

International Issues Regarding Surrogacy

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Abstract

The global spread of surrogacy and the changes to the concept of family resulting from historical, social and cultural factors should lead lawmakers to address the issue of children born through this procedure. This should draw both on the most recent academic literature as well as an interdisciplinary perspective.

The purpose of this article is to propose solutions on an international level to the complex problems arising as a result of both the violation of Italian law and the differences between the court rulings adopted in relation to specific cases. In fact, the current prohibition on surrogacy gives rise to interpretative uncertainties and the principle of *favor minoris* risks being compromised whenever an Italian couple returns to Italy with a child born abroad of a surrogate mother.

I. Introduction: The Need to Overcome the Impediments Posed by Italian Law

The traditional family comprising a mother, a father and their children conceived through sexual intercourse has been challenged both by medical technology offering alternative paths to reproduction and by engagement with foreign legal systems.

Over the last thirty years, the desire to become a parent has been achieved in many cases through surrogacy, a widespread practice that is today one of the most heated issues in law and bioethics, within both the Italian¹ and foreign literature.²

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¹ A. Trabucchi, 'Procreazione artificiale e genetica umana nella prospettiva del giurista' *Rivista di diritto civile*, I, 495 (1986); V. Franceschelli, 'Verso una paternità contrattuale: famiglia artificiale e diritto privato' *Diritto di famiglia e delle persone*, 1159-1174 (1987); D. Clerici, 'Procreazione artificiale, pratica della surroga e contratto di maternità: problemi giuridici' *Diritto di famiglia e delle persone*, 1011 (1987); F.P. Sisto, '*Mater non semper certa est*: la gestazione per conto terzi fra (pieni di) scienza e (vuoti di) legislazione' *Diritto di famiglia e delle persone*, 1467-1473 (1987); P. Zatti, 'Verso un diritto per la bioetica: risorse e limiti del discorso giuridico' *Rivista di diritto civile*, I, 43-57 (1995); I. Corti, *La maternità per sostituzione* (Milano: Giuffrè, 2000), 94; F.D. Busnelli, 'Verso una madre intercambiabile?', in G. Visintini ed, *Dieci lezioni di diritto civile* (Milano: Giuffrè, 2001), 99.

² C. Shalev, *Birth Power. The Case for Surrogacy* (New Haven and London: Yale University

This essay focuses exclusively on issues related to heterosexual couples, as the circumstances of same-sex couples are specific and call for a different analysis.

Surrogacy involves a woman (the surrogate or 'parturient' mother) who agrees to carry a child for one or two persons (the commissioning couple or intended parents) who want to become parents and raise this child. This procedure is often sought after by women suffering from serious reproductive pathologies, such as endometriosis, the absence of a uterus or the presence of tubal malformations as well as those who have undergone a hysterectomy.

A distinction may be drawn between two core scenarios: the first is gestational surrogacy (in Italian '*maternità surrogata per sola gestazione*', or '*gestazione per altri*', also known as total or full surrogacy), under which the commissioning couple provides the genetic material or when it is provided by a donor.

Another form of surrogacy is traditional surrogacy (in Italian '*maternità surrogata per concepimento e gestazione*', also called partial surrogacy), where the surrogate mother also supplies the eggs.

While a number of jurisdictions permit human reproduction through surrogate motherhood, Italian legge 19 February 2004 no 40 on medically assisted procreation expressly prohibits it (Art 12 para 6 of legge 19 February 2004 no 40). Various justifications are offered for this prohibition: first, the state has an interest in preventing children from being turned into commodities and reduced to mere merchandise; moreover, surrogacy makes maternity uncertain, due to the separation of the various mother figures, which has negative consequences for the psychological and social development of the child.

The ban under Italian law is also rooted in the claim that surrogacy involves the exploitation of women because it treats the surrogate mother as a means to an end, relegating her from a person worthy of respect to a mere object. According to this view, a woman acting as a surrogate is often

Press, 1989), Italian translation by G. Ajani and A. Maffiodo: *Nascere per contratto* (Milano: Giuffrè, 1992), 16, 92; M. Coleman, 'Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction' 17 *Cardozo Law Review*, 497 (1996); R. Schuz, 'The Right to Parenthood: Surrogacy and Frozen Embryos' *The International Survey of Family Law*, 237 (1996); M.H. Baughman, 'In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy' 10 *Columbia Journal of Gender and Law*, 263 (2001); J. Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' 10 *Medical Law Review*, 271 (2002); V.S. Browne-Barbour, 'Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?' 26 *Whittier Law*, 429 (2004); J.B. Reich and D. Swink, 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era' 14 *Journal of Health Care Law & Policy*, 241 (2011); S. Dar, T. Lazer et al, 'Assisted Reproduction Involving Gestational Surrogacy: An Analysis of the Medical, Psychosocial and Legal Issues: Experience from a Large Surrogacy Program' 30 *Human Reproduction*, 345 (2015), available at <http://humrep.oxfordjournals.org/content/30/2/345.full.pdf+html> (last visited 6 December 2016).

persuaded by the substantial amount of compensation offered and is thus not able to decide freely to hand over the child to whom she has just given birth. Therefore, the principle contained in Art 2 of the Italian Constitution, which enshrines respect for human dignity in the light of a social awareness, lies at the root of the decision to consider such agreements unlawful.

The potential for exploitation created by this practice, especially when the commissioning couple is rich and the surrogate mother is poor, cannot be denied. Nevertheless, this is only a risk, not a certainty, as is shown by the spread of altruistic surrogacy on a wide scale.

Among Italian scholars, there is greater acceptance of the practice by which the surrogate mother is inseminated with the commissioning couple's gametes, as the woman then only carries a child who has genetic links with both intended parents. According to this view, the existence of this biological relationship, which is particularly significant for the identity of the child, can justify the child being 'handed over' to the couple immediately after birth.

It is obvious that the enormous advances made by medical technology in the field of human reproduction have had a profound effect on the Italian prohibition on surrogacy and the rules on maternity. As a result, couples have started to travel to more permissive foreign States in order to overcome sterility and fulfil their desire of becoming parents.

Under Italian law, when a child is born of an unmarried surrogate mother and there is a genetic link with the commissioning father, the fact that the two have acted illegally cannot constitute grounds for a refusal to perform a DNA test to confirm the paternity of the latter: the commissioning father can formally recognise the child and will as a result be registered as the father on the birth certificate. However, if the child is born to a married surrogate mother, the presumption of paternity within marriage would result in the surrogate mother's husband being considered to be the legal father of the child. This presumption could again be rebutted by a DNA test.

The discussion concerning the possible ways of identifying a child's mother is more complex since, according to Italian law, the woman who gives birth is unequivocally the child's mother (Art 269 para 2 of the Civil Code).

In our contemporary societies, the issue of who must care for and bring up a child after birth seems to be addressed less with reference to Italian norms and the country's legal tradition and more on the basis of a new concept of responsible motherhood. This notion, which evokes the idea of affection and love, appears to be better suited to the requirements of developing the child's personality.

The central questions are: is the commissioning parents' desire to have a child really unconstitutional if it is satisfied thanks to a surrogate? Is it reasonable to make a presumption unequivocally, without taking account of the particular circumstances of a case, of the fact that a woman is unable to

decide freely to become a surrogate mother? Is it at all possible to view surrogacy as a lawful 'free act of giving', comparable to free acts of tissue or blood donation?

