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Breaking out of the Regulatory Delusion. The Ban to Surrogacy and the Foundations of European Constitutionalism

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Abstract:
The transnational market of reproductive services puts a strain on western European States that refuse to acknowledge surrogacy contracts on public policy grounds. The cases decided so far rise three questions. First, under what circumstances foreign surrogacy judgements should be recognised? Second, what would be the constitutional repercussions of the recognition of these judgements? Third, how would it be like a legislation at once effective and respectful of fundamental rights of all parties involved? This Article analyses these questions and how they relate to each other. Based on a transaction-cost economic framework an argument is made that neither top-down, nor market-based regulatory solutions overcome the constitutional arguments that uphold the ban to surrogacy. An alternative approach to legal reform is considered, grounded on IPL and substantive domestic measures.

Keywords: Transnational market for reproductive services, Gestational surrogacy contracts, transaction-cost economics, European Constitutionalism

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1 Introduction: The conquest of ubiquity by technology and the transformations of parenthood

«Nos Beaux-Arts ont été institués, et leurs types comme leur usages fixés, dans un temps bien distinct du nôtre, par des hommes dont le pouvoir d'action sur les choses était insignifiant auprès de celui que nous possédons». Dating back to 1928, *La conquête de l'ubiquité* is a prescient fragment by Paul Valéry, dreaming of a future in which the enjoyment of the arts will be freed from the ties to a place, a time, a programme set by someone else: «Je ne sais si jamais philosophe a rêvé d'une société pour la distribution de Réalité Sensible à domicile».[1] Ninety years on, the ubiquity conquered by technology and markets has changed for good the ways we live and think, communicate and desire; the forms and contents of politics; the means of material and symbolic (re)production. This change could not leave the law unscathed, and it did not, starting from its very inception, the institutions of kinship and family, traded on the transnational market of reproductive services as part of the package deal offered to the private consumption of human fertility. The foundations of parentage do belong after all to a time in which the grip of technology on life was «insignificant in comparison with ours».

In what follows this transformation is seen through the lens of the dilemma faced by the Courts in western European States that outlaw gestational surrogacy agreements on public policy grounds, whenever they are requested to acknowledge the familial status assigned to a child according to a foreign law that recognises and enforces these transactions. The cases decided so far rise three questions.

First, under what circumstances, and subject to which restrictions, if any, a foreign birth certificate should be recognised by the law, in spite of the existence of a national prohibition? Unconditional deference to the commands of the internal *ordre public* would surely represent a heavy burden for some at least of the subjects involved – maybe too heavy a burden for the most vulnerable of them. But an equally unreserved acquiescence to the *fait accompli* might be at odds with basic understandings of the inalienability of the human body and parental status under the internal law. Interestingly, several Courts have addressed these issues, coming to different conclusions.[2] This I will call the international private law (IPL) question.

This raises a second question. What would be the impact for the internal law of the full-blown recognition of foreign judgements, true to the terms of surrogacy agreements? A legal system that allows its well-off citizens to avail themselves of permissive regulations abroad, while banning or even criminalising domestic gestational surrogacy agreements at home, would most likely be deemed contradictory and unfair – but ditto of a system

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that allows lower-class women to sell their reproductive capacity, while forbidding the trade in bone marrow and blood, or that vetoes private adoption and child-trafficking, but permits would-be parents to commission a child to third parties.[3] This is the constitutional question.

Which brings us to a third issue. Suppose that legislatures in Germany, France, or Italy decide that prohibitionism has been ineffective and unfair: what would be like a piece of legislation at once effective and deferent to fundamental rights? Top-down regulation based on altruism and non-discriminatory access looks like the obvious response to objections grounded on the infringements of human rights of surrogate women and children, but empirical evidence proved it vulnerable to the lack of economic incentives and burocratic encroachment on intended parents' privacy. Supporters of market regulation, on their part, boast the superiority of the price system, but – again – there is evidence that effective contract enforcement mechanisms would come at the expense of deeply felt intuitions concerning the inalienability of human body, equal access to health care and discrimination against women.[4] I will call this issue the regulatory question.

This Article analyses these three questions and how they relate to each other. The argument goes as follows: after a brief account of the rise of the market for gestational surrogacy services and an explanation of the object of the agreements (Section 2), Section 3 deals with the IPL question, i. e. the political issues at stake in the decision to waive or to apply the public policy exception against foreign surrogacy judgements. Sections 4 to 5 discuss the constitutional question, namely, the strain put by the recognition of foreign surrogacy judgements and the connection between prohibitionist and permissive legislations within the transnational market for surrogacy services. In sub-Sections 5.1 and 5.2 the regulatory question is examined in the light of extant top-down and market allocation schemes. Based on a transaction-cost economics framework an argument is made that neither approach overcomes the constitutional arguments that uphold the ban to surrogacy. In the last section, an alternative approach to legal reform is briefly considered, grounded on private international law and supplemented by substantive domestic measures aimed at risk-reduction and anti-discrimination.

2 What surrogacy contracts are (and what they are not) about

The transnational market of gestational surrogacy services stands at the crossroad of two formidable innovations in assisted reproductive technologies (ART) and information and communication technologies (ICT). The first innovation has reshaped the imagery of parenthood, by shifting the accent from culture and custom to autonomy and freedom of contract. By the late 1980s in the USA the popularization of in vitro fertilization and pre-embryo transplant techniques provided for the breaking up and reallocation of the factors of reproduction among customers, gamete donors, surrogate mothers, middlemen and professionals, against the backdrop of a pervasive medicalisation of procreation and pregnancy.[5] The subsequent, spectacular slump in transaction costs – psychological, social, racial barriers, moral scruples rooted in religion and custom, uncertainty about the legal status of the offspring[6] – paved the way to the meeting of a demand of «healthy, white infants»[7] expressed by well-off, middle-class heterosexual white couples, with an offer largely made up by destitute women from ethnic minorities and socially disadvantaged groups.[8] As the public outcry kindled by the *Baby M* case gradually assuaged,[9] a new market was on the rise. In the race to State regulation that followed,[10] the most cost-effective solution came from a decision of the California Supreme Court, recasting the rule of recognition of motherhood from the woman who gives birth to the child to the intended mother, the «true» mother pursuant the surrogacy agreement.[11] At first glance, this rationale is hardly persuasive. The intention of becoming a parent cannot make parentage 'true' more than it can make it 'fake', as it is not an ontological marker for the essence of parenthood, but a normative criterion applied by the law in order to assign parental status. Even in a system that bestows a significant role on consent in adoption proceedings,[12] the grounding of parenthood in intention as a general matter would be an overstatement, in the light of the considerable amount of public regulation aimed at safeguarding the interests of both the children and the (adoptive and biological) parents.[13] But the blatant confusion between facts and norms went unnoticed, or maybe it just suited too well the relentless commitment of market societies to shift the frontier between status and contract, to the accretion of the latter.[14]

The second innovation has disrupted the economic geography of the market for surrogacy. Internet is the infrastructure used by the industry of reproductive services in order to channel a demand coming from affluent societies towards countries where conditions of economic destitution and gender inequality grant the female *Ur-proletariat* necessary to take down the costs of reproductive labour.[15] Thousands of surrogacy contracts are signed and performed each year, under legislations that leverage on the opportunities of international division of labour offered by the convergence of communication technology, in vitro fertilization, pre-embryo transplant.

It is a rogue market, though, as portrayed by a 2017 report by the French *Comité Consultatif National d'Ethique*[16]:

> Les gestatrices sont, dans leur grande majorité, des femmes des pays pauvres et des pays intermédiaires qui connaissent de fortes disparités économiques: Asie du Sud-Est, Ukraine, Russie et, dans une moindre mesure, Mexique, Grèce. Ce sont des femmes issues de groupes défavorisés qui deviennent gestatrices, si l'on excepte le cas américain qui constitue un modèle en soi, avec toutefois une grande disparité entre les États. Les violences observées sont d'ordre économique, juridique, médical et psychique.

The outcome of technical innovation is known as commercial cross-border gestational surrogacy, distinguished by most European prohibitionist jurisdictions from both the case (i) where a genetic connection between the intended parents and the child is totally missing,[17] and (ii) where the intended parent is a woman, partner of the woman who gives birth to the child.[18]

Commercial gestational surrogacy is indeed unlike any other form of ART,[19] for women accept to temporarily give up their rights to personal intimacy, autonomy, procreation and parentage, in order to generate a child whose familial status is set up by contract before the inception of the IVF procedure. What these contracts are about is therefore not the 'rental' of wombs, as the repulsive, misogynistic *vulgata* has it, nor the trading of children, in spite of the clauses that bind the surrogate to «deliver» the child,[20] at least as long as parentage is based on genetic descent from one or both the would-be parents. Surrogacy contracts are not even primarily about the obligation to get pregnant, carry the fetus to full term in accordance with exacting behavioural stipulations, and relinquish parental rights in exchange for compensation. For all these obligations, as material as they are to the complex duty of performance weighing on the surrogate, are instrumental to the institution of a legally recognised subject – a *persona*, in the legal technical sense of the Latin word[21] – before conception, and to the placement of that still purely fictional human being within a system of genealogy and kinship at least in part conflicting with the system of genealogy and kinship assigned to the child by the law of the State where the intended parents live and whose citizenship they own.

This operation is not entirely original. Modern codifications still retain the remnants of the fictions coined by Medieval jurists in order to allow testators to manage the transmission of the estate beyond the limits of human existence, through the mechanism of substitutions.[22] At the start of this century, a masterly analysis of a French case found a retrospective application of this very same technique in the decision of the *Court de Cassation* to set aside the proscription «qui subordonne l'autonomie du sujet de droit aux conditions naturelles de sa naissance»[23] in order to grant compensation to a child, born with severe disabilities after the doctors had negligently omitted to diagnose the rubella infection suffered by his mother at an early stage of pregnancy.[24] Compared to the baffling audacity of the *Perruche* judgement, though, the reversal of the time-sequence between a human being and her or his legal *persona* obtained by surrogacy agreements seems almost trivial. For if the *persona* of Nicolas Perruche may be said in a sense to have authored herself, with a help from the Court,[25] the *persona* of a child born of a surrogate mother is brought to legal existence by the parties to a contract, and «established» by a judgement,[26] leaving the order of generations untouched.

Unwinding this thread of reasoning, the difference between the act of institution as an heir and the act of institution as a family child before conception morphs into a «merely technical issue» of private law, obscuring the biopolitical issues at stake, conventionally recapped under the public policy exception.[27] These issues touch upon the conflicts between the modes through which the ties of filiation are formed and the political constitution, and include, *i.a.*, the legitimacy of a practice that originates outside and against the internal law and the standing of adoption as an instrument of social policy; what amounts and does not amount to discrimination in the access to reproductive technologies; the inalienability of the human body and familial status and the limits of the governmental encroachment upon individual privacy.

3 The private international law question: The political issues at stake in the recognition of foreign surrogacy judgements

The biopolitical dimension of the IPL question stems from the contradiction between the unlimited promises of technology and the limits of the world as it is mirrored in national laws and institutions. In given circumstances, prohibitionist countries may be required to acknowledge the legal effects of transactions carried out in more permissive places. This state of affairs generally implies (i) the conclusion and performance of a gestational surrogacy agreement according to a foreign law; (ii) a relationship of genetic descent between the child and at least one of the intended parents, if they are a couple; (iii) a legitimate and faithful certificate of birth, and (iv) an order issued by the competent judicial authority of the country where the agreement has been performed. Whenever these requirements are met, the usual private international law mechanisms of recognition apply, and ultimately allow the intended parents to partially recover the effects of a contract void under their national law. With the endorsement of the European Court of Human Rights,[28] this solution prodded several prohibitionist jurisdictions – in France,[29] Spain,[30] Italy,[31] Austria,[32] and Switzerland[33] – to change their previous

orientation and authorise the recording in the national register of births of a foreign certificate, with effect limited to the man, who gave his semen for the IVF procedure and has legally recognised the child. Meanwhile, a different judicial pattern came to the fore – in the United Kingdom,[34] Germany,[35] and Italy[36] – favourable to the full-fledged recognition of foreign parental orders, true to the terms of the birth certificate and the surrogacy agreement, in the name of the 'best interest of the child'.

