Medically-assisted procreation and the rise of off-center, new types of “parenthood”: it is incumbent upon lawmakers to intervene

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Abstract

Medically-assisted procreation (MAP) has given rise to a crisis in the traditional family model, made up of a mother and a father, and led to the births of babies who are genetically and biologically unrelated to their legal parents. Italian legal statutes ban such practices, which are punishable by law; yet there is currently no legislation aimed at governing and regulating the legal registration of children born through such procedures abroad. Italian jurisprudence, on the other hand, has acknowledged the right to parenthood for homosexual couples, ruling that the children thus born be considered legally bound to their social parents, by virtue of the affection-based bond, rooted in harmony and listening, that has been formed within the family setting, however unconventional it may be.

The paper’s author feels that an intervention from lawmakers is urgent and inescapable, in order to provide targeted legislation in such a sensitive realm.

Key words: Medically-assisted reproduction, natural motherhood, parental relationships, surrogacy, court rulings

Introduction

Scientific advancements over the past years have made it possible to prolong life by means of highly-sophisticated medical and surgical techniques (1), and most notably, have revolutionized the very notion of birth, somehow taking it away from the laws of nature. In Italy, Law n. 40, enacted on February 19th, 2004 containing “Norms governing medically assisted procreation”(2) has regulated MAP in order to enable sterile or infertile heterosexual couples, whether married or living together, to fulfill their wish to become parents (3-7). Before the enactment of Law 40, the only way to have a child for such couples was through uterus transplant, although that is still an extremely rare and experimental procedure (8-11). The above mentioned Law 40 was designed to uphold the rights of all the parties involved, including the embryo’s (12, 13), and allows for the use of MAP techniques only as a last resort, that is when there is no other way to overcome the obstacles that make procreation impossible. Such a piece of legislation, in its original version, has legalized homologous fertilization, i.e. the use of gametes (oocytes and sperm) extracted from members of the couple themselves, whereas heterologous fertilization, i.e. using gametes from external donors, remains banned. The Italian Constitutional Court, however, has found some aspects of that law to be unconstitutional (14). For instance, decision n. 162, issued in 2004, has struck down the ban on heterologous fertilization (15, 16), deeming it to be a violation of the individual right to self-determination and to start a family for those experiencing sterility or infertility, or suffering from genetically transmissible conditions. Furthermore, the Constitutional Court has acknowledged the prerogative of doctors to define the number of embryos to be implanted, as a way to guarantee personalized standards of care to meet each patient’s needs (17-18).

National legislative approaches and jurisprudence set by the European Court of Human Rights

Assisted conception, in addition to being a valuable therapeutic tool for the treatment of heterosexual infertile couples, has turned into a set of fertilization procedures usable by anyone who wishes to have a baby. Such a new scenario has shaken the very concept of procreation to its foundations. The fetus, in fact, does not have to be necessarily conceived in the mother’s womb, and there can be more than two parents, not necessarily a father and a mother, as traditionally intended. There may be in fact, a biological father and a legal one; as for the mother, in addition to the genetic one, who provides the gametes used for the conception, there can be a biological one, i.e. the woman who carries the pregnancy to term, and the social mother, who will be responsible for the child’s upbringing. Hence, artificial conception is an...
integral part of the so-called “reproductive revolution” (19), which is characterized by three basic aspects: the separation of procreation from the sexual act, the ability to affect the fetus’s genetic background and the increase in the number of those directly involved in the procreation process (oocyte and sperm donors, surrogate mothers). The baby may be conceived by means of heterologous fertilization (in cases of lesbian couples) or by surrogacy (for male homosexual couples). Surrogacy is a technique by which a couple, either heterosexual or homosexual, who have established an affective relationship and are in no condition to naturally procreate, task a “surrogate mother” with carrying a pregnancy to term on their behalf. Once the child has been born, the surrogate mother will be legally bound to hand the newborn over to the commissioning couple, who will then become the infant’s legal parents (20, 21).

