THE COURT OF CASSATION WALTZ DANCE AROUND THE PRINCIPLE OF PUBLIC ORDER IN FAMILY QUESTIONS*.

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1. *So, where were we?*

With these words Enzo Tortora, on 20 february 1987, after four years of absence from sets because of the drama of which he had become a victim, gave way to the fortunate television programme thanks to which he had partaken in the most intimate family dimension of an entire generation of Italians. The recalled fact aims at remarking upon the effect of solemn decisions taken in Courtrooms with regard to persons' destinies, but also at highlighting, like the anchorman himself said in the circumstance, that they often leave a mark in those who can't talk "and who are many, too many"[81]: there is no doubt that there are minors among them[82], the only ones who aren't responsible, as they certainly never asked to be born, yet exposed as they are to status and affection impairment effects due to the engulfing morphogenesis of the actual family relationship in its substantial dimension[83]. But the

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[81] The attention and solidarity towards the individual are the constitutional basis of our law system: as for the topic, we may refer to the doctrine by P. Perlingieri, *La personalità umana nell'ordinamento giuridico*, Napoli, 1972, *passim*; Id., *Famiglia e diritti fondamentali della persona*, in *Legal giust.*, 1986, page 484 onwards.; Id., *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*[3], II, Napoli, 2006, pages 433 onwards.

[82] P. Perlingieri, *La persona e i suoi diritti, Problemi del diritto civile*, Napoli, 2005, page 170; Id., *Norme costituzionali e rapporti di diritto civile*, in *Le prolusioni dei civilisti*, III (1940-1979), Napoli, 2012, page 3211 onwards; V. Barba, *Unione civile e adozione*, in *Fam. dir.*, 2017, 4, page 387 onwards; A. Gorgoni, *La rilevanza della filiazione non genetica*, in *Dir. succ. fam.*, 2018, 1, page 123 onwards; R. Pane, *Mutamenti sociali e itinerari del diritto di famiglia*, in *Quaderni di Diritto delle successioni e della famiglia*, 24, Napoli, 2018, page 93 onwards. As for a discussion on the fundamental Italian-French aspects regarding the effect of procreative techniques onto filiation relationships, see L. Chieffi (by), *Tecniche procreative e nuovi modelli genitorialità. Un dialogo italo-francese*, Milan-Udine, year 2018, *passim.* On the topic, A. Patroni Griffi, *Le regole della bioetica tra legislatore e giudici*, Napoli, 2016, page 75 onwards.

[83] M. Paradiso, *Navigando nell'arcipelago familiare. Itaca non c'è*, in *Riv. dir. civ.*, 2016, 4, page 1314, standing to whom «it's in filiation, in other words, that we may find the major interest of a family that we have strived to remove from conjugal unions, and family law so becomes automatically filiation law»; Id., *Libertà e responsabilità dei conviventi nella vita familiare e nella crisi del rapporto*, in *Dir. succ. fam.*, 2018,

purpose of this initial survey is also that of referring to recent in-depth analysis results[84], with particular concern for parental responsibility within family structure expressions and evolutions, to be considered as the only parameter able to grant, *de jure condendo*, concreteness to the much proclaimed but still little pursued *best interest of the child*[85].

In particular, by examining surrogate maternity in the transnational context, a reasoning contamination emerged between penal and civil sections of the Supreme Court, tending to unprecedented interpretive horizons concerning delegated pregnancy as well as biological and social parenthood modalities. As from the *trenchant* intervention of the Italian Civil Court of Cassation no 24001/2014[86], going through Penal Court of Cassation decision no 13525/2016[87] and ending with Civil Court of Cassation decision no 19599/2016[88], the jurisprudence orientation finally denying the contrariness to the transcription fixed by public order of birth certificates regarding minors born abroad from gestation of a third person in compliance with *lex loci*, was at last outlined, defining an evolutionary interpretation of such a principle and basing the consideration on the relevance of the interest of minors meant as a right to the continuity of the *status filiationis* obtained abroad. But the Supreme Court[89] grasped the occasion for a reflection on the convenience of legal

1, page 271 onwards; G. Recinto, *Responsabilità genitoriale e rapporti di filiazione tra scelte legislative, indicazioni giurisprudenziali e contesto europeo*, in *Dir. succ. fam*., 2017, 3, page 895 onwards.

[84] As for all, R. Picaro, *Famiglie e genitorialità, tra libertà e responsabilità*, Napoli, 2017, *passim.*

[85] G. Corapi, *La tutela dell'interesse superiore del minore*, in *Dir. succ. fam.*, 2017, 3, page 777 onwards.

[86] Cass., Sec. I, 11 november 2014, no 24001, in *Guida dir.*, 2014, 48, page 44 onwards; in *Fam. dir.*, 2015, 3, page 306 onwards, with a comment by A. Vesto, *La maternità surrogata: Cassazione e CEDU a confronto*; in *Foro it*., 2014, 12, 1, page 3408, with note by G. Casaburi, *Sangue e suolo: la Cassazione e il divieto di maternità surrogata*; in *Nuova giur. civ. comm*., 2015, I, page 10235, with a note by F. Benatti, *La maternità è della donna che ha partorito: contrarietà all'ordine pubblico della surrogazione di maternità e conseguente adottabilità del minore*; in *Corr. giur.*, 2015, page 471, with note by A. Renda, *La surrogazione di maternità tra principi costituzionali e interesse del minore*; furthermore A. Figone, *Utero in affitto, il no della Cassazione sulla maternità surrogata*, in *quotidianogiuridico.it*, november 25th 2014; B. Salone, *Contrarietà all'ordine pubblico della maternità surrogata e dichiarazione di adottabilità del minore*, in *dirittocivilecontemporaneo.com*, december 7th 2014. On this topic, see also M. Sesta, *La Filiazione*, in R. Clerici, M. Dogliotti, M. Sesta e T. Auletta, *Filiazione–Adozione–Alimenti*, IV, in *Trattato Bessone*, Torino, 2011, *passim*.

[87] Cass. peno, Sec. V, 10 march 2016, no 13525, in *Dir. peno proc*., 2016, page 1085 onwards, with a note by A. Madeo, *La cassazione interviene sulla rilevanza penale della surrogazione di maternità*; in *Foro it*., 2016, II, subparagraph 286; Cass. peno, Sec. VI, 11 october 2016, no 48696, in *Quotidiano giur*., 2016.

