

## Letter to the editor in response to “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

The present letter is meant as a response to the commentary titled “Medically-assisted procreation and the rise of off-center, new types of “parenthood”: it is incumbent upon lawmakers to intervene”, which was published in issue 4, 2019, of the *La Clinica Terapeutica* journal. Newly available reproductive techniques have given rise to new opportunities to fulfill one’s wishes for parenthood. Such developments have caused procreation to be perceived as a right, intended as the right to «artificial» procreation. Not only do such trends impact those couples who travel abroad in order to have children through heterologous fertilization and surrogacy: singles and same-sex couples pursue those avenues as well in order to become parents.

In the article which we are commenting upon, the author has perused the evolving jurisprudence on that subject, pointing out how necessary it is for lawmakers to step in and clearly define the rights of all parties involved, minors in particular. *Clin Ter 2019; 170(6):e427-429. doi:10.7417/CT.2019.2171*

**Key words:** *Medically-assisted Reproduction, Surrogate Motherhood, Legislation*

### Dear Editor

In Issue four of Your prestigious journal “*La Clinica Terapeutica*”, a commentary by Susanna Marinelli was published, titled “***Medically-assisted procreation and the rise of off-center, new types of “parenthood”: it is incumbent upon lawmakers to intervene***” (1). Said commentary is centered around the “new forms and expressions of parenthood”. “New” forms for two chief reasons: on the one hand, they reflect an evolutionary trend of social conscience pertaining to how family itself is conceived; on the other hand, they redefine, to a certain extent, the very right to self-determination. Fertility rates have been sharply declining over the past two decades. Elements such as environmental pollution, greater female participation in the workforce, which often leads them to postpone mother-

hood, are among the determining factors causing sterility or infertility for numerous couples. Such phenomenon has been increasingly drawing the attention of the scientific community, and technological advancements have provided tenable solutions to such problems.

The rise of Medically Assisted Procreation procedures (MAP), especially those which entail the use of genetic material (heterologous fertilization) has led to the number of Assisted Reproductive Technology (ART) cycles throughout Europe rising steadily: over 640,000 cycles were completed until 2012 (2). Undoubtedly, the impact of ART on the population as well as the introduction of new diagnostic and therapeutic tools into ART clinical practice needs a cautious, evidence-based approach (3). The use of a surrogate mother (usually referred to as surrogacy) (4) has profoundly upset the very concept of parenthood, thus engendering ambiguity and confusion as to the newborn children’s status. The provision and use of genetic materials from outsiders, in addition to causing a split between sexuality and reproduction (which constitute the cornerstone of the family as traditionally intended), also entails a further rift: the child’s genetic profile, in fact, does not stem from the union of the intended parents’ gametes. In heterologous fertilization instances, the genetic parents are not the intended (or social) parents, who have sought to take on the parental role within society; hence, there is an underlying issue about which parents should be legally acknowledged and ascribed parental status. From an international perspective, surrogacy is regulated in various different ways, particularly with regards to third party reproduction (5). The overall scenario is therefore quite complicated: surrogacy is in fact banned in most European countries, such as Italy, Spain, Germany France (6), whereas the Ukraine and India go as far as allowing “commercial surrogacy”, by which surrogate mothers are financially compensated by the commissioning parents (7). Commercial surrogacy is legal in the USA as well, although it is regulated at the state-level (8), where several organizations operate in order to establish contacts between couples and surrogates, even providing aid to the parties involved in order to avoid legal issues. In the UK, commercial surrogacy is prohibited,

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following the 1985 Surrogacy Arrangements Act. Under UK law, the legal mother is deemed to be the woman who bears a child, regardless of genetic parenthood. As for legal paternity, the biological father is likely to be viewed as the legal father but not necessarily so: several circumstances play a role, including the marital status of the surrogate and the child's birthplace (9). Heterologous fertilization leads to there being more than two parents for each child, and that in turn might make it difficult to establish the children's origins (10-12) as well as their legal status.

Law n. 40/2004 on assisted procreation (13-15), which had been criticized from the outset, sheds no light on such points. A particularly controversial point was the lawmakers' choice to ascribe to embryos a legal status on a par with the other parties involved in MAP procedures (16-19). Legislators decided to give human life top priority. Art. 13 exemplifies that concept, in that it forbids any kind of research trial on embryos, except for interventions aimed at treating and preserving the embryo itself. Hence, Law 40/2004 was meant to safeguard embryos intended as "vulnerable parties"; yet, in so doing, it sacrificed the rights of the other parties involved, namely the couples, the women and even the community, considering the ban on human embryo research. The law, in fact, mandated that no more than three embryos be produced, all of which had to be implanted into the womb. Such a set of rules made it all but impossible for the treatment to succeed, even exposing women to the dangers arising from twin pregnancies, which are somewhat risky for mothers and newborns alike. It was only after the Constitutional Court intervened (20) that a balance was struck between the different principles and positions at play, all of which need protection. The Italian Constitutional Court, in fact, chose to keep the rule that limits the number of embryos that can be produced to the amount strictly necessarily, to be established by clinical tests. At the same time, the Court ruled out both the obligation to carry out a single implantation procedure and the maximum number of embryos to be transferred in single IVF treatment. By virtue of that, there is no longer any need for women to possibly undergo several cycles of ovarian stimulation, which jeopardized their right to enjoy good health. The 2014 Italian Code of Medical Ethics, (21, 22) under article 22, codifies the right of doctors to refuse to carry out any procedure, barring cases of emergency, if it goes counter to their deeply-held convictions or their conscience. Similarly, under article 16 of Law 40/2004, conscientious objection is allowed, especially as a form of protection for embryos (23) that are poised to be frozen, as it is for other services such as the prescription of emergency contraceptives (24, 25). In absence of a specific piece of legislation, the courts (26), including the Italian Supreme Court (27), have upheld the right of donor-conceived children to be raised by the homosexual intended parents that had resorted to MAP procedures abroad. That ruling has been issued based on European Court of Human Rights-set jurisprudence, which has asserted the fundamental need to enforce the children's best interest by enabling them to keep family relationships that are already well-established; that decision significantly reduces the margin of appreciation for member states, which cannot set up unreasonable barriers to that family recognition (28, 29).

The commentary is certainly noteworthy, in that it hi-

ghlights the flaws of a set of regulations, merely based on legal aspects, on subjects as complex as parental relationships and new forms of parenthood. The analysis of court filings reflects the complexities of circumstances with each individual trial, which make a case-by-case approach inevitable. Nonetheless, that may lead to an overly high degree of discretion for judges, which fuels the spread of fertility tourism and constitutes a cop-out for national legislators, Italian ones especially, who often tend to shirk ethically charged issues.

Still, a set of guiding principles seems to be widely shared and accepted, through which mostly uniform national laws may be achieved: the best interest of minors, the protection of well-established family relationships, the growing importance of social parents in family life nowadays. It should therefore be fairly easy to draft and enact laws taking into account all the interests at play, including those of genetic and social parents. Certainly, such a legislative exercise would entail a duty to identify priorities and interests that are worthy of protection under the law.

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