

No more only one mom? European Court of Human Rights and Italian jurisprudences' ongoing evolution

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Abstract

The author has delved into the most significant Italian and European court rulings related to heterologous fertilization and surrogate motherhood between 2012 and 2019, with a close focus on same-sex couples seeking to have their donor-conceived children born abroad legally registered in their country of origin. Undeniably, surrogacy has brought about a crisis in the traditional family model, made up of a mother and a father. The paper draws upon European Court of Human Rights established jurisprudence that upholds the children's best interests. Italian Court rulings are expounded upon as well, which have been instrumental in establishing the principles by which parental figures do not necessarily coincide with those who have generated the children (through biological bonds or delivery), but rather with those who wish to be recognized as parents. The cases herein examined involve homosexual couples who decided to travel abroad in order to gain access to surrogacy, from which children were born. In the case regarding two fathers, the child had no genetic tie with either one intended parent. The Italian Supreme Court's joint sessions have ruled that such children cannot be legally registered in Italy, since their foreign-issued birth certificates indicate no genetic connection between the children and their intended parents. The Author believes that the Supreme Court decision is valuable, but further legislative interventions will be necessary on account of scientific advancements; the issue of surrogacy is utterly complex and multi-faceted. *Clin Ter 2020; 171(1):e36-43. doi:10.7417/CT.2020.2186*

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Introduction

The review's author has set out to expound upon the most significant legal and judicial trends in light of the new challenges posed by scientific advancements in medically-assisted procreation; social and ethical perspectives need to be taken into account as well, since something extremely important is on the line: the well-being of children, i.e. the

future generations of our respective nations. There is no denying that we are living through times of deep, fundamental social change, which affects every facet of daily life. The presence of children growing up in same-sex parented families is no longer uncommon, for various reasons. Children may have been born from previous heterosexual relationships or unions; they may have been conceived by means of heterologous fertilization (in cases of female same-sex couples) or surrogacy (in cases of male couples). Surrogacy is a technique through which couples (whether heterosexual or homosexual ones), who are in a relationship and unable to procreate in a conventional fashion resort to the gestational carrier, a woman that agrees to be impregnated and carry the pregnancy to term on their behalf. After the baby is born, the surrogate mother will be legally required to hand him or her over to the couple, who legally become the newborn's parents (1). Medically assisted procreation is meant to refer to both the donation of sperm by a third party outside the couple and to gestational surrogacy practices, in which a woman acts as a surrogate mother, bringing to term a pregnancy on behalf of another woman, the intended mother (2). Such procedures have undoubtedly upset the traditional family model, the one constituted by a mother and a father (3). Gestational surrogacy, in fact, relies on three different female figures: the surrogate mother, the oocyte donor and the intended mother; three male figures may as well come into the picture: the gestational mother's partner, the gamete donor and the intended father (4).

There is as yet no internationally enforced set of regulations that acknowledge such techniques as legitimate (5). Some European countries have legalized altruistic, but not gainful, surrogacy. Surrogacy may happen for altruistic reasons or in exchange for monetary compensation. The former scenario is quite uncommon, for obvious reasons, whereas the surrogacy phenomenon is often related to social and economic hardships faced by the surrogate mother who agrees to gestate for others. Surrogacy is in fact almost always rooted in exploitation of needy women, and the practice itself is at the center of a real "market", which appears to be growing and regulated by commercial contracts.

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In the United Kingdom, for instance, surrogacy is legal, provided that all promotional, advertising and brokering activities related to it are banned; In Greece, the courts are charged with making sure that there are no financial benefits pursued by the gestational mother.

In Sweden, as well as in France, surrogacy is banned altogether, and both nations have enacted laws meant to deter their citizens from resorting to facilities abroad in order to carry it out (6). In Italy, law n. 40 from 2004 entails custodial sentences from three months to two years and fines from 600,000 € to one million (in addition to supplemental sanctions) for “anyone who carries out, arranges for or advertises” any form of maternal surrogacy (7, 8). Similar restrictions apply in most Australian jurisdictions (surrogacy is autonomously regulated by States and Territories, although the norms have been somewhat harmonized), which have laws in place banning any form of surrogacy promotion and arrangement made overseas, thus outlawing commercial transnational surrogacy altogether; such statutes also entail the unenforceability of contracts between commissioning parents and surrogates, who can therefore legally keep the child if they change their minds after birth (9). Surrogacy is far more widespread in some American states such as California, and in several eastern European states such as the Ukraine, and in Asia, particularly in India, Nepal and Thailand (10, 11).