The compelling interests underpinning the prohibition under Italian law justify the state's intrusion into reproductive decisions in the area of commercial surrogacy contracts. However, the reasons influencing the decision by the surrogate mother to provide an infertile couple with a child may not always be financial; in some cases it may result from an altruistic desire. Recent changes to social attitudes are provoking new, positive reactions among legal scholars in Italy.³ Some argue that the sole biological fact of giving birth should be put into perspective and that the focus should be placed on evaluating the reasons for free procreative choices; by drawing on notions such as the protection of human health and solidarity among women, they attempt to legitimise surrogacy agreements by framing them as a 'gift relationship'.⁴

In support of this view, one can point to the relevance acquired by a concept of parenthood that is founded both on the notion of 'procreative choice' derived from Arts 2 and 32 of the Italian Constitution and on the notion of 'procreative responsibility' based on Art 30 para 1.

In spite of this shift within the Italian literature, the existence of a blanket ban under Italian law means that it is impossible to consider each situation individually, even though it would be vastly preferable to avoid any kind of automatism and to scrutinise the full circumstances of each particular case. Traditional surrogacy should not be regulated in the same way as gestational surrogacy because in the latter case the child is not genetically related to the surrogate mother and the intended parents may be the child's genetic parents.

There is, in particular, a legal gap with regard to children born abroad to foreign surrogate mothers. In fact, no Italian legislation deals with the issues that arise when Italian citizens travel abroad, conclude a surrogacy agreement in accordance with foreign law and then return to Italy with the children. In Italy, any children born through such a process are not considered to be the children of the commissioning couple and may also end up not holding Italian citizenship.⁵

³ M. Dell'Utri, 'Maternità surrogata, dignità della persona e filiazione' *Giurisprudenza di merito*, 358 (2010); F. Turlon, 'Nuovi scenari procreativi: rilevanza della maternità sociale, interesse del minore e *favor veritatis*' *Nuova giurisprudenza civile commentata*, 712 (2013); 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' *GenIus*, 85 (2014); M. Di Masi, 'Maternità surrogata: dal contratto allo «status»' *Rassegna critica di giurisprudenza*, 615 (2015).

⁴ J. Colban, 'Out of the Goodness of My Heart, I Give You this Child' *Law School Student Scholarship*, 764 (2016), available at http://scholarship.shu.edu/student_scholarship/764 (last visited 6 December 2016).

⁵ S. Stefanelli, 'Procreazione e diritti fondamentali', in A. Sassi, F. Scaglione and S.

A survey of practical outcomes reveals that courts have adopted different positions. When some couples return to Italy, they provide the civil registry office with foreign documents in which the commissioning couple is stated to be the legal parents; the surrogate mother's name may also be noted. Some documents are judicial decisions while others are simple birth certificates. In some cases, the documents presented are not valid in Italy because they are not accepted by the national authorities as attesting the status of the child, who consequently will not be able to be legally recognised as an Italian citizen.

Turning to the position taken by the civil courts, it appears that a twofold trend can be identified as far as the registration of foreign birth certificates in Italy is concerned. On the one hand, the lower courts tend to endorse the acceptance of the commissioning couple as the legal parents when at least the man has contributed genetically to the surrogacy process. On the other hand, the Court of Cassation has rejected surrogate motherhood outright when neither the commissioning man nor the commissioning woman has a genetic link with the child.

However, the protection of the best interests of the child does not appear to be compatible with contrasting decisions which jeopardise the right of all children to the same legal status.⁶ Under Italian law, children have acquired a unique legal status since the enactment of the legislation reforming the law on filiation (by legge 10 December 2012 no 219 and decreto legislativo 28 December 2013 no 154).⁷ Hence, it is necessary to respect the principle of non-discrimination on the basis of the circumstances of conception or birth. Consequently, the state should acknowledge foreign birth certificates whenever such acknowledgement is required in order to guarantee the human rights of the child, such as right to privacy, to identity, to be loved, etc.

The following sections will argue in favour of the legal recognition of parentage between the newborn child and the intended parents in certain cases, specifically when the process has been completed in accordance with the law of another state and the child needs to continue in Italy the family

Stefanelli eds, *La filiazione e i minori. Trattato di diritto civile diretto da R. Sacco* (Torino: Utet, 2015), 4, 112; S. Mohapatra, 'Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy' 30 *Berkeley Journal of International Law*, 412 (2012); K. Trimmings and P. Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Oxford: Hart Publishing, 2013); J. Tobin, 'To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy?' *International and Comparative Law Quarterly*, 317-348 (2014).

⁶ G. Chiappetta, *Famiglie e minori nella leale collaborazione tra le corti* (Napoli: Edizioni Scientifiche Italiane, 2011), 323-351; M. Paradiso, 'Unicità dello stato di filiazione e unificazione delle denominazioni' *Nuove leggi civili commentate*, 589 (2013).

⁷ See M. Bianca, 'Tutti i figli hanno lo stesso stato giuridico' *Nuove leggi civili commentate*, 507 (2013); A. Palazzo, 'La riforma dello status di filiazione' *Rivista di diritto civile*, 245 (2013); F. Prosperi, 'Unicità dello status filiationis e rilevanza della famiglia non fondata sul matrimonio' *Rivista critica di diritto privato*, 273 (2013).

relationship previously established with the intended parents.⁸

II. Examples from Abroad

Starting with an overview of all foreign legal systems, it is apparent that surrogacy is banned in several European countries⁹ but permitted in others, such as Greece, the United Kingdom, Russia, Ukraine, in addition to various non-European nations.¹⁰

⁸ R. Baratta, 'Verso la «comunitarizzazione» dei principi fondamentali del diritto di famiglia' *Rivista di diritto internazionale privato e processuale*, 591-601 (2005); L. Tomasi, *La tutela degli status familiari nel diritto dell'Unione europea* (Padova: Cedam, 2007), 348; A. Scalisi, '«Famiglia» e «Famiglie» in Europa', Presentation held during the 'Persona e comunità familiare' Conference, Salerno, 28-29 September 2012, available at http://comparazioneDirittoCivile.it/prova/files/convpersona_scalisi_famiglia.pdf (last visited 6 December 2016); S. Stefanelli, 'Status e modelli procreativi nel sistema attuale', in R. Cippitani and S. Stefanelli eds, *La parificazione degli status di filiazione* (Roma-Perugia-Mexico: ISEG Gioacchino Scaduto, 2013), 51, 80; A. Palazzo, *Eros e jus* (Milano: Mimesis, 2015), 67; A. Bellelli, 'La filiazione nella coppia omosessuale' *Giurisprudenza italiana*, 1819-1823 (2016).

⁹ Surrogacy is forbidden in France, Germany, Spain, Austria, Sweden and Denmark. For the position under Spanish law, see H. Corral, 'La nuova legislazione civile spagnola sulle tecniche di riproduzione artificiale e sui processi affini' *Rivista di diritto civile*, I, 79 (1990).

¹⁰ In California, the Family Code (available at https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=12.&title=&part=7.&chapter=&article, last visited 6 December 2016), Section 7962, f), provides that: 'the judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section'. Regarding this issue, see D.E. Lawrence, 'Surrogacy in California: Genetic and Gestational Rights' 21 *Golden Gate University Law Review*, 3 (1991); A. Garrity, 'A Comparative Analysis of Surrogacy Law in the United States and Great Britain – A Proposed Model Statute for Louisiana' 60 *Louisiana Law Review*, 809 (2000), available at <http://digitalcommons.law.lsu.edu/lalrev/vol60/iss3/6> (last visited 6 December 2016).