[88] Cass., Sec. I, 30 september 2016, no 19599, in *iurisprudentia.it*, october 27th 2016, with a note by C. Cucinella, *Il riconoscimento dello* status filiationis *di un minore che risulta figlio di due donne*; in *Familia*, october 11th 2016, with a note by E. Contu, *Non è contraria all'ordine pubblico il riconoscimento in Italia dell'atto di nascita di un bambino con due mamme*; in *ilfamiliarista.it*, 1 decemeber 2016, with a comment by A. Fasano, *La Costituzione non vieta alle coppie dello stesso sesso di generare figli*; in *Quotidiano giuridico*, 2016; in *Foro it.*, 2016, 11, 1, c. 3329, as well as the reconstruction by M.G. Stanzione, *Ordine pubblico costituzionale* e status filiationis *in Italia e negli ordinamenti europei: la normativa e l'esperienza giurisprudenziale*, in *www.comparazionedirittocivile.it*, october 2016, page 2.

[89] Cass., Sec. I, 30 september 2016, no 19599, above.

protection for same sex unions *ex* art. 2 of the Constitution, to be considered as horizontal relationships between persons of age, thus valued to be a possible context for a parental project. The hermeneutic development was to be: if the union between same sex persons is a social formation in which the individual «expresses his or her personality» and if becoming parents and creating a family represents «the expression of the fundamental and general self-determination freedom» in compliance with articles 2, 3 and 31, and not with article 29 of the Constitution, so a constitutional ban obligation for same sex couples desiring to have or generate children is to be excluded. Notwithstanding some ambiguities, the orientation of jurisprudence has had the merit to achieve an analysis of the prevalent needs revealed by the social context that underlines the importance of parenthood will and responsibility, influenced by a widespread and sometimes also selfish necessity of parental fulfilment of single persons. In any case the Court of Cassation, without the ontological preclusions that had marked their previous leanings[90], has so avoided that the gestation of third persons could undermine the minor's right to personal and social identity, thus safeguarding this principle regardless of conception and birth modalities[91]. The adaptation of techniques and notions to community primary values appeared to be quite clear, as well as the respectful interpretation of law decisions with regard to the basic law sources hierarchy, standing to an orderly, fundamental meaning[92]. On the basis of this perspective the Supreme Court[93] considered international public order[94] as prime example of the complex of principles that typify the internal law system in a fixed historic period, although directed towards tutelage necessities of human fundamental rights, which is in common with different law systems: public order aversion is not to be deduced from the mere dissimilarity with the entirety of internal law regulations, seen as the comparison is to be made with the main values that bind the ordinary legislator, and not with the rules issued by virtue of subjectivity of a given subject matter.

The fact is that in an unstable social dimension characterized by evanescence of family roles, the sound and harmonious development of family-community members may be

[90] Cass., Sec. I, 11 november 2014, no 24001, above.
[91] M.G. Stanzione, *Ordine pubblico costituzionale e* status filiationis *in Italia e negli ordinamenti europei: la normativa e l'esperienza giurisprudenziale*, above, page 5 onwards.
[92] Under the teaching of Pietro Perlingieri, interpretation should always be systematic, in the view of the unity of the legal system, and assiologic, as far as any regulations or single rules aim to implement constitutional, European and international values.
[93] Cass., Sec. I, 30 september 2016, no 19599, above.
[94] On which topic, see lastly V. Barba, *L'ordine pubblico internazionale*, in *Rass. dir. civ.*, 2018, 2, page 403.

achieved only if concrete relationships and stable functions are granted. If a legislative atrophy is present the whole law system must seek the necessary protection answers inside itself, in a self-restoring manner[95]. On the basis of this interpretation the law judge is obliged to grant fundamental rights effectiveness and ordinary judges have to satisfy tutelage requirements so as to be able to avoid that family formation changes may become a cause of prejudice in relation to primary community standards[96], apart from juridical, national and over national law systems, because of the personality of the members[97]. In a context characterized by the persisting absence of a reforming legislative design but also by the legal difficulty to grant adequate regulation answers to such fast and deep changes - on the contrary ending up in a loop of cold and agnostic precepts whereby it resorts to rules rather than principles - as the most recent law surveys regarding surrogated maternity demonstrate, we are assisting to an out of control self-restoring drift of the jurisdictional function, that risks lacking systematic and homogeneous answers. Never as much as in this historic phase, value judgments concerning the family sphere must be remarked in terms of merit leanings of a community[98], as an expression of society needs and necessities, in a reasonable balance between objectivity of interpretation and its ontological and existential

[95] On the creative function of judges and on the connected implications, in particular see also A.C. Nazzaro, *Il difficile rapporto tra genitorialità e famiglia tra indicazioni giurisprudenziali e novità legislative*, in *Dir. succ. fam.*, 2017, 3, page 843 onwards; G. Zaccaria, *Questioni di interpretazione*, Padova, 1996, page 148 onwards; M. Taruffo, *Legalità e giustificazione della creazione giudiziaria del diritto*, in *Riv. trim. dir. proc. civ.*, 2001, page 11 onwards; R. Guastini, *L'interpretazione dei documenti normativi*, in *Tratt. dir. civ. comm.* Cicu, Messineo and Mengoni also dealt by Schlesinger, Milano, 2004, page 259 onwards, and lastly G. D'Amico, *Angelo Falzea e il ruolo della dogmatica giuridica*, in *Riv. dir. civ.*, 2017, I, page 1015 onwards.

[96] L. Mengoni, *Ermeneutica e dogmatica giuridica*, *Saggi*, Milano, 1996, page 10; V. Scalisi, *Per un'ermeneutica giuridica "veritativa" orientata a giustizia*, in *Riv. dir. civ.*, 2014, 6, page 1256; G. Alpa, *Il metodo nel diritto civile*, in *Contr. impr.*, 2000, page 357 onwards; Id., *La certezza del diritto nell'età dell'incertezza*, Napoli, 2006, page 75 onwards; Id. by *Paolo Grossi, alla ricerca di un ordine giuridico*, Roma-Bari, 2011, page 191 onwards; P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* [3], I, Napoli, 2006, page 116 onwards. See also the reconstructions by F. Marinelli, *Scienza e storia del diritto civile*, Roma-Bari, 2009; F. Macario and M. Lobuono, *Il diritto civile nel pensiero dei giuristi. Un itinerario storico e metodologico per l'insegnamento*, Padova, 2010; M. Pennasilico, *Il diritto civile tra storia e metodo*, in *Rass. dir. civ.*, 2015, I, page 337 onwards.

[97] See also V. Scalisi, *Le stagioni della famiglia nel diritto dall'Unità d'Italia a oggi*, *Parte seconda*, *«Pluralizzazione» e «riconoscimento» anche in prospettiva europea*, in *Riv. dir. civ.*, 2013, 6, page 1292; Id., *Regola e metodo nel diritto civile della postmodernità*, in *Riv. dir. civ.*, 2005, 3, page 585 onwards, now in Id., *Fonti-teoria-metodo. Alla ricerca della «regola giuridica» nell'epoca della postmodernità*, Milano, 2012, page 55 onwards; G. Iudica, *Il mezzo secolo lungo*, in *Nuova giur. civ. comm.*, 2016, I, page 1355.

