

The best interests of the child born *via* cross-border surrogacy. A comparison between Greece and Italy

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THE BEST INTERESTS OF THE CHILD BORN VIA CROSS-BORDER SURROGACY. A COMPARISON BETWEEN GREECE AND ITALY

ABSTRACT: Greece has recently amended its legislation on medically assisted reproduction, extending the conditions under which surrogacy can be practiced and introducing one of the most liberalised regime of surrogacy in Europe . The aim of this paper is to investigate, in a comparative perspective, the consequences of these new provisions, taking also into account the Italian legal framework, considered one of the most restrictive at the European level – in the perspective of the most recent developments of the European Court of Human Rights’ case law. In particular, the paper focuses on the problem of the guarantee of the best interests of the child born through surrogacy and on the legal issues related to the phenomenon of cross-border surrogacy.

KEYWORDS: Surrogacy; Medically assisted reproduction; Best interests of the child; Cross-border reproduction; Right to know one’s origins.

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1. Introduction

1.1. General legal framework

Greece and Italy are characterised by big differences in the legislation governing the process of medically assisted reproduction (MAR). So, while Greek Law on MAR (Law no. 3089/2002¹ and no. 3305/2005²) is one of the most liberal at a European level, in Italy, the relative Law no. 40/2004³, is described as anachronistic and incompatible with scientific developments on the issues of human reproduction, as well as with the legislation on MAR applied in other European countries⁴.

In this context, since 2002, the process of surrogacy is permitted under Greek law, as provided by Article 1458 of the Civil Code that regulates the specific conditions for its implementation (which will be presented *infra*). Recently though, the Greek legislation regarding surrogacy has become even more permissive: while, under the previous regime, the process was legal only if both the assisted woman and the surrogate mother were permanent residents in Greece, now, according to Article 17 of Greek Law no. 4272/2014, the assisted woman *or* the surrogate mother should have her permanent or *temporary* residence in Greece⁵. Therefore, after this legislative change of crucial importance, permanent residents of other states can also legally have access to the process of surrogacy in Greece⁶.

It could be easily imagined that Greece is trying to become a “candidate” destination, where couples (or even single women) from abroad can have access to a method which is prohibited in their State. It should be reminded that, in Italy, surrogacy agreements are prohibited by Italian Law no. 40/2004, that provides severe legal consequences in case the prohibition is violated⁷. In particular, according to Article 12 par. 6 of Law no. 40/2004, the implementation of surrogacy is criminally punishable with imprisonment from three months to two years and a fine from 600,000 euro up to 1,000,000 euro. Moreover, the Law no. 40/2004 does not exempt neither the assisted persons nor the surrogate mother from the above mentioned penalties, as it does, on the contrary, for other breaches of its provisions.

¹ Government Gazette no. 327 / 23.12.2002.

² Government Gazette no. 17 / 27.1.2005.

³ Official Gazette no. 45 / 24.2.2004.

⁴ See P. HANAFIN, *Law, Biopolitics and Reproductive Citizenship. The Case of Assisted Reproduction in Italy*, in *Tecnoscienza*, 1, 2013, 45; S. BIONDI, *Access to Medical-Assisted Reproduction and OGD in Italian Law: A Deadly Blow to an Illiberal Statute? Commentary to the European Court on Human Rights’s decision Costa and Pavan v Italy (ECtHR, 28 August 2012, App. 54270/2010)*, in *Medical Law Review*, 21(3), 2013, 474-486; G. REPETTO, «Non di sola Cedu...» *La fecondazione assistita e il diritto alla salute in Italia e in Europa*, in *Diritto Pubblico*, 1, 2013, 131-166; L. BUSATTA, S. PENASA, *The Italian perspective on cross-border assisted reproduction: the law no. 40/04 in action*, in M. KAIIFA-GBANTI, E. KOUNOUGERI-MANOLEDAKI, E. SYMEONIDOU-KASTANIDOU (eds.), *Assisted Reproduction in Europe: Social, Ethical and Legal Issues*, Athens-Thessaloniki, 2015, 435-453.

⁵ In the preliminary report of Law no. 4272/2014 it is noted that in this way «the possibility of access is extended to women – donors or future surrogates that have their permanent residence abroad».

⁶ For some thoughts regarding the reasons of this legislative change see. M. MILAPIDOU, *N. 4272/2014 and the amendments made to the Law 3305/2005 on Medically Assisted Reproduction*, in *PoinDik*, 2014, 978 ff.

⁷ According to Article 12 par. 6 of Law no. 40/2004, the implementation of surrogacy is criminally punishable with imprisonment from three months to two years and a fine of 600,000 euros to 1,000,000 euros.

1.2. The protection of the child's best interest: introductory remarks

The Greek legislation on assisted reproduction and, more specifically, Article 1 par. 2 of Law no. 3305/2005, expressly provides that «during the application of these methods the interests of the child to be born should be particularly taken into account». In the preliminary report of the same law, it is specified that the assessment of the child's interests is an expression of the fundamental principle of the protection of children's rights, safeguarded by Article 3 of the International Convention on the Rights of the Child and by Article II 24 of the Charter of Fundamental EU rights and, also, that this principle runs through the whole law of minors in the Greek legal system⁸.

On the other hand, in Italy, the legislator did not include in the text of Law no. 40/2004 explicit reference to the interests of the child to be born, as a restriction to be respected when the methods of MAR are being applied. However, in Article 1 par. 1 of Law no. 40/2004, it is stated, as a general principle, that the provisions of the Law assure the interests of all parties involved in the process of MAR, including the unborn («concepito»)⁹. Of course, it should be noted that some of the provisions of the Italian Law, aiming to protect the unborn can, in the same time, affect the interests of the child to be born. A typical example is the ban of pre-implantation diagnosis imposed on fertile couples – carriers of hereditary diseases, that was provided by the Italian Law, and was very recently lifted by the Constitutional Court¹⁰: in this decision, the Court stated that the Law, attempting to protect the “integrity” of the embryo from the invasive practice of preimplantation diagnosis and to avoid the practice of embryo selection seemed to undermine the interests of the future child who, because of this restrictive and contradictory legislative choice, was likely to be born with serious anomalies or pathologies.

However, issues regarding the protection of the interests of the child can arise not only before the application of the methods or during the period of gestation, namely when the child is not yet born, and so his “interests” remain quite “unclear”, but also after the birth of a child *via* MAR methods

⁸ Available at <http://repro.law.auth.gr/> (last accessed 27.02.2016).

⁹ See also the report presented to the legislative body of the Camera dei Deputati on 30.5.2001 by Giancarlo Giorgetti, one of the main initiators of the Law, according to which the law proposal was based on the following three principles: a) that the human embryo is a human subject from the moment of fertilization, b) protection of the family institution, as an essential unit of society, vital to the continuity of the human species and c) protection of the right of the infant to have a father and a mother to bring him up, to love him, to care for his education and to ensure him the necessary support until adulthood. See <http://storia.camera.it/documenti/progetti-legge/20010530-47-giancarlo-giorgetti-norme-materia> (last accessed 27.02.2016).

¹⁰ Decision no. 96/2015, Gazzetta Ufficiale, Serie Speciale no. 23/10.6.2015. An English translation of the decision is available on the website of the Italian Constitutional Court: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S96_2015_en.pdf (last accessed 27.02.2016). It must be noted that, even before the cited decision, ordinary judges came to interpret the Law, as to allowing the access to pre-implantation diagnosis also in favour of fertile couples carrying a genetically transmissible diseases (see, among others, decisions of Tribunal of Cagliari, 9th November 2012; Tribunal of Rome, decision of 23rd September 2013); see also the decision *Costa and Pavan v. Italy* (European Court of Human Rights, appl. no. 54270/10, 28th August 2012). For a comprehensive analysis of the case-law in this area, see B. LIBERALI, *La diagnosi genetica preimpianto fra interpretazioni costituzionalmente conformi, disapplicazione della legge n. 40 del 2004, diretta esecuzione delle decisioni della Corte europea dei diritti dell'uomo e questioni di legittimità costituzionale*, in *Rivista AIC*, 2, 2014.

and, for the purposes of the present analysis, *via* a surrogacy agreement, moment in which the legal recognition of personhood and the ownership of rights to be respected arise¹¹. A typical example is the case of the so-called “reproductive tourism”¹², otherwise, the “cross-border reproductive care”, as it should more correctly referred to¹³, phenomenon which is highly expected to involve an increasing number of Italian citizens legally seeking a surrogacy treatment in Greece, because of the recent legal amendments in the latter State (see *supra*, 1.1.). As made evident by many recent judgments issued by Italian Courts¹⁴ and by the European Court of Human Rights¹⁵, such cases often present legal complications that arise when the couple applies for the registration of the newborn before the competent Italian authorities. Clearly, such situations and the way they are resolved by judges are directly reflecting their effects on the interests of children born through surrogacy.