In Canada, the *Assisted Human Reproduction Act* (SC 2004, c 2) allows altruistic surrogacy, while commercial arrangements are banned. On this issue, see R. Ruparelia, 'Giving away the «Gift of Life»: Surrogacy and the Canadian Assisted Human Reproduction Act' 23 *Canadian Journal of Family Law*, 12 (2007); A.L. Burpee, 'Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy' 37 *Georgia Journal of International & Comparative Law*, 305 (2009), available at: <http://digitalcommons.law.uga.edu/gjicl/vol37/iss2/4> (last visited 6 December 2016).

In Israel, the 1996 *Embryo Carrying Agreements Law* regulates surrogate motherhood and provides that the agreement must be authorised by a public authority. See C. Shalev, 'Halakha and Patriarchal Motherhood – An Anatomy of the New Israeli Surrogacy Law' 32 *Israel Law Review*, 51 (1998); R. Schuz, 'Surrogacy and PAS in the Israeli Supreme Court and the Reports of the Committee on Children's Rights' 247 *International Survey of Family Law*, 197 (2004).

Under Ukrainian law,¹¹ commissioning parents are considered to be the child's parents from birth, provided that they follow a specific procedure; on the other hand, in the United Kingdom and Greece they can only be declared by a court order to be the parents from birth.

In most Member States of the European Union, the legal mother is the woman who gives birth to the child.

The differences among the approaches followed in the various jurisdictions in the area of surrogacy reflect the combinations of legal values that are linked to the cultural, historical and social characteristics of the various nations.

On a European level, an overview of existing legal approaches indicates that it is not possible to identify a common core of uniform norms,¹² though the Member States of the European Union appear to agree on the need for a clear definition of parenthood and the status of the child.

The rapid spread of surrogacy arrangements within the European Union has had serious implications in terms of free movement of persons and the variety of parental models.

It may be noted that almost all legislation adopted until now has been founded on some common general principles: the protection of the right to decide freely to become a parent, state control over access to available techniques of medically assisted reproduction, the protection of the participants'

In South Africa, the 2005 *Children Act*, which was amended in 2007-2008 and entered in force in 2010 (available at <http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf>, last visited 6 December 2016), allows single persons and same-sex couples to enter into an altruistic agreement with a surrogate mother, provided that all parties are domiciled in that state. The validation of the agreement by the High Court enables the intended parents to be recognised as the legal parents before the birth, although the surrogate retains the right to revoke her consent until sixty days after the birth. If the woman decides to terminate the pregnancy for non-medical grounds, she can be obliged to pay back the money received in advance for health expenses. Moreover, if the commissioning person is a single person, he/she must be genetically related to the child; if the applicant is a couple, both must be genetically related to the child unless they are a same-sex couple (see Chapter 19, South Africa Children's Act of 2005). See, D. Meyerson, 'Surrogacy Agreements' *Acta Juridica*, 121 (1994); L. Mills, 'Certainty about Surrogacy' 21 *Stellenbosch Law Review*, 429 (2010).

¹¹ See the Ukrainian Family Code, available at <http://www.familylaw.com.ua/> (last visited 6 December 2016). Art 123 provides that: '1. If the wife is fertilised by artificial procreation techniques upon written consent of her husband, the latter is registered as the father of the child born by his wife. 2. If an ovum conceived by the spouses is implanted into another woman, the spouses shall be the parents of the child. 3. Whenever an ovum conceived by the husband with another woman is implanted into his wife, the child is considered to be the child of the spouses'. The specific aspects have been regulated by the Ukrainian Ministry of Health by Act no 771 of 23 December 2008. See S.N. Kirshner, 'Selling a Miracle? Surrogacy Through International Borders: Exploration of Ukrainian Surrogacy' 14 *Journal of International Business and Law*, 1 (2015), available at <http://scholarlycommons.law.hofstra.edu/jibl/vol14/iss1/4> (last visited 6 December 2016).

¹² On 12 October 2016, the Parliamentary Assembly of the Council of Europe (PACE) voted against the proposal by the Health Parliamentary Commission of 21 September 2016 to fix certain guidelines to ensure children's rights in relation to surrogate agreements.

health during the procedure, procreative responsibility in the interest of the child's welfare and the principles of solidarity, altruism and humanity.¹³

In the United Kingdom, the Surrogacy Arrangements Act 1985 permits altruistic agreements between commissioning couples and surrogate mothers.¹⁴ Under UK Law, it is an offence to pay the surrogate mother for the service, aside from 'reasonable expenses'; where this prerequisite is fulfilled, a surrogacy agreement is considered not to violate human dignity.

According to UK law, the *in vitro* fertilisation of the surrogate mother must take place in a clinic licensed by the Human Fertilisation and Embryology Authority. Before providing medical treatment to a woman, the physicians must consider the welfare of any future child and if any, of the surrogate's existing children who may be affected by the birth. An independent ethics committee must resolve any complicated cases and may impose its own restrictions on access to surrogacy.

An essential element of the agreement is its non-enforceability; none of the parties is bound by any obligation¹⁵ and thus the intended parents cannot compel the surrogate mother to hand over the child, while the surrogate cannot force them to take the child after birth if they refuse. These obligations may only arise after a court has ruled on the matter. The Human Fertilisation and Embryology Act 1990, the Adoption and Children Act 2002 and the Human Fertilisation and Embryology Act 2008 introduced important changes to UK surrogacy law. These changes aim to strike a balance between the different interests at stake: the desire to become a parent and the right of the child to grow up in a stable family.

The woman who has carried a child after the implantation of an embryo is the mother of the child, regardless of whether or not she is genetically related to the child. However, legal motherhood can be formally transferred to the commissioning woman through parental orders or adoption. In

¹³ R. Torino, 'Legittimità e tutela giuridica degli accordi di maternità surrogata nelle principali esperienze straniere e in Italia' *Famiglia*, 179 (2002); J. Tobin, 'To Prohibit or Permit: What Is the Human Rights Response to the Practice of International Commercial Surrogacy?' *International and Comparative Law Quarterly*, 317-348 (2014).

¹⁴ G. Criscuoli, 'La legge inglese sulla «surrogazione materna» tra riserve e proposte' *Diritto della famiglia e delle persone*, 1029-1047 (1988); D. Brahams, 'The Hasty British Ban on Commercial Surrogacy' 17 *The Hastings Centre Report*, 16-19 (1987); S. Cretney, *Family Law in the Twentieth Century* (Oxford: Oxford University Press, 2003), 543; K. Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' 22 *Child and Family Law Quarterly*, 449 (2010); F. Burton, *Family Law* (London, New York: Routledge, 2012), 300; M. Vijay, 'Commercial Surrogacy Arrangements: The Unresolved Dilemmas' 3 *UCL Journal of Law and Jurisprudence*, 200 (2014).

¹⁵ Specifically, agreements relating to surrogate motherhood are considered to be admissible under UK law, but unenforceable in the event of non-compliance by the parties. See, on this aspect, W.J. Giacomo and A. Di Biasi, 'Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements' 36 *Pace Law Review*, 250 (2015), available at: <http://digitalcommons.pace.edu/plr/vol36/iss1/7> (last visited 6 December 2016).

particular, the 2008 Act permits applications for a parental order within six months of birth, provided that the child is already living with the applicants.¹⁶ When deciding whether or not to grant a parental order, the court must consider all the relevant circumstances in order to safeguard and promote the welfare of the child.