The European Parliament, via resolution 2009, on 13th December 2016, decried surrogacy. On 2nd February 2016, human rights organizations in Paris, along with politicians and scientists, have signed the charter of Paris, calling on European nations “to respect the international conventions for the protection of human rights that they have ratified and to oppose firmly any form of legalization of surrogate motherhood at a national or international level.”

Sixteen organizations from 18 nations have recently signed *Stop surrogacy now*, a document designed to shed a light on the array of health-related and psychological consequences that surrogacy entails for children and mothers, appealing for an outright ban on all forms of surrogacy and the ratification of an international convention on the subject. Such a treaty would be geared to unequivocally lay out principles such as the unavailability of human bodies to be reduced to commodities and the need to protect human and children's rights from a dehumanizing procedure, which flies in the face of human dignity and runs afoul of women's and children's rights (12). The Italian Bioethics Committee has pointed out that surrogacy is a contract liable to harm the dignity of women and children alike, and it stands in stark contrast with the fundamental bioethical principles enshrined in the Oviedo Convention and the Charter of Fundamental Rights of the European Union (13).

At a national level, however, legislative discrepancies contribute to fueling “reproductive tourism (14).” Several couples (whether married, in civil unions, heterosexual and homosexual) in fact and singles suffering from fertility issues travel to countries where surrogacy is legal and easily accessible. Once there, a child is born via medically assisted procreation procedures. There is a substantial downside to reproductive tourism though: the newborn child's birth certificate, issued by the state in which the baby was born, is not automatically acknowledged in the intended parents'

country of origin, giving rise to difficulties in determining citizenship. Unstable scenarios may therefore arise (also known as “limping situations”)(15), in which children end up being orphaned, or with different legal parents according to the legislative frameworks of the nations involved (the intended parents' country of origin and the country in which the child was born). Whether birth certificates issued abroad are acknowledged by the countries of origin of the intended parents is to be determined based on each country's different legislation. Yet, the margin of discretion is only partial: states are in fact required to abide by the provisions and fulfill the obligations laid out by the European Court of Human Rights with respect to the recognition of surrogacy arrangements made abroad, which we will briefly elaborate on (16-18).

Whether the legal registration of children born abroad through surrogacy is feasible depends on the national regulations governing the issue. Nonetheless, national jurisdictions have no full discretionary powers, but they are required to comply with the European Court of Human Rights directives, which have mandated that legal agreements made abroad be acknowledged by member states. Such legal agreements, within the context of medically assisted procreation, have given rise to scenarios all but inconceivable until a few decades ago, such as the “children of two mothers” (19) or “the children of two fathers” (20).

An innovative concept of family and the children's best interests in accordance with European Court of Human Rights Rulings

The whole controversy revolves around the newborn's legal *status*, which in turn reverberates on the right to parenthood, international public order and the preservation of the children's best interests.

The European Court of Human Rights has allowed for a certain margin of appreciation while choosing whether to permit or ban couples, particularly same sex couples, to become parents. Yet, the Strasbourg Court has made it clear that such a margin is to be exercised in a limited fashion when intervening on fundamental rights and freedoms. According to the European judges, in fact, the right to respect for one's private and family life, as well as the right not to be discriminated against on account of sexual orientation constitute fundamental rights. For that reason, the European Court has ruled against Austria for discriminating against same sex couples, barring them from adoption, which is instead legal for unmarried heterosexual couples. Hence, those states that fail to uphold such rights go over the line, overstepping the margin of appreciation and possibly violating art. 8 of the European Convention on Human Rights. According to the European Court judges, the minor's best interests constitute a beacon light that should guide any decision on matters that involve children (21). Thus, while balancing state interests against the children's best interests, the latter ought to prevail.

