Single filiation state, maternal recognition and anonymous childbirth

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SINGLE FILIATION STATE, MATERNAL RECOGNITION AND ANONYMOUS CHILDBIRTH
ABSTRACT: By Law 10th december 2012, no. 219 and the subsequent Italian Legislative Decree 28th December 2013, no.154 was introduced the single state of filiation, with consequent unified treatment and not only equal protection – regardless of whether or not the birth took place within wedlock – and a full legal recognition of "natural" kinship. The accentuation of the principle of *favor filii* at both the regulatory and the jurisprudential levels, also with reference to the status of filiation, both at the time of its acquisition and at the time of its dispute, implies a redefinition of the institution of, which has now become detached from the logic of opposition (if not of reconciliation) between children born in and out of wedlock.

KEYWORDS: State of filiation; recognition; maternity; birth anonymously; adoption

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1. Introduction

With Law 10th December 2012, no. 219 and the subsequent Italian Legislative Decree 28th December 2013, no.154, a radical change has been made in Italy to the code structure of the discipline of parentage: in fact, the distinction between children born in and out of wedlock (illegitimate or natural, according to the terminology of the time) has finally been definitively superseded through the institution of the single status of child. All children have the same legal status (art. 315 of the Italian Civil Code)[1] – that is to say, enjoying[2].

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[1] Italy conforms to the choice made by other systems close to us: for example, Spain, Greece, Switzerland and Germany.

[2] For initial comments see M. SESTA, *L'unicità dello stato di figlio nelle relazioni familiari*, in *Famiglia e diritto,* 2013, 231 ff; M. DOGLIOTTI, *La nuova filiazione fuori del matrimonio: molte luci e qualche ombra*, in *Famiglia e diritto,* 2013, 480 ff; P. SCHLESINGER, *Il d.lgs. n. 154/2013 completa la riforma della filiazione*, in *Famiglia e diritto,* 2013, 443; M. BIANCA (ed.), *Filiazione: commento al decreto attuativo*, Milan, 2014; V. CARBONE, *Riforma della famiglia: considerazioni introduttive*, in *Famiglia e diritto,* 2013, 225 ff; M. DOSSETTI, M. MORETTI, C. MORETTI, *La riforma della filiazione. Aspetti personali successori e processuali l. 10 dicembre 2012, n. 219*, Bologna, 2013; A. PALAZZO, *La riforma dello status di filiazione*, in *Rivista di diritto civile*, 2013, 245; ID., *La filiazione*, in A. CICU, F. MESSINEO, L. MENGONI, *Trattato di diritto civile e commerciale*, continued by P. SCHLESINGER, II ed., Milan, 2013; M. BIANCA, *L'unicità dello stato di figlio*, in C.M. BIANCA (ed.), *La riforma della filiazione*, Padua, 2015, 3 ff.

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The introduction of the single state of filiation was a corollary to the timely intervention (lexical and substantial) – respectful of the original code system – on the disciplines, among others, of recognition, the action of legal declaration of parenthood and unrecognised filiation. Among the main changes, the obsolescence of the special rules that governed the exercise of authority (now parental responsibility) of unmarried parents, dictated by art. 317-bis of the Italian Civil Code; the repeal of the aforementioned institution of commutation (art. 537, paragraph 2 of the Italian Civil Code), with consequent obsolescence of the position of subordination of children born out of wedlock in the succession to the parent with respect to children born in wedlock; finally, the rewriting of art. 74 and 258 of the Italian Civil Code, with consequent full legal recognition of "natural" kinship. As for this latter aspect, the assessment of non-marital parentage (through recognition or legal action of parenthood) has changed its expansive scope. In fact, it no longer produces – as in the past – purely "bilateral" effects, limited to the relationship between parents and children,[3] but allows the emergence of effects that are propagated by law to the relatives of the parent. The "collective" relationship of kinship, which until the Reform of 2012-2013 was the exclusive effect of the marriage bond – so that the child acquired parental ties, as born within the legitimate family, while the child born out of wedlock, without legal ties of kinship, remained outside the family – is now an automatic effect of the relationship of filiation *tout court*.[4] While the loss of diversification between legitimate and natural children has made indifferent the relationship between parents at the time of conception for the purposes of child protection, it has not eliminated the differentiation with regard to the methods of ascertaining the status of the child.[5] So while the relationship between parents and children (whether they were born inside or outside marriage) is now solely governed by art. 315-bis et seq. of the Italian Civil Code, the discipline of ascertaining parentage remains different depending on whether or not the parents are married. While for children born in wedlock the acquisition of the status of child is based on the automatisms dictated by the operation of the presumption of paternity of the husband of the expectant mother, in the case of non-marital parentage the acquisition of the *status filiationis* requires that the parent (*rectius* each parent) recognise the child or alternatively that the child act to have the parents declared. The centrality of recognition has therefore remained unchanged since the Reform. That this continuity of the system also corresponds to a continuity of *rationes* is an aspect to be verified, taking into account the fact that much has changed in the overall regulatory context of the discipline of non-marital filiation. In fact, the Reform created a unitary statute of "child", organically regulating the relationship between parents and children (art. 315 et seq. of the Italian Civil Code), regardless of whether they were born in wedlock or not, thus attributing equal conceptual importance to the discipline of ascertainment and the discipline of the relationship. This not only emancipated the out-of-wedlock parentage from the subordinate role it had suffered until recently with respect to matrimonial parentage – to the point of becoming a normative reference – but also influenced the «substantial nature of the institution of recognition»: it is no longer necessary for the attribution of a specific status of parentage, but has value – equal with respect to the presumptions of matrimonial parentage – attributed «to the single and all-