The Social Services Department must carry out enquiries in order to ensure that the child is not at risk of any harm or in danger; if it has reasonable grounds to believe that this is the case, it can seek a care order in family proceedings. The court is entitled to issue an alternative order, such as a residence order or an additional order, for example, to the effect that the child should continue to have contact with the surrogate mother. This means that, in certain circumstances, the commissioning couple will not formally acquire legal parenthood. Once a child reaches adulthood, he or she can access the original birth certificate, after receiving specific counselling.

Several aspects can give rise to difficulties, especially the gap that is apparent between theory and practice.

First, the UK courts may uphold a substantial payment that was made illegally if they consider that it is in the child's best interest to remain with the commissioning couple and such a payment will make this possible.¹⁷ Since one of the statutory criteria for making a parental order is that the child must be living with the applicants, his or her welfare will rarely be safeguarded by removal from a settled family home. Thus, even if an unlawful payment has in fact been made, the child's interest may still be best served by upholding it as lawful.

¹⁶ Regarding the time limit, see the judgment of the High Court 3 October 2014: *X A Child* [2014] EWHC Fam 3135. This decision authorised the recording of a parental order even though the statutory time limit of six months (fixed by Section 54 of the 2008 Human Fertilisation and Embryology Act) had expired. The case concerned a child born in 2011 following a cross-border surrogacy arrangement between a British couple and an Indian surrogate mother. Only the commissioning man was genetically related to the child, while the ovules were supplied by a donor. The High Court issued the parental order on the following grounds: the good faith of the commissioning couple; their UK nationality; the free and informed consent of the surrogate mother and her husband; the report of social services attesting that there was no alternative way to legally establish the parental relationship, as the children did not have any family other than the commissioning couple in the receiving State. The couple was mentioned as the legal parents on a birth certificate issued by the Indian authorities and they declared to the court that they had started the parental order proceedings out of time because they were unaware of the time limit. The English High Court took into account the interest of the child in continuing the relationship already established with the couple and held that the time limit was too strict.

¹⁷ With regard to the payments that can be made to the surrogate mother to reimburse the expenses incurred as a result of the pregnancy, see in the UK: *Re C* [1985] FLR 445; *Re Q* [1996] FLR 396, with comment by G. Douglas. On this issue, see M.J. Radin, 'Market-Inalienability' 100 *Harvard Law Review*, 1849 (1987); A.M. Capron and M.J. Radin, 'Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood' 16 *Law Medicine & Health Care*, 34-43 (1988).

Secondly, the ban on commercialisation entails a bar on access to professional expertise and legal advice, with potentially adverse effects for all persons concerned. However, changes made to the law have allowed non-profit organisations to place prospective surrogate mothers into contact with commissioning couples and to charge a reasonable fee in order to cover their expenses. The problematic issue is whether or not it is acceptable for these non-profit bodies to act as intermediaries.¹⁸

In the United Kingdom, surrogacy may be an option for men who do not have a female partner. Regarding this aspect, a difference compared to the Greek legal system may be highlighted. According to Law 19 December 2002 no 3089, gestational surrogacy is understood in Greece exclusively as a method for overcoming female sterility. Under Greek legislation, as amended by Law 18 January 2005 no 3305, a court may only authorise a surrogacy arrangement before the embryo is transferred if the following conditions are met: a written agreement between all parties, without any financial benefit for the surrogate mother; the consent of the husband of the surrogate mother, if she is married; the procedure is practised on humanitarian grounds, through the implantation of embryos into a woman who has not provided the eggs. The surrogate mother will thus carry an embryo that is genetically 'unrelated' to her and give away the unborn child to his or her genetic parents. The embryo may be genetically related to a third woman, if the commissioning woman does not produce eggs.

The commissioning mother must provide a medical certificate attesting her inability to conceive and the surrogate mother must also provide a medical certificate to confirm that she is in good health (Art 1458 of the Civil Code).

Under the conditions set out in Art 1458 of the Civil Code, the child's mother is presumed to be the woman who has obtained the court's permission. This presumption may be rebutted within six months of the child's birth by a legal action to challenge maternity. A challenge to maternity may be brought by the intended mother or by the surrogate, provided that evidence is submitted that the child was conceived from the latter's eggs (Art 1464 of the Civil Code).

A number of problems affect the law governing surrogacy in Greece.

¹⁸ See the website: www.surrogacy.org.uk (last visited 6 December 2016). Regarding the necessity of regulation, M. Cartine, 'Surrogacy and Silence: Why State Legislatures Should Attempt to Regulate Surrogacy Contracts' *Law School Student Scholarship*, 417 (2014), available at http://scholarship.shu.edu/student_scholarship/417 (last visited 6 December 2016); M. Strasser, 'Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law' 18 *Journal of Health Care Law and Policy*, 85 (2015), available at <http://digitalcommons.law.umaryland.edu/jhclp/vol18/iss1/4> (last visited 6 December 2016).

First of all, the ban on commercial surrogacy has failed to prevent the routine payment of money to surrogate mothers. Another issue is that the complexity of the rules governing the transfer of legal parenthood sometimes prevents the commissioning couple from establishing a formal relationship with the child. For example, if maternity is contested within six months of birth and it is proved that the surrogate actually carried her own child (and is also the genetic mother), the court may cancel the first authorisation and establish a legal relationship with the surrogate mother. The problem is that the child will in all likelihood already have lived for several years with the commissioning couple while awaiting the court order. In order to avoid pain, suffering and costs and to promote the child's best interests, it would be preferable to perform DNA tests on all persons involved immediately after birth.¹⁹

The examples from these European countries suggest that the possibility should be considered of recognising birth certificates issued by a foreign state attesting that a surrogacy agreement has been concluded and implemented abroad. The specific cases will be resolved differently by the Italian courts, depending upon the effects of the foreign document presented (a judicial authorisation or a birth certificate) and, above all, upon whether or not there is a genetic link between the child and at least one of the intended parents.

Nevertheless, the Italian state's punitive policy cannot constitute adequate grounds for denying a family status to the child. Even if the infant does not have a genetic link with one of the commissioning parents, he or she should not be deprived of a continued relationship with the persons who have been identified as his or her parents since birth. Separation from the commissioning family is surely not advantageous for the child whenever a fulfilling and stable social relationship has already been established.²⁰

For the reasons indicated above, there is a need for new legislative solutions in Italy to allow for the international recognition of documents certifying family status. Within this perspective,²¹ if a person acquires a status

¹⁹ I. Kriaris Catranis, 'Assisted Procreation Technologies and Human Rights – Legal Developments in Greece and Abroad' *Ethics and Morality of Health* (Athens: Paschalides, 2012), 67; Id, 'Human Assisted Procreation, Donor Anonymity and Surrogacy in the Greek Legal Frame' *Legal Essays in Honour of Prof. Theod. Panagopoulos* (Athens: Sakkoulas, 2011), 437.

²⁰ G. Ferrando, 'Stato unico di figlio e varietà dei modelli familiari' *Famiglia e diritto*, 952 (2015), who underlines the need for a concrete approach that starts from the efficacy of the family relationship in order to grant legal protection to each member of the family group.

