignity of women and children[60].

3.1. The health of the pregnant woman.

The Italian ban could be interpreted as an absolute prohibition which bans any form of surrogate maternity, including the altruistic surrogacy, whether there was evidence that this technique impacts the birth mother's health, protected under Art. 32 Cost.

However, in reality, surrogacy does not contain risks other than those existing in the heterologous artificial fertilization, with regard to the artificial insemination and the subsequent embryo implantation, nor does it subject the birth mother to different risks to those that could be encountered by any woman during pregnancy or childbirth[61].

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[58] See A. Finkelstein – S. Mac Dougall – A. Kintominas – A. Olsen, *Surrogacy law and policy in the U.S.: a national conversation informed by global law making*, in *Columbia law school sexuality & gender law clinic*, 2016, 9.

[59] J. M. Camacho, *Maternidad subrogada: una práctica moralmente aceptable. Análisis crítico de las argumentaciones de sus detractores*, Città del Messico, 2009, 15.

[60] A. Ruggeri – C. Salazar, *"Non gli è lecito separarmi da ciò che è mio": Riflessioni sulla maternità surrogata alla luce della rivendicazione di Antigone*, in *Consulta OnLine*, 2017,143; V. Scalisi, *Maternità surrogata: come "far cose con regole"*, in *Rivista di diritto civile*, 2017, 1100; B. De Filippis, *Maternità surrogata o assistita, utero in affitto*, in *Trattato di diritto e bioetica*, ed. A. Cagnazzo, Napoli, 2017, 369; to the contrary, see S. Serravalle, *Maternità surrogata, assenza di derivazione biologica e interesse del minore*, Napoli, 2018, 89. See also App. Milano, ordinanza 25.07.2016, no. 273, in *Foro italiano*, 2016, I, c. 3258.

[61] See: AA.VV., *Surrogacy: outcomes for surrogate mothers, children and the resulting families (a systematic review)*, in *Human reproduction update*, 2016, 263.

However, we could hypothesize a risk of psychological damage caused by the separation from the new born baby[62]: several studies, in fact, have noted that in some surrogate mothers their level of psychological distress is particularly high, even over years since the "delivery" of the child to the intended parents[63].

Nevertheless, on the one hand, the studies published carried out on the health of the surrogate mothers have focused primarily on cases of commercial surrogacy[64], on the other hand the same scientific studies have shown that the pregnant woman suffers less after the separation from the child if they can establish and maintain a strong emotional bond with the intended parents[65] and, in particular, with the social mother[66].

In this perspective, therefore, the altruistic nature of the agreement reduces the risks of potential injuries for the psychological health of the surrogate mothers, since in these cases it is very likely that the pregnant woman, the intended parents and the child will continue to remain in close contact over time[67].

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[62] R. Bitetti, *Contratti di maternità surrogata, adozione in casi particolari ed interesse del minore*, in *Nuova giurisprudenza civile commentata*, 1994, I, 179.

[63] H. Baslington, *The social organization of surrogacy: relinquishing a baby and the role of payment in the psychological detachment process*, in *Journal of health psychology*, 2002, 64; E. BLYTH, *"I wanted to be interesting. I wanted to be able to say "I've done something with my life"*: *Interviews with surrogate mothers in Britain*, in *Journal of reproductive and infant psychology*, 1994, 12, 189; H. RAGONE, *Surrogate motherhood: conception in the heart*, Boulder, CO: Westview Press, 1994, 189.

[64] H. Baslington, *The social organization of surrogacy: relinquishing a baby and the role of payment in the psychological detachment process*, see no. 62 above, 57; J. Jadva – L. Blake – P. Casey – S. Golombok, *Surrogacy: the experience of surrogate mothers*, in *Human Reproduction*, 2003, 18, 2196; O. Van Den Akker, *Genetic and gestational surrogate mothers'experience of surrogacy*, in *Journal of reproductive and infant psychology*, 2003, 21, 145; H. Hanafin, *Surrogate parenting: reassessing human bonding. Paper presented at the american psychological association convention*, New York, 1987.