[98] See lastly P. Perlingieri, in F. Pedrini e P. Perlingieri, *Colloquio su (Scienza) del diritto e Legalità costituzionale*, in *Rass. dir. civ.*, 2017, 3, page. 1146, where he states that «non v'è sistema ordinamentale che non abbia una sua assiologia e anche qualora non la esplicasse sarebbe la sua una falsa neutralità».

dimension, and between scientific objectivity and subjectivity of the exegete[99].

2. The step backwards of the Supreme Court: decree no 4382/2018.

The public order principle meaning at the basis of the conclusions of the legitimacy judges in decision no 19599/2016, actually tended to conform the position of the Italian law system to the one emerging in the international setting, even though in accordance with the fundamental principles of the Constitution, but also, where compatible, with the foundation Treaties and both the Charter of the European Community fundamental rights and the European Convention of Human Rights[100].

From this point of view the international public order is an expression of «that complex of fundamental principles that characterize the internal law system in a given historic period, yet inspired by tutelage necessities of the fundamental human rights that are common to different law systems»[101]. In compliance with this qualification, within the limits dictated by public order, it's first of all necessary not so much to verify if the foreign deed is compliant with internal ordinary decisions, even though commanding or binding, but rather if it's in contrast with the supreme or prime principles of the Constitution -and therefore impossible to be subverted by the ordinary legislator- or, instead, with the principles of the foundation Treaties and of the European Charter of Fundamental Rights, whether compatible with these and, furthermore, of the European Convention of Human Rights. The Supreme Court didn't omit to remark how the research of such parameters is subject to a delicate hermeneutic operation, not by limited interpretation of the regulation itself, even though of constitutional level, on the assumption that there are constitutional rules that don't express inviolable principles and, as such, don't contribute to integrate the notion of public order. As a matter of fact, the lack of conformity with public order is effective only in case the legislator actually isn't in the condition to introduce rules similar to foreign ones, because of overcoming differences, with regard to prime constitutional values. Thus

[99] This way G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, Napoli, 2015, page 16 onwards; Id., *Sul criterio di ragionevolezza*, in G. Perlingieri e A. Fachechi (by), *Ragionevolezza e proporzionalità nel diritto contemporaneo*, I, Napoli, 2017, page 1 onwards.
[100] On the constitutional principles and their auxioligical range see also P. Grossi, *Dalle "clausole" ai "principii" a proposito dell'interpretazione come invenzione*, in *Giust. civ*., 2017, 1, page 11 onwards.
[101] Verbatim Cass., Sec. I, 30 september 2016, no 19599, above.

having to considerate the compatibility with public order for a foreign civil condition act to be acknowledged in Italy[102], it's necessary to verify if it's in in contrast with human fundamental rights tutelage necessities, such as the mentioned over national and national fundamental Charters sanction, and certainly not - on the other hand - if it's consequent to a topic regulation more or less compliant with local laws, even though imperative or binding[103]. From this point of view particular significance is to be reserved to the superior interest of the minor with regard to his personal and social identity, as well as persons' right to determine themselves and to form a family, in consideration of the fact that these are sound constitutional values (artt. 2, 3, 31 e 32 cost.), the tutelage of which has been all the way enshrined by the over national law sources that contribute to the development of the principles of international public order.

The outlined legal framework, as a confirmation of judges' more and more asserted decision authority, has recently been overturned by decision no 4382/2018, with which, setting apart the detail of the question submitted to the close examination of the Court[104], the Supreme Court decided that the notion of international public order assumed by the Court of Cassation itself with decision no 19599/2016, needs guaranty of the United Court Sections, as it doesn't express the internal juridical tradition. The mentioned decision discusses the causal judgement connected to the conception of public order as defined by its terms of comparison: on one hand the foreign act, and on the other hand the fundamental values to which the ordinary legislator is bound, and that therefore cannot be modified. Standing to the reasons offered by the ordinance, differently from the statement of sentence no 19599/2016, the public order principle involves not only the above mentioned fundamental values, but also the rules representing legislative discretionary power in somehow connected arguments and rather directly implied matters.

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[102] Articles 16, 64, 65, l. no 218/1995, and art. 18 d.P.R. no 396/2000.

[103] M. Sesta, *Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?*, in *Nuova giur. civ. comm.*, 2000, I, page 310 onwards. On the topic, M.G. Stanzione, *Ordine pubblico costituzionale e* status filiationis *in Italia e negli ordinamenti europei: la normativa e l'esperienza giurisprudenziale*, above, p. 15, states that «non ha senso, in questa prospettiva, invocare il contrasto della normativa ordinaria straniera con quella italiana di pari rango, sia pure costituita da norme inderogabili».

[104] Actually, the case in question is to be distinguished from the one examined in sentence no 19599/2016 for two aspects: on one hand the second parent has no biological bond with the child (whereas, in the case examined in sentence no 19599/2016, the second mother had contributed genetically); on the other hand, the adopted technique is that of the surrogated maternity, which is forbidden and prosecuted (while, in the case examined by sentence no 19599/2016, standing to the judges, it was a matter of a particular type of heterologous artificial insemination).

The question requires a precise definitiono As a matter of fact, apart from the full-bodied doctrine expressing agreement in the direction of sentence no 19599/2016[105], in the very context of this decision the necessity of a sound jurisprudence orientated appeal is perceived, concerning the wide spread sedimented notions on the matter[106] within the Supreme Court. Among the *rationes* alleged by ordinance no 4382/2018 there's a reference in terms of guaranty to the recent decision taken by the United Sections, with regard to punitive damage[107]. But differently from what stated in the mentioned ordinance, the United Sections, in this very argument context, recall the description of international public order, *i.e.*