The aim of this paper is to try to offer a concrete answer to this issue, taking in due consideration the ECtHR case law in similar situation and, in particular, the landmark decision in *Paradiso and Campanelli v. Italy*¹⁶. In the context of surrogacy, the interests of the child should be used as the dominant criterion to be taken into account in solving the above-mentioned problems, as it clearly emerges from the relevant decisions of the Strasbourg Court but, also, from some recent national judgments on the matter.

Consequently, a special paragraph will be dedicated to answer the question whether the interests of a child born *via* a surrogacy agreement and gametes’ donation in Greece (which is also legal according to the Greek Law) should be pursued also by acknowledging the child’s right to know her origins, and, in particular, the identity of the person that donated the genetic material¹⁷. Is it for the best interests of the child to provide her with a right to such information? And, in case of a positive response, wouldn’t that be a lack of protection of the rights of the donor of the genetic material? How to reconcile the right to anonymity of the donor with the right to know one’s genetic origins?

In order to achieve a more complete study of the subject and to answer the above mentioned questions, a brief monitoring of the “path” to be followed by a (Italian or other foreign) couple, who wishes to resort to surrogacy in Greece, from the beginning until the completion of the process (after the birth of the child and their return to their country of origin), will be attempted.

¹¹ Under the provisions of both the Greek (art. 35 of Civil Code) and the Italian Law (art. 1 of Civil Code) legal personhood is acquired at the moment of the birth.

¹² For the definition of the term, see. A. GRAMMATICAKI-ALEXIOU, *Fertility Tourism, European Law and Conflict of Laws Issues, Volume in Honor of Professor Ioannis Voulgaris*, Athens - Thessaloniki, 2011, 93.

¹³ See e.g. G. PENNING ET AL., *ESHRE Task Force on Ethics and Law 14: Equity of access to assisted reproductive technology*, in *Human Reproduction*, 23, 2008, 772-774.

¹⁴ See paragraph 4.

¹⁵ Although, for the moment, there is no legal case concerning Italian citizens that underwent a surrogacy treatment in Greece.

¹⁶ *Paradiso and Campanelli v. Italy*, appl. no. 25358/12, decided on 27th January 2015 and available at <http://hudoc.echr.coe.int/eng?i=001-150770> (last accessed 27.02.2016).

¹⁷ It is noted that under art. 1460 of the Greek Civil Code, the identity of the persons who have donated their genetic material or their fertilized eggs is not revealed to the couple. Nevertheless, the child can have access to the clinical record with medical information on the donor, but only for reasons related with her own health.

2. Implementation of the method in Greece

2.1. Conditions for the application of surrogacy in Greece

The conditions for access to surrogacy in Greece are mainly provided by Article 1458 of the Greek Civil Code, according to which the assisted woman should file an application to the competent Court, before the transfer of the fertilised oocytes into the uterus of the surrogate mother, requesting the granting of judicial authorisation for the transfer. For the grant of judicial authorisation, the assisted woman must prove, by presenting the corresponding medical certificate, that she is medically unable to conceive but, also, that the candidate surrogate mother is able to conceive, as to her state of health¹⁸. Furthermore, under Article 4 par. 2 and 13 of Greek Law no. 3305/2005, the future surrogate should also pass a thorough psychological evaluation. Moreover, the assisted woman should not have exceeded 50 years of age, while, on the contrary, for the surrogate mother, there is no equivalent law provision providing for an age limit, as her ability to conceive and to bear a pregnancy is demonstrated by medical certificate.

As regards the genetic material to be used, given the fact that heterologous fertilisation is permitted in Greece, the genetic material (male, female or both) can legally come from a third donor. However, it should be underlined that, under Greek law, only “partial substitution” is possible, i.e. it is forbidden that the ova derive from the surrogate mother herself¹⁹.

If all the above-mentioned conditions are met, the assisted woman must provide the Court with a written and free of exchange agreement²⁰ between her and her husband and the future surrogate and her husband, from which the consent of all of the above persons applying the method and the altruistic nature of the agreement should be proved.

The Court, in order to authorise the transfer of the fertilised eggs and the gestation by the surrogate mother, must normally just verify if the above-mentioned conditions imposed by law for the legality of the process are satisfied. Since the entry into force of the Greek law, however, there has been a relatively small number of judicial decisions which go “one step further”, and seem to give attention not only to the legality, but also to the feasibility of the implementation of surrogacy in each single case. For instance, there have been decisions that, whilst allowing the implementation of the method, included in the reasoning evaluations on the couple’s financial situation, on their ability to raise the child in a loving environment with affection or even on the couple’s “positive presence in

¹⁸ In the prevailing view, in the concept of inability to conceive is included the case where there is a risk of disease transmission to the child. See. K. PANAGOS, *Surrogacy: Greek legal system and forensic implications*, Athens - Thessaloniki, 2011, 47.

¹⁹ See E. KOUNOUGERI – MANOLEDAKI, *Family Law*, Athens – Thessaloniki, 2003, 34, who states that the underlying reason of this prohibition is that it is “socially unacceptable” to deprive a woman who is biologically and genetically mother of a child (i.e. the surrogate mother) of the right to be also the legal mother of the child.

²⁰ However, according to Article 13 par. 4 of Law no. 3305/2005, «It doesn’t consist exchange: a. The payment of the expenditure required to achieve pregnancy, gestation, childbirth and maternity; b. Any actual damage of gestation because abstinence from work, as well as fees for dependent work, which was denied due to the absence, to achieve pregnancy, gestation, childbirth and postpartum. The amount of covered expenses and allowances is determined by a decision of the Authority».

the community”²¹. Such decisions, in which the child's interests (even if this term is not explicitly mentioned) have in fact been used as a separate additional condition for the admissibility of surrogacy, have been strongly, and not unfairly, criticised by legal scholars²². In particular, it has been argued that these evaluations may lead to future decisions prohibiting the application of the method because i.e. the couple will not be able to ensure a suitable environment for the child, imposing in that way restrictions on the private and the marital autonomy of the candidate assisted persons that are not described and required by Greek law. It should also be noted that at the moment in which each separate case is pending for authorisation before the Court, according to the Greek law, the “potential person” whose interests are at stake (namely the embryo) has not yet been created²³. Therefore, it is at least irrational (if not even dangerous) broadening the jurisdictional interpretation of the Law and applying additional conditions for the authorisation of the method, with the aim to protect a future person and, in the meantime, restricting the rights of persons who are already alive (the assisted couple). In any case, the rule followed by most decisions remains and should, for the reasons explained above, remain that, if the Court confirms that the conditions set by law for the implementation of the method are met, permission for the transfer of the fertilised ova is granted, without examining issues related to the child's interests.

The transfer will normally take place in a Greek MAR centre (even though such condition is not mandatory by law); during the pregnancy, the surrogate mother will undergo the necessary medical tests and follow up as any other pregnant woman.

