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The transforming family: Heterologous fertilization and the new expressions of family relationships in Italian jurisprudence and European Court of Human Rights rulings

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Abstract

The rise of Medically Assisted Procreation has led to the issue of how to determine who is entitled to parental status and custody rights. In this article, the author comments upon the rationale and legal principles that Italian Courts have applied in order to solve those problems, given the absence of a targeted piece of legislation. The principle of the child's best interests, the 'public order' clause and various rulings from the European Court of Human Rights constitute the foundations on which legal trends have developed, allowing same-sex couples to become parents through 'stepchild adoption' or the legal registration of children born through heterologous fertilization practices abroad. Italy has therefore repositioned itself a step closer to the middle ground with respect to the overall European scenario: Italy's law now acknowledges motherhood for intended mothers, although it continues to stop short of recognizing same-sex marriage.

Keywords

European Court of Human Rights, heterologous fertilization, same-sex couples, Italian Court rulings, right to parenthood, stepchild adoption

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Introduction: New procreation and childbearing techniques

Until the 1970s, the dominant family model was based on heterosexual marriage.[1] The changing role of women in society, divorce, the affirmation of unmarried couples and same-sex unions have led to an evolved notion of 'family'.[2] Childbirth has been achieved through increasingly innovative medical interventions and has come to be viewed by some as an expression of the individual right to self-determination.[3] The availability of Medically Assisted Procreation (MAP) procedures to same-sex couples has further disrupted traditional notions of parenthood, which had been based on children having both a 'mother' and a 'father'. Thus, 'assisted parenthood' has been added to procreation-based parenthood and adoption.[4] The involvement of a gamete donor (either an egg donor or a sperm donor) necessarily entails a plurality of individuals who are potentially and/or factually linked to the newborn child from a parental perspective: it may therefore prove difficult to determine who among them is entitled to parental status towards the child.[5] European Union (EU) member states generally lean towards a permissive approach on the subject of heterologous fertilization[6] (i.e. with the assistance of donated gametes from someone other than the commissioning parties), although with a specific set of regulations, as in the United Kingdom[7] and Italy.[8]

1. A. Di Fede, 'La famiglia legittima e i modelli familiari diversificati: luci e ombre, scenari e prospettive', in R. Pane, ed., *Nuove frontiere della famiglia. La riforma della filiazione* (Naples: Edizioni Scientifiche Italiane, 2014), p. 45; R. Collier and S. Sheldon, 'Fragmenting Fatherhood — A Socio-Legal Study', *Journal of Law and Society* 3(12) (2009), pp. 417–420; R. Baiocco and F. Laghi, 'Sexual Orientation and the Desires and Intentions to Become Parents', *Journal of Family Studies* 19(1) (2013), pp. 90–98.
2. In Italy, there was a rapid rise in births to unmarried parents in the 2000s. In 1999, children born to unmarried parents accounted for a mere 10% of total births, which increased to 20% in 2009 and 28% in 2016. Currently, one child out of four is born to unmarried parents. Available at: https://www.fanpage.it/politica/in-italia-i-bimbi-che-nascono-fuori-dal-matrimonio-sono-il-28-del-totale/ (accessed 10 August 2019).
3. A. Sutton, 'The British Law on Assisted Reproduction: A Liberal Law by Comparison with many other European Laws', *Ethics & Medicine: A Christian Perspective on Issues in Bioethics* 12(2) (1996), pp. 41–45.
4. G. Baldini, *Riflessioni di Biodiritto* (Padova: Cedam, 2013), p. 21.
5. G. Montanari Vergallo, E. Marinelli, N.M. di Luca, et al. 'Gamete Donation: Are Children Entitled to know their Genetic Origins? A Comparison of Opposing Views. The Italian State of Affairs', *European Journal of Health Law* 25(3) (2018), pp. 322–337.
6. 'Heterologous fertilisation' meaning using gametes donated from someone other than the commissioning parties, as compared with 'homologous fertilisation' which includes only the gametes of the commissioning parties.
7. Human Fertilisation and Embryology Act 1990, section 4(1); Human Fertilisation and Embryology Authority, Code of Practice 2019, section 11.
8. Italian Guidelines on Medically assisted reproduction, 2015. Available at: http://www.salute.gov.it/imgs/C_17_notizie_2148_listaFile_itemName_0_file.pdf (accessed 20 January 2020).