This disagreement has been recently embodied by two national Courts at the highest level of their respective jurisdictions, acting on comparable facts but very different understandings of the public policy exception. In September 2018, the German *Bundesgerichtshof* reversed the judgement of the Appeal Court of Braunschweig, denying recognition to a parental order issued by a District Court of the State of Colorado, where two German spouses were acknowledged as parents of two siblings, born of a woman in execution of a surrogacy agreement.[37] A few months later, in May 2019, the joint sessions of the Italian *Corte di Cassazione* granted the appeal brought against an injunction issued by the Appeal Court of Trento, which had ordered the registration of a judgement by the Superior Court of Justice of the State of Ontario, recognising as the father of two siblings born of a surrogate mother the civil partner of the man who gave his semen for the IVF procedure.[38]

Contrary to the expectations conveyed by the somewhat trite opposition between libertarian and communitarian values, neither judgement is based on some comprehensive, mutually exclusive conception of the Good, the gist of the disagreement being at once the *trait d'union* between them. Indeed, both Courts consider paramount to the recognition of a foreign decision the test of international *ordre public*, seen as a wider, more generous concept than the internal *ordre public*, driven by the convergence of the national constitutional traditions towards common standards of protection of fundamental rights, with a strong emphasis on the European Convention of Human Rights.[39] Following that test, national judges are called on to ascertain whether the application of the foreign law in the case at hand would be in such a stark contradiction to the idea of justice immanent to the basic principles of the internal law to usher intolerable results.[40] But whereas the German Court grounded its decision on the absolute priority given to the consideration of «der Schutz des Kindeswohls [...] als Individualschutz des Kindes» over the *ex ante* appreciation of the right of women and children not to be treated as an object of commercial transactions,[41] the Italian Court took on a more nuanced perspective. The recognition of a foreign judgement, ordering the registration of the birth certificate of a child born in execution of a gestational surrogacy agreement, shall be accepted in so far as the man designated in the certificate as the intended father is the child's biological father, whereas it shall be refused towards his spouse, provided that the legal system avails itself of suitable means, such as simplified adoption procedures,[42] in order to establish a parental relationship.[43]

Notably, this judgement was built on a decision of the Italian Constitutional Court (November 22, 2017, n. 272), concerning a claim brought against art. 263, It. Civil Code, by the Tribunal of Milan in a case of transnational surrogacy, on the assumption that it does not limit the challenge brought against the acknowledgement of a child for lack of truthfulness to the circumstance that the action meets the interests of the child. The Court turned down the claim, arguing that neither interest can assert an absolute primacy over the other. Instead, the judge should take into account «much more complex variables» than the «true or false» alternative, including the lenght of the relationship between the commissioning parents and the child, the modalities of conception, and the availability of other instruments, such as the adoption, that provide adequate protection for the child.[44]

In the same vein, the French *Cassation*[45] ruled at joint sessions that the partner of the biological father of a child born by a surrogate mother must resort to the adoption procedure, emphasizing, in a series of judgements given by its first Chamber, the meaning of adoption as the institution to which the protection of the child is entrusted.[46] This view has ultimately received the endorsement of the European Court of Human Rights. Answering to a question raised by the French judge of last instance pursuant to Prot. n. 16, sect. 1–2, ECHR, the Court agreed to defer to the States, if not the *an*, the *quomodo* of the establishment of the parental relationship between the child and the spouse of the biological father[47]:

> Depending on the circumstances of each case the child's best interest can be served in a suitable manner by other means than the registration of the birth certificate, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details.

In the judgement that followed[48] the *Assemblée Plenière* was requested by the claimants to pronounce on the issue whether a parental relationship deriving from the execution of surrogacy agreements, absent a relationship of genetic descent, can be established through the «possession d'état» (art. 311–1 Fr. Civil Code),[49] certified by a decision of a trial judge (or by a notary act). In rejecting that claim, the judgement highlighted the role of adoption in the recognition of foreign surrogacy judgements[50]:

> il convient de privilégier tout mode d'établissement de la filiation permettant au juge de contrôler notamment la validité de l'acte ou du jugement d'état civil étranger au regard de la loi du lieu de son établissement, et d'examiner les circonstances particulières dans lesquelles se trouve l'enfant.

At the same time, the Court emphasized the circumstances of the case – i. e. the exceptional lenght of the dispute and the initiative of the adoption procedure being reserved to the parents – in order to *trancher en équité* the issue and finally draw the curtain over the fifteen years battle between the French State and the Mennesson family[51]:

> Il résulte de ce qui précède, qu'en l'espèce, s'agissant d'un contentieux qui perdure depuis plus de quinze ans, en l'absence d'autre voie permettant de reconnaître la filiation dans des conditions qui ne porteraient pas une atteinte disproportionnée au droit au respect de la vie privée de Mmes A... et B... X... consacré par l'article 8 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et alors qu'il y a lieu de mettre fin à cette atteinte, la transcription sur les registres de l'état civil de Nantes des actes de naissance établis à l'étranger de A... et B... X... ne saurait être annulée.

To many observers the line between full-blown recognition of surrogacy judgements and partial recognition-plus-adoption seems just another sophisticated, painstaking, and ultimately pointless distinction. For why on earth should we bother to draw that line, if the results are essentially the same? The answer to this question depends on the constitutional dimension of the public policy exception. For if the international public order test means that a foreign decision is subject to the exception whenever the Court mantains that the legislature would be prevented by the Constitution from passing a statute close to that on which the foreign decision was based, then at the heart of the matter lies a question of constitutional legitimacy. According to the German judge, a law declaring that surrogacy contracts are legally binding would not, in given circumstances, be inconsistent with the values of European constitutionalism, whereas for the Italian and French judges it would.

In my opinion the latter are probably right on the constitutional issue. There should be no question, of course, of denying *a priori* any legal status to a relationship based on care and affection, whenever it is established by a judicial authority in compliance with the law of a foreign country. For however elusive the 'best interest' formula may be,[52] strong substantial reasons are surely needed in order to waive the general rules of mutual recognition, and close the gate of the national *ordre public* to an official document issued by a foreign judge. Even so, and irrespective of the safeguard clause pursuant to art. 8, sect. 2, ECHR, it is fair to acknowledge that the best interest of the child expresses a general directive, not yet the rule of the case.[53]

First, the reader will have probably noticed the outstanding *non sequitur* between the premise – 'the best interest of the children must be safeguarded' – and the conclusion, that the appropriate consideration of the welfare of the child commands an absolute, unconditional, all-or-nothing priority in all questions concerning the status. From the acknowledgement that children have a prominent interest in keeping the status assigned to them by a foreign judgement,[54] it simply does not follow that that judgement should be given full recognition.

Similarly, from the fact that most contemporary legal systems recognize legal parentage outside of genetic descent and the heterosexual family,[55] it does not follow that any mode of establishment of parentage is legitimate, lest the interest of the child not be diminished, *a fortiori* if it originates from the elusion of national laws, *maxime* if these laws enact fundamental constitutional principles.[56] The dutiful consideration of the intricate matrix of the international public order test surely commands a close and thorough examination before jumping to the conclusion that the full-fledged recognition of surrogacy judgements is imposed, or even simply allowed by the law. The answer to that question may therefore be addressed by developing the criteria for the identification of the interests that may, under certain conditions, justify the raising of the public policy exception.

A principle of response can be worked out by looking at the developments of the international *ordre public*: compared to a not too distant past, in which it was associated to the sovereignty of the State, its contemporary *Leitbild* is marked by the emphasis on the supranational dimension of the law and the consequent, symmetrical reduction of the freedom of the States in drawing the boundaries of their sharing into a common legal culture – to the point where the choice of particularism in defence of idiosyncratic values seems no longer attainable. The exclusion of idiosyncratic values, however, does not return a suitable criterion whenever the interests that claim protection originate from a practice deemed illegal, and even criminalised by the receiving State,[57] in order to protect the fundamental rights of vulnerable individuals and groups.

One might ask whether the public order exception could not be justified by the imposition by contract of an almost absolute control over the life and intimacy of the woman and the fetus,[58] the transformation of the status of the unborn child into the object of a duty of performance,[59] the infringement of the prohibition on making the human body «as such» a source of financial gain (art. 3, Eur. Ch. Fund. Rights and art. 21 European Conv. of Human Rights and Biomedicine),[60] the elusion of the adoption, as «the one procedure that is truly geared towards [the interest of the child] and is based on detailed international and national regulation to that effect».[61] In which case it seems not inappropriate to give certainty and stability to the status assigned to the child to the greatest extent allowed by the safeguard of other constitutionally relevant interests, according to a principle of adequacy and proportionality of the means to the ends, *i. e.* the recognition of the foreign judgement shall be limited to the man who gave is semen for the IVF procedure, the path of adoption remaining open to his partner.

A broader acknowledgement would yield to the logic of the accomplished fact – in the words of the Swiss Federal Court – with the inescapable, hasty undermining of the prohibition against surrogacy in the national legal system.[62] Which is exactly what is going on in several European jurisdictions.

4 The constitutional question: Social justice in the age of the third globalization of law

The strain put by cross-border surrogacy on the costitutional identity of prohibitionist legal systems thrives on the tension between the emphasis of contemporary law on individual identity and the model of social justice developed in western Europe throughout the second half of the XX century. That model had a unique, utopian, and almost paradoxical trait: it tied together universalism and particularism, the claim of fundamental rights to unreserved recognition and their relevance to a community: «a place in the world that makes opinion significant and actions effective».[63] Immanent to this view is the idea that human beings have the same social dignity, insofar as they are part of a polity, and that the goal to preserve and enhance the equal dignity of fellow citizens may justify the imposition of limits on the power of individuals to engage the State in the enforcement of their private agreements.[64] The restrictions imposed by the Oviedo Convention on biomedicine and most western European legal systems on the appropriation of the human body and its functions, even when it takes the form of voluntary exchanges,[65] partake precisely of that idea, namely, that markets can be constrained in order to protect the individual and social rights of third parties as well as societal interests.

The argument made by the French Government before the ECtHR in the joint cases Mennesson and Labassée in order to square the State interference within the frame of the «protection de la santé et [...] des droits et libertés d'autrui» (art. 8, sect. 2, ECHR), neatly fits into this scheme.[66] By contrast, when the ECtHR, in order to justify the restriction of the States' margin of appreciation, replies that «un aspect essentiel de l'identité des individus est en jeu dès lors que l'on touche à la filiation»,[67] it is departing from that background. It surely is a partial departure, confined as it is to the protection of the child, with no reference to the commissioning parents as such. Even according to this narrow description, however, the retreat of the public policy exception before the privity of the relation between the child and the intended parents deeply resounds within the fragmented, post-ideological horizon of the «third globalization of law» canvassed by Duncan Kennedy.[68]

Reproductive tourism[69] offers indeed a striking first-hand experience of the way in which individual identities may deploy against collective identities the same abrasive potential that back in the day was wielded by the latter against the abstract legal subject of XIX century legal systems. Solicitude for the interest of the children in keeping their status and consideration for the privacy of the intended parents might well secure the connection to human rights required to overcome the inalienability of bodily privacy and parental status. As a consequence, the constitutional basis of the ban on surrogacy suddenly becomes «transparent» and seems to loose its relevance,[70] whereas an industry that for obvious reasons of deregulation thrives where human rights are trampled is given a humanitarian and anti-discriminatory façade.[71] So the argument goes: prohibitionism at home and rogue markets abroad won't deter infertile couples from seeking a progeny; in fact, the opposite may be true: restrictive policies at home rest on the 'safety valve' provided by cross-border commercial surrogacy.[72] The way forward would thus be

> not to fully prohibit certain ART and surrogacy, but rather regulate them in a way that ensure the protection of those in need of protection, particularly the surrogate mothers and the children. Any other approach, while protecting ethical views and the dignity of individuals at home, runs the risk that this is done at the expense of sacrificing the same values abroad by effectively condoning or even encouraging exploitation elsewhere – the ethical ussue is thus merely exported.[73]

This intervention would take the form of either market regulation (commercial gestational surrogacy services are permitted, provided that they comply with strict subjective and objective requirements) or hierarchical allocation (only non-commercial surrogacy services are allowed, within a system of burocratic allotment).