[3] Cf. M. SESTA, *Famiglia e figli a quarant'anni dalla Riforma,* cit.
[4] M. SESTA, *La crisi genitoriale tra pluralità di modelli di coppia e di regole processuali*, in *Famiglia e diritto,* 2017.
[5] On the point see the critical reflections of M. MANTOVANI, *Questioni in tema di accertamento della maternità e sistema dello stato civile*, in *Nuova giurisprudenza civile commentata,* 2, 2013, 323 ff.

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inclusive status of child»[6]. It is inferred that non-marital filiation no longer corresponds to a specific statute of the parent-child relationship – which in fact is single and undifferentiated – but it is so because of the rules governing its verification.

Consistently and again from a general point of view, the Reform inevitably distanced recognition from the status of "private fact", having on the other hand to measure itself more and more with the function of instrument of implementation of the child's interests, especially when it is a minor, to achieve *status filiationis* in the most immediate manner. The accentuation of the principle of *favor filii* at both the regulatory and the jurisprudential levels, also with reference to the status of filiation, both at the time of its acquisition and at the time of its dispute, implies a redefinition of the institution of recognition, which has now become detached from the logic of opposition (if not of reconciliation) between children born in and out of wedlock.

2. The necessary instruments for recognition with respect to the assessment of the status of child born out of wedlock

Recognition is a parent's duty. This is not the place to go into the analysis of the arguments in support of this assumption. It is sufficient to point out that the rightful nature of the recognition is a necessary consequence of the lack of automatism in the attribution of status of parent for filiation out of wedlock. Unlike filiation in wedlock, in fact – where the child's birth certificate is completed by the registrar based on the birth declaration made by one of the parents, by a special proxy, by the doctor or midwife or by another person who attended the birth (pursuant to the combined provisions of art. 29 and 30 of Italian Presidential Decree 396/2000) indicating that the mother is the woman who gave birth and the father is her husband – in the case of filiation outside marriage, in the absence of a similar automatism, the ascertainment is a consequence of the initiative of the parent[7]. In the absence of a declaration of recognition, the registrar cannot name the father and/or mother on the birth certificate and must produce a birth certificate for the child as a "child of unknown persons".

Now, with regard to the father, the lack of any automatism in the production of the birth certificate can be easily explained as an inevitable consequence of the objective uncertainty in the absence of a marital bond between the parents and therefore of an element (the duty of fidelity between the spouses) on the basis of which the father's identity is presumed. In other words, the ascertainment of parentage outside marriage *ex latere patris necessarily* requires the initiative of the person who, with recognition, expresses the conviction of his paternity, the result of «an assessment of circumstances, which seems appropriate to leave to his discretion»[8]: only the man who has (or believes to have) contributed to procreation is in a position to make the statement that gives legal certainty to the relationship of parentage that, in the absence of a marital relationship, would not otherwise be possible to achieve.

[6] S. TROIANO, *Le innovazioni alla disciplina del riconoscimento del figlio (art. 250, come modificato dall'art. 1 comma 2°, l. n. 219/2012)*, in *La riforma della filiazione,* edited by C.M. BIANCA, Padua, 2015, 191.

[7] V.A. RENDA, *L'accertamento della maternità: anonimato materno e responsabilità per la procreazione*, in *Famiglia e diritto,* 2004, 510.

[8] L. FERRI, *Lezioni sulla filiazione,* Bologna, 1976, 137.

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With regard to the mother, on the other hand, given the fact that, as is the case in many legal systems similar to our legal culture, motherhood could be attributed by law to the woman who gave birth, the provision of the necessary means of recognition with regard to the attribution of the status of child is a *choice* of the system. It was originally based on the need to preserve – to the detriment of the newborn child – the anonymity of the mother, protecting her from the disrepute resulting from the birth of a child out of wedlock[9]. The assessment of maternity conveyed by the recognition was therefore a «clear option of value»[10] to protect the desired differentiation between marital and non-marital parentage.

In such a perspective, the traditional rule – which remained in place even after the 2012-2013 reform of filiation – seems to be (not only discordant but even) irreconcilable with the single status of child: in fact, the reiterated prescription of the burden of maternal recognition retains an unnecessary differentiation in the assessment of maternity that affects the effectiveness of the right of the child to achieve *status filiationis*, recalling the dishonourable (or undesirable) character of parentage out of wedlock[11].

The change in the juridical and, even before, social context in which the traditional rule prevailed therefore requires a re-reading of the system for ascertaining maternity that identifies the reasons underlying the denial of the automatism of verification based on the fact of giving birth.

The foundation of the option of voluntary recognition even with respect to the ascertainment of maternity could be found in the principle of equality between father and mother. Just as the ascertainment of paternity cannot disregard recognition, the same degree of "discretion" must also be guaranteed to the mother: «since it was not possible to order the name of the father to be specified in the birth certificate (without his consent), it was thought to apply art. 3 (Constitution) establishing that the same would be true for the mother, thus achieving perfect equality between mother and father». This interpretative hypothesis has not been exempt from criticism, since, in the name of alleged equal treatment, the necessary instrumentality of the recognition of the mother leads to treating different situations in the same way (that of the father and that of the mother), moreover sacrificing the right of the child to immediately obtain *status filiationis* at least with regard to the birthing mother[12].