The Italian law on MAP dates back to 2004[9] and allows such interventions solely for the purpose of overcoming reproductive problems arising from sterility or infertility (Article 1(1)). Lawmakers have determined that access to MAP procedures, via either homologous or heterologous fertilization, may be granted only to 'heterosexual couples over the age of 18, either married or living together, of fertile age, with both partners alive'. The main purpose of this provision was to prioritize couples who met traditional family standards and to 'safeguard the fetus' by ensuring that it was born in a 'traditional' family unit, which lawmakers believed to be the best fit to meet the child's interests. Same-sex couples, however, have stood firm against that conclusion, which discriminates against a class of citizens based on sexual orientation, forcing them to seek those procedures abroad. The Italian Constitutional Court, in its 2019 ruling, found that the law banning same-sex couples from MAP procedures was constitutional, in that it did not run counter to any constitutional precept, since there was no fundamental right to parenthood.[10] Hence, law n. 40, which has been amended by various court rulings,[11] is to be left unchanged on that essential point: same-sex couples who wish to have a child that is genetically related to at least one partner have no choice but to go abroad for heterologous fertilization.

Article 9(3) of law n. 40/2004 effectively excludes gamete donors from having any role in the child's life: 'gamete donors shall have no legal parental relationship with the children, and may claim no right, nor be ascribed any obligation, toward them'. Only the commissioning parents, who resorted to MAP, are therefore legally acknowledged. That said, there may be scenarios in which a donor-conceived child's parental and family situation may present some ambiguities. The article aims to identify and clarify such instances.

In the case of a child born through heterologous fertilization abroad to a female same-sex couple, the recognition of the parental role held by the social mother (i.e. the biological mother's partner) may vary on a case-by-case basis, with up to three different legal profiles: (1) stepchild adoption, that is, the adoption of one's partner's child; (2) legal registration of the foreign birth certificate indicating 'two mothers'; and (3) the registration of the foreign certificate documenting the adoption of the partner's child.

9. Italian Law n. 40/2004. Available at: https://www.camera.it/parlam/leggi/04040L.htm (accessed 1 August 2019).
10. Italian Constitutional Court, 22 October 2019, n. 221. Available at: https://www.camera.it/temiap/2019/11/05/OCD177-4183.pdf (accessed 20 January 2020).
11. Italian Constitutional Court, 10 June 2014, n. 162. Available at: http://www.giurcost.org/decisioni/2014/0162s-14.html (accessed 1 August 2019); R. Cecchi, V. Masotti, A.U. Meo and R. Rinaldi, 'The Law on Artificial Insemination: An Italian Anomaly', *Acta Biomedica* 88(4) (2018), pp. 403–408.

The impact of the European and international regulatory frameworks on Italian legislation

Under Italian statutes, any decision on similar cases is necessarily swayed by elements related to public order as well as the minor's best interests.[12] According to Article 65 of law n. 218, passed on 31 May 1995, any formal certification of family relations issued abroad is to be acknowledged as legally valid in Italy, provided that it does not run counter to 'public order'. In the early 21st century, the notion of public order in Italy included a wide array of ethical precepts that constituted the country's legal and judicial framework. The concept of 'public order' as internationally intended was dismissed as immaterial, by virtue of its perceived abstractness. Consequently, any acknowledgement of foreign-issued legal provisions or certificates was deemed null and void on Italian soil, if found to be counter to such ethical standards.

Such an approach has been set aside owing to two factors that have come into play. These are, firstly, the adoption of the 1948 Constitution of the Italian Republic, particularly its Articles 10, 11 and 117, which have prevented the enactment of laws that would conflict with European or international statutes, including European Court of Human Rights jurisprudence. Secondly, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights have proved the international community more effective in the expression of widely shared common principles, which in turn has led to a much less abstract notion of 'international public order'.