5 The regulatory question: A legal and economical analysis

The transnational industry for reproductive services is often portrayed as a phenomenon at the outer margin of the legal spectrum.[74] Empirical analysis shows a different picture. Cross border gestational surrogacy, in particular, is an intensely regulated practice, albeit by a puzzle of heterogeneous sources – private agreements,

statutory law, decisions of national and international courts, industry self-regulation – gradually coalescing, as it were, under the pressure of technology and markets.

This reading is consistent with a well known ECtHR judgement in an Austrian case, concerning the States' margin of appreciation in limiting the access to ART, where the Court *i.a.* observes[75]:

> there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and [...] in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents.

This passage vividly illustrates the quasi-omeostatic character of the relationship between public powers and private rights. The extent of the States' margin of appreciation on their citizens' reproductive choices is a function of the freedom of the latter to access more permissive legal regimes, while enjoying the mechanisms of parental recognition provided by the former. Should that freedom be restricted, also the State power would proportionally decrease.

One might read this doctrine in the light of the willingness of the Court to strike a political compromise between antithetical conceptions of human dignity: constraint versus empowerment. This interpretation surely is a strong argument in favour of a regulatory intervention aimed at contrasting the most hateful effects of reproductive tourism, while at the same time domestically upholding freedom of choice. The whole point would be to put an end to a «cynical» practice of «outsourcing ethical dilemmas»,[76] whereby permissive regimes work as a safety net for prohibitionist regimes and prohibitionism at home feeds rogue markets abroad.[77]

Sometimes the arguments underpinning the outsourcing thesis are sheer eristic. The claim that prohibitionism reinforces exploitation, for example, is empirically disproved by the fact that the opposition against the transnational surrogacy industry in many western countries has been pivotal in inducing the governments of India and Thailandia to review their previous free-market approach and give up commercial surrogacy.[78]

Besides factual considerations, the argument that prohibitionist States should set aside inalienability rules against the selling of reproductive capacities and parental status, unless they cannot effectively prevent their citizens from taking full advantage of more lenient regulations abroad, is a clear instance of *ignoratio elenchii*: the conclusion fails to address the relevant issue. One might just say as well that because States that prohibit children's labour commonly import from developing countries a lot of stuff which is actually manufactured by children, children's labour should be introduced in domestic legislation – in a respectable and sanitized fashion, of course – lest the «integrity» of national law is undermined.[79] Or that because a lot of wealthy nationals enjoy foreign tax heavens, progressive taxation should outright be abolished, lest the opportunity of dodging taxes «becomes a privilege for the wealthy»,[80] and so on. If none of such things happen, it is because our societies rightly or wrongly believe that there are reasons for prohibiting children's labour and stick by progressive taxation at home, which are not subverted by regulatory competition on taxation and social dumping abroad. In other words, the argument fails to consider that legal interpretation – particularly of mandatory rules – «hängt [...] in der Luft», as Wittgenstein famously taught, unless we connect it with the reasons that underpin those rules.[81] These reasons, in turn, are deeply interlaced with particular institutions, systems of values, social models – «forms of life»[82] – and cannot be simply explained away by pointing to different rules, without engaging in normative considerations concerning their intrinsic merit and relevance.

Yet, defenders of the outsourcing moral dilemmas argument do have a point, when they stress the discriminatory and unfair outcomes of this state of affairs. To the extent that the delocalization of regulatory powers may disguise an unfair allocation of culturally «tragic» resources,[83] such as the possibility to have children, the result of the convergence of permissive and prohibitionist legal orders in the normative infrastructure of cross border surrogacy markets is strikingly similar to the functioning of decentralized decision mechanisms for the allocation of «tragic goods» within a single legal system[84]: prohibitionist States *prima facie* delegate to permissive States the decision as to whom shall have children with ART, the choice is actually made by the system of prices, but the economic discrimination on the demand side is concealed.[85]

The unfair outcomes of prohibitionism could indeed justify a call for regulation if we were to acknowledge something as a fundamental right to genetic descent. The following sections argue that such a right, aside from its constitutional *pedigree*, could only be guaranteed at the price of injecting more discrimination in prohibitionist western European countries. For however hypocritical and contradictory the current compromise may seem to the upholders of regulatory solutions, it might be a necessary hypocrisy and a savvy contradiction.

5.1 The futility of vertical regulation

As commercial surrogacy is at odds with the inalienability of human body and parental status declared in several national Constitutions and supra-national Treaties, vertical regulation looks prima facie like the most suitable option, according to a model largely experimented in health care legislations across Europe. As the

examples of human blood and organs clearly show, however, different categories of 'donors' are affected to different extents by the decision to reject market allocation. If the prohibition to sell a kidney is explained *i.a.* by the will to prevent the seller from a choice she might one day regret, the same rationale surely does not apply to the selling of blood, the common foundation of the inalienability rule for kidneys and blood being rather the will to remove from the market the allocation of tragic goods, even at the cost of making worst off those who could improve their condition with a somewhat limited sacrifice.[86]

How far can this reasoning go if we replace blood and kidneys with pregnancies? We are to imagine a hierarchical governance structure, matching the supply and demand of surrogacy services on a purely altruistic and non-discriminatory basis: remuneration would not be allowed, only the restitution of 'reasonable expenses', and both women willing to act as surrogates and intending parents would be eligible according to a system of registers, merit rankings, licenses and authorization.[87] Surely intended parents could not exercise any control over the inception and development of gestations, included abortion,[88] nor be made certain to get the legal status of parents until after the birth, or later, lest fundamental rights to self-determination of the women acting as surrogate mother be violated.[89]

The history of regulatory schemes based on the ban on commercial surrogacy and *ex post facto* authorization of non-binding agreements empirically testifies that hierarchical allocation systems are vulnerable to the lack of both supply and demand.[90] There is no reason to think that arrangements based on *ex ante* authorization would fare better, as the troubled history of the Portuguese legislation suggests.[91] These regulation failures can be explained with a help from basic law and transaction costs economics. Giving birth to a child is indeed a much more burdensome performance than the gift of blood: absent economic incentives and enforcement mechanisms, emotional bonds and deep trust are needed, that hierarchical allocation cannot replace.[92] As a result, very few women would be willing to act as a surrogate and most intended parents would rather go abroad than submit to bureaucratic control and defer to a foreigner's discretion.

Interestingly, whereas vertical regulation does not work as a proxy for the trust required by truly altruistic relationships, authentic altruism makes legal regulation unnecessary, as the expectation in that case does not have the quality of an expectation interest, and should rather be considered as the complement of pure, not enforceable promises.[93] The super-ethical nature of truly altruistic surrogacy is thus what ultimately explains the existence of a market for gestational services. With minor adjustments, Smith's proverbial words on the role of personal interest in the division of social work still apply:[94] it is not from the benevolence of surrogates and middlemen that we expect our offspring, *etc*. The practice of surrogacy as we know it today simply would not exist without an industry, a market, and enforceable obligations.

It is no coincidence, thus, if many scholars, favorable to regulatory intervention, would rather opt for market regulation: are not regulated markets by definition superior to wild, unregulated markets?

5.2 The pointlessness of market regulation

Pace Monsieur de La Palisse, there are strong reasons to reject the call for a regulated market of surrogacy services, and all have to do with a concern for the idea of equality and social justice underpinning the European constitutional model. In order to measure that impact we might consider how an hypothetical regime would address the issue of remedies against breaches brought by surrogate mothers in such difficult and sensitive areas as behavioral stipulations and the right to abortion, based on empirical evidence.

Long-term contracts tipically require principals to strictly monitor their agents' performance, as violations are difficult to verify ex post. Surrogacy agreements are no exception. In developing countries these agency problems are sometimes addressed by confining the surrogates in compounds for the time of the pregnancy under strict medical and behavioural control,[95] as if in a post-colonial, privatised, cheap replica of Atwood's 'The Handmaid Tale'. However effective, maybe precisely because is effective, this strategy is clearly unsuitable the more the legal and social acceptance of surrogacy depends on self-determination and autonomy. As a somewhat second-best solution, therefore, the agreements in U.S.A. States that allow surrogacy are repleted with behavioural stipulations concerning nourishment and living habits, medical prescriptions and examinations, and so on, twenty-four hours a day, seven days a week, from before the inception to the end of pregnancy. As a rule, however, these clauses do not lay out liquidated damages provisions and even if they did, it is by no means obvious that a Court in the U.S. would be willing to enforce them.

Much harder questions are raised by abortion. Under the previous free-market approach, Indian surrogates had to reimburse their customers and the clinic of the expenses if they got the pregnancy interrupted, which made the eventuality of abortion rather speculative.[96] At the opposite, upper end of the market, surrogacy agreements in the United States usually allow both parties to ask for abortion at any time for any reason, although – again – they do not normally provide for liquidated compensatory damages.[97]

The reticence of contracts drafters when it comes to remedies is not unintended. Ironically, it follows from the very same ground that justifies the social acceptance of surrogacy: a concern for the constitutional right

to privacy, of which the right to procreate, the right to personal autonomy, the right to abortion are but single instances, protected by an inalienability rule:

> If the nature of the right is such that it must be recognized as fully inalienable or market-inalienable, then again, whatever else is happening, there is not an enforceable contract.[98]

The legal culture most committed to freedom of contract apparently struggles to come to terms with a mechanism that would push the threshold of bargained-for constraints on fundamental rights to the point of temporary self-enslavement. Hence the silence of State legislatures and the precarious status of behavioural stipulations, mandatory provisions concerning abortion, and even liquidated damages before the U.S. Courts.[99]

How would western European national legislatures poised for market regulation address these issues? The first option that comes to mind is a statutory scheme within a free-market framework.[100] In order to set up a credible alternative to rogue markets abroad, this piece of legislation would address the issue of remedies, generously allowing contract enforcement in the spirit of neo-liberal doctrines, and be recast as a part of a general reassessment of the distribution of 'tragic goods' in adherence to strict welfare-economics allocative doctrines.[101] Both lines of interventions, however, would be undercut by the limits set by most European Constitutions to the freedom of the parties to regulate these issues by themselves. First, as to the enforcement question, the pressure exercised by remedies against the event of a breach – either in the strong form of specific performance or in the milder form of liquidated damages – would hardly square with the constitutionally protected interests of unborn children and pregnant women, as access to abortion regulation and privacy rights plainly lie beyond the limits of freedom of contract. Second, as for the allocative question, to the extent that the objections to trading in bone marrow, blood, gametes hold just as well with pregnancy, the establishment of a market for gestational services would almost logically imply the acceptance of a Paretian approach to the management of health care systems: a perspective at odds with universal access to health care, on which the European social security systems rest.

Absent such a dramatic, deeply «reactionary»[102] reassessment, market regulation would likely take the shape of a limited, conditional suspension of fundamental rights connected to personal intimacy, autonomy, procreation and familial status in order to allow mostly impoverished women (and women only, *en attendant* the artificial womb) to use their reproductive capacity to generate children to well-off people.

