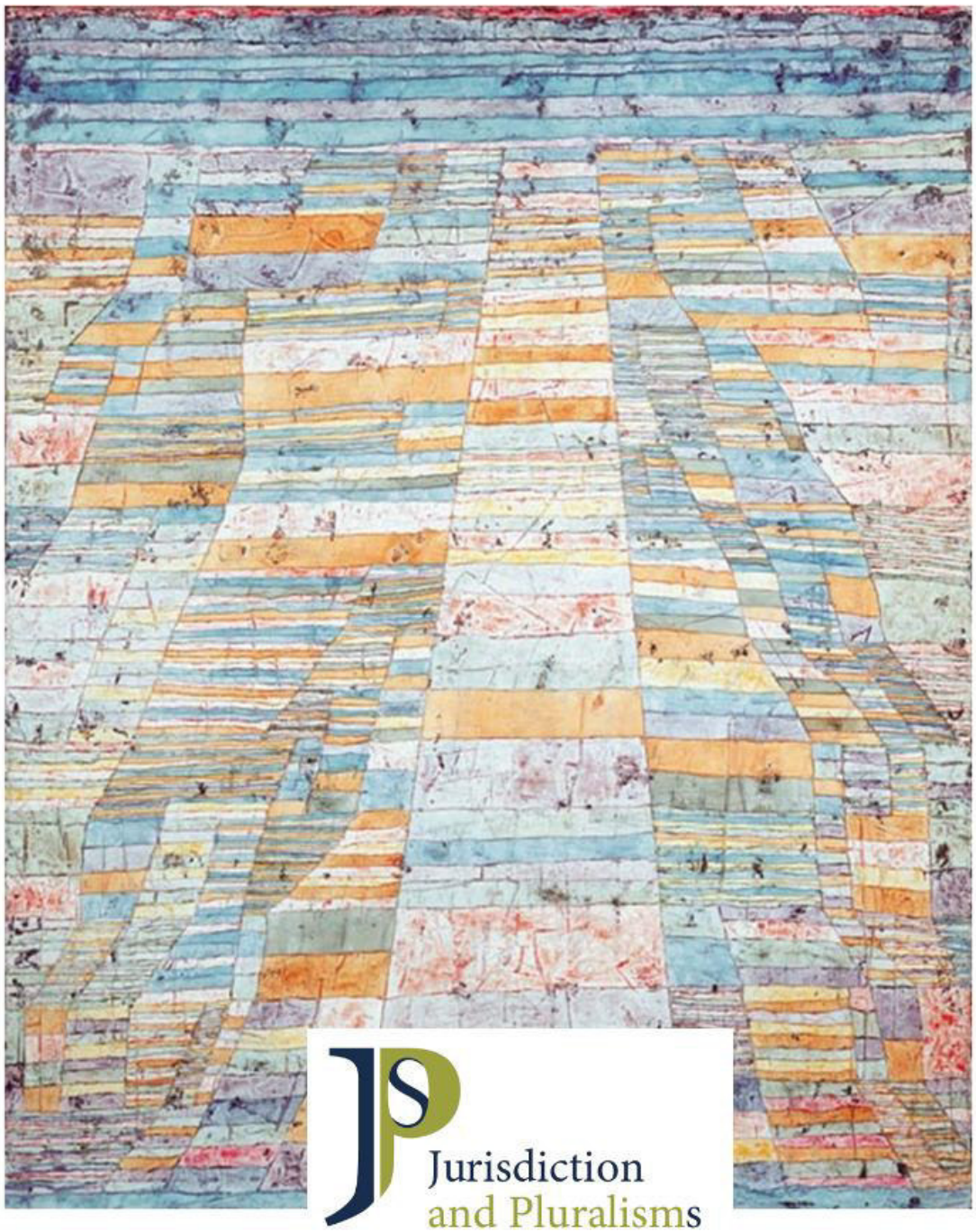
LEGAL PLURALISM IN EUROPE AND THE *ORDRE PUBLIC* EXCEPTION:

NORMATIVE AND JUDICIAL PERSPECTIVES



Jurisdiction and Pluralisms

LEGAL PLURALISM IN EUROPE AND THE ORDRE PUBLIC EXCEPTION: NORMATIVE AND JUDICIAL PERSPECTIVES

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Jurisdiction and Pluralisms

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Marta Tomasi

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1. Some reasons for a pragmatic approach.

Surrogacy procedures find themselves at the crossroad of a plurality of thorny ethical and legal issues. The coexistence of a multiplicity of ethical attitudes to these practices is translated, in the global realm of law, into different normative approaches that go from strict prohibitions to more liberal tendencies.[1]

The main target of this paper is offering a reflection about the consequences deriving from the application of surrogacy techniques and, in particular, about the role of the judiciary in governing ethical and axiological pluralism. Due to the differences in regulating surrogacy around the world, in fact, the judiciary more and more often comes to be confronted with the requests of who – after entering surrogacy agreements abroad – ask for parenthood recognition or for the transcription of for-

[1] As to US regulation see C. SPIVACK, *The Law of Surrogate Motherhood in the United States*, in *American Journal of Comparative Law*, 58, 2010, pp. 97-114. With regard to European legislation, see the Report by the Directorate-General for Internal Policies of the European Parliament (*Policy Department C: Citizens' Rights And Constitutional Affairs*), *A Comparative Study on the Regime of Surrogacy in EU Member States*, 2010.

eign birth certificates or judicial decisions in their country of origin. Judges are in charge for filtering these requests in order to ensure the functioning of the whole system and the protection of all of the interests coming into play.

This pragmatic approach – aimed at managing the effects of debated practices – allows to avoid, at least partly, to get stuck into the ethical debate and opens the possibility of taking advantage of this topic to test the consistency of a public policy argument in the European context. The public policy exception is, in fact, the most commonly used argument to oppose the possibility for measures taken abroad to enter national borders.