The aporia of the egalitarian foundation leads us to check if there are not plausible reasons for the lack of automatism in the assessment of maternity, descending from the nature and function of recognition in a systemic perspective. Before the 2012-2013 reform of filiation and in particular the extension of the effects of recognition to the parent's relatives (see art. 258 of the Italian Civil Code), the abdication of the certification function by the legal system in the absence of maternal initiative could be explained as a consequence of the nature of recognition as a "private fact", in itself unsuitable to give rise to a family relationship.

Only with respect to filiation in marriage does there exist – it was said – a public interest in the official verification of status, as instrumental to the automatic inclusion of the newborn in the family itself,

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[9] Originally, maternal recognition was the strategy for discouraging out-of-marriage parentage and a characteristic of the entire family of codes that arose from that position.

[10] A. RENDA, *L'accertamento della maternità*, cit., 512.

[11] *Ibid*.

[12] L. FERRI, *op. cit.*, 137.

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outside which there was no evidence of «the need to ensure the immediate inclusion of the newborn in that cell». The conclusion, formulated before the Reform, must be examined in light of the change in the notion of kinship, which now includes "natural" kinship. Indeed, while recognition also has an effect on the parents' relatives, so that the child acquires parental ties by virtue of the recognition made by the parent, it could be doubtful whether the recognition can still be qualified as a "private matter", and as such left to the exercise of the parents' self-determination. Such a change – while a harbinger of epochal practical and systematic consequences – is not able to overcome the assumption according to which recognition is the source of the intersubjective relationship between the parent and the child – having effects that extend to the parent's relatives – but in itself not functional to the *de facto* insertion of the child in the nuclear family, which in fact may or may not occur. Such a reading – even if still compatible with the current discipline of the effects of recognition – appears to be unsatisfactory in that it is irreconcilable with the prospect of a system of unitary treatment of children. To affirm that it is not in the law's interest to automatically ascertain the status of a child when it is not subordinate to the entry into the nuclear (marital) family, can only mean recognising the parent's discretion with respect to the establishment of the status of a child born out of wedlock, which underlies the thought – also criticised – that if the birth does not take place within wedlock it is reasonable to allow the woman to decide to evade parental responsibility by omitting recognition and abandoning the child (but on this point see § 3).

Hence the need to identify an interpretative solution that (re)reads the prescription of the burden of maternal recognition in light of the principle of equality between children born outside and inside marriage: if the status of the child can only be one because the regulation of the relationship is unified, but the ascertainment of maternity is differentiated according to whether the mother is married or not, it is necessary to verify in what terms the existence of the marital relationship – which inevitably affects the attribution of paternity – justifies the existence of different rules also with regard to the ascertainment of maternity. And assuming that the rational basis of such differentiation can only be distinct from the purpose of the children according to the relationship that unites the parents, what must be subject to verification is whether the exclusion of automatism in the attribution of maternity corresponds to the best protection of the child's interests.

In this perspective, it is important to note that – unlike in the case of filiation in marriage – the law reserves the right to assess *ex ante*, or at the time of the establishment of the filiation relationship, the absence of conditions of potential harm to the child such that it is considered appropriate that recognition should produce its effects not *ex se*, but only at the outcome of a positive assessment of its actual correspondence with the child's interest. Apart from the case in which recognition does not take place simultaneously by the parents – extraneous to the analysis herein because of the singularity of its rational basis – making it necessary to verify that it does not damage the personal and family identity acquired in the meantime by the child, in the current system of ascertaining non-marital parentage there are cases in which recognition – even if there is a hypothetical assumption of correspondence to the biological truth of the parentage – requires authorisation by the court to assess its correspondence with the child's interest: the recognition of the newborn by persons united by bonds of kinship or affinity referred to in art. 251 of the Italian Civil Code and the parent who has not yet reached the age of 16.

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The basis of these rules is the assumption that, in specific circumstances, the mere procreative fact is not considered sufficient in itself to establish parenthood (and therefore also maternity), requiring verification that the establishment of the legal relationship of parenthood does not conflict with the child's interests.

In the case of filiation between parents who are relatives or similar (taking into account the expiry of the general prohibition of recognition and the need for judicial authorisation pursuant to art. 251 of the Italian Civil Code, to which reference should be made), the particular circumstances of conception require that it be ascertained that the child is not placed in a family context that is detrimental to its balanced development.

Where the mother is not yet 16 years old, recognition requires authorisation in order to verify that in such case the ascertainment of parentage also corresponds to the mother's ability and suitability to care for the child. This is what emerges specularly from the provisions of the abbreviated procedure for the adoption of the child of a parent who is younger than 16, where it is provided that it can be postponed at the request of the parent only if «in the meantime the minor is assisted by the natural parent or relatives up to the fourth degree or in some other convenient way, while still maintaining a relationship with the natural parent».