Such a regulatory scheme could either admit or reject liquidated damages for violations brought by a woman acting as a surrogate. The first scenario points to a blatant violation of constitutional guarantees, as women's bodies would be *pro tempore* considered as a private utility, for the benefit of their customers. In the alternative scenario surrogate mothers would keep a substantive margin of control over their intimacy, and the encroachment on the principle of gender equality would be somewhat subdued, or concealed, albeit at the price of a costly and ineffectual regulation, unable to compete with cheaper, less deferential to fundamental rights, markets abroad.

6 Four policy proposals

More than a century has passed since Anatole France made fun of bourgeois laws, which «dans un grand souci d'égalité» forbid the rich and the poor from sleeping under the bridges (Le Lys rouge, 1894). One only needs to replace 'forbidding' with 'permitting' in order to grasp the reasons for the apparently very unpractical choice of upholding the ban to surrogacy, balanced by a partial recognition of the legal status obtained by commissioning parents abroad.

If the current state of affairs seems 'tragic', it is not because prohibitionism or permissivism are intrinsically right or wrong. Rather, it is because in the framework of the escalating inequality within the nations and among the nations, prohibitionist and permissive regimes are like the two sides of the same coin: the transnational market of reproductive services. This market has very high costs for both prohibitionist States (which delegate to the price system the choice between who can and who cannot have children) and permissive States (which trade social and gender inequality with women's 'freedom' to sell their procreative capacity). It also produces bilateral negative externalities, as prohibitionism fuels local markets with harmful social consequences, and permissiveness undermines the rule of law and threatens social and civil rights hastily believed unassailable.

This paper has found that internal regulation would only add up to economic and gender discrimination at home, without offering any credible alternative to rogue markets abroad.

As a matter of fact, national private law can hardly take on by itself problems that have a transnational dimension. But it can and must act with a consideration for equality and risk control. The protection of family life, in the first place, does not justify the waiver of the public policy exception against foreign surrogacy judgements, provided that the receiving State avails itself of a suitable legal procedure (e. g. simplified adoption) in

order to establish the parental relation between the child and the partner of the biological father of a child born from gestational surrogacy.[103]

Secondly, whenever the agreement is performed under conditions of exploitation comparable to the trafficking of human beings, a response at once effective and mindful of the interest of the children is not criminal repression, leading up to the forced removal of the child from the intended parents, but a pecuniary sanction assessed at the costs of surrogacy services in those countries where the conclusion and the execution of the agreements take place within a framework of guarantees for the health and security of women and children.

Thirdly, and regardless of the legal framework of cross border surrogacy, an acknowledgement of familial status limited to parents biologically linked to the children seems an appropriate solution to the need of balancing the interest of the child and public policy considerations.

Fourthly, and for the very same reasons, nothing justifies the survival of anachronistic and discriminatory rules in those legal systems that bar single persons and homosexual couples from adoption.

Notes

1 P. Valéry, "La conquête de l'ubiquité," in *Œuvres* (Gallimard, Paris, 1960), 1283. Valery's words are featured as a caption to the third version of W. Benjamin, "Das Kunstwerk im Zeitalter seiner technischer Reproduzierbarkeit", in *Illuminationen. Ausgewählte Schriften*, vol. I, Suhrkamp, Frankfurt a. M. 1977, 136.
2 See below, Sect. 3 and accompanying notes.
3 See below, Sect. 4 and 5 and accompanying notes.
4 See below, Sect. 5.1–5.2 and accompanying notes.
5 I will set aside the contemporary developments of the genome editing technology known as CRISPR (clustered regularly interspaced palindromic repeats), as it is not yet extensively applied in the industry of human reproduction, though it will, in a few years, and its impact will be huge, see: See H. Greely, *The End of Sex and the Future of Human Reproduction* (Cambridge (Mass.), 2016).
6 D. L. Spar, "For Love and Money: The Political Economy of Commercial Surrogacy," *Review of International Political Economy* 12 (2005): 287.
7 R. A. Posner, "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood," *Journal of Contemporary Health Law and Policy* 5 (1989): 21, 22.
8 A. L. Allen, "The Socio-Economic Struggle for Equality. The Black Surrogate Mother," *Harv. BlackLetter Journal* 8 (1991): 17.
9 E. S. Scott, "Surrogacy and the Politics of Commodification," *Law and Contemporary Problems* 72 (2009): 109.
10 C. Spivak, "The Law of Surrogate Motherhood in the United States," *The American Journal of Comparative Law* 58 (2010): 97. See also: I. G. Cohen and K. L. Kraschel, "Gestational Surrogacy Agreements: Enforcement and Breach," in *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*, ed. E. Scott Sills (Cambridge, 2016), 85; E. Hall,"From European Theory to American practice: the United States as a laboratory for Surrogacy Law," in *Regulierung der Leihmutterschaft. Aktuelle Entwicklungen und interdisziplinäre Herausforderungen*, eds. B. Ditzen and M.-Ph. Weller (Möhr, Tübingen, 2018), 69; L. Engelhardt, "Die Leihmutterschaft im US-amerikanischen Recht am Beispiel von Kalifornien und New Hampshire," ibid., 133.
11 *Johnson v. Calvert*, 5 Cal. 4th 84 (1993): «she who intended to procreate the child, that is, she who intended to bring about the birth of a child that she intended to raise as her own, is the natural mother under California law». In 2013 the tenets of the *Johnson v. Calvert* jurisprudence have been integrated in the Family Code (FAM), Division 12, part 7.
12 J. H. Hollinger and N. Cahn, "Forming Families by Law – Adoption in America Today," *Human Rights* 36 (2009): 16; J. H. Hollinger, *Adoption Law and Practice* (Matthew Bender & C., New York, 2019), § 1.01[2][a] § 1.01[1].
13 The analogy between adoption and reproductive technologies is observed by D. L. Spar, "As You Like It: Exploring The Limits of Parental Choice in Assisted Reproduction," *Law & Inequality* 27 (2009): 481, 491; M. Garrison, "Regulating Reproduction," *George Washington Law Review* 76 (2008): 1623, 1627.
14 If only to restore the dichotomy, under new guises: J. Halley, "What is Family Law? A Genealogy. Part II," *Yale Journal of Law & the Humanities* 23 (2011): 189. A case in point: E. S. Scott and R. E. Scott, "From Contract to Status: Collaboration and the Evolution of Novel Family Relationships," *Columbia Law Review* 115 (2015): 293. The ascription of surrogacy agreements to the category of contracts is not universally accepted in legal cultures that draw a sharp distinction between family law and the law of obligations and contracts. See e. g. in the Italian literature: M. Gattuso, "Dignità della donna, qualità delle relazioni familiari e identità personale del bambino," in *Questione Giustizia* 30, no. 2 (2019): 74, at 83–84, who deems misleading the qualification of surrogacy agreements as «contracts» under the Italian legal system, for it does not account for the «bunch of human relations that preceed, accompany, and even follow the childbirth» (my translation). The origins of the «family/patrimony» distinction are traced back to Savigny's scholarship by D. Kennedy, "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought," *American Journal of Comparative Law* 58 (2010): 811. On the (not easy to remove) function of contractual obligations in surrogacy agreements: below, Sect. 5.1 and accompanying notes.
15 M. Fabre-Magnan, *La gestation pour autrui. Fictions et réalité* (Fayard, Paris, 2013), 82, writes of «proletariat réproductif».
16 Comité Consultatif National d'Ethique pour les sciences de la vie et de la santé, "Avis du CCNE sur les demandes sociétales de recours à l'assistance médicale à la procréation," (15 juin 2017), www.ccne-ethique.fr, 34. See also European Parliament, Plenary sitting, 30.11.2015, A8-0344/2015, 114. National Rapporteur on Trafficking in Human Beings. Human trafficking for the purpose of the removal of organs and forced commercial surrogacy (2012) The Hague, 21.
17 See: BGH, 10.12.2014, XII ZB 463/13, (BGHZ 203, 350), Rn. 53, 62; Italian Cass. civ., sez. I, 26.9.2014, n. 24001; ECtHR No. 25358/12, Grand Chamber, January 24, 2017 – *Paradiso and Campanelli v Italy*.
18 See the decision of the Austrian *Verfassungsgerichtshof* (VfGH 10.12.2013, G 16/2013-16, G 44/2013-44, EF-Z 2014, 66), annulling a provision of the 1992 Reproductive Medicine Act (FmedG), according to which only heteroxesual couples were given access to artificial insemination and in vitro fertilization, as the exclusion of lesbian couples violated the prohibition of discrimination enshrined in artt. 14 and 8 of the ECHR. In response to this finding, the *Nationalrat* approved on 21.01.2015 an amendment to the Reproductive Medicine Law (FMedRäG 2015.4), that has lead to a far-reaching change in the Austrian law of reproductive medicine. In the Italian law the distinction has been drawn by the Corte di Cassazione: Cass., sez. civ., sez. I, 30.9.2016, n. 19,599, para. 10.2, in *Nuova giurisrudenza civile commentata*, no. 4 (2017), I, 372. A critique of the equalization of lesbian women and gay men performed under the banner of reproductive rights: S.

Niccolai, "Liberare la maternità lesbica dal discorso neutro sull'omogenitorialità: un interesse di tutte (e di tutti)," in *Nel nome della madre. Ripensare le figure della maternità,* eds. D. Brogi, T. De Rogatis, C. Franco, L. Spera (Del Vecchio, Roma, 2017), 43.

19 Contrary to the ill-considered opinion of an Italian Court: App. Trento, ord. 23.2.2017, *Nuova giurisrudenza civile commentata*, no. 7–8 (2017), I, 994–996, critically commented by V. Calderai, "Modi di costituzione del rapporto di filiazione e ordine pubblico internazionale," ibid., 986–993, and annulled by Cass. civ., SS.UU., 08.05.2019, n. 12,193, below n. 37.

20 A typical contract clause for example would read: «The Surrogate intends to carry the Child(ren) of the Genetic Father to term and thereafter deliver the Child(ren) to the Genetic Father and Intended Mother». See: M. Fabre-Magnan, above n. 15, 52.

21 Y. Thomas, "Fictio legis. L'empire de la fiction romaine et ses limites médiévales," *Droits* 21 (1995): 17; Id., "Le sujet de droit, la personne et la nature. Sur la critique contemporaine du sujet de droit," *Le Débat* 100 (1998): 85.

22 In order prevent the fragmentation of the estate and ensure its conveyance to the elder branch of the family, Glossators and Commentators drew on the *fideicommissum hereditatis* designed by Roman jurists, according to which the testator entrusted all or part of the *hereditas* to an heir (*fiduciarius*), with the obligation of transferring it to a third person (*fideicommisarius*). Non-existant subjects could be instituted as heirs through the mechanism of successive conjoined substitutions, well beyond the limit of four generations set by Justinian to substitutions in *fideicommissum*. Artt. 462.3 and 784 c.c. it., concerning the capacity of the not yet conceived child (*concepturus*) to – respectively – succeed and receive as donee partake precisely of this logic. See Y. Thomas, "Le sujet concret et sa personne. Essai d'histoire juridique rétrospective," in *Du droit de ne pas naître. À propos de l'affaire Perruche,* eds. O. Cayla and Y. Thomas (Gallimard, Paris, 2002), 159.

23 Ibid., 149.

24 Cass. Civ., A.p., 17.11.2000, JCP, II, 10,438. The critics blamed the Court for having dumped the element of causation in civil liability in order to recognise «un droit de ne pas naître», at once self-contradictory (a legal right can only be predicated of an existing subject) and immoral (it undermines the human dignity of disabled people): see L. Aynès, "Le préjudice de l'enfant né handicapé: le plant de Job devant la Cour de Cassation," *Dalloz* 6, no. 6 (2001): 492–496. These criticisms ultimately rested on peddling as compensation for being born ('wrongful life') what is in fact compensation for the consequences of the disability: «la reparation du préjudice resultant de ce handicap» as the judgement reads. As soon as the loss is identified with the latter, the conflation of biological necessity and legal causality inherent to the former becomes apparent: «La Court a tout simplement, sans supposer aucun droit à ne pas naître, aucun droit à être éliminé par avortement, reconnu à l'enfant une fois né le droit de se plaindre, non de sa naissance même, mais de l'état d'infirmité dans lequel il est né» (Y. Thomas, above n. 22, 107). For a thorough and sharp analysis of the 'wrongful life' cases across Common Law and Civil Law jurisdictions, see: J. K. Mason, *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction* (Cambridge University Press, Cambridge, 2007), 188–240.