The European Court's intervention is meant to enforce the rights of children born from surrogacy practices and provide an acknowledgement to the parental bond. For that reason, the Court has ruled that the child's best inter-

est cannot be limited to growing up in a traditional family, in which parental roles are clearly delineated, but rather preserve his or her relationship with the legal parents and relatives, in cases of couples constituted abroad. Children are in fact entitled to grow up in a family setting that is as stable and caring as possible, and to be raised and looked after with balance and respect for their fundamental rights. Any failure to protect and enforce those rights negatively affects their right to respect for private life and their very identities, which obviously include parental relationships. Three rulings from the European Court of Human Rights validate that approach: of those, two had to do with French cases (*Labassee v. France* and *Menesson v. France*) and an Italian one.

As far as the French cases are concerned, the European judges have ruled that violations had occurred, on the part of the French authorities, of the children's rights to family life (article 3 of the European Convention on Human Rights), on account of the denial to recognize the birth certificates of two children born from surrogate mothers in the United States.

The French legislation on the matter bans surrogacy (art. 16-7 of the Code Civil) (22). By virtue of that ban, the French authorities had deemed all relative parental agreements and arrangements entered into by the couple to illegitimate and denied the children's legal registration. The European Court has upheld the rights of the two children to personal identity and invoked the need for preservation of their best interests, which outweighs the margin of appreciation granted to member states. In the case *Menesson v. France*, moreover, a genetic bond existed between the newborn child and the intended father, which is viewed as an integral part of individual identity.

In the Italian case *Paradiso and Campanelli v. Italia* (23), the intended parents and the child had no genetic tie. The European Court has censured the ruling issued by Italian judges that had taken away the child from the intended parents, who were viewed as inadequate to rear him. Such a ruling, it was argued, had been tantamount to depriving the child of his identity.

The European Court of Human Rights has intervened upon request from French Supreme Court, issuing an opinion that was released on 10th April 2019, in order to reassert that children born through surrogacy are entitled to respect for their private lives under Article 8 of the Convention; hence, national law statutes must legally recognize the parent-child relationship between the so-called intended mother and the children themselves. According to the ECHR judges, such a necessary recognition does not have to occur necessarily through the registration of foreign-issued birth certificates; European states can in fact opt for a viable alternative: the adoption of the children by their intended mothers, as long as the proceedings are effective and swift. The European Court therefore calls on all member states to legally acknowledge both intended parents in cases of children born through surrogacy abroad. Such a landmark position has been affirmed with reference to intended mothers; still, it is undoubtedly applicable to birth certificates (usually American or Canadian) indicating same-sex male intended parents as well. It is not in fact a tenable position to assume that legal recognition should be limited

to heterosexual couples: it is the minor's best interest that requires maintaining a family relationship with both parents. No discrimination based on sexual orientation or anything else is in fact tolerable in the eyes of the law. The European Court therefore contends that the legal procedure leading to the adoption of one's partner's child can be deemed a solid alternative to the registration of the foreign-issued birth certificate only if the legal recognition is total and comprehensive, and carried out as quickly as possible ("*breves que possible*"). In that regard, national courts should provide oversight (24).

How does the Italian judiciary look after the best interests of children in same-sex parented families?

Law n. 40/2004 on medically assisted procreation mandates that such techniques only be applicable to heterosexual couples, while banning surrogacy altogether. Current law statutes allow for conscientious objection to medically assisted procreation (25-26). In its original version, the law codified several restrictions, allowing only for homologous fertilization with constraints. The Italian Constitutional Court has issued ruling n. 162/2014, stating that sterile or infertile couples are entitled to procreate and that procreation should occur through the involvement of a donor outside the couple, devoid of ties of any kind with the intended parents and unknown to them.

Law n.76/2016, which regulates civil unions, has harmonized Italian legislation with European norms, allowing for same sex couples to enter into a legal relationship. The children of either member of the couple that entered into a civil union is deemed to be the child of the women who have born them and of the men who conceived them (27).