2.2. The declaration of the birth before the competent authorities

After the birth of the child²⁴, the next step is the declaration of the birth before the competent authority, in this case before the Greek registry office of the municipality where the child was born. At this point, the Greek Law no. 344/1976²⁵ will be applied; its Article 20 provides that every birth must be declared within ten days before the registry office in the place where it took place, by a doctor or midwife certificate or, in case of failure to issue the relevant certificate, by a statement of the person

²¹ These are Monomeles Protodikeio Thessalonikis 29288/2010, 14946/2010 Monomeles Protodikeio Thessalonikis, Monomeles Protodikeio Thessalonikis 838/2010, Monomeles Protodikeio Thessalonikis 16574/2009, Monomeles Protodikeio Thessalonikis 395/2009 (all on Legal Data Bank ISOCRATIS), Monomeles Protodikeio Rodopis 400/2007, Armenopoulos 2008, 1046 et seq., Monomeles Protodikeio Katerinis 408/2006 Armenopoulos 2007, 863 et seq.

²² T. TROKANAS, *The application of methods of medically assisted reproduction and the interests of the child to be born*, in *Family law in the 21st century*, Athens – Thessaloniki, 2012, 127.

²³ Note that, according to the most prevalent view in Greek law, the legal protection of the embryo as such doesn't begin at the moment of conception, but after the implantation of the fertilised egg in the uterus. See, inter alia, E. SIMEONIDOU - KASTANIDOU, *Abortion as a matter of criminal law*, Athens – Thessaloniki, 1984, 180-181. Before this moment and until the 14th day after fertilisation, there is only a “fertilised egg” and not an “embryo” to protect. See also the Explanatory Report of Law no. 3089/2002, at KNoV, 50.2625.

²⁴ It is worth stressing that, in compliance with the legal framework we are dealing with, for the surrogacy agreement to be effective, it is necessary that the birth takes place in Greece. Otherwise – if for example the child was delivered in Italy – the relevant legislative (Italian) framework would be applied: therefore, in compliance with the principle *mater semper certa*, the surrogate would be registered as the legal mother of the child.

²⁵ Government Gazette no. 163/1976.

who has the legal obligation to declare the birth. Then, in the following paragraph of the same article, a special provision is dedicated to births *via* surrogacy and requires that the decision of the Court that authorised the implementation of the method should also be brought to the registry office. After receiving these documents, the responsible registrar will issue the relevant birth certificate, in which the assisted couple will be referred as the legal parents of the child and no reference will be made to the surrogate mother.

In other words, in Greek Law there is no need for the assisted persons to apply for a “parental order” after the birth of the child in order to establish the parental relationship, as it happens, on the contrary in other legal systems (i.e. in the United Kingdom²⁶); the judicial authorisation released before the transfer of the fertilised ova is playing this role. This is provided by Article 1464 of the Greek Civil Code, which stipulates that, in case of surrogate motherhood, the woman which was given permission by the Court is presumed to be the legal mother of the child. Therefore, from the moment of the birth, the child will be considered a legitimate child of the applicant woman and her husband²⁷. Then, in order to return to their country with their child, the couple should address to the competent consular authority in Greece, where they will have to hand in their child’s birth certificate and request the issuance of the essential travel documents for the newborn.

If at this point there is formal information of the competent authorities of the couple’s state that the child born through surrogacy (though legally practiced in Greece), and so, that the woman who gave birth to the child is not the one named on the birth certificate, legal complications for the couple, and, of course, for the child, may begin. Despite the fact that, as mentioned before, there is so far no *ad hoc* published decision for surrogacy performed by an Italian or, generally, a foreign couple in Greece, the Italian case law has in other similar cases adopted contradictory solutions, that sometimes omitted to take into account the best interests of the child, which are presented *infra* (chapt. 4). Before the presentation of the relevant Italian decisions, however, it is appropriate to make a brief reference to the importance that the recent case law of the European Court of Human Rights (ECtHR) has attributed to the protection of the best interests of the child born after a surrogacy agreements between citizens of states where the method is prohibited and surrogate mothers, in states where the same method is legal.

3. “CROSS - BORDER” surrogacy and the ECtHR’ case law

3.1. The decisions in *Menesson v. France* and *Labassée v. France*

The two, relatively recent, decisions of the ECtHR in the cases of *Menesson v. France* and *Labassée v. France*, which directly invoked the criterion of the best interests of the child and highlighted its primary importance in comparison with the interests of the other parties involved in the context of surrogacy, will be briefly presented here.

²⁶ See Section 54 of HFE Act.

²⁷ Because the birth of the child took place while there couple was married, according to the Greek Law, the man of the couple will be the legal father of the child (Article 1465 of the Greek Civil Code).

The history of these cases is quite similar²⁸; it involves an application lodged by the interested couples (Mennesson and Labassée respectively) against France, whose authorities had refused to register the birth certificates of their children born through surrogacy legally performed abroad (in California and in Minnesota, USA). In both cases the applicant couples, after many years of litigation, had to face the dismissal of their claims by the French Court of Cassation, on the grounds that surrogacy agreements are forbidden by domestic (French) law, and, more specifically, by Article 16-7 of the French Civil Code, that poses a public policy restriction, according to which «any agreement relating to procreation or gestation on behalf of another is void».

The applicants argued that the measures adopted by the French Government violated Articles 8 and 14 of the European Convention on Human Rights. The ECtHR, in both cases, found that there had been a violation of Article 8 of the Convention, regarding the child's right to respect for her private life and rejected the other claims of the applicants.

More extensively, in *Mennesson* (which will be cited here, as more representative), the ECtHR noted that there is a lack of consensus among European States on the permissibility of surrogacy and on the legal recognition of the relationship between the assisted person(s) and the child born through this method abroad (§ 78) and confirmed that Member States should be accorded a wide margin of appreciation to decide on these matters (§ 79).

On the other hand, the ECtHR stated that in cases regarding the legal relationship between a parent and a child, a fundamental aspect of the identity of a person is at stake; consequently, the above-mentioned margin granted to the State should be reduced (§ 80).

Additionally, the Court noted that, while verifying the achievement of a fair balancing between the conflicting interests of the State and those affected by the solution adopted by the State, the Court must take into account the fundamental principle according to which, whenever children are involved, their best interests must prevail: «chaque fois que la situation d'un enfant est en cause, l'intérêt supérieur de celui-ci doit primer» (§ 81)²⁹.

Then, after rejecting – for reasons not related to the problematic of this study – the complaint of the applicants for breach of their right to family life, the Court examined whether there had been a violation of the children's right to respect for their private life. According to the ECtHR, this right includes the ability of any individual to establish the “details” of his identity as a human being, which also includes the legal parent-child relationship. And the fact that France, whilst recognising that these children can legally relate with their parents abroad, refuses to register them as legitimate children on its territory, affects the identity of these children within the French society (§ 96). Moreover, it was accepted that the legal uncertainty regarding the recognition of French citizenship to these children and the implications on their heritage rights, have also negative effects on the personal identity of the last ones (§ 97 and § 98). The ECtHR noted that the non-recognition of the legal relationship be-

²⁸ For the background and the text of the decisions see *Mennesson v. France*, appl. no. 65192/11, decided on 26th June 2014, available at <http://hudoc.echr.coe.int/eng?i=001-145179>, *Labassée v. France*, appl. no. 65941/11, decided on 26th June 2014, available at <http://hudoc.echr.coe.int/eng?i=001-145180> (last accessed 27.02.2016).

²⁹ See Article 3.1. of Convention on the Rights of the child, according to which «In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration».

tween parents and children does not only affect the parents, but also the children themselves, whose right to respect for their private life, meaning that everyone should be able to establish the essence of her identity, including the legal relationship between parent and child, is attacked at its base. This situation, according to the Court, raises serious concerns as to its compatibility with the child's best interests. For this specific case, it was stressed that one of the two members of the couple (the man) had a biologic link with the children, which is a component of their identity and thus to deprive them of their legal relationship with their father would be contrary to their interests. Thus, taking into account the consequences of this serious limitation to the identity and the private life of the children, the Court ruled that France had exceeded the permissible limits of its margin of appreciation. Finally, the ECtHR further stressed that its reasoning takes into account the importance that must be given to the child's interests when balancing the conflicting interests and concluded, given all of the above-mentioned facts, that a violation of the children's right to respect for their private life had taken place.