The fact that such checks are only necessary in the case of non-marital parentage is explained by considering that when the parents are married, the hypothesis of a child born of parents who are relatives or relatives by affinity – an impediment to marriage under art. 87 – and the hypothesis of a child born of a parent who is younger than 16 years old are excluded *a priori*, taking into account the regulations governing the capacity to marry (art. 84 of the Italian Civil Code). In other words, the conditions for contracting marriage exclude, even in the interest of the children, that the birth can be the result of an incestuous relationship or that the parents can be very young. It follows that, to the contrary, the absence of the marital relationship implies that such verification is left to the phase of ascertaining parentage. Therefore, in the case where, in the interest of the child, those potentially prejudicial circumstances exist, which in the case of marital filiation are already subject to verification at the time of the establishment of the marital relationship, the recognition cannot produce its effects.

Since such verification would not be possible if maternity were attributed by law to the woman giving birth, the position of the unmarried child would be less safeguarded in relation to cases of "incest" or procreation by a parent younger than 16, since the child would be deprived of that specific form of protection – which the legislature has provided – consisting in the verification of the concrete absence of reasons for potential harm precisely at the stage of the establishment of the *status filiationis*. Therefore, apart from the case of abandonment, to which we will return later, the subordination of ascertainment to the initiative – albeit necessary – of the mother does not correspond to the mother's recognition of the freedom to assess whether to evade parental responsibility for the child, but, in the proposed understanding, rather corresponds to the need to verify that there are no concrete reasons hindering the establishment of the bond, taking into account the particular circumstances of the birth.

The conclusion reached needs to be verified in light of the hypothesis in which the mother is interdicted. Taking into account that the interdiction – which prevents marriage – can also be pronounced against the married woman, when she gives birth to a child, she is automatically specified in the birth certificate as the mother of the child. On the other hand, if the unmarried interdicted woman gives

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birth to a child, not only can she not be specified *ipso facto* as the mother of the newborn, but normally she cannot perform the act responsible for the establishment of the state of filiation, i.e. recognition. As a result, in the cases – which are assumed to be the majority – in which the child is not recognised by the father, an abbreviated procedure of adoption is opened, which allows the child to achieve a state of filiation (full yes, but) not in harmony with the biological bond. This places the child born out of wedlock at an apparently greater disadvantage compared to the child born in wedlock, who is no less guaranteed the establishment of the state of filiation corresponding to the truth of procreation in relation to the mother. It must be considered in this regard how the different position of the child born out of wedlock once again is to be considered in light of the principle of *favor filii*, verifying in what terms the absence of the marital relationship makes it not unreasonable to rule out the automatic establishment of maternity for the interdicted mother. Given that the prohibition of recognition for the interdicted person also finds its raison d'être in the reliability of the declaration made by them, it is undeniable that the parent who is fully deprived of the capacity to act is normally also considered unsuitable for the exercise of parental responsibilities. This is clearly evident from the wording of art. 317 of the Italian Civil Code, by virtue of which the incapacity of the parent constitutes an impediment to the exercise of parental responsibilities. It follows that, where the child is born of married parents, where the mother is interdicted, the child is presumed to be cared for by the father, so that – at least in the abstract – there is no need to assess whether the child has no parents capable of assuming responsibility for his growth. On the other hand, in the case where the mother is unmarried, in the absence of two parental figures, in the perspective of the legal system it is more suited to the interests of the child who, not recognised by the father and provided that the case in which the relatives request adoption pursuant to art. 44 does not occur, the abbreviated procedure of adoption is initiated, which allows the child to achieve the establishment of a full filiation relationship in the shortest possible time. In light of the above, the qualifiable of recognition as a "right" of the parent must be verified. This qualification is established in art. 30 of the Constitution[13] and art. 11, paragraph 2 of the Adoption Law, which allows the biological parent who intends to perform the recognition to request the suspension of the adoption procedure. On several occasions the case law has followed this interpretation[14], finding its basis in the guarantee of effectiveness of family positions.

Indeed, even if the recognition is classified as a right, its "conditional" character cannot be denied, both in consideration not only of the presumed interrelation with the truth of the procreative fact, in the sense that the right to recognition, except in the case of heterologous fertilisation, is based on biological paternity or maternity, but also of the correspondence of the recognition with the interests of the child. The consideration of the child's interests in the phase of the establishment of the filiation relationship is a peculiar trait (and, as mentioned above, characteristic) of non-marital filiation. While in fact in the case of filiation in wedlock the assessment of the state is automatic, without it being

[13] Indeed, by following the letter of the law, the right to perform the duties resulting from procreation is constituted, but not in itself the right to see the filiation relationship ascertained.

[14] P. UBALDI, *La filiazione naturale*, in G. COLLURA, L. LENTI, M. MANTOVANI (eds.), *La Filiazione*, in P. ZATTI (dir.), *Trattato di diritto di famiglia*, II, Milan, 2012, in part note no. 104; in case law Cass. 22 October 2002, no. 14894, in *Guida al diritto,* 2003, 1, 80.

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possible in any way to highlight the correspondence of the assessment of the child's interests – possibly subject to *ex post* verification in the context of a procedure for the forfeiture or limitation of parental responsibility, if the child is a minor – in the system of non-marital filiation it acquires importance right from the ascertainment phase, taking into account, as mentioned above, the time of recognition (art. 250, paragraph 3 of the Italian Civil Code) or of the circumstances of conception (art. 250 and art. 251 of the Italian Civil Code).