[65] M. Hohman - C. B. Hagan, *Satisfaction with surrogate mothering: a relational model*, in *Journal of human behavior in the social environment*, 2001, 4, 61; J. C. Ciccarelli - L. J. Beckman, *Navigating rough waters. An overview of psychological aspects of surrogacy*, in *Journal of social issues*, 2005, 61, 32.

[66] E. Teman, *Birthing a mother: the surrogate body and the pregnancy self*, Barkeley: University of California Press; Van Den Akker, *Psychosocial aspects of surrogate motherhood*, in *Human reproductive update*, 2007, 13, 57.

[67] E. Blyth, *"I wanted to be interesting. I wanted to be able to say "I've done something with my life"*: *Interviews with surrogate mothers in Britain*, in *Journal of reproductive and infant psychology*, 1994, 12, 189; O. Van Den Akker, *Genetic and gestational*

3.2. The best interest of the child.

Even if we came over doubts regarding the human dignity and the health of the birth mother, the idea that we can legalise the altruistic surrogacy should be made subject to further evaluations, since the surrogate maternity involving a third party, the unborn child, to prevent it from being misused by the infertile couple, in order to satisfy their desire to become parents[68].

The best interest of the child might constitute a huge obstacle to the intended parents family's project to appeal to surrogacy both before the in vitro fertilisation and/or the child's birth and after his/her birth as an impediment to the effectiveness of the surrogacy agreement: from this fact the problem concerning the legal significance of the filial relationship between the minor and the intended couple making arises.

With reference to the first point, it should be emphasised immediately that the arguments based on the safeguard of the unborn child's rights, to affirm the constitutional legitimacy of the absolute ban on surrogacy, including the altruistic surrogacy, come up against serious limits, on a logical and axiological level, regarding the fact that those very rights would paradoxically lead to the non-existence or non-birth of this potential child[69].

With reference to the second point, it is further submitted that the prohibition of altruistic surrogacy could be justified to prevent that the

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surrogate mothers'experience of surrogacy, in *Journal of reproductive and infant psychology*, 2003, 21, 145. The psychological problems nevertheless involved only a small amount of birthchild woman: J. Jadva – L. Blake – P. Casey – S. Golombok, *Surrogacy: the experience of surrogate mothers*, in *Human Reproduction*, 2003, 18, 2196; C.G. Kleinpeter – M.A. Hohman, *Surrogate motherhood: personality traits and satisfaction with service providers*, on *Psychological reports*, 2000, 87, 957.

[68] C. Chini, *Maternità surrogata: nodi critici tra logica del dono e preminente interesse del minore*, in *Biolaw journal*, 2016, 1, 185; D. Rosani, *The Best Interests of the Parents. La maternità surrogata in Europa tra Interessi del bambino, Corti supreme e silenzio dei legislatori*, in *Biolaw journal*, 2017, 1, 127; E. Giacobbe, *Dell'insensata aspirazione umana al dominio volontaristico sul corso della vita*, in *Dir. fam. e pers.*, 2016, II, 593.

[69] See J. M. Camacho, *Maternidad subrogada: una práctica moralmente aceptable. Análisis crítico de las argumentaciones de sus detractores*, Città del Messico, 2009, 15; V.L. Raposo, *Quando a cegonha chega por contrato*, on *Boletim da Ordem dos Advogados*, 2012, 88, 27.

child, once born, can be regarded as an object to be transferred: this would encroach upon his dignity as a human being[70]. However, also in this case, the topic did not appear convincing, as evinced who has been argued that *"the fact that this might occur within the context of surrogacy does not detract from that life having come into being and therefore being accorded dignity through its very existence as a human"*[71].

From my point of view, in addition, the risk of commodification of the child is excluded from the altruistic nature of the agreement and the inclusion of the child into the intended parents family may be the winning solution for the interest of the minor, since the surrogate mother surely never intended to carry out motherly duties towards him/her.