In a field marked by a lack of consensus among legal orders about the ethical acceptability of surrogacy procedures, it is suggested that the recent judgments given by the European Court of Human Rights (ECtHR) recommend a common approach, oriented by the criterion of the best interest of the child, to solve issues concerning the consequences of transnational surrogacy agreements. As it will be shown, the way paved by the ECtHR suggests a concrete interpretation of the public policy exception and favours an understanding of that clause strictly rooted into factual reality.

2. Surrogacy: practices that divide.

The ever-widening panorama of assisted reproductive techniques offers surrogacy as an alternative when the infertile woman, man or couple are not able to reproduce. Surrogacy is basically an arrangement between a woman (known as surrogate), who offers her womb to carry the baby and who delivers the child, and another person or couple unable to bear a pregnancy. The intention is usually that the child born to the surrogate mother will be handed over after birth to the commissioning person or couple.

Although surrogacy is no new reproductive technology,[2] its inherence with an "intimate and emotional area of human life"[3] makes it a controversial practice: the technique is indisputably showing an increasing trend[4] but its circulation finds obstacles in the perplexities manifested by those who perceive it as "a kind of baby-farming operation of a wholly distasteful and lamentable kind". [5]

Furthermore, surrogacy can hardly be framed into a comprehensive picture, [6] since the application of those procedures gives rise to different scenarios. In particular, differences can be observed between traditional and gestational surrogacy. In the former, the surrogate acts as both the egg donor and as the actual surrogate for the embryo. With the latter, the embryo is created by using the commissioning couple's gametes. In this case, the surrogate mother is genetically unrelated to the baby. More options are possible, since in both cases gametes can be obtained from third parties not directly involved into the surrogacy agreement.

Due to different features of surrogacy procedures, even the positions shown by those who are not, in principle, contrary to the technique comes to be fragmented: attitudes shown by the general public and by legislators often change according to the existence or non-existence of genetic links between the commissioning parents and the baby,[7] to the commercial or altruistic nature of the agreement,[8] to the context of so-

[2] Some historical examples of reproductive outsourcing can be found in L.J. MARTIN, *Reproductive Tourism in the United States: Creating Family in the Mother Country*, New York, 2014.

[3] BRITISH DEPARTMENT OF HEALTH, *Surrogacy: Review for health ministers of current arrangements for payments and regulation - Report of the review team*, 1998, p. 5.

[4] According to the HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, 2012, pp. 6-8, recent reports documented a rise in the practice of surrogacy, to include arrangements that cross national borders.

[5] This definition was given by Cumming-Bruce J in *A v. C.* [1985] FLR 445,one of the first cases about surrogacy, heard in the United Kingdom in 1978.

[6] Different forms of surrogacy are presented, among others, in C. CARR, *Unlocking Medical Law and Ethics*, New York, 2014, p. 263 ss.

[7] For example, the Ukrainian (Family Code of Ukraine, article 123) and the Russian legislation (Family Code of Russia, articles 51-52) differ on this point.

[8] Commercial surrogacy is legal in India, Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. See P. SAXENA, A. MISHRA, S. MALIK, *Surrogacy: Ethical and Legal Issues*, in *Indian Journal of Community Medicine*, 2012, 37(4), pp. 211–213. Some

cial inequality and economic dependency in which agreements take place, to the possibility for same-sex couples or singles to have access to the techniques.

The European legal scenario described in a report by the European Parliament[9] clearly reflects the aforementioned divides: surrogacy is prohibited and punished in many European legal orders (an explicit provision exists, for example, in Italy, France, Germany, Spain, etc.) and merely tolerated without specific attention in others (*e.g.* Belgium, Ireland).[10] Conversely, surrogacy finds recognition and regulation in few EU member states, such as Greece[11] and the UK.[12]

Beyond the general admissibility of surrogacy practices, its divisive nature also influences specific rules concerning, for example, parenthood determination. To make an example, in the UK, parenthood is transferred from the gestational mother (and her husband) to the intending parents by means of adoption or parental order released by a judicial authority, upon verification of some requirements.[13] In Greece, on the contrary, there is no need for *ex post* adoption procedure, as far as the surrogacy agreement finds court authorization[14] before child's birth; the birth certificate, therefore, will not show the gestational mother's name.

Differences in legal regimes and the global mobility that characterizes today's world created the opportunity for parents willing to have a

critics to the distinction between commercial and altruistic surrogacy in A. STUHMCKE, *The regulation of commercial surrogacy: The wrong answers to the wrong questions*, in *Journal of law and Medicine*, 2015, 23(2), pp. 333-345.

[9] *A Comparative Study on the Regime of Surrogacy in EU Member* States, *supra*, footnote 1.

[10] Specific aspects of the issue came to the attention of national courts in *M.R & Anor -v- An tArd Chlaraitheoir & Ors* [2013] IEHC 91 (5 March 2013) and made their way to the European Court of Justice in C-363/12 *Z versus A Government Department and the Board of Management of a Community School* (26 September 2013).

[11] See Greek laws n. 3089/2002 and 3305/2005.

[12] Section 54 del HFE Act 2008.

[13] In particular, the Act excludes the possibility for a compensation, requires consent from the gestational mother, the existence of a biological link with one of the intending parents, the domicile of one or both the intended parents to be in the UK, Channel Islands or Isle of Man.