Only in 2004 did the Italian legislative framework regulate medically assisted procreation, through law n. 40. Article 12, subsection 6 of said law bans surrogacy, regarded as a criminal offence, whereas heterologous fertilization is only legal in cases of irretrievable sterility or total infertility and at any rate, only for couples of legal age, heterosexual, married or living together, in fertile age, both living. Anyone who, in any shape, matter or form, executes, arranges or advertises the trading of gametes or embryos or surrogacy practices shall be punished by a custodial sentence from three months to two years, and by a fine from 600,000 to one million Euros». this article has nonetheless been declared unconstitutional by the Italian Constitutional Court in a 9th April 2014 decision that does not, however, reverberate on the unlawfulness of surrogacy in Italy (28-31).

Nowhere in the law is the status of children born abroad through such techniques and brought to Italy by the commissioning couples.

Law n. 76, enacted on 20th May 2016, has revamped Italian norms along the lines of European legislation, legalizing civil unions for same-sex couples, who can be legally united. Nevertheless, such a reform is not tantamount to a legalization of parenthood for homosexual couples, what is known as stepchild adoption.

How can Italian judges ensure that children born through assisted reproduction techniques benefit from a stable family relationship with their intended parents if the above-mentio-

ned law n. 40/2004 bans surrogacy? Article 44, subsection 1, letter d) of law n. 184, 4th May 1983, should be referenced, which introduced the notion of adoption under peculiar conditions. Italian lawmakers meant to uphold the minor's right to be raised in a family, even in those instances where an adoption may not legally take place, but still the child needs to be granted the right to be brought up in a family that can cater to his or her needs.

The choice to resort to an adoption under peculiar conditions falls upon the courts, which should make a decision based upon the best interests of children. In cases of children born abroad through surrogacy, their best interests consist of the ability to maintain their family relationship with their intended parents and relatives, as laid out by the European Court of Human Rights. Any failure to enforce those rights negatively affects their right to family life and their personal identity, which includes parental relationships.

Furthermore, if children no longer have a right to both parents, other rights will be impacted as well, namely the one to financial aid should the parents break up, the right to family relations, such as grandparents legally acknowledged, and inheritance rights. In conclusion, the notion of "couple" ought to be construed in the broadest sense, thus including gay couples as well. Moreover, if heterologous procedures were used in cases of same-sex couples, which are banned in Italy but legal abroad, the principle by which the children's best interests must be upheld dictates that children be legally viewed as "offspring" of two mothers or two fathers, in light of them having granted their full informed consent under article 6, law 40/2004.

Second parent adoption (also known as co-parent adoption) has been designed to ensure that children can be raised in a stable, loving family setting. When ruling on the issue of registering birth certificates of children born abroad, Italian courts have followed the following principles:

1. There exists a best interest of children constituted by the continuation of the legal status of the child as acquired abroad
2. The rule spelled out in art. 269 subs. 3, according to which the right to motherhood belongs to the woman who gave birth to the child is no longer to be viewed as a fundamental principle worthy of constitutional protection.
3. Family is the place where parents and children live together and establish love and care-based relationships.

Since 2014, many Italian courts, among which the Milan and Turin Courts of Appeals (32-33) have ruled in favor of the legal adoption of children by the adopting parent's partner in same sex couples, according to letter *d* under article 44. The Italian Supreme Court itself, in several rulings, has stood up for the children's right to establish steady relationships with both biological parents and social ones. According to the justices, "no scientific certainty exists", but merely "a bias" that being raised by same sex couples "may be harmful in terms of the children's balanced development". The Justices are therefore determined to enforce the rights of children growing up in same sex families to be able to rely on two parents who have equal parental rights, obligations and responsibilities toward them. Ruling n. 19599/2016 appears to be particularly meaningful in that regard. The Court was called upon to establish whether the

legal registration of a child born in Spain from two mothers via medically assisted procreation procedures constituted a breach of public order.