²¹ R. Baratta, 'Verso la «comunitarizzazione» dei principi fondamentali del diritto di famiglia' *Rivista di diritto internazionale privato e processuale*, 591-601 (2005); A. Scalisi, '«Famiglia» e «Famiglie» in Europa' n 8 above; M. Condinanzi and C. Amalfitano, 'La libera circolazione della «coppia» nel diritto comunitario', in S.M. Carbone and I. Queirolo eds, *Diritto di famiglia e Unione Europea* (Torino: Giappichelli, 2008), 63; V. Colcelli, 'La parificazione degli status di filiazione', in R. Cippitani and S. Stefanelli eds, *Status di minore e status individuali nell'Unione Europea* n 8 above, 153; G. Chiappetta, 'I nuovi orizzonti del

as a legal child in a foreign country in accordance with the law of that country, this legal situation legitimately established abroad should be recognised by the home state once the family returns there, regardless of any prohibitions under the law of the latter state. According to this theory, the principle of unity of status for European Union citizens would be expressed in the area of family law and would operate in parallel with the expansion of the principles of mutual recognition of civil status documents between Member States and non-discrimination within the European Union.

Since all children have the right to a unique status wherever they live, they must be treated equally by the law, even if they are born abroad to surrogate mothers.²² For these reasons, it would appear to be desirable to achieve convergence internationally amongst nations in order to avoid discriminating against children, based solely on the circumstances of their birth.

Thus, the harmonisation of different legal rules could be achieved through international cooperation initiatives. In particular, an international convention on the recognition of foreign judgements and birth certificates could help to ensure coordination and cooperation among states, with the ultimate aim of promoting the evolution of legal systems and strengthening the protection of children's fundamental rights.

III. The Inconsistent Course of Italian Case Law

Italy does not have adequate tools to tackle the phenomenon of 'surrogate motherhood'. Such agreements are considered to be incompatible with Italian law, which does not recognise 'contracts' involving an obligation to give birth. However, despite the prohibition, surrogacy is practised unlawfully.

diritto allo stato unico di figlio', in G. Chiappetta et al ed, *Lo stato unico di figlio* (Napoli: Edizioni Scientifiche Italiane, 2014), 23.

²² For a brief reference to other states, it should be noted that in France, the highest court has established that children born to a surrogate mother abroad can be recognised by the state. In particular, reversing its previous trend, on 3 July 2015 the *Cour de Cassation* issued two rulings – no 619 and no 620 – regarding the transcription into French birth registers of foreign birth certificates concerning children born abroad to a surrogate mother (https://www.courdecassation.fr/cour_cassation_1/in_six_2850/english_2851/the_transcription_7252/press_release_32236.html, last visited 6 December 2016). In both cases, the Public Prosecutor had opposed the transcription, suspecting the birth to have resulted from a process involving surrogacy; the French Supreme Court dismissed the appeal against the decision ordering the transcription, stating that 'surrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent'. In the United Kingdom, in a ruling dated 9 December 2008, the High Court of Justice, Family Division (*X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam)) issued a parental order to ensure the interests of the minor, despite the conclusion of a commercial surrogate motherhood agreement abroad.

In such a scenario, any of three women could conceivably claim to be the mother: the woman who wants the child (the commissioning or intended mother), even if she was not otherwise involved in the procreation; the woman who supplied her genetic material (the genetic mother) and the woman who carried the child until birth (the surrogate or biological mother).

Since the overriding consideration is the effective fulfilment of the child's best interests, Italian law gives precedence to the surrogate mother, due to the greater importance of the relationship that the child establishes during the pregnancy compared to the relationship with the genetic mother.

Nonetheless, it is possible that a woman who agreed to give birth on behalf of others subsequently does not wish to have a parent-child relationship and wishes to hand the child over to the commissioning couple. In one case,²³ after considering the best interests of the child, the Court of Monza allowed the 'commissioning' father who supplied the gametes to recognise the newborn child as his own while allowing his wife, the 'commissioning' mother, to proceed with an adoption.

The first Italian court ruling that clearly endorsed the practice dates back to 2000,²⁴ when the Court of Rome ruled that surrogacy was ethically acceptable because in that instance it had not been agreed to on a commercial basis. According to the court, the surrogacy agreement was not incompatible with the general principles of Italian law, as the surrogate mother had given birth to the child for humanitarian reasons and did not have any genetic link with it; moreover, it did not violate 'the prohibition on a permanent reduction of physical integrity' (Art 5 Italian Civil Code) due to the temporary nature of pregnancy.

A comprehensive overview of recent Italian case law points to the emergence of several parallel tendencies: the first aims to protect the identity of the child born from a surrogate mother (especially when there is a genetic link with the commissioning father) and to safeguard the affective relationships created around him; the second seeks to interpret the concept of incompatibility with public policy in accordance with the principle of *favor minoris*; finally, the third calls for the acceptance of the registration in Italy of foreign certificates attesting the birth of children from surrogate mothers.

As far as these trends are concerned, a marked shift in the courts'

²³ Tribunale di Monza 27 October 1989, *Foro italiano*, I, 298 (1990), with comment by G. Ponzanelli.

²⁴ Tribunale di Roma 17 February 2000, *Famiglia e diritto*, 165 (2000), with comment by G. Cassano. On this issue, see M. Sesta, *La maternità surrogata tra norme etiche, deontologia e diritto giurisprudenziale*, in G. Visintini ed, *Dieci lezioni di diritto civile* n 1 above, 87; L. Rossi Carleo, 'Maternità surrogata e status del nato' *Familia*, 377 (2002); A.B. Faraoni, 'La maternità surrogata', in P. Cendon ed, *Il diritto privato oggi* (Milano: Giuffrè, 2002), 21.

attitude towards surrogacy occurred in 2009²⁵ when the Bari Court of Appeal ruled two parental orders made in the United Kingdom to be enforceable in Italy; these orders attributed maternity to the commissioning mother rather than to the biological mother.

The case involved a married couple, a British man and an Italian woman. Due to a serious illness, the woman could not have children and could not resort to homologous insemination with her own eggs. Following an altruistic surrogacy agreement with another British woman, two children were born and immediately handed over to the commissioning couple. Two parental orders issued by the Croydon Family Proceedings Court subsequently attributed the maternity of the two children to the wife, while the surrogate formally renounced maternity.

Once the parental orders had become definitive, the commissioning mother became the mother in all respects for the purposes of UK civil status records. The couple subsequently moved to Italy with the children and then separated by mutual agreement. During the separation proceedings, there it was necessary to provide certainty with respect to the status of the two children, who on a formal level had different mothers in Italy and in Britain.

To that end, the commissioning mother requested the Municipality of Bari to recognise the parental orders. Following the rejection of her request, the woman applied to the Court of Appeal, which ruled in her favour on the grounds that a refusal of recognition would certainly be detrimental to the two children.

The problem was how these parental orders could be rendered enforceable in Italy. If this could not be done, the two children would be considered to be the children of the surrogate mother in Italy and of the commissioning mother in the United Kingdom; this discrepancy would have adverse consequences for their stability and development. Hence, the Bari Court of Appeal ordered the transcription of the British parental orders into the Italian registers of civil status. From the time of their birth, the children had lived, for around ten years, stably and happily in Italy with the commissioning couple and for this reason it was in their interests to recognise the parental orders in Italy.

However, on 25 October 2011 the Court of Forlì ruled in precisely the opposite direction.²⁶ Also in this case, twins born abroad of a foreign surrogate mother had a genetic link with the commissioning father. However, while the commissioning father's request for recognition was accepted by the Italian authorities, in this case the commissioning mother's request was not,

²⁵ Corte d'Appello di Bari 13 February 2009, *Famiglia e minori, Guida al diritto*, 50 (2009), with comment of M. Castellaneta, *Dietro l'interesse del minore si nasconde il rischio di un turismo procreativo*. See C. Campiglio, 'Lo stato di figlio nato da contratto internazionale di maternità' *Rivista di diritto internazionale privato e processuale*, 589 (2009).