[14] Upon verification of specific requirements such as the absence of compensation, the existence of medical reasons justifying treatments, the permanent residence in Greece.

baby to take advantage of the processes of international surrogacy. Nonetheless, the birth of a baby of a surrogate mother in one country with genetic or intended parents from another creates legal hurdles and conflicts. The lack of international regulation and the described dishomogeneity of laws potentially encroaches the human rights of the vulnerable subjects involved: beside risks of exploitation and commodification,[15] main threats are related to the position of children who could see their rights and interests impaired and might face the concrete risk of remaining, under some circumstances, stateless and/or parentless.[16]

Most of the answers provided by different jurisdictions to the emerging legal issues are related to the application of a public policy clause: facing the whole discourse from this viewpoint allows a pragmatic approach that, regardless of the unsolvable ethical issues involved,[17] considers the consequences of the application of surrogacy techniques and provides some insights about the shape of public policy clause.

3. International public policy clause.

In the field of private international law, the public policy defence often plays the role of one of the most important points of the recognition and enforcement of foreign judgments and other foreign public acts.

In many States, in fact, foreign acts, decisions or orders concerning parenthood determinations are recognized by operation of law. As reported, the most common grounds for non-recognition of a foreign decision or act are: "(1) lack of jurisdiction of the foreign court according to its own jurisdiction rules, (2) violation of public policy of the State

[15] For an acknowledgment of the commercial aspects about reproduction, see D.L. SPAR, *The baby Business: how money, Science, and Politics Drive the Commerce of Conception*, Boston, 2006.

[16] T. LIN, *Born lost: stateless children in international surrogacy arrangements*, in *Cardozo Journal of International and Comparative Law*, 21(2), 2013, p. 545.

[17] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy*, Preliminary Document No. 3 of February 2016 for the attention of the Council of March 2016 on General Affairs and Policy of the Conference, available online at https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf.

where recognition is sought; (3) the existence of fraud; and (4) the existence of a previous decision contradicting the decision to be recognized".[18]

In particular, the concept of *ordre public* is used in several fields and it constitutes a safeguard to national sovereignties of the States. Regardless of the context where it finds application, the clause serves as a safeguard on which States can rely in order to protect certain national interests, which they understand as essential for the maintenance of their legal orders and of the values they want to preserve.[19] Nonetheless, notwithstanding its relevance, the very concept of *ordre public* has no precise definition in most legal orders and jurisprudences: such indetermination may lead to the incoherence in the application of the exception itself and may create legal uncertainty.

A brief analysis of some of the case-law related to the recognition of acts or judgments concerning parental assessment adopted abroad and to the use of the public policy exception may suggest, if not the surfacing of a European public policy exception, a general approach within Europe which should ensure public policy to serve as an instrument to protect fundamental rights. As noted by the Experts' Group convened by the Council on General Affairs and Policy of the Hague Conference to explore the feasibility of advancing work in the area of Parentage/Surrogacy "it would be useful to have further discussions on the feasibility of unifying the rules on the recognition of foreign public acts and judicial decisions on parentage, taking into account public policy concerns, including those stipulated in domestic law".[20]

Before turning to case-law analysis, one last remark concerns the notion of *ordre public* generally opposed to the recognition of foreign

[18] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements*, Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, available online at https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf, p. 18.

[19] A. LOPEZ-TARRUELLA, *The Public Policy Clause in the System of Recognition and Enforcement of the Brussels Convention*, in *The European Legal Forum,* (E) 2-2000/01, pp. 122-129.

[20] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy, supra*, footnote 17.

measures: as many courts highlighted, in this kind of decisions, the concept of "public order" that was to be taken into account was to be identified with the *international public order*. Therefore, the evaluation of compatibility between the measure adopted abroad and the domestic legal order has to follow two main directives: first, the parameter of the evaluation cannot be represented by a single legal norm, but by an established standard of most basic notions of morality and justice, shared within the international community; second, the foreign measure has to be considered with regard to its effect, to its practical application.[21]

4. Some case-law: two main judiciary approaches.

Cases described in this paper are quite similar to one another as to factual aspects.[22] Therefore, it won't be necessary to go deep into case details, since courts' reasoning about the broad and plastic concept of public policy generally overlooks them. All of the cases considered regard either same-sex or heterosexual couples who decide to go abroad to access surrogacy procedures and obtain what is forbidden to them in their countries of origin.

In most cases, even if rules about surrogacy set by foreign legal orders are commonly respected, the problem of the recognition of acts created abroad emerges when couples try to re-enter their countries' borders. Domestic authorities often refuse to give recognition to the certificate of birth created abroad or to judgments settling questions about parenthood given by foreign authorities.

These uncertainties determine a limping situation for children who risk to face no civil status recognition and matters regarding their relationship with parents.[23]

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[21] See M. GEBAUER, *Ordre public (Public Policy)*, in R. WOLFRUM, *Max Planck Encyclopedia of Public International Law*, Vol VII, Oxford, 2012 pp. 1008 ff.

[22] The case-law concerning surrogacy is quite copious worldwide. The selection of decisions made in this paper depends on the attention specifically given in the courts' reasoning to the concept of public order.

[23] T. LIN, *Born lost: stateless children in international surrogacy arrangements*, *supra*, footnote 16.

Solutions to these issues are obviously deeply rooted into the application of complex international private law mechanisms aimed at striking a proper balance between the need of giving due protection to vulnerable subjects and that of avoiding people to get around national rules and of safeguarding domestic order.

The two main attitudes shown by the judiciary are well summarized in the decisions given in a Belgian case. The case is about a same-sex couple married in Belgium who travelled to the US to enter a surrogacy agreement.[24] The gestational mother, living in California, gave birth to twins in December 2008. In accordance with the laws of California,[25] being one of the men the biological father of the twins, the birth certificate mentioned the names of the two spouses as fathers. Back to Belgium, local authorities refused to recognize the birth certificates, basically denying the existence of the parental status. The couple decided to file a lawsuit to establish the parental relationship.