Within this new scenario, the concept of public order can no longer be intended as domestic public order but rather as international public order. The latter has been characterized by the Italian Supreme Court as a set of founding principles that pervade domestic social orders at a particular time, only limited by those precepts outlined in the Italian Constitution and the EU's founding treaties (provided that they are compatible with the Italian Constitution), the Charter of Fundamental Rights of the EU and the European Convention on Human Rights. Among such principles, the necessary safeguards of the minor's best interests are included, as is the right to personal and social identity, as well as the broader right of all people to self-determination and to family life.[13]

As far as the best interests of the child are concerned, their importance is enshrined in Article 3(1) of the United Nations Convention on the Rights of the Child, which reads: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.[14] In keeping with those same precepts, Article 24(2) of the EU's Charter of Fundamental Rights states that '[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

12. Italian Supreme Court, 30 September 2016, n. 19599, § 7, p. 24. Available at: http://www.neldiritto.it/public/pdf/19599_10_2016.pdf (accessed 1 August 2019).
13. Op. cit., p. 25.
14. United Nation Convention on the Rights of the Child, 20 November 1989. Available at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed 28 December 2019).

On such grounds, the European Court of Human Rights has asserted that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'.[15] As a result of that orientation, it has become necessary to scrutinize each individual case in order to make a decision as to what is really best for the minors involved.[16]

The adoption of a partner's child: Between the child's best interests and the legal acknowledgement of same-sex couples

Law n. 184, enacted in 1983, deals with a minor's right to have a family.[17] Article 44(1)(d), which focuses on 'adoption in particular cases', allows for adoption as long as the minor is found to be 'in a state of abandonment'. Two conditions need to be met in such instances: the genetic parents' consent must be obtained and the eventual adoption must meet the child's best interests. The adoption process does not unfold automatically, however. A juvenile court is charged with investigating and verifying aspects such as affective fitness, child-rearing capabilities, personal and financial circumstances and health and environmental family conditions relative to the prospective stepparents. The Italian Constitutional Court, in its 1999 ruling n. 383, has made it clear that it is not required for children to actually be in a state of abandonment, provided that the adoption 'in particular cases' would serve the child's best interests.

As late as 2007, Parliament had allowed adoptions only for married couples, since it was believed that only traditional family models could ensure the necessary stability and continuity in parental relationships.[18] Eventually, court decisions (namely the Milan Court and the Florence Court of Appeals)[19] broadened that definition to include same-sex unmarried couples as well, because it was concluded that any family relationship,

15. European Court of Human Rights, Grand Chamber, *Neulinger and Shuruk v. Switzerland*, 6 July 2010, *(Application no. 41615/07)*. Available at: https://hudoc.echr.coe.int/FRE#{%22itemid%22:[%22001-99817%22]} (accessed 28 December 2019). For an in-depth analysis of European Court of Human Rights jurisprudence relative to the minor's best interest in cases of second-parent adoption, see B. Tobin, 'The European Court of Human Rights' Inconsistent and Incoherent Approach to Second-Parent Adoption', *European Human Rights Law Review* 1 (2017), pp. 59–67; M. Naldini and J. Long, 'Geographies of Families in the European Union: A Legal and Social Policy Analysis', *International Journal of Law, Policy and the Family* 31 (2017), pp. 94–113.
16. M. Freeman, 'Article 3: The Best Interests of the Child', in A. Alen, J.V. Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde, eds., *Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff, 2007), pp. 25–64.
17. Italian Adoption Law, 4 May 1983, n. 184. Available at: https://www.camera.it/_bicamerali/leg14/infanzia/leggi/legge184%20del%201983.htm (accessed 3 August 2019).
18. Full adoption cases, in which the children retain no connection with their families of origin, becoming legally linked to the adoptive family.
19. Milan Juvenile Court n. 626/2007 and Florence Court of Appeal n. 1274/2012.

including those in unmarried couples, should be regulated legally by ensuring rights and obligations, for the best interests of the children.[20]