Therefore, the ECtHR, by characterising the choice of the French law-maker to prohibit surrogacy as understandable, seems to implicitly accept this prohibition³⁰. Besides, the issue the ECtHR dealt with was not the legitimacy of the French law itself, but the judgment of whether its consequences were restricting the rights of the applicants (parents and children) in a manner that a violation of the Convention could be ascertained. In this direction, the Court used the criterion of the best interests of the child as the basic rule in order to resolve the pending case. Moreover, the ECtHR had already confirmed, through previous judgments, the primacy of the child's interests when they conflict with the public interest, the public order or the interests of an adult³¹. Thus, in the present case, the child's interests, in the sense of protecting the right to private life and, in particular in the building of personal identity, made the restrictions on establishing legal bonds between children born by the method of surrogate motherhood outside France and the interested couple intolerable under the conventional framework.

Furthermore, before condemning France for violation of Article 8 of the Convention, the Court underlined that the existence of a biological link between the children and the intended father clashed with the deprivation of the children of their legal relationship with the man whose genetic material had been used for the implementation of the process. However, the Court did not specify if its decision would have been different if there was no biological link with any of the two members of the couple, namely whether the biological link between the children with father was a *sine qua non* condition for the legal recognition of kinship in these cases³². This issue was, at least, partly addressed in *Paradiso and Campanelli v. Italy*, decided just a few months after *Menesson and Labasse*.

³⁰ G. PUPPINCK, CL. DE LA HOUGUE, *Cour européenne des droits de l'homme: vers la libéralisation de la GPA*, in *Revue Lamy Droit Civil*, 118, 1.9.2014, 78-84.

³¹ See M. DOUCET, *La France contrainte de faire primer l'intérêt supérieur de l'enfant issu d'une GPA*, in <http://www.revuegeneraledudroit.eu/blog/2014/09/15/la-france-contrainte-de-faire-primer-linteret-superieur-de-lenfant-issu-dune-gpa/#.VGsOGoe6rfY> (last accessed 27.02.2016).

³² See J. HAUSER, *État civil, après l'enfant conventionnel, un autre nouveau né, l'enfant fait accompli*; *Note sous Cour européenne des droits de l'homme, 26 juin 2014, arrêt numéro 65192/11, affaire Menesson contre France et Cour européenne des droits de l'homme, 26 juin 2014, arrêt numéro 65941/11, affaire Labassée contre France*, in *Revue Trimestrielle de Droit Civil*, 3, 1.7.2014, 616-619, who supports, among other things,

3.2. The case of *Paradiso and Campanelli v. Italy*³³

The specificity of the facts that occupied the ECtHR in the case *Paradiso and Campanelli v. Italy* lies in the fact that the Italian authorities removed from the claimants' custody the child born after a surrogacy process conducted in Russia. According to the decision, a married couple, Donatina Paradiso and Giovanni Campanelli, after unsuccessful attempts to procreate by IVF in their country, addressed to Russia, where they had a child through surrogacy process with egg donation from a third donor in a clinic in Moscow. As provided by Russian law, the applicants' names were recorded in the child's birth certificate. The birth certificate did not include any mention to the process of surrogacy which had been implemented. The mother of the child went to the Italian consulate in Moscow, where she handed the relevant child's birth documentation and obtained the necessary documents of the child, so that he could travel to Italy. A few days after their return to Italy, the Italian consulate in Moscow informed the Italian authorities that the child's birth file contained false information. Thus, a criminal proceeding was opened against the couple for «alteration of civil status», false declaration before a public authority and violation of the law on adoption. At the same time, the child was declared in a state of "abandonment" according to the predictions of the Italian law on adoption and a procedure for placing the child under guardianship was opened. The Italian authorities refused to register the child's birth certificate in Italian records. After DNA tests ordered by the judicial authorities, it was revealed that neither Giovanni Campanelli nor Mrs. Paradiso were genetically linked with the child and, based on this assumption, the Juvenile Court ordered the removal of the child from the couple's custody and, some time later, the child was assigned to another family.

The couple appealed ultimately before the ECtHR, protesting that the refusal of the Italian authorities to register their child's birth certificate in Italian records and the removal of the minor constituted a violation of Article 8 of the Convention. They also noted that the interest of the child to remain with them should have been the only criterion used by the Italian authorities in order to decide on their case (§ 65).

The ECtHR dismissed the first complaint of the applicants on the non-registration of the birth certificate of the child. However, on the removal of the minor from the applicants, the ECtHR recognised the existence of a "*de facto*" family life between the couple and the child, fact that resulted in the applicability of Article 8 of the Convention. Then, while judging whether there had been a violation of Article 8, the Court reiterated its established position that, in the judgment of whether a fair balance between the public interest and the private interests at stake was observed, the best interest of the child should always be regarded as superior and be protected as such (§ 75). Indeed, according to the ECtHR, this obligation lies on the Member State, regardless of the nature of the parental link, genetic or other (§ 80).

that if the 'key' are the child's interests, it should also be accepted for the same reason, namely to protect the interests and the private life of the child, the recognition of kinship for a same-sex couple that procreates through MAR methods.

³³ *Paradiso and Campanelli v. Italy*, appl no. 25358/12, decided on 27th January 2015, available at <http://hudoc.echr.coe.int/eng?i=001-151056> (last accessed 27.02.2016). See also L. LENTI, *Paradiso e Campanelli c. Italia: interesse del minore, idoneità a educare e violazioni di legge*, in *Quaderni costituzionali*, 2, 2015, 472, who correctly notes that the real object of the ECtHR decision is adoption and not surrogacy.

With specific regard to the removal of the child from the couple's custody, it was pointed out that this was an extreme measure, which should have been the last resort and, as such, could have been justified only if it aimed to protect the child from an immediate danger (§ 80). Finally, the ECtHR decided that it was not convinced about the appropriate nature of the measures that the Italian authorities had used, taking in particular into account the fact that «a child should not be put at a disadvantage because of the fact that it came into the world by surrogate mother» as to the crucial issues related to citizenship or identity (§ 85) and judged that the Italian authorities had failed to adopt a fair balance of interests of the parties, in violation of Article 8 of the Convention. Nevertheless, the Court noted that this violation did not require the Italian authorities to return the child to the applicants, since this had undoubtedly developed emotional bonds with the family to which it was assigned and with which lived since 2013.

4. The best interest of the child born through surrogacy agreement

4.1. The Italian case-law: criminal and civil dimension

Within the Italian case-law, the use made by Italian judges of the “open-textured” principle of the best interest of the child has been plural and not free from uncertainty and inconsistency. It was just recently that Italian judges started to privilege interpretations fully consistent with the best interests of the child, as interpreted by the ECtHR case-law.

If we analyse the recent case-law of criminal (and civil) courts in the light of the best interests of the child, two issues seem to be particularly relevant and challenging: on the one hand, the determination of legal parenthood; on the other hand, the right to know genetic origins (see the following paragraph).

With regard to the first issue, it is worth noting a different approach between the Court of Cassation (Civil section), on the one hand, and a recent trend within Italian criminal Tribunals (Varese, decision of 8th October 2014; Pisa, decision of 10th April, 2015), on the other one.

While the Court of Cassation denied the recognition of parenthood, due to both the absence of any biologic link with the new-born child and the violation of public policy (see below), the Tribunal of Varese, on the grounds of the above-mentioned ECtHR case-law (*Mennesson v France*), has chosen a very different approach³⁴. The Court in Varese, diverging from the Court of Cassation's interpretation of the scope and meaning of the principle of the child's best interest, discharged the couple, that consciously declared a biological link between the woman and newborn children (surrogacy agreement in Ukraine), and stated that the right of the children to have a certain and stable parenthood relationship must prevail on the traditional rules provided by the Italian legal system in the context of the definition of legal parenthood. Interestingly enough, on the one hand, the *Corte di cassazione* does not directly enforce the ECtHR case-law, giving its own interpretation of the concrete case; on

³⁴ The case is available at http://www.biodiritto.org/index.php/item/579-surrogata_varese14 (last accessed 27.02.2016).

the other hand, the Tribunal of Varese directly applies the ECtHR case-law, in order to bypass the Italian legislation in the context of legal parenthood³⁵.