Similar practices are not legal under Italian law statutes, which in fact ban surrogacy altogether. A significant issue arises by virtue of that ban: couples who go abroad in order to use surrogacy where it is legal apply for the child to be legally registered in Italy as their own.

Increasingly often, Italian tribunals, courts of appeals and the Supreme Court of Cassation have found themselves dealing with newly-formed parental relationships in which there were a) a child of two mothers: the biological mother, who had carried the pregnancy to term, and a genetic one, i.e. the egg donor (22), b) a child and a genetic father or a genetic mother, as a result of surrogacy (23), c) a child with two social parents, a heterosexual or homosexual couple, born through surrogacy and genetically unrelated to either one of them (24).

It is worth pointing out that such techniques give rise to court cases such as the one involving the «children of two mothers (22)» or «the children of two fathers (23)».

In Italy, the piece of legislation n. 76/2016 (25), designed to regulate access to civil unions, has brought the Italian legislative framework in line with European norms, enabling same-sex couples to be “legally united”, if they wish to.

Hence, under Italian law, the son of either one partner of a same-sex couple, legally united into a civil union, is the legal child of the woman who bore him or her and of the man whose sperm was used for conception. Nonetheless, given the absence of targeted norms in that regard, the courts have allowed for the legal adoption by the partners in same-sex couples of the other partner’s legal child, the so-called “stepchild adoption”, i.e. the possibility of a non-biological parent to adopt the child with the consent of the legal, biological parent. That has been made possible in consideration of the child’s best interests, according to article 57, subsection I and II, Law 184/1983, and more broadly, in light of the United Nations Convention on the Rights of the Child, signed in New York on November 20th, 1989 (under article 3, subsection 1), and of the Charter of Fundamental Rights of the European Union. The stepchild adoption, however, is certainly lacking in terms of upholding the rights of the children of same-sex couples, in that it is not an alienable right, but one that is granted only if an application is filed, and it is not even fully-encompassing, because the relationship thus formed is not fully legitimized.

The European Court of Human Rights has allowed for a rather wide margin of appreciation, so that they can choose whether to recognize the right of same-sex couples to become parents, and in what way.

Yet, the Court has remarked that such a margin of appreciation must be limited if it negatively affects the exercise of fundamental rights and freedoms, among which, the right to respect for one’s private and family life, and not to be discriminated against based on sexual orientation (26, 27).

The European Court of Human Rights has therefore urged states to legally recognize and register the children born abroad through heterologous fertilization, who become entitled to citizenship, name, family relationships, succession rights, freedom to move within the Union, etc... Such a wide-ranging acknowledgement must be granted even though the laws of the commissioning parents’ native country do not include it, viewing surrogacy as not conducive to public order. The European magistrates make the principle of the «child’s best interest (28-30)» the centerpiece of their reasoning, to be viewed as a beacon light for any future decision affecting the minors. The best interest includes the ability to maintain one’s family life, according to article 8 of the European Convention of Human Rights, and as the European Court stresses, homosexual relationships constitute a family setting as well (26). Such a pivotal principle must therefore be upheld, and outweighs any other aspect, such as the biological truth of parenthood, or the actual correspondence of the legal situation with real-life circumstances.

With regards to such situations, it has been reaffirmed that the two fundamental rights to be upheld are: 1) the child’s best interests, from the standpoints of personal and social identity as well. Minors, therefore, are entitled to live under stable conditions, in well-balanced family settings, and to be brought up and closely helped throughout their growth process 2) the people’s right to self-determination and form a family, irrespective of whether it is constituted of two men, two women, or heterosexual. In fact, the European Court judges argue that the definition “family life” encompasses same-sex unions as well (31) and sharing one’s children’s genetic origins is no longer viewed as a necessary requirement for parenthood (22). Assisted conception techniques enable couples to become parents by virtue of their will, and to be someone’s children not by virtue of being born from heterosexual parents, but because of a mental “connection” that is established between the child and the social parents. In light of those two pivotal principles, one can reasonably assume that the birth certificate issued abroad, which reflects a parental relationship between two men or two women and their children, should be accounted for and registered for all practical and legal purposes in Italy too.