The Court of First Instance sitting in Huy[26] denied the request focusing not on the recognition in Belgium of the decision by which a California Court authorized, prior to the birth of the children, the birth certificates to mention the names of the two fathers, but rather on the recognition of the birth certificates themselves. The Court referred to Article 27 of the Belgian Code of Private International law,[27] under which foreign acts relating to the personal status may only be recognized in Belgium provided, among other requirements, that they comply with public policy.

According to the parents, the choice of the Belgian legislation to allow the adoption of a child by same-sex couples, excluded the need of

[24] It has to be noted that surrogacy finds no explicit regulation in Belgium. This Country, moreover, became the second, after the Netherlands, to allow same-sex marriages in Europe in 2003 (see art. 143 of the Belgian Civil Code).Since 2006, furthermore, same-sex couples have had the same rights as opposite-sex couples in adopting children.

[25] Section 7630 of the California Family Code.

[26] Opinion issued on the 22nd of March, reported by P. WAUTELET, *Belgian Judgment on Surrogate Motherhood*, in *Conflict of laws.net. News and Views in Private international law*, available online at http://conflictoflaws.net/ and commented by C. HENRICOT, S. SAROLEA, J. SOSSON, *La filiation d'enfants nés d'une gestation pour autrui à l'étranger*, *note sous Civ. Huy (4ème ch.), 22 mars 2010 et Liège (1ère ch.)*, *6 septembre 2010*, in *Revue trimestrielle de droit familial*, 2010, pp. 1139-1163.

[27] Law of 16th July 2004.

considering the recognition of the birth certificates against the core principles of the Belgian legal order. Contrarily, the Court found that surrogacy agreements presented critical points both under the UN Convention on the Rights of the Child and under the European Convention on Human Rights.

In particular, surrogacy procedures would create the risk of a commodification of children (which would be in contrast with Article 7 of the Convention of the Rights of the Child, which grants each child the right to know and be cared for by his or her parents) and of a violation of the mother's dignity determined by the payment for her services (incompatible with Article 3 of the European Convention on Human Rights).

The Court concluded that giving recognition to the foreign certificates would infringe very fundamental principles, determining a violation of public policy.

The appellate Court reversed in part the decision of the lower court.[28] the first Chamber of the Court of Liège considered, first of all, whether the birth certificates could have been issued applying the Belgian law. The factual situation of the two fathers had to be distinguished. As to the biological father of the twin girls, under Belgian law, since the surrogate was not married, he could have recognized the children, legally becoming their father. For the other man, because of the lack of a biological link, the Belgian law offered no different solution than creating a legal parentage through adoption by same-sex couples.

The Court turned, then, to the review of the effects of the recognition of the paternity of the biological father, which derived, also, from a contract, of commercial nature, between the mother and the commissioning parents.

The appellate Court agrees with the lower Court as to the invalidity, under public policy principles, of contracts concerning human beings and human bodies. Nonetheless, in the Court's judgment the public policy reservation calls for a nuanced application: in particular, the public policy mechanism should entail the respect of the fundamental interest of the children. Considering that the twins could not be legally related

[28] Court of Appeal of Liège, 1st Chamber, ruling of 6th September 2010, docket No 2010/RQ/20. See C. HENRICOT, S. SAROLEA, J. SOSSON, *op. cit.*, *supra*, footnote 26.

to the mother, the deprivation of any link with the biological father as well would leave the children ultimately parentless. Birth certificates were therefore given effects in so far as they represented the basis for establishing a legal link between the girls and the biological father, being this solution in line with the best interest of the children and, therefore, not contrary to public order.

The absence of a general prohibition against surrogacy in Belgium[29] might partially explain the outcome of the decision, but what is more relevant to note is that the result of the judgments is totally dependent on the interpretation of the public policy reservation given by the Courts.

5. Public policy reservation and the explicit prohibition of surrogacy.

The interpretation given by the Court of first instance in Belgium is shared by many recent decisions given in legal orders characterized by the existence of a clear and explicit prohibition against surrogacy procedures.

In Spain, for example, according to art. 10 of *Ley 14/2006 sobre Técnicas de Reproducción Humana Asistida* surrogacy agreements, irrespective of their commercial or non-commercial nature, are to be considered void. Legal motherhood, moreover, in any case corresponds the gestational carrier.

Circumventing this ban, a married gay couple from Spain travelled to California in 2008 to enter a surrogacy agreement, through which a woman gave birth to twins that, as in the Belgian case, were registered as sons of the intending parents. The couple attempted to register the US birth certificate in the Spanish Consular Registry but the Consul rejected the request arguing that the foreign legal act did not comply with the Spanish law. The case – that once again, concerned the "recognition" of a foreign legal act – went through to the Tribunal Supremo

[29] Nonetheless, a wide case-law on the topic is reported in K. TRIMMINGS, P. BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Oxford, 2013, pp. 68 ff.

de España.[30] The Tribunal, in carrying out the control of compatibility between the foreign act and the *orden público internacional*, recognizes the impossibility of a requirement of full compliance with every aspect of the domestic legal system. However, a threshold set by the most important values and principles enshrined in the Spanish Constitution and in the international covenants on human rights ratified by Spain has to be respected. This fundamental core includes also rules regulating fundamental aspects of family life and parent-child relationships and, in particular, rejects any form of commodification that compromises the dignity of women and children.

The claimants based their request on two intertwined arguments: on the one hand, they highlighted their request did not concern a recognition of the agreement itself but of its effects only. In this sense, the act of registration represents just the "últíma y periférica" consequence of the surrogacy agreement. On the other hand, according to the commissioning parents, the inscription is the main means to secure the "best interests of the children".[31]

Five judges out of nine, however, contended that the "best interest" criterion is a "non-determined" concept that needs to be concretized. Surprisingly, according to the Tribunal, this concretization does not necessarily imply the recognition of parentage to the intending parents. This statement was made despite the surrogate mother explicitly relinquished motherhood and despite the intended parents served for years as social fathers:

> La concreción de dicho interés del menor no debe hacerse conforme a sus personales puntos de vista, sino tomando en consideración los

[30] Tribunal Supremo de España, n. 835/2013, 6th February 2014, *recurso* n. 245/2012.