The analysis of the two reasoning clearly shows a different approach to both the interpretation of the best interest of the child and the role of ECtHR case-law, although the different nature of the jurisdictions involved must be underlined: civil – *Corte di cassazione* - and criminal – Tribunal of Varese and Pisa –. Therefore, on the one hand, the *Cassazione* was called to recognise the legal parenthood of the Italian couple; on the other hand, Tribunals of Varese and Pisa decided on the criminal responsibility of Italian couples for *alterazione di stato*³⁶ of the child born on the ground of a surrogacy agreement signed and implemented abroad.

The *Corte di cassazione* (Civil section, n. 24001/2014), after having preliminary declared the surrogacy agreement void according to the relevant national law (Ukraine) as both gametes were donated, states that the parenthood declaration made by the Italian couple was invalid too. The declaration is contrary to public policy, intended as shared fundamental national values, within which it must be intended also the prohibition of any surrogacy agreement, to guarantee both the principle of human dignity of the pregnant woman and the legal institution of adoption. Interestingly, the Court clearly states that the decision not to recognise any legal relationship between the couple and the child does not violate the child's best interest: according to the Court, «the legislature considered, not unreasonably, that the interest of the child is guaranteed by attributing motherhood to the woman giving birth to the child. Furthermore, adoption is the means selected by the legislature, instead of the mere agreement between private parties, to realise parenthood separated with any biological link». The *Cassazione* goes to dismiss also the reference to the ECtHR case-law, differently from the approach of the Tribunal of Varese. According to the Court, the ECtHR – in the case *Mennesson v. France* – recognised, on the one hand, the State's broad margin of appreciation; and, on the other hand, the concrete case was different, as one of the men was the biological father of the child born via surrogacy agreement³⁷.

³⁵ Related to the identification of the ECHR as a source of law within the Italian legal order, see – among others – Italian Constitutional Court, decisions nn. 348-349/2007, 80/2011, 313/2013, 49/2015. Recently, A. PIN, *A Jurisprudence to Handle with Care: The European Court of Human Rights' Unsettled Case Law, its Authority, and its Future, According to the Italian Constitutional Court*, in *Int'l J. Const. L. Blog*, 1st May 2015, available at <http://www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015> (last accessed 27.02.2016); D. TEGA, *A National Narrative: The Constitution's Axiological Prevalence on the ECHR—A Comment on the Italian Constitutional Court Judgment No. 49/2015*, in *Int'l J. Const. L. Blog*, 1st May 2015, available at <http://www.iconnectblog.com/2015/04/mini-symposium-on-cc-judgment-49-2015> (last accessed 27.02.2016); G. MARTINICO, *Corti costituzionali (o supreme) e "disobbedienza funzionale"*, in http://www.penalecontemporaneo.it/upload/1430150015MARTINICO_2015.pdf; A. RUGGERI, *Spunti di riflessione in tema di applicazione diretta della CEDU e di efficacia delle decisioni della Corte di Strasburgo (a margine di una pronunzia del Trib. di Roma, I Sez. Civ., che dà "seguito" a Corte EDU Costa e Pavan)* in Consulta Online, 2013, <http://www.giurcost.org/studi/ruggeri27.pdf>. (last accessed 27.02.2016).

³⁶ According to article 567 of the Italian Criminal Code, «anyone who through the replacement of a newborn, alters her/his civil status shall be punished with imprisonment from three to ten years. The punishment of imprisonment from five to fifteen years shall be applied to anyone who, in the process of formation of a birth certificate, alters the newborn's civil status through false certifications, false declarations or other untruth».

³⁷ With regard to the relationship between Cassazione and ECtHR case-law, see M. RIZZUTI, *La maternità surrogata: tra gestazione altruistica e compravendita internazionale di minori*, in *BioLaw Journal – Rivista di*

On the contrary, the Tribunal of Varese does not recognise any criminal responsibility for an Italian couple, in the light of guaranteeing the certainty of the legal *status* of the children born *via* surrogacy. Their interest, especially when one of the members of the couple is the biological parent, must prevail on the competing public interest to detect false declarations on legal parenthood. Guaranteeing them a stable legal status, which is at the same time coherent with the social situation between them and the couple, performs the children's best interest. The goal to pursue the children's best interest allows judges to overcome the possible violation of the duty not to declare a false parenthood status, in line with the recent ECtHR case-law stating that the way of conception is not relevant for the recognition of parenthood. The plain denial of parenthood, due to the presence of a surrogacy agreement, will consist in an intolerable violation of the identity of the children, according to the Tribunal, in a way consistent with the ECtHR in the case *Menesson v. France* (2014³⁸). By directly enforcing the ECtHR case-law, the Tribunal recognises the prevalence of the social link on the biological one, in the light of guaranteeing the best interest of the children and their right to identity.

It is possible to conclude, therefore, that on the point of the determination and the impact of the principle of the best interest of the child, the Italian case-law seems to express some key elements and normative variables, which orient the Tribunals' line of reasoning.

With regard to the determination of the content of such principle, the more recent decisions, in the light of the implementation of ECtHR case-law, seem to privilege a direct link between the best interest and a social understanding of familial relationships, which seems to prevail on the "mere" biological one (Varese). At the same time, other factors play a decisive role in defining the impact of the principle, even when intended according to a "social" perspective, on the concrete cases in which a couple has signed a surrogacy agreement abroad: the existence of a genetic link between at least one of the members of the couple³⁹; the role performed by the principle of the national public order⁴⁰; the consistency with the *lex loci*, which is a precondition on the point of criminal responsibility of couple in the light of the determination of filiation⁴¹.

BioDiritto, 2, 2015, 89 ff.; A. VESTO, *La maternità surrogata: Cassazione e CEDU a confronto*, in *Famiglia e diritto*, 3, 2015, 306-312.

³⁸ See T. TRINCHERA, *Maternità surrogata all'estero e responsabilità penale: il dibattito prosegue con una sentenza del Tribunale di Varese che si adegua ai principi espressi dalla Corte EDU e assolve gli imputati*, in www.penalecontemporaneo.it, 2014 (last accessed 27.02.2016).

³⁹ The more critical is the legal determination of motherhood: on this regard, B. SALONE, *Figli su commissione: profili civilistici della maternità surrogata in Italia dopo la legge 40/2004*, in *BioLaw Journal – Rivista di Biodiritto*, 2, 2014, 178 ff.

⁴⁰ C. CAMPIGLIO, *Il diritto all'identità personale del figlio nato all'estero da madre surrogata (ovvero, la lenta agonia del limite dell'ordine pubblico)*, in *La Nuova Giurisprudenza Civile Commentata*, 12, 2014, 1132-1139; S. TONOLO, *La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore*, in *Rivista di diritto internazionale privato e processuale*, 1, 2014, 81-104; G. CASABURI, *Sangue e suolo: la Cassazione e il divieto di maternità surrogata (Nota a Cass. 11 novembre 2014, n.24001)-Parte I*, in *Il Foro italiano*, 12, 2014, 3414-3416.

⁴¹ On this regard, see M. LO GIUDICE, *Maternità surrogata: alcune declinazioni penalistiche della trascrivibilità dell'atto di nascita formato all'estero; la non configurabilità del delitto di alterazione di stato (art. 567, comma 2 c.p.) per conformità alla "lex loci"; il difficile ruolo del diritto penale in campo biogiuridico: tra esigenze preventive, derive penalistiche e diritti dell'uomo*, in *Il Diritto di famiglia e delle persone*, 4, 2014, 1488-1494.

With regard to the third criteria, a decision of the Tribunal of Pisa (June 2015) contributes to clarify the approach of Italian judges⁴². In this case, criminal responsibility of an Italian couple for *alterazione di stato* following a surrogacy agreement signed in Ukraine and the related declaration of parenthood before the Italian authorities has been denied on the ground of the respect of the *lex loci*. The Italian Tribunal particularly outlines that the birth certificate is in compliant to the *lex loci* and, therefore, the Italian couple must be considered the legal parents of the children born through surrogacy. Accordingly, the couple couldn't have declared something different from what effectively declared, as there is a duty to respect Ukrainian legislation (see also Varese): the couple's behaviour, therefore, is imposed by Italian law on international private law (articles 15 and 17 of the decree of President of the Republic n. 396/2000) and seems to be in line with the recent ECtHR case-law, which the Tribunal of Pisa expressly refers to (*Paradiso and Campanelli v. Italy*).