[105] That of public order is a concept «circondato, se non proprio da un alone di mistero, da una forte dose di ambiguità» (Ang. Federico, *L'ordine pubblico economico e il contratto*, in F. Di Marzio (by), *Illiceità, immeritevolezza, nullità*, Napoli, 2004, page 53). Differently from those who talk about the argument only in terms of negative limit to rule validity, P. Perlingieri, *Autonomia privata e diritti di credito*, in A. Belvedere and C. Granelli (by), *Confini attuali dell'autonomia privata*, Padova, 2001, page 93 onwards, describes public order also as «impegno positivo della Repubblica all'attuazione dei princípi fondamentali». G.B. Ferri, *Ordine pubblico, buon costume e la teoria del contratto*, Milano, 1970, and Id., *Ordine pubblico (dir. priv.)*, in *Enc. dir.*, XXX, Milano, 1980, page 1038 ss., identifies the reason for the principle in question in «quelle idee e […] quei valori politici, sui quali si fonda ed è ordinata la società» (page 1053): the lawfulness limit imposed upon negotiation activity should avoid the subverting of social system fundamental values by private persons. See also F. Galgano, *La giurisprudenza nella società* post-*industriale*, in *Contr. impr.*, 1989, page 363; F. Toriello, *I princípi generali del diritto comunitario. Il ruolo della comparazione*, Milano, 2000, p. 7 ss.; A. Guarneri, *L'ordine pubblico e il sistema delle fonti del diritto civile*, Padova, 1974; Id., *Ordine pubblico*, in *Dig. disc. priv., sez. civ.*, XIII, Torino, 1995, page 154 onwards; L. Lonardo, *Ordine pubblico e illiceità del contratto*, Napoli, 1993, page 443; U. Breccia, *Causa*, in G. Alpa, U. Breccia and A. Liserre (by), *Il contratto in generale*, III, in *Tratt. dir. priv.* Bessone, XIII, Torino, 1999, page 161 onwards and page 207 onwards; F. Gazzoni, *Manuale di diritto privato*[12], Napoli, 2017, page 799 onwards; O. Feraci, *L'ordine pubblico nel diritto dell'Unione europea*, Milano, 2012. In the same perspective, P. Lotti, *L'ordine pubblico internazionale. La globalizzazione del diritto privato e i limiti di operatività degli istituti giuridici di origine estera nell'ordinamento italiano*, Milano, 2005, page 64 onwards; L. Lonardo, *Ordine pubblico*, in Various Authors, *Fonti, metodo e interpretazione. Primo incontro di studi dell'Associazione dei Dottorati di Diritto Privato, 10-11 novembre 2016, Sala degli Affreschi, Complesso di S. Andrea delle Dame-Napoli*, by G. Perlingieri and M. D'Ambrosio, Napoli, 2017, page 317 onwards. International public order represents a complicated, indefinite and varying concept, covering judicial, social, economic and political values and principles, that are fundamental for a national law system, meaning that they contribute to qualify its essence. See also A. Correra, *(Bi)genitorialità e ordine pubblico internazionale: la famiglia non è solo quella fondata sul legame genetico*, in *Gazzetta forense*, 14 march 2017. On the topic, NO Palaja, *L'ordine pubblico internazionale, Problemi interpretativi dell'art. 31 delle disposizioni preliminari al codice civile*, Padova, 1974, page 14 onwards; R. De Felice, *Diritto di famiglia e ordine pubblico internazionale*, in *www.personaedanno.it*, 29 october 2006.

[106] Cfr., tra le tante, Cass. no 1302/2013, no 19405/2013, no 27592/2006, no 22332/2004, no 17349/2002.

[107] Cass., 5 july 2017, no 16601. On the topic, A. Carrato, *Danni punitivi: semaforo verde per il loro riconoscimento nell'ordinamento italiano*, in *Quotidiano giuridico*, 7 july 2017; G. Ponzanelli, *Le Sezioni Unite sulla delibazione di sentenze straniere di condanna a danni punitivi*, in *Quotidiano giuridico*, july 12th 2017; R. Savoia, Le *Sezioni Unite aprono la strada al riconoscimento in Italia di sentenze straniere che contengano risarcimenti punitivi*, in *Dir. giust.*, 2017, page 7 onwards; A. Lamorgese, *Luci e ombre nella sentenza delle sezioni unite sui danni punitivi*, in *Riv. dir. civ.*, 2018, 8, pages 317-327; G. Scarchillo, *La natura polifunzionale della responsabilità civile: dai* punitive damages *ai risarcimenti punitivi. Origini, evoluzioni giurisprudenziali e prospettive di diritto comparato*, in *Contr. impr.*, 2018, 1, pages 289-327; M. Franzoni *Danno punitivo e ordine pubblico*, in *Riv. dir. civ.*, 2018, 8, pages 283-299.

«the complex of the fundamental principles characterizing the internal law system in a given historic period, based on fundamental human rights tutelage common to various law systems and first of all deducible from the upper ordered tutelage systems in relation to ordinary legislation», and thus in line with what indicated in sentence no 19599/2016.
Actually, reading the ordinance -which as a matter of fact lacks organic unity and consistency of argument- we can clearly notice the will to make a step backwards, in the attempt to stop the disruptive effects of sentence no 19599/2016, replacing the question, conceived in the current discussion context substantially as *a maxim of no particular importance*, in accordance to art. 374, par. 2, c.p.c., to be examined by the United Sections.

3. The systematic framework suggestiveness: a coordinated interpretation of Council decision no 272/2017, with Court of Cassation decree no 14007/2018.

The hermeneutic course of sentence no 19599/2016 underlines how in the current family configuration prevails its being an affection community based on the relationships actually achieved within the sphere of its members, to whom law must grant tutelage, also pursuing a conforming compromise as far as potential conflicting values are concerned, and duly attributing importance to the prevalent interest of the minor. With regard to this aspect, the Supreme Court sets the conclusion that when acknowledging a birth act of a child born of two women abroad, within a parenthood project planned by a couple once again married abroad, we can't take position against a public order principle consisting of the presumed existence of a constitutional restriction or ban precluding child embracing and bearing, but rather take into consideration persons' freedom to self-determinate and form a family without discriminations, with respect to heterosexual couples[108].
In the above mentioned sentence the Supreme Court favorably solves the problem concerning the acknowledgement of a foreign birth act on the *lex loci* basis, through a well-structured reasoning aimed at verifying if the differences between Italian and Spanish law regulation may legitimize an acknowledgement contrast of such a juridical act with Italian public order, even though other aspects have been taken into consideration, going far

[108] On the topic, see also law no 76, 20 may 2016, Regulation of civil unions and coexistence between same sex persons.

beyond this minimum objective, aimed at the redefinition of the contents of the public order principle, as well as the value system present in Law no 40/2004, and furthermore of the current significance of Civil Code art. 269, par. 3, which is not considered as a realization of a constitutional principle[109]. This ascertained, standing to the judges of legitimacy, it's not possible to assert the existence of a fundamental constitutional principle - in this particular case to be referred to public order - suitable in terms of impeding the transcription in Italy of a birth certificate legally edited abroad, concerning a child born of a parenthood project of two mothers, one having materially given birth to him/her, and the other one having given an ovum fertilized by the semen of an anonymous mano

The *rationes decidendi* of the examined decision, as become evident in our survey, brought to less inadequate results compared to previous decisions, even though referred to a case dissimilar to the one here examined because of the absence of a genetic bond with both the demanding parents[110]. In any case the Court of Cassation finally sets free from the mainly ontological preclusions that had previously led to the declaration of the abandonment status of a minor born of a surrogated mother abroad. The intention to avoid that resorting to gestation of another person may compromise the minor's right to a personal and social identity is quite clear, and in this specific case it's safeguarded by means of the juridical acknowledgement of the parental bond between the minor and the genetic parent, regardless of the qualification the local legislator attributes to conception and birth modalities[111]. But in an even more relevant way the Court of Cassation considers the constitutional legality principle in the over range context of international law sources as a guarantee of respect of the fundamental values of the juridical system, achieving an interpretation of normative regulations in compliance with the hierarchy of law sources and

[109] G. Chiappetta, *Questioni transnazionali del diritto di famiglia e della vita nascente*, in P. Perlingieri and G. Chiappetta (by), *Questioni di diritto delle famiglie e dei minori*, *Quaderni Rass. dir. civ.*, Napoli, 2017, page 42, standing to which, Cass. NO 19599/2016, «il brocardo *mater certa est* è ormai superato. La definizione di maternità è controversa».