Italian Constitutional Court ruling n. 383/1999 says nothing about the sexual orientation of adopting partners. Thus, same-sex people may legally adopt if there are guarantees that such a prospect will not cause prejudice or harm to the children.[21] Thus, individuals, regardless of sexual orientation, may legally adopt only if the unique circumstances of each case point towards adoption are in the best interests of the child. Forsaken children will still therefore be preferred for adoption to heterosexual couples rather than to same-sex couples. However, in cases of second-parent adoption, there is no 'abandoned child': the choice is between legally recognizing an already consolidated family tie, which also gives the minor rights towards the new foster parent, and allowing such children to grow up in same-sex families without however having any right towards one of the parents, not recognized as such by law. Not surprisingly, Italian courts have admitted adoptions under such conditions.[22] Children need to live and be raised in a context where they can grow and flourish and where their psychophysical development and well-being will be nurtured. Hence, the courts that have authorized second-parent adoptions have a duty to ensure that the adopting couple is fit and capable of raising children, to verify their financial means, and to assess the character and emotional fitness of the second adopting parent.[23] To that end, courts can order all proper investigations through social services and law enforcement agencies (under Article 57, law n. 184/1983). Law n. 762, passed on 20 May 2016, regulated same-sex unions by a 'civil partnership' provision, yet fell short of granting same-sex people the right to become parents.[24] Lawmakers have made a choice to draw a distinction between marriage and civil union in terms of parenthood rights.[25] Current legislation does not allow second-parent adoptions in same-sex couples. Lawmakers have thus chosen to tackle fertility

20. L. Balestra, 'Affidamento dei figli e convivenza omosessuale tra 'pregiudizio' e interesse del minore', *Corriere Giuridico* 30(7) (2013), pp. 893–899.
21. N. Cipriani, 'La prima sentenza italiana a favore dell'adozione nelle famiglie omogenitoriali', *Diritto di Famiglia e delle Persone* 44(1) (2015), pp. 176–183. On that topic, see S. Tonolo, 'La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore', *Rivista di Diritto Internazionale Privato e Processuale* 50(1) (2014), pp. 81–104.
22. Naldini and Long, 'Geographies of Families', p. 105; N. Cipriani, 'La prima sentenza italiana a favore dell'adozione nelle famiglie omogenitoriali', *Diritto di Famiglia e delle Persone* 44(1) (2015), pp. 176–183. On that topic, see S. Tonolo, 'La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore', *Rivista di Diritto Internazionale Privato e Processuale* 50(1) (2014), pp. 81–104.
23. S. Misuraca, L. Antonaci, F. Costantini, C. Piedimonte, M. Stanca and R. Rinaldi, 'The Development of Children of Same-sex Couples: Review of International Literature and Italian Perspective'. *Minerva Psichiatrica* 57(2) (2016), pp. 72–81.
24. Original Article 5, which would have allowed for second-parent adoption to couples in civil unions, has in fact been stricken from the law.
25. G. Ferrando, 'Il problema dell'adozione del figlio del partner. Commento a prima lettura della sentenza della Corte di Cassazione n. 12962 del 2016', *La Nuova Giurisprudenza Civile Commentata* 32(9) (2016), pp. 1213–1219.

tourism, particularly those seeking surrogacy agreements abroad. Moreover, it should be noted that surrogacy is directly and criminally punishable under Article 12(6) of law n. 40/2004 by a 3 months to 2 years custodial sentence and by a monetary penalty from 600,000 to 1 million euros. The ban on heterologous fertilization, on the contrary, has been declared unconstitutional by ruling 162/2014.[26]

Nonetheless, it has become increasingly common for two women, a social mother and a biological one, to attempt to have the family tie with their donor-conceived child, born abroad, legally recognized in Italy. The first instance of adoption by a same-sex couple having been legally acknowledged in Italy dates back to 2014, when the juvenile court of Rome allowed a woman to legally adopt her female partner's biological child, via ruling n. 299,[27] issued on 30 July 2014. The two women had been married in Spain, where they had sought heterologous fertilization. The baby girl who had subsequently been born was taken care of by both women, thus establishing a solid family bond between them, akin to a parental relationship. The court had mandated a psychosocial assessment be made by social services institutions, which concluded that taking the child away from her family setting would not have served her best interests.[28] The court ultimately applied the already mentioned Article 44 of the legislation regulating adoptions, thus acknowledging that the child's best interests lay in maintaining her existing relationship with the social mother, which had been developed and nurtured. According to the Court, the relationship between the child and the social mother was characterized by family and affection-based traits, tantamount to a parent–child relationship.[29] Such a ruling constituted a turning point in Italy, a milestone in the evolving legal and judicial approach towards same-sex families and their right to adopt children.[30]