25 See Y. Thomas, above n. 22, 164, at 166.

26 See Ch. 7962, sub (e), of the California Family Law Code (FAM): «A copy of the assisted reproduction agreement for gestational carriers shall be lodged in the court action filed for the purpose of establishing the parent and child relationship», where «establishing» denotes precisely the action of setting something up on a firm basis, or achieving permanent recognition for something.

27 See D. Kennedy, "The Political Stakes in "Merely Technical" Issues of Contract Law," *European Review of Private Law* 1 (2001): 7, for a pathbreaking inquiry into the mutual relations of technical private law arguments with regulatory intervention rooted in political concerns. The concept of biopolitics as worked out by M. Foucault, *Naissance de la biopolitique. Cours au Collège de France* (1978–1978) (Seuil, Paris, 2004), lends beautifully itself to an analysis of the reversal of the meaning of self-determination framed in neo-liberal theory of rights: from cornerstone of the exercise of fundamental rights to the tool used by the «entrepreneur of himself» to maximize his or her opportunities.

28 ECtHR, *Mennesson v. France*, no. 65192/11, and *Labassée v. France*, no. 65941/11, 26.6.2014.

29 Cass., ass. plen., 3.7.2015, n. 14–21,323, PB. See: M. A. Frison-Roche, "Comprendre la Cour de Cassation (à propos des deux arrêts d'Assemblée plénière du 3 juillet 2015 sur la pratique des maternités de substitution (dite GPA)," Petites Affiches 404 (2015): 4.

30 Tribunal supremo, 6.2.2014, 247/2014. See: H. Fulchiron and C. Guilarte Martin-Calero, "L'ordre public international a l'épreuve des droits de l'enfant: non à la GPA internationale, oui à l'intégration de l'enfant dans sa famille. A propos de la décision du Tribunal supremo español du 6 février 2014," *Revue critique du droit international privé* 6 (2014): 531.

31 App. Milano, 28.12.2016 and Trib. Napoli, 14.7.2011, in *Foro it.* (2012), I, 3349. Absent a genetic connection between the intended parents and the child, this is not departing from Cass., 11.11.2014, in *Nuova giurisprudenza civile commentata*, no. 3 (2015), 239, commented by C. Benanti, *La maternità è della donna che ha partorito: contrarietà all'ordine pubblico della surrogazione di maternità e conseguente adottabilità del minore*, ibid., 235–249.

32 Österreichisches Verfassungsgericht, 14.12.2011, B 99/12 and B 100/12, (2012) 39 *Europäische Grundrechte Zeitschrift*, 65. See: B. Lurger, "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot," *Praxis des Internationalen Privat- und Verfahrensrechts* 32 (2013): 282, 287.

33 Bundesgericht, 21.5.2015, 5A 748/2014. See: L. Engelhardt, "Die Leihmutterschaft im schweizerischen Recht," in B. Ditzen and M.-Ph. Weller, above n. 10, 93.

34 Re X and Y (Foreign Surrogacy) [2009] 1 FLR 733, Re D (A Child) [2014] EWHC. See: C. Fenton-Glynn, "Outsourcing Medical Dilemmas: Regulating International Surrogacy Agreements," *Medical Law Review* 24 (2016): 59.

35 See: BGH, 10.12.2014, XII ZB 463/13, (BGHZ 203, 350) (2015) *Neue Juristischen Wochenschrift*, 479.

36 App. Trento, ord. 23.2.2017, above n. 19.

37 BGH, XII ZB224/17, 05.09.2018, (2018) *Familienrecht Zeitung*, 1846, reversing OLG Braunschweig 12.04.17, AZ: 1 UF 83/13, (2017) *Familienrecht Zeitung*, 972. This approach had been fully developed by K. Duden, *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht: Abstammung und ordre public im Spiegel des Verfassungs- Völker- und Europarecht* (Möhr, Tübingen, 2015), 216.

38 Cass. civ., SS.UU., 08.05.2019, n. 12,193, *Nuova Giurisprudenza Civile Commentata* 35, no. 4 (2019): 741, commented by U. Salanitro,*Ordine pubblico internazionale, filiazione omosessuale e surrogazione di maternità*, ibid., 737.

39 Ibid, n. 12.1; BGH, 10.12.2014, above n. 35, para. 44–45, and 05.09.20198, above n. 37, para. 21–23.

40 BGH, above n. 37, para. 15; Cass. civ., above n. 38, para. 12.1–12.2.

41 BGH, above n. 37, n. 25.

42 Such as art. 44, sect. 1, (d), L. n. 184/1983 (Law on Adoption) in the Italian law: see Cass. civ., SS.UU., above n. 38. Interestingly, before the veto imposed on surrogacy agreements special adoption procedures within married couples had been applied by the Courts in Italy and in France in order to establish the parentage of the wife of the man who gave his semen for the IVF procedure: see M. R. Marella, *Adozione* (Torino, 2000), 1.

43 A similar argument had been advanced in a critical commentary to the decision annulled by the Court by V. Calderai, above n. 19, 992. This approach is contested by the scholars who observe that according to a (controversial) interpretation of art. 74, It. Civil Code, the stepchild adoption does not grant to the child the same protection offered by plenary adoption: see, in particular, G. Ferrando, "I bambini, le loro mamme e gli strumenti del diritto," *GenJus* 6, no. 1 (2019), 6, at 7–8.

44 Corte Cost., 22.11.2017, n. 272, in 62 *Giurisprudenza Costituzionale*, no. 6 (2017), 2970, favorably commented by S. Niccolai, "La regola di giudizio. Un invito della Corte a riflettere sui limiti del volontarismo," ibid., 2990. This flexible approach to the best interest test is critically discussed by V. Scalisi, "Maternità surrogata: come «far cose con regole»," *Riv. dir. civ*. 73, no. 5 (2017), I, 1097, at 1111–1112, and M. C.

Venuti, "Procreazione medicalmente assistita: il consenso alle tecniche di pma e la responsabilità genitoriale di single, conviventi e parti unite civilmente," *GenIus* 6, no. 1 (2018): 85.
45 Cass., A.p., 3.7.2015, cit., and n. 824, 5.7.2017.
46 Cass., 1re Civ., 12.2.2019, n. 785. 1re Civ., 5.7.2017, n. 15–28.597, Bull. 2017, I, n. 163, n. 16–16.901 et n. 16–50.025, Bull. 2017, I, n. 164, n. 16–16.455, Bull. 2017, I, n 165.
47 ECHR 132 (2019) 10.04.2019, para 53. A comparative analysis of the repercussions of the ECtHR judgement in the French and in the Italian legal orders is made by A. G. Grasso, "Maternità surrogata e riconoscimento del rapporto con la madre intenzionale," *Nuova Giurisprudenza civile commentata* 35, no. 4 (2019): 757. The stronger emphasis put by the Court in comparison to it previous judgements on the margin of appreciation of the State somewhat mitigates the risk, stressed by some Authors, that the deference to the children's right to respect for their private life «amounts to compromising the best interest of children in general, i. e. the requirement not to tackle the commodification of children»: see K. Trimmings, "Surrogacy Arrangements and the Best Intrerests of the Child," in *Fundamental Rights and Best Interests of the Child in Transnational Families*, eds. E. Bergamini and C. Ragni (Intersentia, Cambrige, 2019), 187, at 208. An interesting application of the distinction between women acting as surrogate and different groups of women affected by the practice of surrogacy is made by an Italian feminist legal philosopher: S. Pozzolo, "Gestazione per altri (ed altre). Spunti per un dibattito in (una) prospettiva femminista," *BioLaw Journal – Rivista di BioDiritto,* no. 2 (2016): 93, at 104.
48 Cass., A.p., 4.10.2019, n. 648 (10–19,053).
49 Ibid., para. 16 and 18.
50 Ibid., para. 16.
51 Ibid., para 19.
52 The vagaries of the best interest test are sharply observed by M. Di Stefano, "The Best Interests of the Child Principle at the Intersection of Private International Law and Human Rights," in *Fundamental Rights and Best Interests of the Child*, eds. E. Bergamini and C. Ragni, above n. 47, 157.
53 See for an interpretation of the best interest formula as a standard rather than a rule, whenever the interest of the child is but one of many other legitimate policies and concerns that require consideration: J. Eekelaar, "Two Dimensions of the Best Interests Principle: Decisions About Children and Decisions Affecting Children," in *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well- Being*, eds. E. Sutherland and L. Barnes Macfarlane (Cambridge University Press, Cambridge, 2018), 99. That very same distinction is applied to surrogacy by C. Thomale, *Mietmutterschaft. Eine international- privatrechtliche Kritik* (Tübingen), 31 and Id. "Das Kinderwohl ex ante – Straßburger zeitgemäße Betrachtungen zur Leihmutterschaft," *Praxis des Internationalen Privat- und Verfahrensrechts* 37 (2017): 583, 587. See in the Italian scholarship: P. Morozzo della Rocca, "Diritti del minore e e circolazione all'estero del suo stato familiare," in *La famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico interno e interesse del minore*, eds. G. O. Cesaro et al. (Franco Angeli, Milano, 2014), 35, at 46.
54 See in the scholarship, across different European jurisdictions: G. Ferrando, "Ordine pubblico e interesse del minore nella circolazione degli *status filationis*," *Corriere giuridico* 34 (2017): 946; S. Stefanelli, "Procreazione e diritti fondamentali", in A. Sassi, F. Scaglione, S. Stefanelli (eds.), 'La filiazione e i minori', in *Trattato di diritto civile*, vol. IV, UTET, Torino, 2018, 93; A. Diel,*Leihmutterschaft und Reproduktionstourismus* (Metzner, Frankfurt a.M., 2015), 207; C. Fenton-Glynn, above n. 34, at 69.
55 Intention is the gist of the rule of recognition of motherhood according to *Jonhson vs Calvert* (above, n. 11). In the scholarship see: K. Horsey, "Challenging presumptions: legal parenthood and surrogacy arrangements," *Child and Family Law Quarterly* 22, no. 4 (2010): 449; G. Palmeri, "Accordi di gestazione per altri, principio di autodeterminazione e responsabilità genitoriale," in *Riproduzione e relazioni. La surrogazione di maternità al centro della questione di genere*, eds. M. Caielli, B. Pezzini, A. Schillaci (CIRSDe, Torino, 2019), 44.
56 A similar point is made by K. Norrie, "Surrogacy in the United Kingdom: An Inappropriate Application of the Welfare Principle," in *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well- Being*, eds. E. Sutherland and L. Barnes Macfarlane (Cambridge University Press, Cambridge, 2018), 165, at 178–179: «Best interests is not a trump card […] it is a statutory rule that needs to be interpreted consistently with other – equally valid – statutory rules».
57 This is a choice shared by the many Western European legal systems: below, n. 65. With a clear *inversionsverfahren*, the public policy exception in the Italian judiciary has been sometimes traced back to the criminal sanction (see, e. g. App. Trento, ord. 23.2.2017, above n. 19) when actually the opposite is true: the criminal sanction is the consequence, not the cause of the infringement of the constitutional public order.
58 See below, Section 5.2.
59 See above, Section 2.
60 The inalienability of the physical, moral, social integrity of human beings, considered in themselves and as members of the species (*Gattungswesen*) is the core meaning of the protection of «human dignity» in biomedicine and justifies the limits to the body's possession: see below, sect. 4. As E. Olivito, "Una visione costituzionale sulla maternità surrogata. L'arma spuntata (e mistificata) della legge nazionale," in *Maternità, filiazione, genitorialità. I nodi della maternità surrogata in una prospettiva di diritto costituzionale,eds.* S. Niccolai and E. Olivito (Jovene, Napoli, 2017), 3–29, at 23, rightly observes: «la maternità surrogata è in potenza una pratica idonea a cambiare la nostra percezione della vita e della persona umana, poiché – *in nuce* e in concreto – sottende la pensabilità della loro mercificazione».
61 C. Thomale, "State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU?" *Journal of Private International Law* 13 (2017): 463, 471 and Id., above n. 49, advocating for the extension of the adoption procedure to both commissioning parents.
62 Bundesgericht, 21.5.2015, above n. 33, n. 5.3.3. The erosion of the States control over market failures through mandatory law, is the subject matter of a compelling book by J. Stark, *Law for Sale: A Philosophical Critique of Regulatory Competition* (Oxford, 2019), 126–173.
63 H. Arendt, *The Origins of Totalitarianism* (New York, 1976), 296.
64 On the meaning of dignity as a project of social emancipation: A. Somek, *The Cosmopolitan Constitution* (Oxford University Press, Oxford), 2014, 169–75. See in the Italian scholarship: M. R. Marella, "Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti," *Rivista critica del diritto privato* 25 (2007): 67; S. Niccolai, "Alcune note intorno all'estensione, alla fonte e alla ratio del divieto di maternità surrogata in Italia," *GenIus* 5 (2017): 49. The implications of social and economic inequality between the parties of the surrogacy agreement are analysed by E. Beck-Gernsheim, in "Ware Kind? Kinderwunsch Transnational," in *Nachrichten aus den Innenwelten des Kapitalismus*, hrsg. C. Koppetsch (Springer, New York, 2011), 99, at 111.
65 See: Convention on Human Rights and Biomedicine, art. 21. In Germany the ban on GPA and the repression of intermediation are – significantly – included in the Adoptionsvermittlungsgesetz, §§ 13 c, 13d, 14. In France the nullity of the agreement (art. 16–7 and 16–9 c.c.) is strengthened by the criminal sanctionbrought against interediaries: art. 227–12, al. 1, c. pen. In the Italian law the criminal repression of intermediation is featured by art. 12.6, l. 40/2004, regulating assisted reproduction.
66 ECtHR, above n. 28, n. 60.
67 Ibid., n. 80.
68 D. Kennedy, "Three Globalizations of Law and Legal Thought," in *The New Law and Economic Development: a Critical Appraisal*, eds. D. M. Trubek and A. Santos (New York, 2006), 19, 59.