Rather, it has been underlined that the removal of the child from the pregnant woman could be a significant source of severe psycho-physical injuries for the child, because it is very important that the surrogate mother continues to maintain a relationship with the child during the period of growth and, moreover, during the periods immediately following childbirth[72]. However, this item is not conclusive as to the altruistic surrogacy, because the relationship which usually links the pregnant woman with the intended parents seems to be suitable to ensure affective continuity and, consequently, seems to be suitable

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[70] E.S. Anderson, *Why commercial surrogate motherhood unethically commodifies women and children: reply to McLachlan and Swales*, in *Health care analysis*, 2000, 8, 19; P. Otero, *A dimensão ética da maternidade de substituição*, in *Direito e política*, 2012, 1, 87; S. Niccolai, *Maternità omosessuale e diritto delle persone omosessuali alla procreazione. Sono la stessa cosa? Una proposta di riflessione*, in *Costituzionalismo.it*, 2015, 3, 50; 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 *Maternità Filiazione Genitorialità*, ed. S. Niccolai – E. Olivito, Napoli, 2017, 136; M. Aramini, *Introduzione alla bioetica*, Milano, 2015, 266; E. Montero, *La maternidad de alquiler frente a la summa divisio iuris entre las personas y las cosas*, in *Persona y derecho*, 2015, 1, 230.

[71] K. Galloway, *Theoretical approaches to human dignity, human rights and surrogacy*, in *Surrogacy, law and human rights*, ed. P. Gerber e K. O'Byrne, Abingdon, 2015, 25; J. Reis Novais, *A dignidade da pessoa humana*, I, Coimbra, 2015, 120.

[72] M. Johansson Agnafors, *The harm argument against surrogacy revisited: two versions not to forget*, on *Medicine, health care and philosophy,* 2014, (17), 3, 357; M. Tieu, *Altruistic surrogacy: the necessary objectification of surrogate mothers*, in *J Med Ethics*, 35*,* 2009, 172.

to exclude potential injuries for the psychological health of the child resulting from the separation with the pregnant woman[73].

4. The legal *status* of the surrogate-child: introductory notes.

The analysis so far performed shows that there are valid reasons to support that the current interpretation of the ban of surrogate maternity is not convincing and, for this, to accept a different, narrow interpretation of the ban.

In this perspective, the recognition of the right to appeal to altruistic surrogacy requires a coherent and harmonious interpretation of the rules governing the establishment and the safeguard of the legal status of the child: in this interpretation, it should be possible to establish the parent-child relationship not only with the father with whom there is a genetic link[74], but also with the intended woman.

As a result, the Italian legal expert who intends to make the right to the infertile couple reality must draw from the rules of our legal system and, in particular, from the rules governing the legal status of the child conceived through artificial procreation (Articles 8 and 9, law no. 40\2004), the principles which could bridge the gap in terms of

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[73] S. Imrie – V. Jadva, *The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements*, in *Reproductive biomedicine online*, 2014, 29, 430; AA.VV., *Surrogacy: outcomes for surrogate mothers, children and the resulting families (a systematic review)*, in *Human reproduction update*, 2016, 273; S. Golombok – L. Blake – P. Casey – G. Roman – V. Jadva, *Children born through reproductive donation: a longitudinal study of psychological adjustment*, in *Journal of child psychology and psychiatry,* 2013, (6), 54, 653; S. Golombok – F. Maccallum – C. Murray – E. Lycett – V. Jadva, *Surrogacy families: parental functioning, parent–child relationships and children's psychological development at age 2*, in *Journal of child psychology and psychiatry*, 2006, 47, 220; S. Golombok – E. Iloi – L. Blake – G. Roman – V. Jadva, *A longitudinal study of families formed through reproductive donation: parent-adolescent relationships and adolescent adjustment at age 14*, in *Developmental psychology*, 2017, 53, 10, 1966.