3. The mother's choice to remain anonymous

The conclusions reached with regard to the rational basis for protecting the child's interests, the limitation period for the burden of maternal recognition[15] and the duty to recognise must be verified in light of the option granted to the woman giving birth – unless the child is the result of medically assisted procreation, in view of the prohibition laid down in art. 9 of Italian Law 40/2004 – not to be named in the birth certificate, as envisaged by art. 30 of Italian Presidential Decree 396/2000.

The recalled art. 9 of lo. n. 40/2004 regulates a preclusive discipline regarding the attribution of the filiation status to the child born after a human fertilization practice: in particular, the comma 1 of the art. 9 states that the father is unable to apply the court in order to remove the status of the child on the basis of the absence of the genetic bond between them[16]. Moreover, the same *ratio* justifies the normative choice of the 3rd comma which excludes the legal value of the genetic relation between the donor and the child which was born with donor's genetic contribution[17].

The aim of both recalled norms is, on a hand, to protect the stability of status's child and also to promote the so called reproduction responsibility[18] of the parents which accessed to the medical practice and, on the other, to avoid any kind of relationship between the donor, a stranger to the familial nucleus and not involved in the parental project, and the child, which has to be guaranteed that his/her status has to be according to the parental consensus and choice.

Taking in consideration the mother perspective, the art. 30 of Italian Presidential Decree 396/2000 states that «[t]he birth declaration shall be made by one of the parents, by a special proxy or by the doctor or midwife or by any other person who has attended the birth, respecting the mother's wish not to be named». This right, however, is also granted to married women, who, unlike their husbands – for whom the presumption pursuant to art. 231 of the Italian Civil Code – can prevent the production of a birth certificate that qualifies her as the mother, making use – not only of the right to recognise the child, but, at least in the abstract – to remain anonymous as well.

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[15] Thus excluding the mother's right to evade responsibility for procreation. On this point cfr. M. GIORGIANNI, entry *Madre,* in *Enciclopedia del diritto*, XXV, Milan, 1975, 135; A. SASSI, F. SCAGLIONE, S. STEFANELLI, *La filiazione e i minori*, in R. SACCO (dir.), *Trattato diritto civile,* II ed., Turin, 2018.

[16] U. SALANITRO, *La procreazione medicalmente assistita*, in G. BONILINI (dir.), *Trattato di diritto di famiglia*, IV, Turin, 2016.

[17] R. VILLANI*, La "nuova" procreazione medicalmente assistista,* in L. LENTI, M. MANTOVANI (ed.), Il *nuovo diritto della filiazione,* in P. ZATTI (dir.), *Trattato di diritto di famiglia,* Milan, 2019, 328.

[18] A. MARGARIA, *Nuove forme di filiazione e genitorialità. Leggi e giudici di fronte alle nuove realtà*, Bologna, 2018, 38; A. VALONGO, *Nuove genitorialità nel diritto delle tecnologie riproduttive*, Naples, 2017, 37.

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It is worth pointing out that the recognition of the right of women to give birth anonymously is a peculiarity of the Italian law on the subject of ascertaining maternity in the European context, taking into account the fact that in the majority of countries with a legal culture similar to ours, by law maternity is attributed to the woman giving birth[19].

As a corollary to the provision of art. 30, Italian Presidential Decree no. 396/2000, art. 93, paragraph 2 of Italian Presidential Decree no. 396/2000 establishes that the «certificate of childbirth care or the medical record, which includes personal data that make it possible to identify the mother who has declared that she does not want to be named, making use of the right referred to in art. 30, paragraph 1 of Italian Presidential Decree no. 396/2000, a full copy of the document may be issued to those who have an interest in it in accordance with the law one hundred years after the document was created». The typical effect of the right to anonymity is that of the inacessibility of information relating to the identity of the mother by third parties, which was indeed envisaged even before the Bassanini Reform. This right to remain anonymous dates back to art. 9 of Italian Royal Decree Law no. 198 of 8 May 1927, converted into Italian Law no. 2838 of 6 December 1928 (*Conversion into law of Italian Royal Decree Law no. 798 of 8 May 1927 concerning the organisation of service assisting illegitimate children who have been abandoned or exposed to abandonment*), which, while it did not establish an explicit prohibition against natural children entrusted to public assistance learning who their mothers were, in fact it prevented this from being discovered, implicitly recognising the right to remain anonymous[20].

Given the non-exhaustive literal wording of the provision of art. 30, paragraph 1 of Italian Presidential Decree no. 396/2000, it is necessary to make a considerable effort of interpretation aimed at clarifying whether the declaration of anonymity performs additional functions with respect to the secrecy of the identity of the woman giving birth. In fact, it has been shown how the declaration of anonymity allows the woman to evade responsibility for procreation. By declaring that she does not want to be named in the birth certificate, in essence the woman abdicates (freely, but legitimately) motherhood, preventing the future establishment (according to a reading, even legally) of a parental relationship.