69 See I. G. Cohen, "Circumvention Tourism" 97 *Cornell Law Review* (2012) 1309.
70 See M.-A. Frison-Roche, above n. 28, at 10: «l'absence the pertinence de la convention de matérnité de substitution pour l'établissement de l'état civil est montée d'un cran».
71 Ch. Thomale, "Das Kinderwohl ex ante," above n. 51, at 469.
72 L. Brunet et al., "A Comparative Study on the Regime of Surrogacy in EU Member States," Brussels (2013): 36.
73 See: J. Scherpe, *The Present and the Future of European Family Law* (Cheltenham, 2016), 98.
74 Ibid., 93, observing a «surpraising lack of regulation».
75 ECtHR, *S.H. and others v Austria* [GC], no 57813/00 (S.H. and Others v. Austria and circumvention tourism Grand Chamber, November 3, 2011), para. 82. This decision has stirred a lively debate, see: W. Van Hoof and G. Pennings, "The consequences of S.H. and Others v. Austria for legislation on gamete donation in Europe: an ethical analysis of the European Court of Human Rights judgments," *Reproductive Biomedicine Online* 25 (2012): 665–69; I. G. Cohen, "S. H. and Others v. Austria and Circumvention Tourism," ibid., 660–62. S. Arnold, "Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts," in *Das Recht der Fortpflanzungsmedizin 2015. Analyse und Kritik*, eds. S. Arnold, E. Bernat, Ch. Kopetzki (Manz, Wien, 2016), 125.
76 See, respectively, J. Scherpe and C. Fenton-Glynn, "Surrogacy in a globalised world: Comparative Analysis and Thoughts on Regulation," in *Eastern and Western Perspectives on Surrogacy*, eds. J. Scherpe, C. Fenton-Glynn, T. Kaan (Cambridge, 2019), 518, 577; C. Fenton-Glynn, above n. 34.
77 See, e. g. G. Pennings, "Reproductive tourism as moral pluralism in motion," *Journal of Medical Ethics* 28 (2002): 337; R. F. Storrow, "Judicial review of restrictions on gamete donation in Europe," *Reproductive Bio Medicine Online* 25 (2012): 655 and Id., "The Pluralism Problem in Cross-border Reproductive Care," *Human Reproduction* 25 (2010): 2939–943.
78 See P. Kotiswaran, "India," in J. Scherpe, C. Fenton-Glynn, T. Kaan, above n. 73, 469; S. Hongladarom, "Thailand," ibid., 499.
79 See for the argument of the «integrity of domestic legislation» applied to surrogacy: J. Scherpe and C. Fenton-Glynn, "Surrogacy in a Globalised World. Comparative Analysis and Thoughts on Regulation," above n. 73, 577.
80 *Ibid.*, 568.
81 L. Wittgenstein, *Philosophische Untersuchungen* (Blackwell, London, 1999 [1953[1]]), § 198, 80.
82 *Ibid.*, § 241, 88: «So sagt du also, daß die Übereinstimmung der Menschen entscheide, was richtig und was falsch ist? – Richtig und falsch ist, was Menschen *sagen*; und in der *Sprache* stimmen die Menschen überein. Diese ist keine Übereinstimmung der Meinungen, sondern des Lebensformen».
83 See G. Calabresi and Ph. Bobbitt, *Tragic Choices* (Norton, New York, 1978), at 17–18 for the definition of 'tragic goods' as those goods the distribution of which 'arouse emotions of compassions, outrage, and terror'.
84 Ibid., 53–79.
85 In a similar vein, I. G. Cohen, above n. 75, at 662, although admitting that there are a host of «*possible* reasons why a home country might justifiably, based on exploitation concerns, maintain a ban at home but not on citizens who travel abroad», acknowledges that the choice of a double standard regime is most likely «a reflection of the general default rule against extraterritorial application of domestic laws and/or a cynical attempt to 'divide and conquer' opponents in favour of more procreative liberty, by providing a way for the wealthy and more informed to opt out of the domestic policy through international travel».
86 See G. Calabresi and Ph. Bobbitt, above n. 83, 29–34. In the Italian scholarship: G. Resta, "La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti)," *Rivista di diritto civile* 48 (2002): 801, 816.
87 As a mild instance of the bureaucratic approach sketched in the text one might consider the Portuguese *Lei* n. 25/2016, which modified the *Lei* n. 32/2006 on assisted medical reproduction, rejecting the former *proibição absoluta*. Gestational surrogacy has been devised by the Legislature as an exceptional means of assisted reproduction: it is made conditional upon the occurrence of a serious medical pathology, requires the use of the gametes of at least one of the would be parents, and under no circumstances can the ovocyte of the woman acting as a surrogate be used for the IVF. Contract regulation is essential to this scheme, as the law allows gestational surrogacy agreements solely on a non-commercial basis, subject to ex ante authorisation by the National Council of Medically-Assisted Procreation based on the advice of the Portoguese Medical Association. The rights of the parties to the agreement, included contractual withdrawal, are ensured by mandatory provisions concerning the form and content of the contract. This regulatory framework has been upset by the Tribunal Constitucional Acórdão n. 225/2018 (http://www.tribunalconstitucional.pt/tc/acordaos/20180225.html). While praising the general framework of the «Portuguese way to surrogacy», the Court struck down several dispositions, including the lack of legal criteria for the authorization of surrogacy agreements by the National Council of Medically Assisted Procreation and the limits imposed to right of the surrogate to withdraw her consent (infra, n. 68). On the Portuguese legislation see: R. Teixeira Pedro, "Portugal," in J. Scherpe, C. Fenton-Glynn, T. Kaan, above n. 71, 229.
88 See below, Section 5.2.
89 Two decisions of the Portuguese provide a case in point. Pursuant to the law regulating surrogacy women acting as a surrogate could only revoke their consent until the beginning of therapeutic procedure for the IVF. In the Acórdão n. 225/2018 (above, n. 87) the Court found this a disproportional breach of the right to development of personality, in accordance with the principle of human dignity (Articles 18(2), 26(1) and 1 of the Constitution), and required the revocation of consent be made available to the surrogate woman until at least the moment of birth. This judgement stirred an unprecedented institutional crisis, after the Parliament approved a new version of the law that did not abide by the judgement and the President of the Republic, on his part, witheld the promulgation and decided instead to send it back to the Court for a (rather unhortodox) ex ante review. On September 18, 2019, the Tribunal Constitucional confirmed its previous judgement, finding the «inconstitucionalidade, por violação do direito ao desenvolvimento da personalidade da gestante, interpretado de acordo com o princípio da dignidade da pessoa humana, e do direito de constituir família, em consequência de uma restrição excessiva dos mesmo» (Acórdão n. 465/2019, available at: http://www.tribunalconstitucional.pt/tc/acordaos/20190465.html). Meanwhile all surrogacy treatments in Portugal remain suspended.
90 See for the U.K. and the Netherlands, respectively, K. Parizer-Krief, "Gestation pour autrui et intérêt de l'enfant en Grande-Bretagne. De l'indemnisation raisonnable de la gestatrice prévue par la loi à la reconnaissance judiciaire des contrats internationaux à but lucratif" 63 *Revue intérnational de droit comparé* (2011) 645, 646 (observing «l'impossibilité d'inscrire la GPA dans le cadre d'un don gratuit») and B. Van Beers, "Is Europe Giving in to Baby Markets? Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets" 23 *Medical Law Review* (2015) 103. For the U.K. C. Fenton-Glynn, above n. 34, suggests a reform based on the *ex ante* authorization of commercial agreements.
91 Above n. 87 and 89.
92 O. E. Williamson, "Calculativeness, Trust, and Economic Organization," *Journal of Law & Economics* 36 (1993): 453, 484: «Be that as it may, trust, if it obtains at all is reserved for very special relations between family, friends, and lovers. Such trust is also the stuff of which tragedy is made. It goes to the essence of the human condition».
93 This point is beautifully made by G. B. Ferri, "Dall'intento liberale al cosiddetto impegno etico e superetico: ovvero l'economia della bontà," *Diritto privato* 6–7 (1999–2000): 327. In the Italian system surrogacy on a truly altruistic basis could be performed through the exercise