[74] See Eur. Court H.R., Mennesson v. France, Judgment of 26 June 2014, see no. 7 above, 561; Eur. Court H.R., Labassee v. France, Judgment of 26 June 2014, see no. 7 above; Eur. Court H.R., Foulon v. France, Judgment of 21 July 2016, and Bouvet v. France, see no. 7 above; Eur. Court H.R., D and Others v. Belgium, Judgment of 8 July 2014, see no. 7 above.

legal status of the child who is born as a consequence of the altruistic surrogacy agreement.

In this context, a distinction has thus to be drawn between the situation where the pregnant woman making use of her right to be named in the birth certificate, from the situation in which she intends to waive the filial relationship with the child, bringing the pregnancy to term anonymously[75].

In the latter case, in the absence of any conflicts between the pregnant woman and the intended parents, there is no reason to foreclose to the intended parents the establishment of a filial relationship: this establishment would be based on the genetic link between the intended parents and the child or, in its absence, on the informed consensus expressed by parents in advance of the treatment process, taking into account the best interests of the child and its right to have two parents.

Where, instead, the pregnant woman decides to make use of her right to be named in the birth certificate and decides to revoke her original consent to the altruistic surrogacy, probably in those cases the conflict will be solved in favour of the pregnant woman, for the absence of a specific legislative framework.

III. A brief postscript: the Constitutional Court calls on Parliament to find more adequate forms of protection for children born via surrogacy.

Pending this publication, the Constitutional Court decided on the question raised by the First Civil Division of the Court of Cassation in Order no 8325/2020, which has been given full consideration in the course of the discussion[76].

At the time of writing, we are aware of only the press release made known by the Court's Press Office[77], from which we can understand that the Italian constitutional judges declared the issue inadmissib-

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[75] In Italy it is possible for the pregnant woman bringing to term anonymously, unlike in other States (like Portugal, Belgium, Netherlands, Spain etc etc): see Art. 30, para. 1, Decree No. 396 of the President of the Republic of 30 December 2000.

[76] Court of Cassation 29 April 2020 no 8325 no 17 above.

[77] Press Office of the Constitutional Court, Press Release of 28 January 2021, available at *https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20210128193553.pdf* (last visited 29 January 2021).

le, leaving the resolution of the problem to the intervention of the legislator, who will have to find more adequate tools to protect the condition of the child born through surrogate maternity. The judges, without prejudice to the criminal prohibition (if considered also extended to altruistic surrogacy, is currently not known; we will have to wait for the reasons), recognized that the current legal framework, therefore including the use of adoption, does not ensure full protection to the interests of the child. In particular, it cannot be excluded that, in the absence of an intervention by the lawmaker, which they define as necessary, the judges will intervene in the near future directly to fill the gap found regarding the child's protection[78]. However, regardless of a possible future intervention by the Constitutional Court, which wins against the inertia of the legislator, the Italian legal scholar is not exempted from the task of finding in the current legal system the most suitable rules to ensure the protection of the surrogacy child's rights nor the absence of a specific legislative framework can bind the scholar to a hermeneutic option that he considers detrimental to constitutional values[79].

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[78] Gap of protection that the Court also found in one case, concerning a child born to a lesbian couple, decided in the same hearing on 27 January 2021, in which – following a conflict situation of the two women – it was not even possible to resort to adoption. Even in this case the judges, in declaring the question inadmissible, issued a strong warning to the legislator to urgently identify the most suitable forms of protection of children's rights, also in the light of international and European sources: Press Office of the Constitutional Court, Press Release of 28 January 2021, available at *https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20210128192038.pdf* (last visited 29 January 2021).

[79] For more widespread considerations on the role of legal scholars with regard constitutional interpretation see P. PERLINGIERI, *Interpretazione e controllo di conformità alla Costituzione*, in *Rassegna di diritto civile*, 2018, 601; ID, *La dottrina del diritto civile nella legalità costituzionale*, in *Rassegna di diritto civile*, 2007, 497.

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