In general terms, it is possible to conclude that, according to the existing case-law, the more those criteria are fulfilled within the specific concrete case, the more judges seem to be open to favour the social dimension of filiation on the biological/genetic one and to interpret the limit of the public order in the light of the protection of the best interest of the child, as interpreted by the recent ECtHR case-law⁴³.

5. The right to know one's biological origin: a difficult balancing among individual rights

The use of medical technologies applied to the field of reproduction (i.e. assisted reproduction *via* gametes' donation and surrogacy) raises several legal and ethical issues concerning the interests of subjects involved in these procedures. Among all, a particularly sensitive field is the one related to the possibility to disclose the donor's or the surrogate mother's identity, either to the parents or to the child.

The example we have been referring to, concerning an Italian couple seeking access to surrogacy in Greece, under the new law, might come across also to this issue and, in this perspective, the legal framework concerning the protection of the child's best interests deserves due consideration with regards to access to information concerning genetic parents or the surrogate.

In this context, there are different legal aspects that might be taken into account.

The first one is related to the possibility to know the donors' genetic or clinical profile for medical reasons, for example in case of need to access data concerning the prevalence of some given diseases. In this case, it seems that both the Italian and the Greek framework might permit the disclosure of those data which are necessary from a medical viewpoint in order to ascertain the relevant aspects of the genetic profile⁴⁴.

⁴² The decision is available at the following link: <http://www.biodiritto.org/index.php/item/684-surrogata-pisa> (last accessed 27.02.2016).

⁴³ M. RIZZUTI, *op. cit.*, 94, reasonably distinguishes between determination of parenthood and regulation of surrogacy, stating that the ECtHR approach does not entail any consequence in terms of legitimacy of national regulation and criminal sanctions in the context of surrogacy.

⁴⁴ With regards to the Italian legal framework, the Agreement adopted by Region in the aftermath of the Constitutional Court's decision no. 162/2014, which lifted the ban on gametes' donation, makes clear that

The second aspect is different and, maybe, more challenging from the legal point of view. Disclosing the identity of the donor for non-medical reasons, actually, could not be taken for granted, as it seems that – at the present state of art – there is no consensus among European States on the possibility of permitting access to the donor's personal identity. Moreover, those legal orders that enacted express provisions on the right to have access to information concerning the donor's identity are characterised by very different legal frameworks and the means by which this right is granted are significantly different. For example, the information could be requested by the person born after MAR at the age of 18⁴⁵, a difference between the type of data to be disclosed is foreseen, and so on. Among European countries, Sweden became the first one, in 1985⁴⁶, to legally regulate gamete donation and to recognise the right for all offspring «to obtain identifying information about the donor when they are sufficiently mature»⁴⁷. For the law to be properly effective, at least two conditions must be fulfilled: first of all, recipient parents should tell their children about the way they were conceived and, secondly, the offspring should be made aware of the possibility to have access to the donors' records and should apply to the competent authorities for donors' data disclosure⁴⁸. Quite interestingly, several arguments can be made either to favour or to oppose donors' identity disclosure to the offspring.

For the purposes of the present analysis, the issue of the right to have access to genetic information and to the identity of the donor or the surrogate will be taken into consideration comparing the Greek legal framework and the solution gained in the Italian legal order, after the interventions of the Constitutional Court on law no. 40/2004 on assisted reproduction and after some judicial decisions concerning the debated issue of "anonymous birth"⁴⁹ and its outcomes.

access to donors' clinical and genetic information for medical reasons has to be granted to the medical staff, but it excludes access to those data for the receiving couple.

Similarly, in Greece, as provided by article 8, par. 6, of law no. 3305/2005 and by art. 1460 of the Civil Code, medical «information regarding the donor is kept in a confidential archive without indication of the donor's identity. Only the child may have access to this archive and only for health related purposes of his own person».

⁴⁵ For example, in the UK, The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 and the 2008 to the relevant legislation provided for the disclosure of donor's identifying information.

⁴⁶ The law is no. 1140/1985, known as the Genetic Integrity Act, amended in 2006 (2006:351) and available at <http://www.smer.se/news/the-genetic-integrity-act-2006351/> (last accessed 27.02.2016).

⁴⁷ S. ISAKSSON ET AL., *Two decades after legislation on identifiable donors in Sweden: are recipient couples ready to be open about using gamete donation?*, in *Human Reproduction*, 26(4), 2011, 853. See also M. DENNISON, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, in *Journal of Law and Health*, 21, 2008, 8.

⁴⁸ Some recent studies investigated the impact of the law in Sweden and its effectiveness, as it seems that not all parents told their children about donation. S. ISAKSSON ET AL., *Two decades after legislation on identifiable donors in Sweden*, cit.

⁴⁹ With the expression "anonymous birth" we refer to the possibility provided by Italian law, that the woman who gives birth decides not to be nominated in the child's birth certificate. In this case, the law guarantees anonymity and no legal consequences to the mother, whether the child is left for adoption. As we will see, recently, the issue came to the attention of ordinary tribunals with regards to the request, made by a child (once achieved the major age), to know the mother's identity.

The Italian law on assisted reproduction has been challenged several times before the Constitutional Court, that – in three major decisions – lifted some of the most restrictive bans of the law⁵⁰. Among these, the opening to gametes' donation granted by decision no. 162/2014, contributed to a spreading of the debate that opposes those in favour for donors' anonymity and those *pro* data disclosure. Even though we cannot affirm that the Italian legal order has already reached a stand point on the issue, as the new national guidelines on assisted reproduction have just been approved but do not contain any precise indication on gametes' donation⁵¹, the Agreement reached by Regions in the aftermath of the constitutional decision in 2014 partially addressed the issue and represents – at the moment – the only source, which completes the Constitutional Court's decision, for the regulation of gametes' donation in Italy. The general principle Italian Regions agreed on is the one of donors' anonymity, thereby it will not be possible either for donors or for the couple who received the gametes to have access to the identity of the others. Just in case of medical necessity, it will be possible – for healthcare professionals – to recall the donors' clinical data. A part from the exception of extraordinary medical reasons, therefore, the general rule is the one of complete anonymity of the donor, both for the receiving couple and the new born⁵².

It should, anyway, be remarked that the aforementioned document has not the force of law or secondary legislation: it represents an agreement among institutions and its value – from the viewpoint of sources of law – is debated. Moreover, it is transitory in nature, as in its preamble it is stated that the document is aimed at granting the effectiveness of fundamental rights recognised by the Constitutional Court, by means of its decision no. 162/2014, in the wait for a legislative amendment. After the Constitutional Court's decision, in fact, the Government decided not to intervene either by a provisional decree with the force of law or with a new regulation, preferring to leave the matter to the Parliament and to permit the exercise of its full discretionary political power. Nevertheless, in order to grant an effective access to gametes' donation, Regions observed that an agreement on the main principles ruling its functioning might be of help, especially for health professionals working in authorised centres⁵³.

⁵⁰ Italian Const. Ct., decision n. 159/2009 on the limit of the simultaneous implantation of three embryos, with regards to the right to health of the mother; Italian Const. Ct., decision no. 162/2014 on assisted reproduction via gametes' donation; and more recently, Italian Const. Ct., decision no. 96/2015 on the access to pre-implantation genetic diagnosis for perspectives parents who are not formally infertile but are healthy carriers of a severe genetic disease that might affect the newborn. An English translation of all decisions is available on the website of the Italian Constitutional Court.

⁵¹ The Italian Ministry for Health approved the 2015 guidelines on ART on July 1st 2015. As to gametes' donation it is made clear that the discipline will be completed after the final approval of a regulation issued by the same Ministry and by the National Institute for Health which is also connected to the enforcement of the European tissues directives.