[31] This very same argument was made by the Spanish Administrative Agency in charge of Official Registries when overruling the decision made by the Consulate, and is recalled in the dissenting opinion (*voto particular discrepante*). According to the dissenting opinion, the decision of the majority only ensures a preventive form of public policy exception ("la sentencia de la que se discrepa tutela la excepción del orden público de una forma preventiva"), but far from a case by case concrete determination of that clause ("la vulneración del orden público internacional sólo puede comprobarse caso por caso"), fails to protect the interests of children involved. The refusal of recognise a foreign measure is possible only where "se contraría el orden público entendido desde el interés superior del menor".

> valores asumidos por la sociedad como proprios contenidos tanto en las reglas legales como en los principios que inspiran la legislación nacional y las convenciones internacionales.

Sate's interests against commodification of children and motherhood need to be taken into account. Interestingly, in this kind of reasoning we do not have the interest of the child acting as a counterbalance to public policy exception, but, on the contrary, the Tribunal maintains that it is necessary to fill the open and non-determined concept of the best interest of the child with considerations based on the *ordre public* argument: in a perspective that seems to be inverted, the concretization of the best interest of the child depends on the general and abstract values that go to form the *ordre public* reservation.

This very strict application of the public order exception is quite similar to that adopted in three different decisions by the Cour de Cassation in France.[32]

Article 16-7 of the French Civil Code clearly states that surrogacy is forbidden.[33] It is interesting enough the fact that art. 16-9 specifies that art. 16-7 – as well as the others pertaining to Chapter II, dedicated to the respect of human body – is a public policy provision.

[32] Civil Cassation, 1st Section, n. 10-19.053, n. 09-66.486, n. 09-17.130, all decided on 6th April 2014.

[33] The article was created by art. 3 of the bioethics law n. 94-653 of 29th July 1994. It literally provides "Toute convention portant sur la procréation ou la gestation pour le compte d'autrui est nulle". Actually, surrogate motherhood has been prohibited in France since 1991, under a decision by the *Cour de cassation* (Cass. Ass. plén., 31st May 1991). Violations of the prohibition are punished by civil (articles 311-25, 325 and 332-1 of the Civil Code) and criminal sanctions (articles 227-12 §3 and 227-13 of the Penal Code). Despite the broad support for reform, the prohibition was reaffirmed during the process for the revision of bioethics laws in 2009-2010 due to a wide consensus within the committee in charge of revising the law, finding that surrogacy is incompatible with French moral principles and human dignity. The committee also rejected the possibility of allowing *ex-post* adoption because it would validate a system in which children are programmed to be abandoned at birth. The results of the discussion can be found in French in CONSEIL D'ÉTAT, *La révision des lois de bioéthique. Étude adoptée par l'assemblée générale plénière le 9 avril 2009*, online at http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/094000288.pdf, pp. 60 ff.

Differently than in other cases, this time birth certificates were registered but several courts granted the request of the Ministére public to annul the transcription on the grounds that it violated the *ordre public*.

One of the cases brought to the attention of the Court was already decided in 2008: at that time the Court confirmed the annulment of transcript of the birth certificate of two children because their legal parents had entered a surrogacy agreement in California. The main argument in this decision was that French citizens could not go abroad to circumvent French surrogacy laws. The foreign document, thus, was not to receive the e*xequatur* in so far as it was contrary to international public order.

In 2011 the old case, together with two new ones, came to the attention of the Cour de Cassation. At a hearing concerning one of the cases (the Menesson case), on 8th March 2011, the advocate-general recommended quashing the judgment. According to his opinion a right lawfully acquired abroad could not be prevented from taking effect in France on grounds of international public policy where this would infringe the integrity of family life, protected by art. 8 of the European Convention of Human Rights. Taking into account the substantial and effective existence of a family dimension, albeit "legally clandestine", the advocate-general identifies two possible approaches:

> At this stage two answers are possible: either – somewhat theoretically and largely paradoxically – the refusal to register the birth particulars is inconsequential and does not substantially affect the family's daily life, which means that registration is a mere formality and it is therefore difficult to see any major obstacle in the circumstances to recording the details of certificates with such minimal legal effect that it is inconceivable that they are capable in themselves of shaking the foundations of our fundamental principles and seriously contravening public policy (since they do not intrinsically contain any mention of the nature of the birth).
> Alternatively, the refusal to register the birth details permanently and substantially disrupts the family's life, which is legally split into two in France – the French couple on one side and the foreign children on the other – and the question then arises whether our international public policy – even based upon proximity – can frustrate the right to family life within the meaning of Article 8 [of the Convention] or whether, on the contrary, public policy of that kind, whose effects have to be ana-

> lysed in practical terms as do those of the foreign rights or decisions that it seeks to exclude, should not be overridden by the obligation to comply with a provision of the Convention.[34]

The advocate-general highlights the dangers implied in a consequences blind application of the public policy clause and stresses the need for a practical analysis of the factual situation.

Nonetheless, the Court dismissed the appeal, confirming the same rationale adopted in 2008 and concludes that the birth certificates registration has to be annulled because giving effect to a surrogacy agreement violates the inalienability of civil status, an essential principle of French law.[35]

According to the Court this conclusion does not deprive children of the legal parent-child relationship recognized in California and does not prevent them from living in France with the intended parents. Children's private and family life and their best interests are therefore preserved.

These decisions led the way towards the European Court of Human Rights' judgements in the cases of *Menesson* and *Labasee* to which we will turn in a short while.