The specifics of the case: a Spanish woman had born a baby, her Italian partner had donated her eggs and gametes were donated from an anonymous male donor. In this instance, the peculiarity of the heterologous fertilization procedure was that the child that had been born was genetically tied to both women who formed the couple. The two mothers had acquired the status of genetic and biological mother. According to the judges who ruled on the case, the notion of public order must be construed from an international perspective. It was therefore necessary to take into account, in addition to the foundational principles enshrined in the national constitution, those outlined in the fundamental European Union treaties as well, namely in the The Charter of Fundamental Rights of the European Union and in the European Convention on Human Rights. In light of such considerations, the Italian Supreme Court has asserted that "the recognition and registration of foreign documentation, lawfully agreed upon in Spain, in which childbirth from two mothers is reflected, do not constitute a disruption of public order just because national legislation does not acknowledge or bans any such practices on national soil. The prevailing principle, in fact, must be the best interests of the children, which are tantamount to maintaining their legal status of children (*statua filiationis*) as lawfully acquired abroad" (point 8.4). What does run counter to public order is found in art. 269 of the Italian Civil Code, which grants the status of mother to the woman who bears the child only. According to the Supreme Court, the constitutional notion of public order, which bars same sex couples from having children, constitutes a violation of the personal freedom to exercise self-determination and to start a family without being discriminated against compared to heterosexual couples (point 12.1). In another instance, which was ruled upon on 22nd June 2016, via ruling 12962, the Supreme Court applied stepchild adoption provisions. A Spanish woman had resorted to in vitro fertilization procedures using her partner's eggs (whom she was lawfully married to, according to Spanish law) and a male donor's sperm. She had successfully brought the pregnancy to term and given birth. The two women had then divorced and agreed upon joint custody. The Italian woman, upon coming back to Italy, had tried to register the child as her own, but was unable to do so, by virtue of Italian law only ascribing the status of mother to the woman who gives birth. The judge though saw fit to allow the registration to occur, in light of the well-established affective bond between the Italian mother. The same principle was applied: children are entitled to rely on two parents who share responsibilities toward them, and to have their personal identity acknowledged.

The Italian Constitutional Court has itself chimed in on a case involving surrogacy, with ruling n. 272/2017 (34-35). First and foremost, the judges have asserted that surrogacy «is a blight on women's dignity and gravely undermines human interrelationships». They do not assume, however, that the children who were born through surrogacy should necessarily be taken away from, or left with, their intended parents. They have gone on to say that juvenile courts ought to make those decisions on a case by case basis, determining

whether the interest of truth should outweigh the interests of minors or vice versa. In order for the best interests of minors to be thoroughly evaluated, judges need to take into account a set of variables. For instance, «in addition to considering how long the parental relationship has gone on, other relevant factors are the methods of conception and gestation» and the possibility for social parents to establish, through adoption in some cases, a legal bond that could guarantee an adequate degree of protection to minors. For those reasons, thorough social and psychological scrutiny is needed in order to verify affective adequacy and child-rearing skills of those who are set to have parental roles.

Minor court rulings and Supreme Court decisions, though not constituting binding precedents, have laid the groundwork for a full recognition of parental status for both partners in cases of births by surrogacy or medically assisted procreation, even for same sex couples.

The following principles have ultimately been set forth: 1) genetic ties are no longer viewed as determinants, since minors have a right to establish and maintain stable relationships with those who have fulfilled parental obligations, irrespective of biological affinity or whether an adoption actually occurred, 2) parental ties involving social parents are more relevant than blood ties: parents who love their children do not necessarily coincide with those who have born them.; 3) the child's best interests could be served just as well in a family setting constituted of same sex partners.

The legal doctrine has even taken it a step further, going so far as acknowledging parental relationships irrespective of any biological bond, constituted on the basis of consent: the principle of *favor affectionis* (*favoring affection*) thus outweighs the one of *favor veritatis* (*favoring the truth*). It is worth noting that the ruling from the Trento Courthouse has allowed the registration of a birth certificate ascribing fatherhood to the male partner of the child's biological father; the child had been born abroad from a surrogate mother, using genetic material from still another woman (36).