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26. Italian Constitutional Court, 10 June 2014, n. 162.
27. Rome juvenile Court, 30th July 2014, n. 299. Available at: www.articolo29.it/adozione-in-casiparticolari-second-parent-adoptionmerito/ (accessed 28 July 2019).
28. The minor's best interest, specifically laid out in the 1989 United Nations Convention on the Rights of the Child, constitutes the cornerstone of the European Court of Human Rights jurisprudence, through the provisions of Article 8 of the 1950 Convention, according to the interpretation of several countries' jurisprudence. See on the same topic: C. Focarelli, 'La Convenzione di New York e il concetto di best interests of the child', *Rivista Internazionale* 93(4) (2010), pp. 981–993; F. Alston, *The Best Interest of a Child: Reconciling Culture and Human Rights* (Oxford: Oxford University Press), 1994.
29. Cipriani, 'La prima sentenza italiana', p. 176. A. Lorenzetti, 'Coppie same-sex e fecondazione assistita: la progressiva decostruzione del paradigma familiare', in M. Azzalini, ed., *La Procreazione Assistita, Dieci Anni Dopo. Evoluzioni e Nuove Sfide* (Ariccia: Aracne, 2015), p. 121.
30. For an overview on that topic, see F. Alicino, 'The road to equality. Same-sex relationships within the European context: the case of Italy', *SOG Working papers series* 26 (2015), pp. 1–30; K. Almack, 'Display Work: Lesbian Parent Couples and their Families of Origin Negotiating New Kin Relationship', in E. Dermott and J. Seymour, eds., *Displaying Families. A New Concept for the Sociology of Family Life* (New York: Palgrave MacMillan, 2011), pp. 102–118.

The Rome Court of Appeals[31] and the Italian Supreme Court have subsequently[32] reinforced the point that same-sex unions, in which partners share life plans and daily routine, fully constitute 'families', a setting in which minors can be raised, unhindered by discriminatory treatment of the same-sex nature of the union itself. Obviously, however, if the courts were to ban a same-sex parent, regardless of whether they have a legally recognized relationship to the other parent, from adopting her or his partner's biological or adoptive child (second-parent or co-parent adoption), inequality of treatment would arise. Such unequal treatment would fall foul of the Italian Constitutional precepts of Article 3 and run counter to European Court of Human Rights jurisprudence.[33] The European Court, in fact, has already asserted the illegality of discrimination based on a parent's sexual orientation, in its decision in *Salgueiro da Silva Mouta v. Portugal*.[34] On the other hand, in the ruling of *X et al. v. Austria*, the European Court confirmed that member states enjoy a margin of appreciation in terms of regulating access to second-parent adoptions by unmarried couples. Still, where second-parent adoption is legal, same-sex couples may not be banned from accessing it, since such a prohibition would constitute a violation of Article 14 (right to equal treatment), in combination with Article 8 (right to respect for private and family life) of the European Convention of Human Rights.[35]

31. Court of Appeal of Rome, 23 December 2015, n. 7127.
32. Italian Supreme Court, 22 June 2016, n. 12962. Available at: http://www.articolo29.it/adozione-in-casiparticolarilegittimita (accessed 1 August 2019).
33. E. Falletti, 'Homosexual Single Individuals' Right to Adopt Before the European Court of Human Rights and in the French Legal Context', *Human Rights Brief* 18(2) (2011), pp. 26–38.
34. European Court of Human Rights, *Case of Salgueiro da Silva Mouta v. Portugal*, 21 December 1999 (Application n. 33290/96) §§ 35. Available at: http://www.articolo29.it/decisioni/corte-europea-dei-diritti-delluomo-quarta-sezione-salgueiro-da-silva-contro-portogallo-decisione-del-21-dicembre-1999/ (accessed 3 August 2019); M.C. Vitucci, 'Orientamento sessuale e adozione nella giurisprudenza della Corte europea dei diritti umani', *Diritti Umani e Diritto Internazionale* 7(2) (2013), pp. 481–498.
35. European Court of Human Rights, *S.H. v. Austria*, 19 February 2013 (Application n. 57813/00). Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-107325%22]} (accessed 4 August 2019); J. Long, 'I giudici di Strasburgo socchiudono le porte dell'adozione agli omosessuali', *Nuova giurisprudenza civile commentata* 24 (2008), pp. 676–689; M. Winkler, 'La Cassazione e le famiglie ricomposte: il caso del genitore convivente con persona dello stesso sesso', *Giurisprudenza italiana* 165(5) (2013), pp. 1038–1041; M. Gattuso, 'Gestazione per altri: modelli teorici, protezione dei nati in forza dell'articolo 8, legge 40' (2017). Available at: http://www.giudicedonna.it/articoli/forum/maternit%C3%A0/Gestazione%20per%20altri%20-%20Gattuso.pdf (accessed 5 August 2019); A.M. Lecis Coccu-Ortu, 'La Corte europea pone un altro mattone nella costruzione dello statuto delle unioni omosessuali: le coppie di persone dello stesso sesso non possono essere ritenute inidonee a crescere un figlio' (15 marzo 2013), pp. 1–7. Available at: http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0025_lecis_cocco_ortu.pdf (accessed 5 August 2019).