[110] Cass., 11 november 2014, no 24001, above.

[111] A. Vesto, *La maternità surrogata: Cassazione e CEDU a confronto* in *Fam. dir.*, 2015, 3, page 209, standing to which «si tratta piuttosto di sapere se la madre genetica abbia un titolo per far valere la sua maternità, che possa ritenersi poziore rispetto a quello della madre uterina. L'ultimo quesito deve risolversi negativamente, in quanto è la gestazione che crea l'essenziale e concreto rapporto materno in cui si realizza l'accoglimento dell'essere umano. La forzata sottrazione del minore alla madre uterina appare quindi inammissibile in ragione del preminente interesse del minore a mantenere il rapporto materno già naturalmente costituito e vissuto»; M.G. Stanzione, *Ordine pubblico costituzionale e* status filiationis *in Italia e negli ordinamenti europei: la normativa e l'esperienza giurisprudenziale*, above, page 5, stating «nel tempo attuale, le identità genitoriali, come quelle coniugali o di altre relazioni familiari, non sono attribuite o imposte una volta per tutte, ma negoziate e costruite nel lungo periodo».

principles, in a systematic and ethical sense[112]. An original reconstruction able to acknowledge even same sex couples' requests made of men, for whom surrogated maternity represents the only possibility to have a child with a genetic bond with one of the partners[113]. It's right from this perspective that we may state that *obiter* the real challenge in this field is man negation and gender bias[114], or rather going beyond the strongly influencing approach in the debate on homosexual rights and their families, that associates the procreative function exclusively to marriage or to stable heterosexual couples, relegating in a sort of limbo in which the non-discrimination reasoning prevails rather than the pursuit of the *best interest of the child*[115], the duty of law significance of same sex couples parenthood[116]. On the basis of the prevalence of the right to family life, the legitimacy judges in fact point out the wide spread conviction of the inexistence of objective indicators on which the inappropriateness of a same sex couple to bring up children may lie on, the same way as the unquestionable right of homosexual parents' children to see their social parenthood bond being recognized, in compliance with the

[112] This way Pietro Perlingieri's lecture, consistenly traceable in all his works.

[113] About the parental relationship recognition concerning two men having had twins of a surrogated maternity in one of the USA country members, considering the biological father and relative life companion distinction, see also App. Trento, 23 february 2017, in *www.articolo29.it*, 28 february 2017, with a comment by A. Schillaci, *Due padri, i loro figli: la Corte di Appello riconosce per la prima volta il legame tra figli e il padre non genetico*, and in *Quotidiano giuridico*, 3 march 2017, with a comment by M. Winkler, *Maternità surrogata: due gemelli a due padri, la storica senza della Corte di Appello di Trento*, in which it's clear how «l'insussistenza di un legame genetico tra i minori e il padre non è di ostacolo al riconoscimento di efficacia giuridica al provvedimento straniero: si deve infatti escludere che nel nostro ordinamento vi sia un modello di genitorialità esclusivamente fondato sul legame biologico fra il genitore e il nato; all'opposto deve essere considerata l'importanza assunta a livello normativo dal concetto di responsabilità genitoriale che si manifesta nella consapevole decisione di allevare ed accudire il nato; la favorevole considerazione da parte dell'ordinamento al progetto di formazione di una famiglia caratterizzata dalla presenza di figli anche indipendentemente dal dato genetico, con la regolamentazione dell'istituto dell'adozione; la possibile assenza di relazione biologica con uno dei genitori (nella specie il padre) per i figli nati da tecniche di fecondazione eterologa consentite»; in *Fam. dir.*, 2017, 7, page 674 onwards, with a comment by M. C. Baruffi, *Co-genitorialità* same sex *e minori nati da maternità surrogata*.

[114] F. Ferrari, *Omogenitorialità, eterosessismo e ricerca scientifica*, in *GenIus*, 2014, 2, page 110 onwards, standing to whom a heterosexist approach represents the two sexes as two non-communicating monoliths, with rigidly complementary characteristics, reciprocally attracted to form a parenthood based on procreation, on blood genealogy and lineage belonging.

[115] From the acknowledgement of the homosexual couple naturally derives the right to family life tutelage in accordance to one's sexual orientation, whereas as far as the homogeneous parenthood question is concerned, the law system is compelled to safeguard in a prevalent way the minor's interest, compliant with the constitutional and European dimensiono On the topic, see D. Amram, *Diritto del bambino alla bigenitorialità e genitore omosessuale*, in D. Amram and A. D'Angelo (by), *La famiglia e il diritto fra diversità nazionali e iniziative dell'Unione europea*, Padova, 2011, page 100 onwards.

[116] A. Schuster, *L'abbandono del dualismo eteronormativo della famiglia*, in Id. (by), *Omogenitorialità. Filiazione, orientamento sessuale e diritto*, Milano-Udine, 2011, page 35; F. Bilotta, *Omogenitorialità, adozione e affidamento familiare*, in A. Schuster (by) *Omogenitorialità*, above, page 163 onwards.

Constitution deriving principle that «doesn't justify a conception of the family that may go against persons and their rights»[117]. Once recognized a family life also in a union between same sex persons with a parenthood project going beyond biological progeny, together with the various discussions on the superior interest of the minor as a consequence of the public order principle revision[118] -in which a considerable importance is to be given to sentimental and care bonds stability, without disregarding the incidence of reliability of the parenthood project- it was quite easy to foresee the administrative acknowledgement of the mere intentional parenthood which, as such, would have been liable to obtain a subversion of the consolidated configuration of parenthood recognition criterions, definitively unbinding it from the genetic element.