[19] Those that hope that this will be changed include, among others, most recently M. MANTOVANI, *Questioni in tema di accertamento della maternità e sistema dello stato civile*, in *Nuova giurisprudenza civile commentata,* 2, 2013, 323 ff.; A. RENDA, *L'accertamento della maternità. Profili sistematici e prospettive evolutive*, cit., passim. Anonymity was legislated in Spain by art. 47(1) of the Law on the Civil Registry, but since 1999 it has not been applied by virtue of a judgement of the *Tribunal Supremo*, which held it to be contrary to the Constitution (*Tribunal Supremo*, 21 September 1999, no. 776). With specific regard to the French legal system, art. 341 of the French Civil Code provides that: «La recherche de la maternité est admise sous réserve de l'application de l'article 341-1. L'enfant qui exerce l'action sera tenu de prouver qu'il est celui dont la mère prétendue est accouchée. La preuve ne peut en être rapportée que s'il existe des présomptions ou indices graves», mentre l'art. 341-1 prevede che: «Lors de l'accouchement, la mère peut demander que le secret de son admission et de son identité soit préservé». With regard to French law, it has been stated that it provides for birth "with discretion", in the sense that, following French Law no. 93-2002 of 22 January 2002 (prompted by the ECHR judgement in Odievre v. France, which will be explained below) concerning access to the origins of adopted persons, the reversibility of the mother's choice to revoke her declaration of anonymity has been made official through the intervention of the CNAOP (*Conseil national pour l'acces aux origines personalles*). In general, for comparative analysis, P. STANZIONE, *Identità del figlio e diritto di conoscere le proprie origini*, in *Famiglia e diritto*, 2015, 190 ff.; J. LONG, *La Corte europea dei diritti dell'uomo, il parto anonimo e l'accesso alle informazioni sulle proprie origini*, in *Nuova giurisprudenza civile commentata*, 2, 2004, 284 ff.

[20] Regional administrative court of Marche 13 November 2008, no. 1914, in *Banca dati Leggi d'Italia*.

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To this end, it is first necessary to verify how the mother must or may exercise this right, as the law is silent in this regard.

Especially with regard to the single woman, it is also doubtful whether the exercise of the right to give birth anonymously requires an express declaration or whether, on the other hand, the effect of anonymity is implicit in the non-recognition of the child. In the case of unmarried women, in the absence of any automatism for the verification of parenthood, the persons entitled to make the birth declaration to the registrar cannot specify the details of the woman giving birth. In fact, art. 29 of Italian Presidential Decree no. 396/2000 – which reproduces the tenor of the previous art. 73, Italian Royal Decree no. 1238/1929 – states that the birth certificate of a child born out of wedlock can only specify the information relating to the parents «who make a declaration of recognition» or «those who have given their consent by public deed to be named». Thus, «unless the birth declaration itself has been made personally by the woman, i.e. she has expressed her consent to be named on the birth certificate by public deed»[21], the civil registrar cannot specify the information of the mother on the birth certificate.

The interpretation that non-recognition is equivalent to a declaration of anonymity is supported by the Book of maxims for civil status officers of the Interior Ministry[22]. It reads, «[c]onsidering that regulations do not provide for an express declaration of this will not to be named by the woman who has recently given birth, it is irrelevant that this be noted by third parties in any form. If the woman who has recently given birth does not intend to be named, her information must not be entered on any civil status records, extracts or declarations, and the birth certificate kept in the records shall not be accessible to any person»[23].

On a practical level, therefore, there does not seem to be any differentiation between the position of the single woman who remains inactive – and therefore does not provide her recognition – and the woman who in contrast declares that she does not want to remain anonymous.

This reconstruction appears unconvincing in a number of respects. While it is true that the mother's declaration on the birth certificate implies recognition of parentage – without the need for a further formal act of recognition[24] – several considerations lead to the conclusion that the opposite is not true, namely that the mother's failure to declare her birth is equivalent to the exercise of the right not to be named on the birth certificate. First of all, in consideration of the fact that the omission of recognition may not coincide with the mother's willingness to remain anonymous, since it may, on the other hand, be dictated by contingent reasons, even temporary ones, which are incompatible with the mother's willingness to renounce her maternal role. Consider the case where the mother at birth is not, even temporarily, in a position to make the declaration of recognition of the child either because she is not in full possession of her faculties or because she has not yet reached the minimum age to recognise a child and authorisation has not been requested from the court. Again, consider the case where she voluntarily does not recognise the child temporarily, waiting for the father to recognise it first.

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[21] A. RENDA, *L'accertamento della maternità. Profili sistematici e prospettive evolutive*, cit., 518.

[22] Last edition, 2012, available at the website *http://servizidemografici.interno.it/sites/default/files/Massimario-Ufficiale-Stato-Civile_2012_0.pdf*.

[23] However, it should be borne in mind that there are administrative practices in place to request such a declaration from women who have recently given birth.

[24] Cass. 5 July – 25 September 2018, no. 22729, in *Il caso.it*.

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Then, to affirm that the choice of not being named is exercised (even or only) through the non-recognition of the child by the mother is, in the author's opinion, in contrast with a systematic interpretation of the rule. In fact, taking into account the necessary instrumentality of recognition with respect to the ascertainment of parenthood, and therefore also of maternity, the mother – like the father – cannot in any case be "named" in the birth certificate. Article 258 of the Italian Civil Code itself makes this assumption explicit, establishing that no reference may be made to a parent who does not recognise the child. It follows that art. 30 of Italian Presidential Decree 396/2000 does not establish any specific rules on the attribution of maternity, but merely reiterates the system for recording data relating to the mother which, while available to the registrar since they are included in the certificate of childbirth, cannot "transit" onto the birth certificate being drafted. Such a statement therefore affects the management of information held by the public administration relating to the identity of the mother, being aimed at preventing that in the period following the birth and following the abandonment of the newborn her personal data get disclosed to third parties.