Legal recognition of birth certificates issued abroad for donor-conceived children

In addition to co-parent adoptions, same-sex couples may resort to heterologous fertilization abroad and apply for the newborn's legal registration by the authorities in the parents' place of origin, so as to be legally recognized as parents of the donor-conceived child born abroad. In such instances, the intended parents seek recognition from the donor-conceived child's birth, rather than recognition of an already established and well-developed family relationship, as in cases of co-parent adoption.

A bone of contention has been whether the courts could deny the recognition of such family ties, by virtue of Italian statutes banning such procreation methods. Italian courts have apparently followed the principles established by various European legal statutes and concluded that the registration of donor-conceived children born abroad may be denied only if it is found to be conflicting with supranational principles and values. Since no international norms or principles exist that ban same-sex people from becoming parents, several Italian courts have now granted such requests for the legal registration of children born abroad through heterologous fertilization.

The first instance in which an Italian court has done so, a case of a birth certificate indicating two mothers, was the decision of the Turin Court of Appeals on 29 October 2014. The donor-conceived child had been born with two commissioning mothers who lived in Spain, where they had entered into a marriage and later divorced.[36] The Court stated that the procreative path that the two women had undertaken was to be deemed different from surrogacy, in that one partner had gestated the child, rather than a surrogate mother. Therefore, the newborn child had not been 'handed over' to the commissioning parents, which is the distinctive trait of surrogacy. It was, on the other hand, a rather unusual case of MAP via heterologous fertilization, since both partners had contributed to the childbirth: the Spanish partner had brought the pregnancy to term and given birth and the Italian partner had donated the oocytes, which had been fertilized *in vitro* with donated sperm. The childbirth was therefore an integral part of a shared, planned parenthood.[37] The Italian civil registry official, however, had refused to register the child according to the Spanish certificate, claiming it would be contrary to public order. The couple then filed an application to the Turin Court, which initially denied the registration, pointing out that under Italian law, only the woman who bears the child can be recognized as its 'mother', and it would therefore be unlawful to acknowledge the parental status of both women. Nonetheless, the Turin Court of Appeals reversed that decision, recognizing for the first time the value of the foreign birth certificate which identified two mothers, and allowing for their legal registration in Italy. According to the Court of Appeals, public order dictated that the child's best interests in preserving the well-established family relationship with both women should be upheld.[38] In order to

36. E. di Napoli, 'La Corte d'appello di Torino di fronte alla fecondazione assistita eterologa all'estero', *GenIUS* 2(1) (2015), pp. 258–272.
37. Italian Supreme Court, 30 September 2016, n. 19599, §§ 10.1 e 11.1.
38. Court of Appeal of Turin, 29 October 2015. Available at: http://www.articolo29.it/corte-dappello-torinosezione-famiglia-decreto-29-ottobre-2014 (accessed 5 August 2019);

fully assess the child's best interests, the key factor is the parental bond that has been established between the social mother and the child. Such a connection should be kept separate from the relationship between the two female partners.[39] The Court of Appeals cited precedents from the European Court of Human Rights, namely *Mennesson v. France*, *Labassee v. France* and *X et al v. Austria*,[40] in order to buttress the point that failing to legally register the child could harm his or her interests, constraining the right to personal identity and creating an unsteady and ambiguous legal status. The child would in fact lack any legal recognition while on Italian soil, with no connection with the social mother and her relatives. The child, the judges argued, would be even more penalized by the fact that the couple had in the meantime divorced. Furthermore, failing to acknowledge the link between the child and the social mother would have made it impossible to have joint custody, as mandated by the Spanish Court when the two mothers were divorced. Inevitably, the child would have been prevented from maintaining a relationship with the social mother.[41] The child would have ultimately been damaged by the inability to be supported and provided for by the woman who was not the biological mother.[42]