The above described interpretive framework finds validation in the position of the Constitutional Court[119], with decision no 272/2017, in which with an interpretation sentence of rejection, the constitutional legitimacy question of Civil Code art. 263 fostered by the Court of Appeal for Milano with ordinance delivered on 25 july 25 2016, with regard to articles 2, 3, 30, 31 and 117, par. 1 of the Constitution (the latter related to art. 8 of the European Convention for human rights), is declared unfounded. The question deserves an in-depth analysis for the subtle reasoning of the remittent judge -partially accepted by the law judge, even though by interpretation- based on the enhancement of the current law. The reference to the changed context becomes evident by means of comparison with the preceding constitutional legitimacy question of Civil Code art. 263, even though in the prevision formulation, that had been declared unfounded with sentence no 112/1997[120], on the basis of the assertion by which the ground for appeal of the recognition of lack of veracity is an expression of a principle of superior order and consequently any false status

[117] Corte cost., 28 november 2002, no 494, in *Giur. cost.*, 2002, page 4065; in *Foro it.*, 2004, I, subparagraph 1053.

[118] This way, J. Long and M. Naldini, *"Turismo" matrimoniale e procreativo: alcune riflessioni socio-giuridiche*, in *GenIus*, 2015, 2, page 167 onwards.

[119] Corte cost., 18 november 2017, no 272, in *www.ildirittoamministrativo.it*, with a note by O. Sportelli. Cfr. A. Gorgoni, *Art 263 cod. civ.: tra verità e conservazione dello* status filiationis, in *Nuova giur. civ. comm.*, 2018, IV, pages 540-551; G. Casaburi, *Le azioni di stato alla prova della Consulta. La verità non va (quasi mai) sopravvalutata*, in *Foro it.*, 2018, I, subparagraph 21-26; R. Senigaglia, *Genitorialità tra biologia e volontà. Tra fatto e diritto, essere e dover essere*, in *Eur. dir. priv.*, 2017, 3, pages 956-1011; G. Barcellona, La *Corte e il peccato originale: quando le colpe dei padri ricadono sui figli. Brevi note a margine di Corte cost. 272 del 2017*, in *www.forumdeiquadernicostituzionali.it*, 2018, page 6.

[40]Corte cost., 22 april 1997, no 112, in *Foro it.*, 1999, I, subparagraph; in *Dir. fam. pers.*, 1997, page 842; in *Corr. giur.*, 1997, 7, page 837.

characterization ought to be annulled. The remittent judge doubts that such a setting may still be considered current, seen as it could be in contrast with the special tutelage principles that the Constitution and the European Convention of human rights grant to minors, and therefore demands a renewed observation on the topic of the coincidence between *favor veritatis* and *favor minoris*. The Constitutional Court, while declaring the question unfounded, clarifies a series of arguments that in coherence with sentence no 19599/2016, of the Court of Cassation, underline the awareness of the necessity to come to a hermeneutic indication of the rule that takes into account the requests deriving from experience such as descending from the low court of facts. The reference to the *best interest of the child,* on which the law judge discourses and that requires a reinterpretation with regard to the action imposed by Civil Code art. 263, with special concern for the *ensemble* of values safeguarded by rules - not necessarily coincident with *favor Veritatis* - is to be considered central, once acknowledged that the family topic needs a comparison of the interests in question to be carried on, so as to choose which of these may prevail in the practical case. In some situations the comparative evaluation of interests is made directly by law, as occurs with the disclaiming prohibition consequent to heterosexual insemination; in other situations such as the one we are examining, the evaluation is in charge of the judge, who is obliged to verify all the circumstances of each specific case. The deriving balancing of the single situations is due to a comparative judgment based on the good sense principle[121] between the interests connected to the verification of status truth and the consequences that may originated by this scrutiny with regard to the juridical position of the minor. We may therefore deduce -and the reflection directly affects the range of

[121] On the topic, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, *passim*; C. Lavagna, *Ragionevolezza e legittimità costituzionale*, in *Studi in memoria di Carlo Esposito*, III, Padova, 1973, page 1573 onwards; J. Luther, *Ragionevolezza (delle leggi)*, in *Dig. disc. pubb.*, XII, Torino, 1997, page 341 onwards; L. Paladin, *Ragionevolezza (principio di)*, in *Enc. dir., Agg.*, Milano, 1997, page 902 onwards; più di recente, G. Scaccia, *Gli "strumenti" della ragionevolezza nel giudizio costituzionale*, Milano, 2000, *passim*; A. Morrone, *Il custode della ragionevolezza*, Milano, 2001, *passim*; M. La Torre, *Introduzione*, in *La ragionevolezza nel diritto*, by M. La Torre and A. Spadaro, Torino, 2002, page 3; L. D'Andrea, *Il principio di ragionevolezza come principio architettonico del sistema*, *ibidem*, page 231; F. Galgano, *La forza del numero e la legge della ragione. Storia del principio di maggioranza*, Bologna, 2007, *passim*; S. Patti, *La ragionevolezza nel diritto civile*, Napoli, 2012, *passim*; R. Perchinunno, *La ragionevolezza e la forza del numero (a proposito di un recente volume di Nicola Lipari)*, in *Studi in onore di G. Iudica*, Milano, 2014, page 1067 onwards; L. Balestra, *A proposito delle categorie del diritto civile*, in *Riv. trim. dir. proc. civ.*, 2015, page, 25 ss.; F. D. Busnelli, *Quale futuro per le categorie del diritto civile?*, in *Riv. dir. civ.*, 2015, 1, page 1 onwards; E. Minervini, *Le categorie del diritto civile (a proposito di un libro recente)*, in *Rass. dir. civ.*, 2015, page 712 onwards. Standing to G. Zagrebelsky, *Il giudice delle leggi artefice del diritto*, Napoli, 2007, page 48, on the basis of the reasonableness principle, «*l'altro lato* del diritto, il lato materiale, fa la sua trionfale ricomparsa».

sentence no 19599/2016, that the *best interest of the child* may legitimate in our law system a parenthood bond, even though only social and not biological, without hindering public order meant in its over national ordinary usage.

As known, jurisprudence leanings deriving from sentence no 19599/2016, have embraced the principal lines of discussion, with effects not only in relation to cases revealing similar contents, but also with regard to aspects intersecting - even though not overlapping - those examined by the Supreme Court in the above mentioned sentence. One of the most recent *ratio decidendi* implementations is to be found in Civil Cassation ordinance no 14007/2018[122]. The incident giving rise to the decision derives from the request by two women (a French one and an Italian-French one) of registration of two sentences delivered by the French judge, on the basis of which each of the two women adopted the biological child of the other one. We must start by saying that the two women had had a stable and uninterrupted relationship since the eighties of the past century, that had given rise first to *a solidarity civil agreement* stipulated at the French Consulate in Naples, such as envisaged by French law, and then to a marriage in France in 2013, in compliance to French law no 404/2013 (the marriage was registered in the civil status book, as a consequence of the decision of the Court of Appeal for Naples, considered definitive in the sentence object of our survey). More exactly both women had given birth to a child thanks to artificial insemination and the respective minor children have been adopted by the two women married in France, standing to the French Law full adoption principle, on the basis of sentences delivered by the civil judge from the other side of the Alps. Once the request of registration of the sentences had been submitted to the Italian civil status public official, it had been rejected because of an alleged contrast with public order. This denial has therefore been contested with a request to the Court of Appeal for Naples, which with an ordinance dated march 30th 2016, and thus before sentence no 19599/2016, accepting the international public order concept, ordered instead that the act be registered by the civil status public official, having found no contrast with public order. The decision, contested in Court of Appeal, has given way to an ordinance that demands a close hermeneutic examination because of the renewed setting of the public order principle, once more placing it in an over