of the right of the mother to refuse to be named in the birth certificate (art. 30, sect. 1, D. P. R. 396/2000), combined with the recognition of the child made by the man who gave his semen.
94 A. Smith, *An Inquiry into the Nature and Causes of the Wealth of the Nations* (Oxford University Press, Oxford, 1979), 19.
95 I. G. Cohen, above n. 64, 1324–1326.
96 Ibid., 1325. This feature is cancelled under the new tightly regulated approach to surrogacy introduced by the recently approved Surrogacy (Regulation) Bill 2019. An abortion requires the written consent of the surrogate mother and the authorisation of the appropriate authority, compliant with the Medical Termination of Pregnancy Act, 1971.
97 D. Mazer, "Born Breach: The Challenge of Remedies in Surrogacy Contracts," Yale Journal of Law & Feminism 28 (2017): 211, 236. See also N. Cahn and J. Carbone, "United States of America," in J. Scherpe, C. Fenton-Glynn, T. Kaan, above n. 76, 307–330. An unsettling empirical inquiry is carried out by D. Danna, "*It's not their pregnancy*. L'aborto nei contratti di maternità surrogata statunitensi," *About Gender. International Journal of Gender Studies* 3 (2014): 139. In the State of California, a contract clause regulating the choice to (not) abort would be unenforceable: see *Johnson vs Calvert*, above n. 11, at 96–97.
98 M. J. Radin, *Boilerplate: the Fine Print, the Vanishing Rights, and the Rule of Law* (Princeton University Press, Princeton, 2014), 181. *Adde* A. L. Allen, "Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human," *Harvard Journal of Law & Public Policy* 41 (2018): 753. See also I. G. Cohen and K. L. Kraschel, above n. 10, 91: «the idea of a judicially supervised and mandated abortion, even that is what the parties agreed to, seems to be something a US court simpy would refuse to order. ... Also unclear is what would happen in the opposite situation, where the contract prohibited having an abortion, but the surrogate did not want to deliver the baby ... Again, specific enforcement, entailing judicial monitoring of the woman to prevent abortion, seems very unlikely. Damages might be possibile, but they pose significant quantification challenges».
99 I. G. Cohen and K. L. Kraschel, above n. 10, 91: «Damages do not require the same judicial supervision, nor do they require forcing an abortion, but at the same time, it seems that most courts would be loath to do anything that might pressure a woman to choose to have an abortion to avoid paying damages». See in particular for the problem of 'selective reduction' clauses (i. e. clauses that gives the intended parent(s) the right to choose to terminate one or more of the fetuses in the event of a multiple pregnancy or fetal abnormality): H. Jones, "Contracts for Children: Constitutional Challenges to Surrogacy Contracts and Selective Reduction Clauses," *Hastings Law Journal* 70 (2019): 595.
100 Even more than the California jurisdiction, which sets only procedural requirements, the Russian legislation is what comes nearer to a free market approach: see, respectively, N. Cahn and J. Carbone, above, n. 76, and O. Khazova, 'Russia', both in J. Scherpe, C. Fenton-Glynn, T. Kaan, ibid., 281.
101 The foundations of the welfare economics approach to surrogacy lies in E. Landes and R. A. Posner, "The Economics of Baby Shortage," *Journal of Legal Studies* 7 (1978): 323–48 and R. A. Epstein, "Surrogacy: the Case for Full Contractual Enforcement," *Virginia Law Review* 81 (1995): 2305–401. See also: H. Hansman, "The Economics and Ethics of Markets for Human Organs," *Journal of Health Politics, Policy & Law* 14 (1989): 57–85; P. H. Schuck, "The Social Utility of Surrogacy," *Harvard Journal of Law & Public Policy* 13 (1990): 132; K. D. Krawiec, "Price and Pretense in the Baby Market," in *Baby Markets: Money, Morals, and the New Politics of Creating Families*, ed. M. Goodwin (New York, 2009), 41–55; Ead., "Altruism and Intermediation in the Market for Babies," *Washington & Lee Law Review* 66 (2009): 203; Y. Margalit, "In Defense of Surrogacy Agreements: A Modern Contract Law Perspective," *William & Mary Journal of Women & the Law* 20 (2014): 423. For general assessment of the welfare economics theoretical framework: L. Kaplow and S. Shavell, *Fairness versus Welfare* (Cambridge, Mass., 2002) A powerful inquiry on the relevance of market-inalienability to the institutions of property and contract is made by M. J. Radin, "From Babyselling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market," *Osgoode Hall Law Journal* 54 (2017): 339.
102 According to the meaning given to the word by A. O. Hirschmann, *The Rhetoric of Reaction. Perversity, Futility, Jeopardy* (Harvard University Press, Cambridge (Mass.), 1991).
103 Above sect. 3 and accompanying note.

References

Allen, Adeline A. 2018. "Surrogacy and Limitations to Freedom of Contract: toward Being More Fully Human." *Harvard Journal of Law & Public Policy* 41 (3): 753–811.

Allen, Anita L. 1996. "The Socio-Economic Struggle for Equality: the Black Surrogate Mother." In *Applications Of Feminist Legal Theory*, edited by D. Kelly Weisberg, 1117–25. Philadelphia: Temple University Press.

Arendt, Hannah. 1976. *The Origins of Totalitarianism*. New York: Harvest Book.

Arnold, Stefan. 2016. "Fortpflanzungstourismus und Leihmutterschaft im Spiegel des deutschen und österreichischen internationalen Privat- und Verfahrensrechts." In *Das Recht der Fortpflanzungsmedizin 2015. Analyse und Kritik*, edited by S. Arnold, E. Bernat, and Ch. Kopetzki, 125–67. Wien: Manz.

Aynès, Laurent. 2001. "Le préjudice de l'enfant né handicapé: le plant de Job devant la Cour de Cassation." *Dalloz* 6: 492–96.

Beck-Gernsheim, Elisabeth. 2011. "Ware Kind? Kinderwunsch Transnational." In *Nachrichten aus den Innenwelten des Kapitalismus*, edited by C. Koppetsch, 99–112. New York: Springer.

Benanti, Claudia. 2015. "La maternità è della donna che ha partorito: contrarietà all'ordine pubblico della surrogazione di Maternità e conseguente adottabilità del minore." *Nuova Giurisprudenza Civile Commentata* 31 (2): 235–48.

Benjamin, Walter. 1977. "Das Kunstwerk im Zeitalter seiner technischer Reproduzierbarkeit," in *Illuminationen. Ausgewählte Schriften*,. Vol. I. Frankfurt a.M.: Suhrkamp Verlag.

Brunet, Laurence, Carruthers Janeen, Davaki Konstantina, King Derek, Marzo Claire, and Mccandless Julie. "A Comparative Study on the Regime of Surrogacy in EU Member States." Brussels, 2013. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2013)474403

Bureau of the Dutch National Rapporteur on Trafficking in Human Beings. 2012. *Human Trafficking for the Purpose of the Removal of Organs and Forced Commercial Surrogacy*. The Hague.

Cahn, Naomi, and June Carbone. 2019. "United States of America." In *Eastern and Western Perspectives on Surrogacy*, edited by J. Scherpe, C. Fenton-Glynn, and T. Kaan, 307–30. Cambridge: Intersentia.

Calabresi, Guido, and Philip Bobbitt. 1978. *Tragic Choices*. New York: Norton.

Calderai, Valentina. 2017. "Modi di costituzione del rapporto di filiazione e ordine pubblico internazionale." *Nuova Giurisrudenza Civile Commentata* 33 (7–8): 986–93.
Cohen, I. Glenn. 2012. "Circumvention Tourism." *Cornell Law Review* 97 (6): 1309–98.
Cohen, I. Glenn, and Katherine L. Kraschel. 2016. "Gestational Surrogacy Agreements: Enforcement and Breach." In *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*, edited by E. Scott Sills, 85–92. Cambridge: Cambridge University Press.
Comité Consultatif National d'Ethique pour les sciences de la vie et de la santé. "Avis du CCNE sur les demandes sociétales de recours à l'assistance médicale à la procréation." http://www.ccne-ethique.fr (2017).
Danna, Daniela. 2014. "*It's Not Their Pregnancy* L'aborto nei contratti di maternità surrogata statunitensi." *About Gender. International Journal of Gender Studies* 3: 139–73.
Duden, Konrad. 2015. *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht: Abstammung und ordre public im Spiegel des Verfassungs- Völker- und Europarecht*. Tübingen: Möhr Siebeck.
Eekelaar, John. 2018. "Two Dimensions of the Best Interests Principle: Decisions about Children and Decisions Affecting Children." In *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best interests, Welfare and Well- Being*, edited by E. Sutherland, and L. Barnes Macfarlane, 99–111. Cambridge: Cambridge University Press.
Engelhardt, Lisa. 2018a. "Die Leihmutterschaft im Schweizerischen Recht." In *Regulierung der Leihmutterschaft. Aktuelle Entwicklungen und interdisziplinäre Herausforderungen*, edited by B. Ditzen, and M.-Ph. Weller, 93–100. Tübingen: Mohr Siebeck.
Engelhardt, Lisa. 2018b. "Die Leihmutterschaft im US-amerikanischen Recht am Beispiel von Kalifornien und New Hampshire." In *Regulierung der Leihmutterschaft. Aktuelle Entwicklungen und interdisziplinäre Herausforderungen*, edited by B. Ditzen, and M.-Ph. Weller, 133–46. Tübingen: Mohr Siebeck.
Epstein, Richard A. 1995. "Surrogacy: the Case for Full Contractual Enforcement." *Virginia Law Review* 81: 2305–401.
Fabre-Magnan, Muriel. 2013. *La gestation pour autrui. Fictions et réalité*. Paris: Fayard.
Fenton-Glynn, Claire. 2016. "Outsourcing Medical Dilemmas: Regulating International Surrogacy Agreements." *Medical Law Review* 24: 59–75.
Ferrando, Gilda. 2017. "Ordine pubblico e interesse del minore nella circolazione degli *status filationis*." *Corriere Giuridico* 34: 946–66.
Ferrando, Gilda. 2019. "I bambini, Le Loro Mamme E Gli Strumenti Del Diritto." *GenJus* 6 (1): 6–17.
Ferri, Giovan Battista. 1999–2000. "Dall'intento liberale al cosiddetto impegno etico e superetico: ovvero l'economia della bontà." *Diritto Privato* 6–7: 327–464.
Foucault, Michel. 2004. *Naissance de la biopolitique. Cours au Collège de France*, 1978–1978. Paris: Seuil.
Frison-Roche, Marie-Ange. 2015. "Comprendre la Cour de cassation (à propos des deux arrêts d'Assemblée plénière du 3 juillet 2015 sur la pratique des maternités de substitution (dite GPA)." *Petites Affiches* 404: 4–20.
Fulchiron, H., and C. Guilarte Martin-Calero. 2014. "L'ordre public international a l'épreuve des droits de l'enfant: non à la GPA internationale, oui à l'intégration de l'enfant dans sa famille. A propos de la décision du Tribunal supremo español du 6 février 2014." *Revue critique du droit international privé* 6: 531–58.
Garrison, Martha. 2008. "Regulating Reproduction." *George Washington Law Review* 76 (6): 1623–56.
Gattuso, Marco. 2019. "Dignità della donna, qualità delle relazioni familiari e identità personale del bambino." *Questione Giustizia* 30 (2): 74–92.
Giuseppa, Palmeri. 2019. "Accordi di gestazione per altri, principio di autodeterminazione e responsabilità genitoriale." in *Riproduzione e relazioni. La surrogazione di maternità al centro della questione di genere*, edited by M. Caielli, et al., 44–81. Torino: CIRSDe – Centro Interdisciplinare di Ricerche e Studi delle Donne e di Genere Università degli Studi di Torino.
Glenn, Cohen I. 2012. "S.H. And Others V. Austria and Circumvention Tourism." *Reproductive BioMedicine Online* 25: 660–62.
Grasso, Alfio G. 2019. "Maternità surrogata e riconoscimento del rapporto con la madre intenzionale." *Nuova Giurisprudenza Civile Commentata* 35 (4): 757–64.
Greely, Hank. 2016. *The End of Sex and the Future of Human Reproduction*. Cambridge (Mass.): Harvard University Press.
Hall, Eliza. 2018. "From European Theory to American Practice: the United States as a Laboratory for Surrogacy Law." In *Regulierung der Leihmutterschaft. Aktuelle Entwicklungen und interdisziplinäre Herausforderungen*, edited by B. Ditzen, and M.-Ph. Weller, 69–80. Tübingen: Mohr Siebeck.
Halley, J. 2011. "What Is Family Law?: A Genealogy. Part II." *Yale Journal of Law & the Humanities* 23 (2): 189–293.
Hansmann, Henry. 1989. "The Economics and Ethics of Markets for Human Organs." *Journal of Health politics, Policy & Law* 14: 57–85.
Hirschmann, Albert O. 1991. *The Rhetoric of Reaction. perversity, futility, Jeopardy*. Cambridge (Mass): Harvard University Press.
Hollinger, J. H. 2019. *Adoption Law and Practice*. New York: Matthew Bender & C.
Hollinger, J. H., and N. Cahn. 2009. "Forming Families by Law - Adoption in America Today." *Human Rights* 36: 16–19.
Hongladarom, Soraj. 2019. "Thailand." In *Eastern and Western Perspectives on Surrogacy*, edited by J. Scherpe, C. Fenton-Glynn, and T. Kaan, 499–511. Cambridge: Intersentia.
Horsey, Kirsty. 2010. "Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements." *Child and Family Law Quarterly* 22 (4): 449–74.
Jones, Holly. 2019. "Contracts for Children: Constitutional Challenges to Surrogacy Contracts and Selective Reduction Clauses." *Hastings Law Journal* 70 (2): 595–620.
Kaplow, Louis, and Steven Shavell. 2002. *Fairness versus Welfare*. Cambridge (Mass.): Harvard University Press.
Kennedy, Duncan. 2001. "The Political Stakes in 'Merely Technical' Issues of Contract Law." *European Review of Private Law* 1: 7–28.
Kennedy, Duncan. 2006. "Three Globalizations of Law and Legal Thought." In *The New Law and Economic Development: a Critical Appraisal*, edited by D. M. Trubek, and A. Santos, 19–73. New York: Cabridge University Press.
Kennedy, Duncan. 2010. "Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought." *American Journal of Comparative Law* 58: 811–41.
Khazova, Olga A. 2019. "Russia." In *Eastern and Western Perspectives on Surrogacy*, edited by J. Scherpe, C. Fenton-Glynn, and T. Kaan, 281–306. Cambridge: Intersentia.