²⁶ Tribunale di Forlì 25 October 2011, *Diritto della famiglia e delle persone*, 532 (2013).

because it was considered to be contrary to public policy. More specifically, it was held that a woman who had not given birth to the children could not be their legal mother.

The rigid stance adopted by this court is not satisfactory because it is strictly rooted in the traditional notion of purely biological parenthood and risks damaging the children's right to their personal identities and to a stable and ongoing relationship with both parents.

Aside from the genetic links with a group of blood relatives, one's identity is founded on many aspects, such as membership of a national community, an ethnic group, a sex, gender, etc. However, first and foremost, it is founded on possession of a single status, indicative of membership of an unchangeable and established family.

IV. The Contribution of the Criminal Courts

The most noteworthy features that stand out within a general analysis of Italian case law are first, the inability of the legislature to rise to the challenge of continuous technological progress and second, the capacity of parts of the judiciary to adapt to social changes by filling the regulatory gap.

It is now necessary to provide an outline of several judgments from the criminal courts in surrogacy cases because of their implications for the question of determining parenthood.

First, it should be recalled that if a couple is convicted of the offence of misrepresentation of family status, the sentence imposed will not automatically entail a loss of parental responsibility,²⁷ as it is necessary to consider the needs of the child in the specific individual case in accordance with the European Convention on the Exercise of Children's Rights (Art 6(1)(a)).

Second, in most criminal proceedings, it is significant that judges do not interfere with legal relationships that have already been established between commissioning couples and their children in accordance with foreign law. Thus, criminal decisions must be carefully considered due to the indirect pressure that they could exert on the development of case law in the civil court. Indeed, social, political and legal thinking has evolved from a stance of clear opposition towards a vision of interaction and communication between the realms of criminal and private law.²⁸

²⁷ Tribunale di Brescia, Criminal Division, 26 November 2013, available at http://www.pe.nalecontemporaneo.it/upload/1394865082TRIBUNALE_BRESCIA_FECONDAZIONE.doc.pdf (last visited 6 December 2016).

²⁸ Regarding this vision of an unitary legal system and of a communication between the public and private law spheres, see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), I, 196-209.

A ruling issued by the Court of Pisa on 19 June 2015²⁹ can be interpreted as conforming to this view of reciprocal influence between civil and criminal case law. Here, the court ruled that an Italian commissioning couple accused of misrepresentation of family status (Art 567(2) of the Criminal Code) after having returned to Italy with their two sons, who were born in Ukraine according to a surrogacy arrangement involving a donation of ovules, had not committed any criminal offence. In this case, the woman's position was considered to be the same as the man's, even though she had not made any genetic contribution to the reproduction process. The Court of Pisa rejected the Public Prosecutor's request, ruling that the facts alleged did not constitute a criminal offence. According to the *lex loci*, the commissioning man and woman were defined as the legal parents in the birth certificates released by the Ukrainian authorities; they would only have violated the law in Ukraine if they had specifically declared the woman who had carried the children or the woman who had donated her ovules as the 'mother'.

In another groundbreaking decision issued on 13 January 2014,³⁰ the Court of Milan had to deal with a surrogacy agreement involving a donation of ovules that had been signed by an Italian couple in a Kiev clinic. Even though the intended parents had been obliged to pay a fee to the clinic and to reimburse the expenses incurred by the surrogate mother (totalling thirty thousand Euros), they were acquitted of the charge of misrepresentation of family status. As in the case discussed above, the commissioning couple was found not guilty because the family status of the child had been determined in accordance with Art 15 of Decreto del Presidente della Repubblica 3 November 2000 no 396 (Regulation concerning the Review and Simplification of the Legislation on Civil Status), which provides that declarations of birth made by Italian citizens abroad 'must be made on the basis of the law in force where the birth takes place'.

Both the rulings by the Pisa and Milan courts made the foreign birth certificates effective in Italy, having found that they did not give rise to any legal consequences that were contrary to 'public policy'.

'Public policy' is shorthand for 'international public policy', that is to say 'the complex of fundamental principles characterising the legal system in a certain historic period, founded on common needs of protection of human rights'. The correct concept of public policy must be considered carefully and

²⁹ Tribunale di Pisa, Criminal Division, 19 June 2015, available at <http://www.biodiritto.org/index.php/item/684-surrogata-pisa> (last visited 6 December 2016). See also in the same direction, Tribunale di Trieste 6 June 2013, available at http://www.dirittoegiustizia.it/news/15/000064963/Non_e_reato_ricorrere_alla_maternita_surrogata_in_Ucraina_e_chiedere_la_trascrivibilita_in_Italia_dell_atto_di_nascita.html (last visited 6 December 2016).

³⁰ Tribunale di Milano, Criminal Division, 13 January 2014, available at http://www.penalcontemporaneo.it/upload/1392834706TRIBUNALE_MILANO_FECONDAZIONE.pdf (last visited 6 December 2016).

coordinated with the principle of *favor minoris*. Surrogacy does not run contrary to this understanding of public policy nor to the need to promote human rights in the face of different provision in different legal systems in relation to societies as a whole; in particular, it is not at odds with the European Convention on the Protection of Human Rights and Fundamental Freedoms.

This tendency within the criminal courts has been confirmed by a recent decision of the Italian Court of Cassation;³¹ in its judgment of 10 March 2016, the Supreme Court found the accused commissioning parents not guilty of the offense criminalised under the Italian Criminal Code (Art 567(2)), because the birth certificates had been issued in accordance with the foreign law.

The numerous acquittals of commissioning couples demonstrate the difficulty, or even impossibility, of accepting the ban on surrogacy as a rule that operates effectively within the current social context. In the interests of the uniformity of the legal system, the above-mentioned criminal cases could have an indirect impact on private law. In particular, they suggest that, if the commissioning couple are genetically related to the child, they should continue to bring him or her up as their own child where a surrogacy agreement has been lawfully concluded abroad and family life has already been established. In such a case, the family should not be broken up, even if there is only a genetic link with the commissioning man, because the paramount consideration is to guarantee the best possible situation for the minor. The principle of the best interests of the child should result in priority importance being given to maintaining the relationship with the intended mother (even if she is genetically unrelated to the child).

The judgments examined above underline a new core of interests in the field of family status and parenthood. This core rejects an absolute ban³² and casts aside the rigid legislative models of motherhood or fatherhood in favour of a method based on continuous reference to the fundamental principles of international public policy and a considering of the specific circumstances of individual cases.

Following this line of thought, legal scholars might persuade future legislators to intervene and review their current restrictive positions. The

³¹ Corte di Cassazione-Sezione Penale V 10 March 2016 no 13525, *Foro italiano*, II, 286 (2016).

³² G. Ferrando, 'Le nuove realtà familiari nell'ordinamento interno', in I. Queirolo, A.M. Benedetti and L. Carpaneto eds, *Le nuove famiglie tra globalizzazione e identità statuali* (Roma: Aracne, 2014), 75. For a different position, G. Berti De Marinis, 'Maternità surrogata e tutela dell'interesse superiore del minore: una lettura critica alla luce di un recente intervento della Corte EDU' 3 *Actualidad Jurídica Iberoamericana*, 287 (2015), who argues that protection for the child does not imply the recognition of illegal conduct by the commissioning couples.

choice made by the Italian Parliament to ban surrogacy outright is not a realistic option because social reality demonstrates that increasing numbers of children are being born to surrogate mothers and that people who intend to become parents do so within a regulatory vacuum.