[122] Cass., 31 may 2018, no 14007, in *www.centrostudilivatino.it*, 6 giugno 2018, with a note by S. Nitoglia, *La Cassazione ancora a favore della stepchild adoptiono* On the topic, see also F. Carimini, *La* stepchild adoption: *una scelta "consapevole" tra esercizio delle libertà ed assunzione di responsabilità*, in *Dir. succ. fam.*, 2018, 1, page 41 onwards.

national dimension, recalling *tous cours* the arguments expressed in Cassation sentence no 19599/2016. Enhancing the minor's major interest principle, there's a limit to the operability of the public order clause, which in the path drawn by decision of Court no 272/2017, must confront itself with the peculiarities of practical cases. So, in the sequence of events we are here examining, the causal judgment between the foreign act and over national public order law, filtered by *the best interest of the child*, leads to the conclusion that the minor's right to live in a stable manner in a balanced domestic environment and to be brought up and assisted during his/her growth, with equilibrium and respect for his/her fundamental rights, works like an integrative factor *in mitius* of the public order conception itself. Therefore, for the judges there are no contrast outlines between public order and the registration in Italian civil status books of an adoption of a minor by two same sex persons pronounced abroad.

4. *How can a cliff dike the sea?*

The considerations just made reveal an unsettling phase of inter-reign regulation imbued with plain legality, in which the decision depends on the perception of judges, whose role is that to implement a law the contents of which sometimes may not be satisfying and of the implementation of which on certain occasions cannot be applied, thus making the judge himself an interpreter and a creator of a rule subtracted to any sort of assessment, though anchored to law system values[123]. Meanwhile, until the United Sections deliver a decision, the field experience demonstrates how -as already forewarned in a recent work on the topic[124], some local Municipal Councils are proceeding *motu proprio* with the registration of birth certificates of minors born of a surrogated maternity abroad in compliance with *lex loci*. The framework is therefore bound to become more complicated and several destinies

[123] Lastly, P. Grossi, *Dalle "clausole" ai "principii" a proposito dell'interpretazione come invenzione*, cit., page 11 onwards. On the topic, R. Guastini, *Teoria e dogmatica delle fonti*, in *Tratt. dir. civ. comm.* Cicu, Messineo and Mengoni, Milano, 1998, page 105, who states that «in presenza di una lacuna, il giudice si sostituisce al legislatore creando egli stesso una norma nuova idonea a risolvere la controversia»; P. G. Monateri, *Interpretazione del diritto*, in *Dig. disc. priv. sez. civ.*, X, Torino, 2008, page 57, standing to whom «tutto ciò non è né sovversivo, né nihilista né altro: significa solo avere maggiore coscienza del proprio ruolo all'interno del *legal process*, e di saper anche che il processo del diritto non è in realtà dominato da nessuna singola componente, ma è il risultato di una congerie di modelli culturali, spesso anche taciti, che trascendono il controllo esplicito di ciascuno di noi».

[124] R. Picaro, quotation from a work, *passim*.

will depend on the results of the decisions of the superior judges.

The scenery just described certainly isn't encouraging, but it's possible to change it on the basis of a foreseeing recent doctrine[125] formulated within the reasoning school having accepted the theory of interpretation as the main horizon of field in-depth analysis of current Italian civil academics[126]. The way to escape from the post- modern pessimistic vision, also on the basis of the *Drittwirkung*[127] hermeneutic perspective, is offered by the good sense control forms, with regard to tutelage and support of the person, as a value placed at the top of the regulation sources hierarchy[128]. Yet this reasoning abandons the variety of meanings, transforming itself into a hermeneutic criterion, a value judgment, a historic-relative actualization instrument - but uniform and based on fundamental values[129] - of the regulation context, that adapts to the juridical system global reasoning, that is present in the argument demonstration of the motivation of the judicial act, backing out of any type of attempt of uncontrolled abuse of the rule by the law interpreter[130]. Thus, in the

[125] Sul tema G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, *passim.*

[126] Cfr. P. Perlingieri, *Appunti di "Teoria dell'interpretazione"*, Camerino, 1970, page 53 onwards; Id., *Le obbligazioni tra vecchi e nuovi dogmi*, Napoli, 1990, page 38 onwards; Id., *Complessità e unitarietà dell'ordinamento giuridico vigente*, in *Rass. dir. civ.*, 2005, page 203 onwards; Id., *Formazione dei giudici. Scuola superiore della magistratura*, in *Giust. proc. civ.*, 2007, page 313; Id., *Tendenze e metodi della civilistica italiana*, Napoli, 1979, now in Id., *Scuole tendenze e metodi. Problemi di diritto civile*, Napoli, 1989, page 92 onwards; Id., *Interpretazione assiologica e diritto civile*, in *Corti salernitane*, 2013, page 478 onwards. See also the various surveys carried out in the specific context by P. Perlingieri, *Mercato, solidarietà e diritti umani*, in *Rass. dir. civ.*, 1995, page 84 onwards, now in Id., *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile*, Napoli, 2003, page 238 ss.; Id., *Equilibrio normativo e principio di proporzionalità nei contratti*, in *Rass. dir. civ.*, 2001, page 335 onwards, now in Id., *Il diritto dei contratti fra persona e mercato*, above, page 441 onwards; Id., *Valori normativi e loro gerarchia. Una precisazione dovuta a Natalino Irti*, in *Rass. dir. civ.*, 1999, page 787 onwards, now in Id., *L'ordinamento vigente e i suoi valori. Problemi del diritto civile*, above, page 327 onwards; Id., *La forma del licenziamento individuale come «garanzia»*, in *Rass. dir. civ.*, 1986, page 1069 onwards, now in Id., *Il diritto dei contratti fra persona e mercato*, cit., p. 609 ss.

[127] G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, page 97 onwards.

[128] On which, take notice of the lecture by P. Perlingieri, *Norme costituzionali e rapporti di diritto civile*, in Id., *Scuole, tendenze e metodi. Problemi del diritto civile*, above, page 111 onwards.

[129] G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, page 23.