Kotiswaran, Prabha. 2019. "India." In *Eastern and Western Perspectives on Surrogacy*, edited by J. Scherpe, C. Fenton-Glynn, and T. Kaan, 499–511. Cambridge: Intersentia.
Krawiec, Kimberly D. 2009. "Altruism and Intermediation in the Market for Babies." *Washington & Lee Law Revew* 66: 203–57.
Krawiec, Kimberly D. 2010. "Price and Pretense in the Baby Market." In *Baby Markets: money, morals, and the New Politics of Creating Families*, edited by M. Goodwin, 41–55. Cambridge: Cambridge University Press.
Landes, Elisabeth, and Richard A. Posner. 1978. "The Economics of Baby Shortage." *Journal of Legal Studies* 7: 323–48.
Lurger, B. 2013. "Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot." *Praxis des Internationalen Privat- und Verfahrensrechts* 32: 282–89.
Marcella, Di Stefano. 2019. "The Best Interests of the Child Principle at the Intersection of Private International Law and Human Rights." In *Fundamental Rights and Best Interests of the Child in Transnational Families*, edited by E. Bergamini, C. Ragni, E. Bergamini, and C. Ragni, 157–70. Cambrige: Intersentia.
Marella, Maria Rosaria. 2000. "Adozione." In *Digesto delle discipline provatistiche. Sezione civile*, agg., Torino: Utet.
Marella, Maria Rosaria. 2007. "Il fondamento sociale della dignità umana. Un modello costituzionale per il diritto europeo dei contratti." *Rivista Critica Del Diritto Privato* 25 (1): 67–103.
Mason, J. Kenyon. 2007. *The Troubled Pregnancy. Legal Wrongs and Rights in Reproduction*. Cambridge: Cambridge University Press.
Mazer, Deborah S. 2017. "Born Breach: the Challenge of Remedies in Surrogacy Contracts." *Yale Journal of Law & Feminism* 28 (1): 211–40.
Morozzo Della Rocca, Paolo. 2014. "Diritti del minore e circolazione all'estero del suo stato familiare." In *La famiglia si trasforma. Status familiari costituiti all'estero e loro riconoscimento in Italia, tra ordine pubblico interno e interesse del minore*, edited by G. O. Cesaro, et al., 35–48. MIlano: Franco Angeli Franco Angeli, Milano, 2014, 35.
Niccolai, Silvia. 2017a. "Alcune note intorno all'estensione, alla fonte e alla *ratio* del divieto di maternità surrogata in Italia." *Genlus* 5 (2): 49–59.
Niccolai, Silvia. 2017b. "Liberare la maternità lesbica dal discorso neutro sull'omogenitorialità: un interesse di tutte (e di tutti)." In *Nel nome della madre. Ripensare le figure della maternità*, edited by D. Brogi, et al., 43–59. Roma: Del Vecchio.
Norrie, Kenneth McK. 2018. "Surrogacy in the United Kingdom: an Inappropriate Application of the Welfare Principle." In *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best interests, Welfare and Well- Being*, edited by E. Sutherland, and L. Barnes Macfarlane, 165–79. Cambridge: Cambridge University Press.
Olivito, Elisa. 2017. "Una visione costituzionale sulla maternità surrogata. L'arma spuntata (e mistificata) della legge nazionale." In *Maternità, filiazione, genitorialità. I nodi della maternità surrogata in una prospettiva di Diritto Costituzionale*, edited by S. Niccolai, and E. Olivito, 3–29. Napoli: Jovene.
Parizer-Krief, Karène. 2011. "Gestation pour autrui et intérêt de l'enfant en Grande-Bretagne. De l'indemnisation raisonnable de la gestatrice prévue par la loi à la reconnaissance judiciaire des contrats internationaux à but lucratif." *Revue intérnational de droit comparé* 63 (3): 645–59.
Pennings, Guido. 2002. "Reproductive Tourism as Moral Pluralism in Motion." *Journal of Medical Ethics* 28 (6): 337–41.
Posner, Richard A. 1989. "The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood." *Journal of Contemporary Health Law and Policy* 5, (Spring): 21–31.
Radin, Margareth J. 2014. *Boilerplate: the Fine print, the Vanishing rights, and the Rule of Law*. Princeton: Princeton University Press.
Radin, Margareth J. 2017. "From Babyselling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market." *Osgoode Hall Law Journal* 54: 339–76.
Resta, Giorgio. 2002. "La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della carta dei diritti)." *Rivista Di Diritto Civile* 48 (6): 801–48.
Rute, Teixeira Pedro. 2019. "Portugal." In *Eastern and Western Perspectives on Surrogacy*, edited by J. Scherpe, C. Fenton-Glynn, and T. Kaan, 229–57. Cambridge: Intersentia.
Scalisi, Vincenzo. 2017. "Maternità surrogata: come «far cose con le regole»." *Rivista di diritto civile* 63 (5): 1097–114.
Scherpe, Jens. 2016. *The Present and the Future of European Family Law*. Cheltenham: Edward Elgar.
Scherpe, Jens, and Claire Fenton-Glynn. 2019. "Surrogacy in a Globalised World Comparative Analysis and Thoughts on Regulation." In *Eastern and Western Perspectives on Surrogacy*, edited by J. Scherpe, C. Fenton-Glynn, and T. Kaan, 518–92. Cambridge: Intersentia.
Schuck, Peter H. 1990. "The Social Utility of Surrogacy." *Harvard Journal of Law & Public Policy* 13, no. 1 (Winter): 132–38.
Scott, Elisabeth S. 2009. "Surrogacy and the Politics of Commodification." *Law and Contemporary Problems* 72, no. 3 (Summer): 109–46.
Scott, Elisabeth S., and Robert E. Scott. 2015. "From Contract to Status: Collaboration and the Evolution of Novel Family Relationships." *Columbia Law Review* 115, no. 2 (March): 293–374.
Smith, Adam. 1979. *An Inquiry into the Nature and Causes of the Wealth of the Nations*. Oxford: Clarendon.
Somek, Alexander. 2014. *The Cosmopolitan Constitution*. Oxford: Oxford University Press.
Spar, Debora L. 2005. "For Love and Money: the Political Economy of Commercial Surrogacy." *Review of International Political Economy* 12, no. 2 (May): 287–209.
Spar, Debora L. 2009. "As You like It: Exploring the Limits of Parental Choice in Assisted Reproduction." *Law & Inequality: A Journal of Theory and Practice* 27 (2): 481–92.
Spivak, Carla. 2010. "The Law of Surrogate Motherhood in the United States." *The American Journal of Comparative Law* 58, Supplement: Welcoming the World: U. S. National Reports to the XVIIIth International Congress of Comparative Law: 97–114.
Stark, Johanna. 2019. *Law for Sale: A Philosophical Critique of Regulatory Competition*. Oxford: Oxford University Press.
Stefanelli, Stefania. 2018. "Procreazione e diritti fondamentali." In *Trattato di Diritto Civile*, edited by A. Sassi, F. Scaglione, and S. Stefanelli, Vol. IV, 93–175. Torino: UTET.
Storrow, Richard F. 2010. "The Pluralism Problem in Cross-border Reproductive Care." *Human Reproduction* 25: 2939–43.
Storrow, Richard F. 2012. "Judicial Review of Restrictions on Gamete Donation in Europe." *Reproductive Bio Medicine Online* 25: 655–59.
Susanna, Pozzolo. 2016. "Gestazione per altri (ed altre). Spunti per un dibattito in (una) prospettiva femminista." *BioLaw Journal – Rivista Di BioDiritto* 3 (2): 93–110.

Thomale, Chris. 2015. *Mietmutterschaft. Eine international- privatrechtliche Kritik*. Tübingen: Mohr Siebeck.
Thomale, Chris. 2017a. "State of Play of Cross-border Surrogacy Arrangements – Is There a Case for Regulatory Intervention by the EU?" *Journal of Private International Law* 13: 463–73.
Thomale, Chris. 2017b. "Das Kinderwohl ex ante – Straßburger zeitgemäße Betrachtungen zur Leihmutterschaft." *Praxis des Internationalen Privat- und Verfahrensrechts* 37 (6): 583–90.
Thomas, Yan. 1995. "Fictio Legis. L'empire De La Fiction Romaine Et Ses Limites Médiévales." *Droits* 21: 17–93.
Thomas, Yan. 1998. "Le sujet de droit, la personne et la nature. Sur la critique contemporaine du sujet de droit." *Le Débat* 100, (Mai-Août): 85–107.
Thomas, Yan. 2002. "Le sujet concret et sa personne. Essai d'histoire juridique rétrospective." In *Du droit de ne pas naître. À propos de l'affaire Perruche*, edited by O. Cayla, and Y. Thomas, 89–170. Paris: Gallimard.
Trimmings, Katarina. 2019. "Surrogacy Arrangements and the Best Intrerests of the Child." In *Fundamental Rights and Best Interests of the Child in Transnational Families*, edited by E. Bergamini, and C. Ragni, 187–208. Cambrige: Intersentia.
Ugo, Salanitro. 2019. "Ordine pubblico internazionale, filiazione omosessuale e surrogazione di maternità." *Nuova Giurisprudenza Civile Commentata* 35 (4): 737–41.
Valéry, Paul. 1960. "La conquête de l'ubiquité," in *Œuvres*, Vol. II, 1283– 87. Paris: Éditions Gallimard.
Van Beers, Britta. 2015. "Is Europe Giving in to Baby Markets? Reproductive Tourism in Europe and the Gradual Erosion of Existing Legal Limits to Reproductive Markets." *Medical Law Review* 23, no. 1 (Winter): 103–34.
Van Hoof, Wannes, and Guido Pennings. 2012. "The Consequences of S.H. And Others V. Austria for Legislation on Gamete Donation in Europe: an Ethical Analysis of the European Court of Human Rights Judgments." *Reproductive Biomedicine Online* 25: 665–69.
Venuti, Maria Carmela. 2018. "Procreazione medicalmente assistita: il consenso alle tecniche di PMA e la responsabilità genitoriale di single, conviventi e parti unite civilmente." *Genlus* 6 (1): 85–100.
Williamson, Oliver E. 1993. "calculativeness, trust, and Economic Organization." *Journal of Law & Economics* 36, no. 1 (April): 453–86.
Wittgenstein, Ludwig. 1999. *Philosophische Untersuchungen. Philosophical Investigations*. London: Blackwell.