After Spain and France, a very similar approach characterised a decision given by the Italian Corte di Cassazione in 2014. The case discussed slightly differs from those considered so far in that surrogacy agreement was to be deemed void also under law of Ukraine – where the procedure took place – which requires at least 50% of the DNA to come from the intended parents. Controls carried out confirmed, in fact, a lack of biological links with both commissioning parents. The juvenile Tribunal in Brescia declared the baby to be adoptable and suspended parental rights. Moreover, judges acknowledged that the Ukrainian birth certificate could not be registered in Italy because it

[34] The opinion of the advocate general is reported in the judgment by the EUROPEAN COURT OF HUMAN RIGHTS, *infra*, *Menesson v. France*, 26th June 2014 (application n. 65192/11), par. 26.

[35] In the original language: "en l'état du droit positif, il est contraire au principe de l'indisponibilité de l'état des personnes, principe essentiel du droit français, de faire produire effet, au regard de la filiation, à une convention portant sur la gestation pour le compte d'autrui, qui, fût-elle licite à l'étranger, est nulle d'une nullité d'*ordre public*".

was in violation of public order[36] and, in particular, of the Italian law about medically assisted reproduction that openly prohibits surrogacy procedures, their organization and advertising.[37] This decision was confirmed in appeal and once again by the Court of Cassation.[38]

According to the claimants, the existence of a domestic provision prohibiting surrogacy was not, *ex se*, sufficient to declare the birth certificate to be in contrast with international *ordre public*: this concept, built by fundamental principles shaping the ethico-legal attitude of the whole legal system, requires to identify common international values and to harmonize them with the internal order.

Once again the interpretation of public order given by the Court is quite dissimilar to that proposed by the claimants: in its view international *ordre public* is conceived as a limit to safeguard internal coherence and cannot be reduced to international common values, as it embraces fundamental own non-renounceable principles and values.[39] In this sense, the best interest of the child is realised giving legal recognition to the gestational mother and reserving to adoption procedures – governed by judges and not left to private agreements – the creation of parentage bonds detached from biological links.[40]

According to the Court the normative prohibition of surrogacy set by the Italian legislation aims at protecting the dignity of the gestational mother and, ensuring the operability of adoption procedures, the best interest of the child.[41]

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[36] In the Italian legal order, as well as in many others, according to law (art. 65 of law n. 218/1995) foreign acts can produce their effects in Italy if, among other requirements, they are in compliance with public order.

[37] Art. 12.6 literally provides that "Chiunque, in qualsiasi forma, realizza, organizza o pubblicizza la commercializzazione di gameti o di embrioni o la surrogazione di maternità è punito con la reclusione da tre mesi a due anni e con la multa da 600.000 a un milione di euro".

[38] Court of Cassation, 1st civil Section, judgment n. 24001/14.

[39] Page 13 of the decision.

[40] Page. 16 of the decision.

[41] Page 14 of the decision: "il divieto di pratiche di surrogazione di maternità è certamente di ordine pubblico, come già suggerisce la previsione della sanzione penale, di regola posta appunto a presidio di beni giuridici fondamentali. Vengono qui in rilievo la dignità umana – costituzionalmente tutelata – della gestante e l'istituto dell'adozione (…) governato da regola particolari poste a tutela di tutti gli interessati, in primo luogo dei minori (…)".

Despite small distinctions to be traced among cases and judicial approaches, the common mark of the described decisions seems to be the adoption of a theoretical and preventive view of the public policy exception. Courts seem to rely on general clauses and procedural rules much more than in-depth analyzing the consequences and the effects on rights and individual positions of their application. The perspective sometimes comes to be inverted: the protection of the best interest of the child seems to depend upon the guarantee of abstract and general values of public order. This latter reservation, by its side, happens to be operative even despite the compression and disregard of the protection of the vulnerable position of the single individualized child.

It has to be acknowledged that two fundamental – albeit implicit – elements seem to affect the decision of the Italian Court of Cassation and allow to partly distinguish it from other judgments given in other countries: the lack of a biological link and the negative evaluation obtained by the couple during previous pre-adoption procedures.[42] However, staying to what the Court explicitly said, the application of adoption procedures seem to ensure, *in any case*, the realization of the child's best interest.

7. The case-law of the ECtHR.

Following the negative decisions adopted by the Cour the Cassation in France the parents of the children lodged two application with the European Court of Human Rights complaining that, to the detriment of the children's best interest, they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad.[43] Evaluating the complaint of a violation of art. 8 of the Con-

[42] As reported in the first instance decision, social assistants noticed a lack of awareness about difficulties involved in the choice of adopting a baby and troubles in properly elaborating adoptive parenthood, due to emotional and intellectual limitations (Juvenile Tribunal in Brescia, judgment 142/12, 14th September 2012).

[43] Direct references will be made to the already cited case *Menesson v. France*, supra, footnote 34. Most of the considerations of the Court are repeated in the decision EUROPEAN COURT OF HUMAN RIGHTS, *Labassee v. France*, 26th June 2014 (application n. 65941/11).

vention, the Court first of all notices that the refusal of the French authorities to legally recognize the family tie indisputably amounts to an interference in the applicants' right to respect for private life.

Despite the applicants argued for an attenuated effect of public policy – due to the fact that they were only asking for the recognition of a situation acquired, without fraud, abroad[44] – the Court considers the measure adopted by French judges to be in accordance with the law, since the French Civil code explicitly forbids surrogacy. In the Court's view, moreover, French authorities were pursuing the legitimate aim of deterring French citizens from going abroad to access otherwise forbidden techniques, and that of protecting surrogate mothers and children from commodification risks.[45] The Court concludes, moreover, that the measure adopted by French courts might be considered necessary in a democratic society with regard to the parents' position because they intentionally decided to access a forbidden technique and they nonetheless managed to create a life dimension with the children (parents and children were able to settle in France).[46]

On the contrary, turning to the position of children the court says that i) the existing margin of appreciation, that generally characterizes State intervention in ethically sensitive areas, has to be restricted when the best interest of a child is involved and ii) parent-child relationships are a basic part of children's identity and that the national decision did not pursue the realization of their best interest.[47] According to the Court, thus, no *ordre public* is realised if the interests of concrete and individualised children are neglected. The general dimension of public policy has to be taken together with an individual and concrete one, which cannot be neglected.