It is only this perspective that, according to the author, explains the reason why this option is granted only to the mother and not to the father. If the declaration of anonymity were to be based on the production of the birth certificate, which is equivalent to an omission of recognition, it should also be possible for the father to make such a declaration of anonymity, to whom no paternity can be attributed – in the absence of a matrimonial bond – with respect to the newborn. Conversely, if it is understood as a desire to make use of a specific regime of secrecy by the public administration with respect to data relating to identity, it explains why this choice is reserved for the mother only: the identity of the man is not in fact contained in any document held by the public administration, while that of the woman may emerge from the data accompanying the birth certificate. So in practice the right to maintain the secret about who is a parent is related only to the mother, who therefore needs this additional special protection.

In order to achieve this alternative to more tragic or risky ways of managing pregnancy and childbirth, the typical effect of perpetual concealment of the identity of the mother constitutes an unswerving corollary since this right to be forgotten is a guarantee of the finality of abandonment, it not being possible for the adopted child to identify the mother. It should be noted incidentally that the Constitutional Court[25] has in fact mitigated the totally preclusive scope of the declaration of anonymity, stating the constitutional illegitimacy of art. 28, paragraph 7, Italian Law no. 184 of 4 May 1983, as replaced by art. 177, paragraph 2, Italian Legislative Decree no. 196 of 30 June 2003, in so far as it does not provide – by means of a procedure established by law that ensures the utmost confidentiality – for the possibility for the court to consult a mother – who has declared that she does not wish to be named pursuant to art. 30, paragraph 1 of Italian Presidential Decree no. 396 of 3 November 2000 – at the request of the child, seeking a possible revocation of this declaration. The disputed provision constitutes a sort of "crystallisation" or "immobilisation" of the manner in which the mother exercises her choice of anonymity, which assumes connotations of irreversibility essentially intended to "expropriate" the person entitled to know his origins for the protection of his fundamental rights against any other option; but while it can be considered reasonable that the choice for anonymity legitimately prevents the emergence of a "legal parenthood", with inevitably stabilised effects for the future, it

[25] Const. Court, 22 November 2013, no. 278, in *Nuova giurisprudenza civile*, 4, 1, 2014, 279 note of V. MARCENÒ.

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does not seem reasonable that the choice is necessarily and definitively preclusive also with respect to relations of "natural parenthood", since that choice may concern, at the level of the latter, an option that may be revoked (at the initiative of the child), precisely because it corresponds to the reasons for which it was made and can be maintained. It will be the task of the legislature to introduce specific provisions to allow verification of the natural mother's continued desire not to be named, and at the same time to strictly safeguard her right to anonymity, according to procedural choices that adequately circumscribe the methods of accessing identifying information – even by the competent offices – needed for such verification. Following the intervention of the Court, therefore, the child can ask the Court, with due regard for confidentiality, that the mother be asked to renew, so to speak, her desire for anonymity, or vice versa that she accept the disclosure of her personal information to the child[26].
Moreover, there is reason to believe that the mother's declaration of not wanting to be named in the birth certificate is connected (inseparably, in a systematic perspective) with the production of a birth certificate as the child of unknown persons so that a shortened adoption procedure is initiated. Essentially, the declaration of anonymity is nothing more than a remedy for the abandonment of the newborn, allowing the mother to achieve the certainty that the child, then given up for adoption, can never know her identity through the documents that contain her personal data, even though they are in the possession of the public administration. The fact that the guarantee of secrecy of one's identity is associated with the adoption and produces effects only with regard to the parties responsible for the personal data of the mother is confirmed by the fact that the only primary source that refers to the "institution" of anonymity is found in art. 28, paragraph 7 of the Adoption Law. This regulation merely affirms the adopted person's right to know his or her origins where the mother has given birth anonymously[27].
But again, the formulas of the civil registrars relative to the production of the birth certificates reinforce this conviction, where they provide that only in the case where there is not even paternal recognition reference is made to the birth «from a woman who does not consent to being named» (formula 34), while in the case where the father alone consents to recognition the formulas refer to the birth «from the natural union of the declarant, [...] citizen, with a woman who is not his relative or related to him to any degree that precludes recognition in accordance with art. 251 of the Italian Civil Code».

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[26]See judgement to S.U. the Court of Cassation 25 January 2017, no. 1946, in *Corriere giuridico*, 2017, 618, with note by M. N. BUGETTI.
[27] Anonymous childbirth has indeed assumed partially different connotations with regard to the balance between the right to maternal anonymity and that of the adopted child to know her identity following ruling no. 278 of the Constitutional Court of 22 November 2013 in *Corriere giuridico*, 2014, 471, with a note by T. AULETTA; in *Nuove leggi civili*, 2014, 405 with a note by S. TACCINI, *Verità e segreto nella vicenda dell'adozione: il contributo della Corte costituzionale*, in *Famiglia e diritto*, 2014, 11, with a note by V. CARBONE, who declared the illegitimacy of the seventh paragraph of art. 28 of Italian Law no. 184 of 1983, in so far as it does not provide for the possibility for the court – at the request of the child given up for adoption – to contact the biological mother to request a possible revocation of that declaration. See also Cass. no. 15024 of 21 July 2016 in *Nuova giurisprudenza civile commentata*, 2016, 1484, with note by P. STANZIONE, according to which the term provided for by the aforementioned art. 93, paragraph 2, Italian Legislative Decree no. 196/2003 cannot be considered operational beyond the limit of the mother's life.