The facts: a gay couple decided to have two children through surrogacy in California. A woman donated her eggs, which were fertilized in vitro and then implanted into the womb of the surrogate mother, who brought the pregnancy to term, bore the children and handed them over to the Italian gay couple, in compliance with the contract. The children therefore share two biological mothers, since they have in common both the genetic (the same woman, in fact, provided both oocytes) and surrogate mother, the one paid to bring the pregnancy to term and bear the children. The judges characterized the children as "twins" (although the term is inaccurate in defining the two children's relation). By virtue of that court ruling, the children, in Italy as well as in California, are deemed to be the children of two homosexual males who requested the pregnancy and the babies. The procedures were arranged so that each child was conceived with the sperm by each man. The children are brothers in California, yet they are not in Italy, although they were registered under the surnames of the two biological fathers and are termed "twins" in their birth certificates. In order for the registration of the foreign birth certificate to take place, the Italian judges had to resort to two falsehoods: firstly, the children were recorded as "of two male parents" (which is obviously unthinkable); secondly, they were

classified as twins rather than brothers. Such developments are downright unrealistic. In an attempt to rationalize their decision, the judges laid out that «the scientific community has observed instances (although extremely rarely) of twins born from oocytes from the same mother, fertilized by the sperm of different men». The explanation set forth by the court is not a convincing one. First and foremost, in surrogacy procedures the mother bears a child that is genetically unrelated to her. Each newborn child has two mothers, which has never been the case in the history of humanity. What is indeed true (however remote) is that a woman can be impregnated by two different men few hours apart from each other. Hence, she can conceive two children of two different fathers. The difference, however, is remarkable: in such extremely rare cases, there is only one mother, and she is clearly identified. The Italian magistrates have gone out of their way to justify what is not justifiable: the birth of twins who are not brothers. They were born from two men who resorted to a mother who never made her appearance. Thus, the judge erased the "dual mother" – genetic and surrogate – in order to safeguard "the child's best interest". It will likely not be easy for those "two fathers" to explain to their children that they were born from two men and their mothers never existed, and that a judge ruled that their civil status is "twins", but not even brothers. The Trento public prosecutor's office and the Italian Ministry of the Interiors both file an appeal against that ruling. The Joint Sessions of the Italian Supreme Court granted that appeal, asserting that foreign-issued birth certificates of children born abroad through surrogacy should not be legally registered in cases of intended parents with no biological tie to the children. Hence, the parental relationship between intended parents and children born through surrogacy may not be legally recognized in Italy, even though it has been acknowledged by a foreign court. The ruling is apparently based on n.40/2004, which has banned surrogacy. The Supreme Court has therefore prioritized "the values of human dignity for biological mothers and the institution of adoption" over "traditional family". In their decision, in fact the Justices have brought up past rulings from the Supreme Court itself centered around the recognition of children born abroad from two mothers, married abroad, which we have herein expounded upon. Those cases involved children who had a biological connection with each one of their two mothers: "one had given birth to the child, while the other had provided the oocytes used in the medically-assisted procreation procedure". In the Trento couple case, on the other hand, the two children born through surrogacy had a biological connection with only one of their intended fathers, the one who had donated his sperm in a surrogacy procedure in Canada, where only "altruistic surrogacy" is legal. (37, 38) According to the Italian Supreme Court (39), the two cases share the characteristic that "the child's conception and birth have taken place within the context of a homosexual relationship, with a biological contribution from one of the partners"; however, in the case of the male couple, "the absence of any biological relationship with one of the intended partners is undeniable"; that obstacle was overcome, on the other hand, by the mother in the other couple, who brought the pregnancy to term and bore the child, despite the absence of any biological link. The Supreme Court has however not

ruled out the possibility for couples to apply for adoption “in extraordinary circumstances” in order to grant parenthood to the intended father with no biological tie to the two children. That ruling, in fact, has acknowledged the possibility for same-sex couples to apply for adoption under article 44, equating the intended parent with the intended mother from the other couple, generically labelling both of them “intentional parents”. In our view, however, the Supreme Court justices have failed to thoroughly uphold the children’s best interests: adoption “in extraordinary circumstances” is in fact an incomplete kind of adoption, which does not put the children in the same position as children who have been legally recognized or legally registered.