Discussion

On the heels of the European Court’s deliberations on the matter, several Italian courts of law have ruled in favor of legally registering children born abroad, arguing that if such an act were denied, the child’s best interests would be prejudiced, since he or she would be deprived of the valuable family relationships established over time (32).

In that respect, a case was rather telling: the Italian Supreme Court ruled on September 30th, 2016, on the claim brought by two women, an Italian and a Spanish citizen,
who had gotten married in Spain (33). Following a MAP procedure, carried out in conformity with Spanish law, a baby was born by a partner of that couple, from the egg donated by the other partner. The infant’s birth certificate described him as the child of both women, having both of their surnames (34). The Italian official in charge of the legal status registry, however, refused to acknowledge the child’s status as characterized in the Spanish certificate, finding it to run counter to Italian law provisions, according to which the only mother is recognized to be the woman who bore the baby (article 269, subsection 3 of Italian Civil Codes). A subsequent court decision confirmed that view. The court of appeals, however, ultimately backed by the Supreme Court too, ruled that the Spanish birth certificate be legally acquired and registered in Italy (35).

The parental relationship which came into being abroad between a child and two parents of the same sex, in the above-mentioned case a biological mother (who had born the child) and a genetic mother (the one who had donated her eggs), conflicts with two fundamental principles that are enshrined in Italian statutes. Namely: 1) the principle of heterosexuality, which never acknowledges legal parentage for same-sex couples. Such a scenario would moreover be illegal under Law 40/2004, which limits access to MAP procedures to heterosexual couples, 2) the principle of biological parenthood: the Spanish certificate, in fact, also ascribed motherhood to the woman who had not born the child, but shared the parental project with her partner, and provided the oocyte, thus biologically contributing to the child’s birth. Under Italian law provisions, the “biological” mother could have been recognized as “social parent”; at best. On the other hand, the Spanish legislation acknowledges her as a legal parent as well, not by virtue of her having born the baby, but because she had accepted and shared parental responsibility, deemed to be a broader expression of reproductive self-determination (36).

Conclusions

Heterologous fertilization techniques have fundamentally changed the very notion of traditional, heterosexual family. Such a family set-up is no longer considered to be the only one able to provide children with a well-balanced, favorable setting where to grow up, as codified in court rulings that legally recognized children born abroad as the legal offspring of homosexual parents (32).

The inadequacy of some legal frameworks, which were conceived and shaped according to social and scientific conditions that have dramatically changed, is ever more glaring; it is therefore of utmost importance to pass legislation updates so that such new social needs can effectively be met.

A new set of norms is needed in order to allow for the transfer of parentage rights and the transcription in civil status registers of children born through surrogacy, while at the same time enabling them to exercise their right to know their biological mothers, who nourished them in their wombs for nine months (37-39), by virtue of article 7 §1 of the United Nations Convention on the Rights of the Child (40).

Italian legislators appear to be loath to take an unequivocal stand on ethically and morally sensitive issues, as it happened when the new living will legislation was passed, after decades-long parliamentary debates, in December 2017 (41, 42). It is undeniable, however, that the rise and unfettered development of biotechnology have stretched the boundaries of individual rights, paving the way for new possibilities; legislators must take that into account and act accordingly, or the citizens will be bound to go abroad in order to exercise a right that cannot be upheld in their home countries. That was the case with so-called “fertility tourism” (43, 44). If the Italian Parliament fails to take decisive action on those issues, it will have compromised the rights of both prospective parents and their children, and may even determine a discrimination against low-income families, who cannot afford to travel abroad for treatments and procedures that ought to be available in their home countries (45).

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