V. The Importance of the Genetic Link According to the Italian Court of Cassation

The Italian Court of Cassation displayed excessive rigidity when the Civil Division issued its first decision on 11 November 2014.³³

The Supreme Court ruled that a child born as a result of a surrogacy agreement implemented in Ukraine could not be kept by the Italian commissioning couple and had to be put up for adoption.

The Italian intended parents had decided to conclude a contract with a Ukraine surrogate and paid twenty-five thousand euros for her to give birth to the child and decline maternity by omitting her name from the birth certificate. When the couple later returned to Italy with the three-year-old child, they did not disclose the truth concerning the birth and were charged with fraud.

In spite of the Attorney General's submission that the child should remain in the couple's care, the Supreme Court held that no regulatory framework enabled it to recognise them as the parents as neither of the commissioning parents had a biological link with the child. Hence, this 'child of nobody' should be given up for adoption.

The Court of Cassation refused to recognise a legal relationship between the intended parents and the child, arguing that the ban on surrogacy remained in place even after the Constitutional Court's ruling in June 2014 that the ban on heterologous insemination was unconstitutional.

The reasoning followed by the supreme court was thus based on the fact that the practice was actually prohibited by both Italian and Ukrainian law; according to the Court of Cassation, the latter only allows surrogacy

‘provided that the woman who carries out the gestation does not provide her ovules and at least fifty per cent of the genetic heritage of the child comes from the commissioning couple. Thus, the surrogacy agreement was null and void’.

Consequently, the birth certificate attesting family status was false and the newborn child could not be recognised as the son of the commissioning

³³ Corte di Cassazione 11 November 2014 no 24001, *Foro italiano*, I, 3414-3416 (2014), with comment by G. Casaburi, ‘Sangue e suolo: la Cassazione e il divieto di maternità surrogata’.

couple.

More generally, the Supreme Court examined the situation of children on the assumption that the decisive element is the genetic link, as the determination of blood relatives is an important element of the child's personal identity. Accordingly, Western countries that accept surrogacy often require that a biological link exist with at least one of the commissioning couple; this legislative requirement reflects the concern to respect the child's rights, especially the right to know of his or her lineage.

Hence, in the opinion of the Court of Cassation, the absence of a genetic relationship between intended parents and a child conceived abroad according to surrogacy arrangements clashes with the general principle of *favor veritatis* and collides with public policy as a whole.

A further reason for the strict application of national laws probably stems from the fact that the intended parents had not been considered fit to adopt; more specifically, their bid to adopt a child had been turned down three times in the past. Thus, the judgment focused on the need to guarantee the child's best interest.

As a result of this judicial ruling, one nevertheless has to wonder if the removal of the child from the family home, where he had been raised by the intended parents for the past three years, really could be defined as the best solution to protect his or her personal identity and effective interests.

In our view, the enactment of legislation to allow a legal relationship to be established between the child and the commissioning couple would be preferable. In this way, the child would be spared confusion and trauma. Indeed, since the couple had taken care of the child since birth, they should at least have been given priority when the child was placed in a foster family. In Italy, this was not possible at the time of the judgment because the rules on adoption and foster families were quite different; specifically, if a minor had been abandoned by the birth family, the foster persons had no priority in relation to the adoption of the child.

The regulatory framework has now changed. After a protracted legislative enactment process (Bill 11 March 2015 no 1209), the Italian Parliament finally passed legge 19 October 2015 no 173, amending the Law on Adoption (legge 4 May 1983 no 184). As part of this reform, a procedure was put in place and the prerequisites were stipulated for allowing foster parents to become adoptive parents. Therefore, the law now gives preference to the foster family as adoptive parents if the child has lived with them for a substantial period of time. If, at the end of this period, the child goes back to his or her biological parents or is adopted by another family, the law protects the child's right to affective continuity with the foster parents.

VI. The Protection of Children Born Through Surrogacy from a European Perspective

The lower Italian courts have attempted, in the decisions examined in section IV, to offer a solution to the numerous delicate situations they were facing.

In accordance with the principle of non-discrimination between children, some Italian courts have tried to abandon the restrictive approach towards surrogacy when specific conditions were met.

In other European states,³⁴ the courts also protect the child's need to establish the essence of his or her identity, which includes parentage, when weighing up the commissioning couple's right to a child against the child's rights to the registration of his or her birth and the recognition of his or her parents.

This need to strike a fair balance between the conflicting interests at stake means that Italy cannot categorically deny the legal value of a parental relationship established by a foreign court, as otherwise the respect for private and family life would be irremediably compromised.

From this perspective, the increasing importance of the European Court of Human Rights can be properly understood, especially where it addresses the issue of the minor's family status.³⁵ Even though it often refers to the wide margin of appreciation of Contracting States when making decisions relating to surrogacy, this margin is necessarily limited in the area of the registration of documents establishing parentage, which constitutes a key aspect of a person's identity.

This stance is apparent in a judgement issued on 26 June 2014³⁶ by the Strasbourg Court in two cases (*Menesson v France* and *Labasse v France*), which were both decided upon at the same time. The cases involved two French commissioning couples who had obtained judicial decisions attesting the status of children born to surrogate mothers respectively in California

³⁴ For example, the German Supreme Court (Federal Supreme Court of Germany) upheld the appeal by a gay couple and ruled that a Californian judgement that named them as the legal parents of a child born from surrogacy had to be recognised in Germany. *Bundesgerichtshof* 10 December 2014, decision no XII ZB 463/13, available at <https://www.crin.org/en/library/legal-database/supreme-court-germany-decision-xii-zb-463/13-bundesgerichtshof-beschluss-xii> (last visited 6 December 2016). Regarding the German approach to surrogacy, see R. Wagner, 'International Surrogacy Agreements: Some Thoughts from a German Perspective' *International Family Law*, 129 (2012).

³⁵ G. Chiappetta, 'I nuovi orizzonti del diritto allo stato unico di figlio' n 21 above, 23.

³⁶ Eur. Court H.R., *Menesson v Francia*, Judgment of 26 June 2014 (application no 65192/11) and Eur. Court H.R., *Labasse v Francia*, Judgment of 26 June 2014 (application no 65941/11), available at www.hudoc.echr.coe.int. For first comments, see G. Casaburi, 'La Corte europea apre (con riserve) alla maternità surrogata (Osservazioni a Corte europea diritti dell'uomo 26 giugno 2014)' *Foro italiano*, IV, 561-568 (2014); A. Vesto, 'La maternità surrogata: Cassazione e Cedu a confronto' *Famiglia e diritto*, 306 (2015).

and Minnesota. The commissioning women were suffering from infertility and the embryos produced from the sperm of the commissioning men were implanted into the surrogates. As a result, twins were born in the first case in 2000 and a girl in the second case in 2001; the intended mothers were designated in the birth certificates as the mothers, even though they did not have any biological links to the children concerned.

After the French authorities refused to register the birth certificates in the French register of civil status, the applicants appealed to the Court of Cassation. The French Supreme Court dismissed their claim on 6 April 2011 on the public policy ground that the inclusion of such entries in the register would give effect to a surrogacy agreement forbidden under the French Civil Code.