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In short, the mother's declaration that she does not want to be named – in the typical case – constitutes a case of abandonment, in the sense that it results in the production of a birth certificate for the child as the child of unknown persons.
According to the author, this specific content of the declaration by the woman that she does not want to be named in the birth certificate consists in the manifestation of a desire to abdicate her parenthood so that the child can be given up for adoption and immediately acquire a state of filiation that is alternative to the biological relationship. The woman's choice to not be named is justified in the system of ascertaining parenthood in so far as the abdication of her maternal role is based on her assessment of being unable to raise the child and on the presumed existence of a situation of abandonment of the newborn that makes a quick adoption more consistent with its interests.
Secrecy is instrumental to the realisation of the minor's interest, as it encourages the mother not to have an abortion and to safeguard the child's health, as well as her own, giving birth in a protected situation and not to resort after birth to much more tragic choices like infanticide or indiscriminate abandonment. However, this does not allow us to argue to the contrary that the mother is sovereign in her choice (therefore free and discretionary) to not recognise the child so it can be given up for adoption. In fact, the proven connection with the institution of adoption allows identifying a matrix of remedies, as such an exception to the archetype of parental responsibility through procreation: in other words, just as the adoption of a minor who, once he or she has achieved the status of filiation with respect to biological parents, is found in a state of abandonment does not change the dutiful nature of the parents' obligations of care, education, maintenance and education, the finding of a situation of abandonment before the ascertainment of the status of filiation before the child is recognised does not change the dutiful nature of the recognition. In such a case, the state of abandonment is not the subject of an ascertainment by the court that declares a state of abandonment, but rather the subject of a simple finding at the production of a birth certificate as a child of unknown persons.
But in order for the anonymity of the mother to constitute a case of abandonment it must be the case that not even the father is able or willing to assume parental responsibility for the newborn; that, vice versa, one could not hypothesise that the newborn acquires that *status filiationis* which is an alternative to the biological version thus remedying the injustice of coming into the world without parents[28].
In this way anonymous childbirth does not deviate from its original intent as a means of protecting "abandoned" children, according to the old-fashioned vocabulary of the legislature of 1929, or, in a modern vernacular, as a form of assistance to a woman in difficulty who sees the abandonment of the child at birth as a necessary choice yet still preferable to the termination of the pregnancy.
Hence the attempts to arrive at a restrictive interpretation of art. 30 of Italian Presidential Decree No 396/2000, to be considered, therefore, not as an unconditional right of the mother, but as an option to be constantly reconciled with the right of the child to his or her own personal identity, which takes

[28] Cf. on this point the observations of P. MOROZZO DELLA ROCCA, *Lo stato di figlio nato fuori del matrimonio*, in AA.VV., *La nuova disciplina della filiazione*, Santarcangelo di Romagna, 2015, 91.

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form «in the particular aspect of the right to obtain a status in accordance with the biological truth of procreation»[29].

If what has been observed to this point is well-founded, anonymous childbirth does not contradict the different nature of recognition since it does not give the mother the freedom to abdicate her parental role, but rather constitutes a remedy to a condition of difficulty of the pregnant woman that makes it preferable, in the interest of the child, for the mother to cut legal ties with the newborn forever, allowing it to achieve an alternative status to biological filiation. Thus anonymity makes it possible to protect the identity of the woman giving birth with respect to any future investigations into the child's maternity, preventing abortion or abandonment while at the same time ensuring the newborn a status of alternative filiation through adoption. There is no doubt that – although limited within these terms – the institution of anonymous childbirth has critical elements, especially when viewed from the perspective of tradition, and therefore a view of women and non-marital filiation that are far removed from current thinking[30]. However, it is worth reflecting on how things have changed recently, even in systems that adhere to the rule of automatic attribution of parenthood to the mother, by introducing corrective measures that are not dissimilar to maternal anonymity[31].

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[29] Cass. Pen. 6 August 2008, in *Guida al diritto, Famiglia e minori*, 2008, no. 9, 61 ff.; in theory cf. M. Dossetti, *L'accertamento della filiazione legittima tra automatismo e principio volontaristico*, in *Scritti in memoria di Cattaneo*, II, Milan, 2002, who excludes that the married mother can exercise this faculty recognised by the law in a completely free manner; G. Ferrando, *La filiazione: problemi attuali e prospettive di riforma*, in *Famiglia e diritto*, 2008, 644. In the opposite sense, M. Sesta, in M. Sesta, B. Lena, B. Valignani, *Filiazione naturale. Statuto e accertamento*, Milan, 2001, 10.

[30] Cf. the observations of A. Renda, *Accertamento della maternità: anonimato materno e responsabilità per la procreazione*, cit., 510.

[31] After a discussion that lasted for about a decade, law 28-8-2013 on vertrauliche Geburt was issued, which introduces the right of women to give birth without being immediately identified and thus being attributed maternity. For a summary of this policy see C. Rusconi, *La legge tedesca sulla vertrauliche geburt. Al crocevia tra accertamento della maternità, parto anonimo e adozione*, in *Europa e diritto privato,* 2018, 1347.

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