⁵² The document adopted by Italian Regions is available, in Italian at this web address: <http://www.biodiritto.org/index.php/novita/news/item/528-conferenza-regioni-e-ppaa-%E2%80%93-documento-sulla-fecondazione-eterologa> (last accessed 27.02.2016).

⁵³ Therefore, it follows that any further source of law concerning medically assisted reproduction via gametes' donation will not necessarily have to be based on the agreement and the document will anyway be overtaken by a new law or by a legislative amendment. At the moment, a few projects either for the enactment of a new law on assisted reproduction or for the modification of law no. 40/2004 have been presented in the Deputies' Chamber and in the Senate; for no one of them the official legislative proceeding has been started yet.

5.1. The most recent aftermath of the right to know one's origins in Italy: any possibility for an analogical application?

Almost contemporary to the Constitutional Court's decision and to the subsequent Regions' Agreement, the issue concerning the right to know one's origins came to the attention of ordinary tribunals, with regards to the possibility to disclose the mother's identity to the child in the case of anonymous birth.

Under Italian law, the woman who gives birth has the right not to be nominated in the child's birth certificate⁵⁴. In this case, the law provides for the right to remain anonymous for the mother; the child is therefore given for adoption and the relevant law on adoption finds application with regards to the creation of a legal link between the child and the adoptive parents. Recently, the legitimacy of these provisions has been challenged before the European Court of Human Rights and, subsequently, before the Italian Constitutional Court⁵⁵. The legal issue concerned the unreasonableness of the difference between the right to know the child's biological origins, provided by the law on adoption⁵⁶, and the exclusion of this possibility in the case of anonymous birth (originally provided by art. 28, par. 7, of the Italian law on adoption).

The case brought before the European Court of Human Rights concerned a woman, born after an anonymous birth, who filled an application to have access to the information concerning her biological mother. The Tribunal, applying the law on adoption, refused her request; therefore, she appealed to the ECtHR, affirming that the Tribunal's denial and the Italian legal framework violate her right to the respect of private and family life, protected by art. 8 of the Convention. The Strasbourg Court acknowledged that the present legal framework represents the result of a wrong balancing made by the Italian law-maker between competing fundamental rights and therefore Italy was condemned for violation of art. 8 ECHR⁵⁷.

A few months later, a very similar case came to the Constitutional Court, which confirmed the principles established in *Godelli*. In particular, the Court noticed that the irreversibility of the mother's anonymity is unreasonable, as the right of the mother must be balanced with the right of the child to know his/her biological origins, protected by article 2 of the Italian Constitution. Moreover, the Court found also a violation of the principle of equality, as this right is granted to adopted children, with the only exception of those born after anonymous birth. The Court finally suggested that it is for the law-maker to set a balanced system of rules whereby permitting to ascertain the subsistence of the willingness of the mother to remain unknown.

After a few years, no legislative intervention has followed the Strasbourg Court and the Constitutional Court decisions; therefore the judges that have been called to give the final answer to the re-

⁵⁴ DPR 396/2000, art. 30. It is worth noticing, however, that this possibility is explicitly excluded in case of ART, as provided by article 9, par. 2, or law no. 40/2004.

⁵⁵ The ECtHR decision is *Godelli v. Italy*, appl. no. 33783/09, decided on 25th September 2012; the Constitutional Court's decision is no. 278/2013. Both are available at www.biodiritto.org.

⁵⁶ The Italian law on adoption, law no. 184/1983, provides for the right of the child to have access to the information concerning his/her biological origins and the identity of his/her biological parents at the age of 25 (art. 28, par. 5). To this end, he/she should fill in an application before the competent juvenile court.

⁵⁷ For a comment to *Godelli v. Italy*, see C. SIMMONDS, *An Unbalanced Scale: Anonymous Birth And The European Court Of Human Rights*, in *The Cambridge Law Journal*, 72(2), 2013, 263-266.

quest of Mrs. *Godelli* and those involved in similar issues had to interpret the current legal framework under the lens of the principles established by the two Courts, by ascertaining the willingness of the mother to reveal her identity (or to remain anonymous) and then disclosing it to the son/daughter. In the case the mother has already died, the juvenile Court in Trieste has stated that there is no reason to maintain the anonymity of the mother as there are no competing interests to be balanced anymore. Conversely, a Court in Turin, just a few months before, hold that the right of the mother to remain anonymous persists even after the death of the woman. Therefore, without her consent, her identity could be disclosed to the son/daughter, with the only exception of medical data⁵⁸.

Even though this issue raises several interesting issues concerning the correct balancing between constitutional rights, the possibility to extend this discipline *via* analogical interpretation to the issue of assisted reproduction *via* gametes' donation could be highly debated. It could be argued that the right to know one's origins has a *rationale* in the case of adoption, whereas different principles could find application in the case of assisted reproduction. In this context, it is worth pinpointing that the discipline of anonymous birth and the connected right to know the mother's identity are enrooted in the need to give to the woman an alternative to abortion. Differently, this kind of balancing does not find place in the case of assisted reproduction, even *via* gamete's donation.

In any case, being the legislative framework concerning assisted reproduction *via* gametes' donation still not completely defined, it seems that it is for the Parliament to decide whether to provide for the possibility of donors' identity disclosure or for total anonymity, as suggested in the Regions' agreement. It is therefore preferable to enact a specific discipline concerning the rights of children born after gametes' donation, as the peculiarity of the situation, the necessary medical and biological intervention require a dedicated legal framework.

5.2. The Greek legal framework concerning the right to know one's origins

The Greek legal framework concerning the rights of persons born *via* gametes' donation and surrogacy is more precise than the Italian one. As provided by article 8, par. 6, of law no. 3305/2005 and by art. 1460 of the Civil Code, medical information concerning the donor must be recorded in the Cryopreservation bank and in the national registry of donors and recipients. Moreover, donors' identity could not be revealed to the recipient couple, but could be made available only to the child and just for reasons concerning his/her health⁵⁹. Whoever reveals the donors' identity or contravenes to legislative provisions regarding anonymity and data storage commits a criminal offence.

Therefore, as we could see, both countries opted for maintaining donors' anonymity, with the only exception of access to clinical data for medical reasons. This solution may represent one of the possible balances among the rights of persons involved, as the right to health of the offspring is guaranteed by the possibility to have access to medical data and records of the donors. With regards to this profile, it could be interesting to ascertain the correct and complete effectiveness of legal provisions,

⁵⁸ See Juvenile Court of Trieste, 8 May 2015, available at <http://www.biodiritto.org/index.php/item/667-trieste-parto-anonimo> and Turin Court of Appeals, 5 November 2014, available at <http://www.biodiritto.org/index.php/item/666-torino-parto-anonimo> (last accessed 27.02.2016).

⁵⁹ Art. 20, par. 3, of the law no. 3305/2005.

and the way in which the two countries are enforcing them, for example, with regards to procedures and time to access data, requirements to be fulfilled, responsibilities on medical professionals and so on.

The issue concerning the right to know one's origins, broadly intended, appears to be more challenging when applied to persons born after gametes' donation or surrogacy. In this perspective, acknowledging the existence of this right and, therefore, legislating to grant its effectiveness (as in the Swedish model), might open the field to more controversial issues, such as the existence of a (legal or moral) obligation on the recipient parents to reveal to their offspring that they were conceived by means of access to MAR techniques or surrogacy⁶⁰. The answer to this moral dilemma rests (and should remain) upon parents and should be solved within the relationship they decide to establish with their children. From a moral viewpoint, it seems that "telling the truth" could be the best way to create stable and certain familiar relationships. Conversely, from a legal point of view, it seems that if the law-maker decides to opt for a "disclosure mechanism", whereby permitting to the child born after gametes' donation or surrogacy to have access to his/her genetic parents' personal identity, a duty to tell to the child how he/she was conceived should be created upon parents, in order to make the right to know one's origin completely effective. At the present state of art, anyway, it could be argued that this decision rests within the national States' margin of appreciation, as it could not be observed a shared *consensus* on the issue at a European level.