Discussion

In Italy the number of children brought up by same sex couples, lesbian couples in particular, has grown substantially. Yet no piece of legislation or constitutional provision conceive an Italian citizen as being the child of two mothers, with no mention made of any father (who obviously exists). Medically assisted procreation techniques have given rise to situations where it might be quite difficult to establish who the mother of a given child is. The situation that comes into being may be as follows: a woman wants to recognize a child as her own and claims to be the biological mother. In actuality, the child was born through surrogacy, and therefore has a biological mother, who donated her eggs, and a surrogate one, who brought the pregnancy to term and gave birth. Those women both played a vital role in the childbirth, but both are due to disappear from the child’s life, and a third woman comes into the picture: the intended mother, who seeks to legally register the child as her own. Unlike the previous two women, the intended mother has no biological ties with the baby (40-41). According to the judges, however, the third woman is the child’s mother, by virtue of her having laid out a family project. It is then incumbent upon the courts to assess how the child was conceived, born, and lastly, how he or she lived, in order to accurately figure out what the real good of the child is, and thus defining who the mother really is.

Biological truth seems to have taken a back seat, while the notion takes hold that the actual parents are not those who conceive and generate children, but rather those who wish, seek and express their will to become parents and be acknowledged as such (42).

When the judges found themselves dealing with the request to legally register the birth certificates of children born through surrogacy, they adopted the prescriptions from the European Court of Human Rights, which places at the forefront the protection of the children’s identity, irrespective of any biological tie with the parents or the intended ones.

Conclusions

A glaring limitation of this review is certainly the fact that the author has only looked into decisions and rulings issued by Italian courts and the ECHR that significantly impacted and influenced legal scholars and society as a whole. It

would have been more compelling a wider-ranging analysis taking into account all of the rulings centered around the new forms of parenthood, in order to thoroughly assess the legal reasoning at the root of each decision, whether favorable or adverse to the applicants seeking to have their children born abroad through surrogacy legally registered. At any rate, by virtue of the Supreme Court’s joint sessions decision 12193/19, Italian courts will not authorize the legal registration of foreign-issued birth certificates, which are deemed to be contrary to public order, since article 269, subsection 3 links motherhood to childbirth, and acknowledges the woman who gives birth as the only mother. Up until now, the courts have prioritized the protection of the child’s best interest, legitimizing surrogacy when confronting the issue of children born abroad. It is in fact undeniable that the bond which has been formed between children born through surrogacy and the intended parents, whether homosexual or heterosexual, should not be broken, because that would penalize children on account of the way in which they were born. It is still obvious, however, that the courts cannot keep legitimizing surrogacy every time they are called upon to adjudicate on cases children born through surrogacy abroad. It is therefore of utmost importance for lawmakers to intervene and enforce the existing law, which bans surrogacy, even in cases involving children born through it abroad. As we have pointed out repeatedly, there is a clear judicial trend that tends to identify the children’s best interest as being part of the family of the intended parents, i.e. those who have been determined to have them born and want to look after them, unlike the mothers that gave birth, who abandoned them. Nonetheless, that “novel” right to have a social family cannot outweigh the children’s right to know their origins, particularly with respect to their mothers (43, 44). Surrogacy, on the other hand, outright denies those children the right to know their origins, since it is obviously uncertain who the real biological mother should be considered: whether the oocyte donor or the “gestational mother”, the woman who brought the pregnancy to term (45, 46). Still, is it really in the children’s best interest to be denied the opportunity to find out about their origins? It is on the basis of that question that lawmakers should weigh up all possible repercussions very carefully. Personally, we believe the answer is no: one’s origins are an integral part of personal identity.. On the contrary, lawmakers should give thought to the status of commissioning parents and gestational mothers, the determination of which gives rise to extremely sensitive legal and ethical issues such as human dignity, the commodification of human bodies, the exploitation of the weak, health protection, the objectification of children, etc...

On the other hand, it is extremely hard to figure out a solution that would meet the needs of all the parties involved, while upholding personal self-determination and ensuring safeguards for the newborn. Within such a setting, it is indisputable that scientific advancements have raised extremely challenging legal quandaries, and the Italian Supreme Court’s joint sessions decision represents a legal beacon light within the complex issue of surrogacy, which has been spreading; that will likely call for further legislative initiatives, which need to move in lockstep with scientific progress.

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