Issues concerning surrogacy and the effects of the application of related agreements came to the attention of the European Court of Human Rights once again in the case of *Paradiso and Campanelli v. Italy.*[48]

[44] *Menesson v. France*, par. 51.
[45] *Menesson v. France*, par. 62.
[46] *Menesson v. France*, par. 63 ff.
[47] *Menesson v. France*, par. 96 ff.
[48] EUROPEAN COURT OF HUMAN RIGHTS, *Paradiso and Campanelli v. Italy*, 27th January 2015 (application n. 25358/12).

In 2008, the claimants, spouses of Italian nationality, contacted a Russian firm to obtain a child by a surrogate mother. The new-born was delivered in March 2011 with a Russian birth certificate indicating the applicants as parents. When they returned to Italy with the child, the transcription of the birth certificate was refused. Following a DNA test a Court decided to remove the child and to place him under guardianship on the ground that he had no biological relationship with the applicants.[49] The couple was additionally charged for distorting the civil state, circumventing the provision about surrogacy prohibition and violating the law on adoption. Considering the conduct of passing off the baby as their child, the national judges decided that the claimants no longer had standing in the adoption proceedings.

The Court dismissed the part of the complaint concerning the intended parents acting in the name of the child, who had a guardian since October 2011 (par. 49). As to the claim regarding the transcription of the birth certificate, the Court notes that the criterion of the previous exhaustion of internal remedies was not met and, therefore, rejects the argument (par. 90).

The Court then turns to the measures taken by the Italian authorities to separate the baby from the intended parents.

As to the applicability of art. 8 of the Convention, the Court notes that a *de facto* family life existed, since the applicants behaved like parents to the baby for about six months (par. 67 ff.). Moreover, identity is part of private life and it strongly influences the possibility of building one's own personality. The refuse by the Italian authorities to recognize the parent-child relationship and the following activities which led to the removal of the child from the intended parents represented, in the Court's view, an interference with the private and family life. Considering whether these actions pursued a legitimate aim and whether they were necessary in a democratic society – in order to check their compliance with art. 8.2 requirements – the Court considers them not to be unreasonable. What is more relevant, here, however, is the evaluation about their degree of proportionality: this test completely relies on the

[49] As already noted above, differently from the Ukrainian law, the Russian legislation about surrogacy does not require gametes to come from the intended parents.

interpretation given by the Court to the notion of public order and to its role and function.

According to the Court, the *ordre public* cannot be regarded as a "carte blanche"[50] and its recall cannot be sufficient to justify any kind of measure. The duty to protect the best interest of the child, in fact, has to be fulfilled by any State, regardless of the nature (biological or not biological) of the parental link. The interruption of the familiar life and the decision to detach the child from his/her family dimension is a very extreme resort to be used only where it obviously meets the necessity to protect the child from an immediate danger (par. 80).

The Court acknowledges the sensitivity of the situation faced by the national authorities in the present case, given by serious suspicions hanging over the applicants. The harm sustained by the child in being separated by his intended parents was deemed to be surmountable, considered his young age and the short period spent with his family. Nonetheless, the Court considers that the conditions justifying the use of the impugned measures were not met (par. 81). Going deep into factual elements concerning the case and carrying on a markedly concrete analysis, the Court notes that "the applicants, who had been assessed as fit to adopt in December 2006 when they received the authorisation to adopt, were found to be incapable of bringing up and loving the child on the sole ground that they had circumvented the adoption legislation, without any expert report having been ordered by the courts".

The violation of art. 8 derives from the non adequacy of the elements on which the authorities relied in concluding that the child ought to be taken into the care of the social services . The outcome is an unfair balance between the interests at stake.

As highlighted by the ECtHR itself, while the French cases concerned the issue of parent-child relationship and the children's identities, the primary issue in the Italian case is the national courts' decision to remove the child and to place him under guardianship.[51] Beyond differences in cases and related outcomes, one aspect common to all of the

[50] *Paradiso and Campanelli v. Italy*, par. 80.

[51] Press release, EUROPEAN COURT OF HUMAN RIGHTS, *Questions and Answers on the* Paradiso and Campanelli v. Italy *judgment*, 27th January 2015, online at http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf.

described decisions can be identified: the Court, recognizing the role of public policy reservation in judgments concerning the effects of a surrogacy agreement, points the way ahead with regard to the interpretation to be given to that general clause. All of the decisions are tailored towards a concrete and integrated view of the public policy exception: this clause cannot be construed in abstract and general terms, and applied in a consequences-blind way; rather it comes to be confronted and filled in with the evaluation of the best interest of the child, based on concrete and factual elements.

7. The aftermath of the ECtHR's judgments.

A couple of decisions adopted in Europe in the months following the described ECtHR's judgments seem to reflect the visions there expressed.[52]

The Torino Court of Appeal[53] was called to decide on the appeal lodged against a decision in which the Court of first instance found *ordre public* – which, according to the Court, was made of constitutional principles giving shape to the entire legal order – to hamper the recognition of the foreign birth certificate.