According to the European Court of Human Rights, France overstepped its permissible margin of appreciation as its refusal to grant legal recognition to a parent-child relationship legally established abroad infringed the children's right to private life (Art 8 European Convention on Human Rights (ECHR)). A child's right to identity appears in fact to be closely related to genetic parentage and in order to avoid a violation of Art 8 of the European Convention on Human Rights, every national authority is obliged to recognise parentage established abroad between a child born through surrogacy and his or her genetic parent. The European Court focused on the lack of recognition for parental relations between biological fathers and their children, which causes disproportionate prejudice to the children's private life on various levels. In particular, while on the American birth certificates the applicants were mentioned as the children's parents, in France the commissioning fathers were not reported, even though they were the genetic fathers. As a result, the intended parents were French citizens while their children were American citizens. Consequently, the best interests of the children were also breached by the fact that it was impossible to obtain French citizenship, which is another component of personal identity. To sum up, the European Court of Human Rights ordered France to pay compensation for the damage suffered by the children who had been placed in a discriminatory legal situation.

In another ruling issued on 27 January 2015,³⁷ the European Court of Human Rights (*Paradiso and Campanelli v Italy*) asserted the principle that, under Art 8, a genetic link was not a necessary prerequisite for the existence of 'family life' when a *de facto* family had been created.

The applicants in that case were an Italian couple who had entered into a surrogacy arrangement with a Moscow-based clinic specialising in assisted reproduction techniques. In line with the provisions of Russian law, the

³⁷ Eur. Court H.R., *Paradiso e Campanelli v Italia*, Judgment of 27 January 2015 (application no 25358/12), available at www.hudoc.echr.coe.int.

surrogate mother consented to the child's registration as the commissioning couple's son after his birth in February 2011. In accordance with the Hague Convention (Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents of 5 October 1961), an *apostille* was issued for the Russian birth certificate that mentioned the applicants as the parents and did not refer at all to the surrogacy.

The Italian authorities, suspecting that the case involved a surrogacy agreement, refused to register the birth certificate in the Italian register of civil status and charged the couple with fraud. In October 2011, an Italian Children's Court decided to remove the child from his home and placed him in foster care because it had been established that he was genetically unrelated to either of the intended parents. In April 2013 a new birth certificate was ordered which indicated that the child had been born of unknown parents; as a result, he was put up for adoption.

In addition, a Russian company had received money from the applicants, purchased the gametes from unknown donors and assisted the commissioning parents throughout the entire procedure. On grounds that the minor's status has been illegally established abroad, the Strasbourg Court reached the conclusion that the child could not be returned to the applicants, who had been found unsuitable to be parents for the sole reason of having violated the law. Nevertheless, the European Court ordered Italy to pay compensation to the commissioning couple for having been deprived of a *de facto* life which could be seen to be advantageous to the minor; indeed, together as a family, they had loved and nourished the child throughout his first six months of life. The Strasbourg Court highlighted that the Italian State had failed to strike a balance between the competing interests at stake when it deemed the child's removal and subsequent placing into care to be reasonable, without giving sufficient consideration to the interests of the child.

On 21 July 2016³⁸ the European Court resolved two cases (*Foulon v France* and *Bouvet v France*), upholding the rights of children born through surrogacy for their relationships with the biological fathers to be legally recognised.

The applicants were Didier Foulon and his daughter in the first case and Philippe Bouvet and his twin sons in the second case. In both cases, the French nationals were not granted recognition for their biological affiliation as established in India, because the French authorities, which suspected that surrogacy agreements had been concluded, had refused to transcribe the Indian birth certificates into the civil status registers. The Strasbourg Court unanimously considered the refusal to enter the birth as a violation of Art 8

³⁸ Eur. Court H.R., *Foulon v France*, Judgement of 21 July 2016 (application no 9063/14) and Eur. Court H.R., *Bouvet v France*, Judgment of 21 July 2016 (application no 10410/14), available at www.hudoc.echr.coe.int.

of the European Convention on Human Rights with regard to the right to privacy of the children concerned. No violation of Art 8 was found to have occurred by reference to the biological parents' right to respect for family life.

The two cases did not deal with the issue of the transcription of filiation established abroad with respect to intended parents, but only with respect to genetic parents. However, the judgements can be seen as important signs of change as the European Court first accepted that family life exists in contexts involving surrogacy and in addition applied its earlier reasoning for the first time to non-traditional families; in the *Foulon* and *Bouvet* cases, both applicants were single (Philippe Bouvet had concluded a registered partnership with an individual of the same sex) and the birth certificates correctly indicated the respective Indian surrogates as the mothers.

VII. Final Remarks

This paper has shown that the numerous ethical arguments in favour of the Italian prohibition of surrogacy are clashing with a completely different social reality, in which free procreative choices are emphasised by reference to issues of protection of health and solidarity among women.

The restrictive régimes have played a part in creating reproductive black markets which have lead to dangerous consequences both for mothers and children. While some states remain opposed to surrogacy, which they view as contrary to their basic principles of morality, a majority of people worldwide believe that gestational surrogacy agreements should be enforceable, provided that the procedure is used with the aim of protecting both infertile women and unborn children.

The trends within the case law outlined in this essay are indicative of a tentative and partial opening up to the phenomenon, which to some extent appears to be tolerated by the criminal and civil courts. The courts often allow the *de facto* relationships created in the family group to continue; civil courts allow for the legal acknowledgement of parentage and the special adoption of the child, while criminal courts have acquitted intended parents of criminal offences.

The question of whether it is acceptable to pay a surrogate mother remains one of the most controversial because it raises serious concerns over the commercialisation of conception.³⁹ In order to prevent the exploitation of women and children, it is necessary to prevent infertile couples from

³⁹ L. Bianchi, 'Dentro o fuori il mercato? «Commodification» e dignità umana' *Rivista critica di diritto privato*, 489 (2006); M.M. Ertman, 'What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification' 82 *North Carolina Law Review*, 1 (2003); D. Gruenbaum, 'Foreign Surrogate Motherhood: *Mater Semper Certa Erat*' 60 *American Journal of Comparative Law*, 475-498 (2012).

making commercial surrogacy arrangements and by so doing, operating in a regulatory vacuum.

The global spread of surrogacy and the changes affecting the family should lead the Italian legislator to address the issue both by taking account of the most recent legal literature and by adopting an interdisciplinary perspective. As a result, Italian lawmakers should rise to the challenges posed by medicine and biotechnology and establish a legal framework for *de facto* family situations where they are centred on the welfare of individual people.

We have seen that the rules vary considerably from state to state, which results in a detrimental lack of uniformity.

Thus, a possible solution to the problem might involve international cooperation among states. An international convention on surrogacy might be developed in order to avoid unforeseeability within the applicable law and to guarantee not only coordination between different jurisdictions but also the recognition of birth certificates.⁴⁰

The first prerequisite for the recognition of cross-border surrogacy should be compliance with all the legal requirements of the foreign country. Accordingly, national authorities should have access to uniform mechanisms to resolve the complex questions they are facing, while safeguarding the free of movement of persons and respect for human rights.

⁴⁰ M. Carbone and I. Queirolo, *La libera circolazione della «coppia» nel diritto comunitario*, in S.M. Carbone and I. Queirolo eds, *Diritto di famiglia e Unione Europea* n 21 above, 6, 27. On this issue, see C.A. Choudhury, 'The Political Economy and Legal Regulation of Transnational Commercial Surrogate' 48 *Vanderbilt Journal Transnational Law*, 1 (2015), available at: http://ecollections.law.fiu.edu/faculty_publications/125 (last visited 6 December 2016).