[130] G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, page 36 onwards; P. Perlingieri, *Conclusioni della prima sessione*, in Various Authors, *Fonti, metodo e interpretazione*., above, page 197, promptly stating «diventa davvero arduo sostenere che buona fede, diligenza…..-e così tutte le clausole generali che caratterizzano il sistema- possono essere interpretate come si fosse ancora nella fase pre-costituzionale utilizzando valori e principi che in quel momento storico lo identificavano»; V. Scalisi, *Fonti-teoria-metodo. Alla ricerca della «regola giuridica» nell'epoca della postmodernità*, above, page 50, standing to whom «richiamarsi ai valori significa cogliere in un tempo dato e in uno spazio definito le necessità assiologico-reali della vita, le c.d. necessità vitali, di una comunità o aggregazione di consociati, quali emergenti ai diversi livelli (organico, animato o più specificamente spirituale) e quindi verificare se e in che misura tali necessità vitali (esigenze, bisogni, interessi), valutate nelle loro connessioni di qualificazione (oggettive e soggettive), siano sostenute da corrispondenti comportamenti collettivi e sociali oggettivamente conoscibili e materialmente osservabili e come tali univocamente orientati alla loro realizzazione. Il concorso di entrambi gli anzidetti momenti (la necessità di vita e l'azione che vale a

current family system, while loosing rule calculation possibilities whereas the rule isn't expression of principles, decision predictability is imposed as control result, based on good sense, fundamental values of a community in its historic development, such as the law interpreter indicates in the motivations[131]. It's not a matter of knowing in advance the judicial solution as application of a method considered infallible because of a postulated law certainty[132], but rather a question of *pre-expecting* on the basis of a good sense criterion conformed to specific cases, as permeated by regulation values imposed by hierarchy and constantly balanced in a unitary and systematic process[133] able to conform to historic becoming, in the respect of the insurmountable limit of human dignity[134]. In the perspective of the topic of this survey, a reconstruction that doesn't miss the minors' personality tutelage objective, notwithstanding the continuous social changes of the family composition in both its vertical and horizontal dimensions, in between legislative passiveness and temporary interpretations, reveals to be extremely important, once assumed that the *best interest of the minor* principle is still diffusely much proclaimed

soddisfarla) è ciò che, nel quadro di una concezione oggettiva, di tipo storico-reale, definisce il *valore*, ma è anche ciò che, riferito alle necessità di vita dei consociati e alle loro azioni volte a soddisfarle, vale a costituire l'ordine dei *valori* di una determinata comunità e quindi il necessario indice di giuridicità, o dover essere giuridico, da assumere a essenziale criterio di valutazione giuridica».

[131] NO Bobbio, *La certezza del diritto è un mito,* in *Riv. int. fil. dir*., 1965, p. 150; Id., *Il positivismo giuridico*, Bologna, 1979, p. 74.

[132] As stated by P. Perlingieri, *Applicazione e controllo nell'interpretazione giuridica*, in *Riv. dir. civ.*, 2010, 3, page 322 onwards, where he says that «l'attuale sistema ordinamentale, tuttavia, nonostante la pluralità delle fonti che lo caratterizza, si prospetta, non già quale somma di ordinamenti separati e distinti sia pure coordinati, ma unitario, proprio in funzione applicativa e di controllo. La normativa comunitaria e quella di origine internazionale conformano e integrano il sistema ordinamentale della Repubblica in una unità indissolubile» and by V. Scalisi, *Interpretazione e teoria delle fonti nel diritto privato europeo*, in *Riv. dir. civ.*, 2009, 4, page 413 onwards, now in Id., *Fonti-teoria-metodo. Alla ricerca della «regola giuridica» nell'epoca della postmodernità,* above, page 433 onwards, for whom a functionally oriented hermeneutics vision of justice must reclaim the auxiological primacy with regard to law source, also of ultimate rank, in the perspective of an integral concept of issue of legality; Id., *Dalla scuola di Messina un contributo per l'Europa*, in *Riv. dir. civ.*, 2012, 1, page 1 onwards, now in Id., *Fonti, teoria, metodo*, above, page 259 onwards.

[133] «Sia perché i comandi codificati non sono mai in grado di tener dietro all'incessante divenire sociale, economico e tecnico, sia perché fattispecie apparentemente chiarissime vanno riempite continuamente, nel momento applicativo, di funzioni, principi e valori normativi al fine di soddisfare anche l'essenziale fattualità del diritto, la quale si concretizza non soltanto nella inseparabilità tra fatto e singola disposizione, ma tra fatto e diritto», this way, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, page 37 and page 120 onwards.

[134] «Sia perché i comandi codificati non sono mai in grado di tener dietro all'incessante divenire sociale, economico e tecnico, sia perché fattispecie apparentemente chiarissime vanno riempite continuamente, nel momento applicativo, di funzioni, principi e valori normativi al fine di soddisfare anche l'essenziale fattualità del diritto, la quale si concretizza non soltanto nella inseparabilità tra fatto e singola disposizione, ma tra fatto e diritto», in this sense, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile*, above, page 37 and page 120 onwards.

rather than really granted in practical cases.

Abstract: Gli accordi per la surrogazione di maternità stipulati da cittadini italiani in Stati nei quali il ricorso a tale tecnica procreativa risulta lecita aprono al problema della continuità transfrontaliera dello status dei nati mediante gestazione per altri. In un contesto di perdurante atrofia legislativa, un ruolo significativo è svolto dal formante giurisprudenziale che, tuttavia, è esposto al rischio di mancanza di risposte sistematiche ed unitarie. Il timore che il declino della fattispecie normativa espressiva di regole comporti il venir meno della calcolabilità della decisione è procurato dalla convinzione che la certezza del diritto risieda nella ripetitività delle soluzioni. Persuade di più, invece, l'idea che la giustizia del caso concreto sia assicurata dalla controllabilità della decisione alla luce dei valori caratterizzanti il sistema ordinamentale e, in particolare, del solidarismo e della prospettiva di promozione della persona, in un bilanciamento che segue un giudizio comparativo votato al principio di ragionevolezza.

Abstract: Maternity subrogation agreements stipulated by Italian citizens in Countries where the recourse to such a procreative technique is legal lead to the problem of the cross-border continuity of the status of children born thanks to alternative gestationo In a context of enduring legislative atrophy, a significant role is carried out by jurisprudence, though exposed to risks of lack of systematic and unitary answers. The fear that the decline of this normative case, as far as specific rules are concerned, may entail the impossibility of decision evaluation, is due to the conviction that the certainty of right lies in the repetitiveness of solutions. On the other hand, the idea that the justice of a concrete case may be granted by the possibility to control a decision on the basis of the values that portray law, is nevertheless more appealing, with particular regard for solidarity and for the enhancing of the person, in a balancing setting founded on a comparative judgement aimed at the principle of good sense.

Parole chiave: Maternità surrogata – Principio di ordine pubblico – Il superiore interesse del minore.

Key words: Maternity subrogation - Principle of public order – The best interest of the

child.