Respectful of the indications traced by the ECtHR, the Court of Appeal stressed that the domestic *ordre public* has to be integrated by

[52] It has to be acknowledged that both the Cour de Cassation in France and the Tribunal Supremo in Spain came back to surrogacy issues after the ECtHR's decisions. In adapting their previous approach none of the Courts specifically focuses on public policy's interpretation arguments. The Spanish Tribunal Supremo (Sala de lo Civil, 2nd February 2015, recurso n. 245/2012) keeps the best interest of the child and the public policy reservation separate, maintaining that the first can be satisfied as other ways to establish parental relationships are possible. The French Cour de Cassation (Assemblée plénière, 3rd July 2015, arrêt n° 619 (14-21.323)) ruled that children born to surrogates abroad will have the right to be granted French birth certificates (with the names of the surrogate mother an biological father) and will be able to claim French citizenship. According to the Court: "Une GPA ne justifie pas, à elle seule, le refus de transcrire à l'état civil français l'acte de naissance étranger d'un enfant ayant un parent français" (Communiqué relatif à l'inscription à l'état civil d'enfants nés à l'étranger d'une GPA, 3rd July 2015).

[53] Torino Court of Appeal, decree 29th October 2014, available online at http://www.biodiritto.org.

principles coming from a supranational dimension and makes specific reference to the provisions of the European Convention on Human Rights and to Strasbourg Court's jurisprudence. According to the Italian Appellate Court, it is necessary to reach an integration between the two systems of protection: the *ordre public* clause, therefore, has to be interpreted in accordance with the best interest of the child.

Significantly, the best interest of the child is not considered as a counterbalance to public order; rather the concept serves as a parameter to evaluate the compatibility of a certain measure with the *ordre public*.

Similarly, at the end of 2014, the German Bundesgerichtshof[54] found itself to be confronted with the issues concerning surrogacy and the recognition of a foreign judgment assessing parental rights. The Tribunal highlights that *ordre public* reservation has to be limited to very exceptional cases and that, in the case by case determination concerning the violation of the *ordre public*, rights enshrined by the European Convention on Human Rights have to be considered as well. The foreign judicial adjudication recognising the parent-child relationship does not clashes with the fundamental principles of the German legal system, considering that the interest of the child – that has to be concretely assessed – comes out more in favour of the recognition. Once again the best interest of the child does not counterpose itself to the notion of *ordre public*, but comes to integrate it, asking for a case by case evaluation of concrete factual aspects characterizing the single case.

8. Drafting some conclusions: a European approach to ordre public.

Affirming the existence of a European notion of public policy represents today a clear overstatement. Nonetheless, in this area of law, deeply marked by a lack of consensus and by ethical disagreements, the ECtHR's case-law suggests a European approach to deal with the concept of *ordre public*. The way pointed requires to avoid a consequences-blind application of international public order exception and fosters the analysis of its effects in practical and concrete terms. In this

[54] BUNDESGERICHTSHOF, judgment of 10th December 2014, XII ZB 463/13.

sense, the evaluation of the best interest of the child does not play the role of an exception to counterbalance needs related to an abstract notion of public order, but it rather represents a fundamental, constituent part of the *ordre public* clause itself.

This conclusion requires two further specifications.

First, this approach should not be translated into the substitution of a general abstract clause – that of public policy – with another one, likewise theoretical. The consideration of the best interest of the child has to be as concrete as possible, rooted in evidence derived from the factual case and evaluated on the bases of opinions gathered among different professionals who shall be involved. Beyond ethical complexities concerning surrogacy procedures, the duty to protect children has to be fulfilled through a detailed evaluation, as individualized as possible, of the specific matter involved. This approach might also help preserving public policy from criticisms against its uncertain and discretionary character.[55]

Second, the suggested pragmatic approach does not imply setting aside the ethical debate concerning surrogacy, which has to be strengthened and invigorated. Rather, it simply gives a clear indication as to the strike of balance between different interests, allowing to overcome difficulties that may arise in the moment of the evaluation of the effects and consequences of disputed procedures. Surrogacy prohibitions find a solid justification in different moral and ethical concerns (preventing children from becoming commodities traded as merchandise; protecting the interest of children who are psychologically at risk in such transactions; preventing the exploitation of surrogate mothers and perils of social division).[56] Nonetheless, the current globalized world, where some states permit surrogacy contracts, and infertile couples can go abroad to find surrogate mothers, illustrate the complexity of enforcing

[55] For a concrete approach to public policy, A. MILLS, *The Dimensions of Public Policy in Private International Law*, in *Journal of Private International Law*, 4(2), 2008, pp. 201-236.

[56] An interesting perspective about India, in M. UNNITHAN, *Thinking through Surrogacy Legislation in India: Reflections on Relational Consent and the Rights of Infertile Women*, in *Journal of Legal Anthropology*, 2013, Vol. 1., n. 3, pp. 287-313.

this prohibition and imposes to deal with practical questions calling for immediate solutions.[57]

Finally, a consequences-blind application of public order clauses might jeopardize the most important objective that the prohibition against surrogate motherhood is designed to achieve: the protection of the superior interest of the child. This criterion – which, likewise public order, cannot be predetermined – has not to be regarded as a counterbalance to a general need of public policy. Rather, it represents an element to be integrated into the evaluation of any kind of activity and measure to be given recognition, in order to realize the best interest of the society as a whole and to ensure *ordre public* reservation to play a role in the protection of fundamental rights.

[57] On the difficulties about the idea of an effective regime based on a unifying set of rules, see Y. ERGAS, *Babies without borders: human rights, human dignity, and the regulation of international commercial surrogacy*, in *Emory International Law Review*, 27, 2013, pp. 118-188. A plead for the design of a multilateral regulation of surrogacy that would take into account human rights and democratic values along with matters of private international law, J. DE KOENIGSWARTER, *Breaking Fertile Ground in the European Union. A Trial for the Regulation of Womb and Child Trade in Surrogacy*, in *ICL Journal, Vienna Journal on International Constitutional law*, vol. 9, 2015.