6. Conclusive remarks

The significant progress that was recently noted in the field of MAR methods and the amendments of the relative Laws of the Member States towards a more liberal regulation of the subject, have contributed to the birth of an important number of children with the use of these methods⁶¹, many of whom are not biologically connected with one of their parents (or both of them). It could be claimed that the acceptance of surrogacy agreements under a small – but not negligible – number of legislations (among them, the Greek Law), has put into question the principle *mater semper certa est*. In this context, considering that this principle reflects a fact that, in the past (before the evolution of ART), was always true, but, nowadays, its strict implementation fails to describe and regulate in a fair manner the situations created by the use of some MAR methods such as surrogacy⁶², one could pro-

⁶⁰ It is interesting to point out that, with regards to the Italian legal framework on adoption, art. 28, par. 1, of the law n. 184/1983 provides that the adopted child shall be informed of her condition. To this end, it is for her adoptive parents to do it in the more appropriate way.

⁶¹ See for example the recent Report of the Italian Minister of Health to the Italian Parliament regarding the implementation of the Italian Law on MAR for the year 2013 (presented on 26.6.2015), where it is mentioned that the number of births via MAR methods in 2013 was up to 10.350. The Report is available at <http://www.iss.it/rpma/?lang=1&id=440&tipo=5> (last accessed 27.02.2016).

⁶² See also the decision of the Supreme Court of Ireland in the case *M.R. and D.R.* (2014), IESC (7 November 2014) where Judge Denham C.J. stated that the words *mater semper certa est* «were a simple recognition of a fact which existed prior to the modern development of assisted human reproduction» (§110). The decision is available at <http://www.biodiritto.org/index.php/item/570-mr-e-dr-surrogazione-irlanda> (last accessed 27.02.2016).

pose a new interpretation of the principle, which will respect, above all, the best interests of the child⁶³.

Such an interpretation should also respect the recent decisions of the ECtHR that interpreted the “best interests of the child” and stated that a child should not be put at a disadvantage because it was born after a surrogacy agreement. According to the ECtHR, the protection of the best interests of the child requires that the child is able to establish the “details” of his identity as a human being, including the legal parent-child relationship. And, in the case of a child born *via* surrogacy, the existence of a “*de facto* family” between him and the couple, as well his right to have a certain and stable parenthood relationship should prevail upon any legal restriction and result in the recognition of parenthood. Therefore, the meaning of the principle *mater semper certa est* should follow the recent case law – and this could be possible by two ways: either by the complete abolition of the principle or by rereading it in a way that distinguishes between the biological mother, namely the woman who gave birth to the child, the genetic mother (the one that donated the genetic material) and the legal mother (the woman who legally undergone MAR to have a child). The existence of a biological link between the child and one or both the members of the couple should not be regarded as an indispensable condition, but only as an additional one for the acceptance of legal parenthood, as our societies seem to have already accepted that the social understanding of familiar relationships prevails on the biological or genetic one.

On this regard, the comparative analysis of the Greek and Italian approaches to surrogacy agreement has shown how legal orders implementing opposite legal frameworks can be interlinked, in terms of effects of the access of Italian couples to the Greek legal context. This is inevitable, according to the principle of free movement of people and to the broad margin of appreciation to be recognised to each State in such ethically and socially sensitive context: at the same time, this phenomenon reveals the need for a national legal system to taking into account the effects of such phenomenon (surrogacy agreement abroad) within its own territory, in order to regulate them in a express, transparent and unambiguous way. It means that, whether it is not possible (and even appropriate) to call for a general acceptance of such technique at the national level, it is at the same time advisable, in terms of coherency and certainty, to call for a specific regulation of the effects of it with regard to the determination of parenthood based on a surrogacy agreement (legitimately, according to the *lex loci*) performed abroad.

The effects of such phenomenon on the Italian legal order have clearly shown the need for shared common standards in this context, in order to avoid the threat of an excessively diverging and unpredictable case-law: even confirming the absolute ban of surrogacy agreement at the national level, it is a Parliament’s responsibility (eventually by delegating this function to the Government) to provide for a regulation of parenthood in those cases, in the light of a full and adequate protection of the best interests of the children born through surrogacy agreements, without denying – in accordance with the national competences and within a broad margin of appreciation – protection to possible counter-interests, such as woman’s exploitation, certainty of parental relationships and the

⁶³ On the contrary, before the birth of the child, the use of the criterion of an abstract “interest of the child” not yet born in order to grant the judicial authorization for the process is not justifiable (see *supra* 2.1.).

“blanket clause” represented by the principle of public order⁶⁴. From the ECtHR case-law, it seems possible to derive relevant principles and criteria, which should be easily and efficiently implemented also at the national level: this process has been already inaugurated by the judiciary, but the entry into force of normative general standard to be implemented to each concrete case seems to be advisable, in order to guarantee a higher level of certainty and predictability and to avoid the judiciary, which must be – and it is designed as – a last instance means, but turns itself in an ordinary regulatory tool, being forced to “surrogate” Parliamentary function.

On this regard, the Italian case-law seems to show that variables such as the legitimacy of the agreement according to the *lex loci*, the existence of a biological link with at least one of the members of the couple, on the one hand, and the best interests of the new-born child and the principle of national public order must be taken into account at the time of implementing a general regulation of the legal effects of surrogacy agreement signed and performed abroad.

In this perspective, with specific regard to the best interests of the child, an aspect that should duly be taken into account by Parliaments while legislating on the matter is the one concerning the rights of children involved. The first dimension, as we have already underlined, is the one concerning the certainty of family relationships: this is an issue that involves, on the first instance, social parents, meaning those who started the process of surrogacy, but that has also remarkable consequences on the life of the child. Secondly, in connection to this profile, the need to properly address the right to know one’s genetic origins should also be at the core of legal regulation. Given that at the moment there is no shared common standard among European States on the matter, we could not argue that one specific model could take prevalence among another one. Nevertheless, the law-maker should bear in mind that, in compliance with the case law of the European Court of Human Rights, when a decision is taken, the legal framework should be drafted in a coherent way, as to avoid legal uncertainties and inconsistencies with other relevant disciplines⁶⁵.

The comparison between Italy and Greece shows one more aspect that deserves due considerations with regards to the States’ margin of appreciation in the regulation of ethically sensitive matters: given the social phenomenon of cross-border reproductive care and in consideration of the free movement principles operating within the European Union, the question is whether EU States opting for a restrictive regime should provide for “flexibility clauses” to properly address the needs of people travelling to another country to legally get what is prohibited at home.

Finally, with specific regard to the issue of surrogacy, it is worth pointing out that national prohibitions are forcing those who cannot naturally conceive to travel abroad to satisfy their parenthood desire. Given the ban on surrogacy provided by several legislations in European countries and the le-

⁶⁴ In this sense, it seems to be of paramount importance the recent decision by the Irish Supreme Court in a case concerning surrogacy, whereby the Court, dismissing the parents’ appeal against the denial of recognition of parenthood for the social mother, stated that this is a matter that has to be regulated by the Parliament: «The issues raised in this case are important, complex and social, which are matters of public policy for the [Parliament]» Irish Supreme Court, *M.R. and D.R* [2014] IESC 60 (7 November 2014).

⁶⁵ See *Costa e Pavan v. Italia*, appl. no. 54270/10, 28.08.2012. The need for an internal consistency of the legal framework has been already required by the ECtHR in its case law concerning national restrictive regulations on abortion. See *P. e S. v. Poland*, appl. no. 57375/08, 30 October 2012, par. 99: «once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion».

gal uncertainties on the recognition of parental relations, several couples are seeking surrogacy agreements in states where a *laissez faire* regime permits commercial surrogacy. Fears of exploitation on poorer women living in developing countries⁶⁶ should serve as an incentive for European countries to address the issue of surrogacy and to try to find, at a national level, a balanced solution which is both respectful of the fundamental rights of persons involved and adherent to political and ethical choices States can adopt within their wide margin of appreciation.

⁶⁶ S. MOHAPATRA, *Achieving reproductive justice in the international surrogacy market*, in *Annals Of Health Law*, 21(1), 2012, 191. See also see the report *Birthing a market. A study on commercial surrogacy*, Sama – Resource Group for women and health, New Delhi, 2012.