In addition to violating the child's right to develop a personal identity, the failure to recognize the parental status of both women in Italy would have conflicted with Article 24(3) of the Charter of Fundamental Rights of the EU, which asserts: 'Every child shall

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S. Celentano, 'La trascrizione in Italia dell'atto di nascita del figlio di coppia omosessuale' (23 January 2015). Available at: http://www.questionegiustizia.it/articolo/la-trascrizione-in-italia-dellatto-di-nascita-del-figlio-di-coppia-omosessuale_23-01-2015.php (accessed 3 August 2019).

39. Celentano, op. cit.

40. European Court of Human Rights, 26 June 2014, *Labassee v. France*, Application n. 65941/11. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145180*%22]} (accessed 4 August 2019); European Court of Human Rights, *Mennesson v. France*, Application n. 65192/11. Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145179*%22]} (accessed 4 August 2019); S.L. Cooper, 'Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights', *German Law Journal* 12(10) (2011), pp. 1746–1763; P. Johnson, *Homosexuality and the European Court of Human Rights* (London: Routledge, 2013); P.G. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', *Notre Dame Law Review* 73 (1998), pp. 1218–1226. Available at: http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/corte_europea_diritti_uomo/0025_lecis_cocco_ortu.pdf (access 3 August 2019).

41. J.P. Marguénaud, 'L'exagération du droit au respect de la vie familiale des parents d'intention de l'enfant né à l'étranger d'une gestation pour autrui', *Revue Trimestrielle de Droit Civil* 7 (2015), pp. 325–369.

42. F. Corbisiero, 'Mamme lesbiche e i loro bambini. Percorsi di genitorialità (ad ostacoli) e reti arcobaleno', in R. Parisi, ed., *Coreografie Familiari Fra Omosessualità e Genitorialità. Pratiche e Narrazioni Delle Nuove Forme Del Vivere Assieme* (Rome: Aracne, 2017), pp. 131–153.

have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.[43]

The Turin Court of Appeals decision was ultimately backed by the Supreme Court.[44] According to the Supreme Court, the current Italian legislative framework needed to look at foreign family laws, which have opted for innovative solutions[45] in that setting. Italian statutes, in fact, operate within the broader context of the international community, thus the notion of 'public order' needs to be widened by the inclusion of internationally acknowledged precepts and the dismissal of outdated national provisions. Hence, when determining whether an action conflicts with public order, national courts need to verify not only whether such an action runs counter to national statutes, but especially whether it conflicts with the fundamental rights that are enshrined in the Italian Constitution, in the EU founding treaties, in the Charter of Fundamental Rights of the EU, as well as in the European Convention on Human Rights.[46] In accordance with such an interpretation, the fact that Italian lawmakers have disregarded, or even banned, a given conduct does not necessarily mean that such a situation is incompatible with public order.[47] The Italian Supreme Court went on to remark that the minor's best interests should be prioritized, which in the instant case meant that the right to maintain the family relationship with both mothers must be guaranteed, since such a family status has been legitimately acquired abroad.[48]

According to the Supreme Court, therefore, Article 269 of the Italian Civil Code, which identifies the woman who gives birth as the 'mother', should not be viewed as a public order principle. Such a rule, in fact, is outdated and unsustainable in modern societies. Medical and scientific progress has led to a dichotomy: between the woman who gives birth and the gamete donor, whose eggs are fertilized and implanted. The two may not be the same person.[49] In modern societies, motherhood is ascribed in a much broader context, where childbearing and birth are not the only factors at play: the transmission of genetic profile and parental responsibility are just as important, particularly when a stable family setting has been produced. The court has therefore concluded that both applicants are the child's legal mothers,[50] and that

43. Charter of fundamental rights of the European union (2012/C 326/02). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=IT (access 1 August 2019).
44. Italian Supreme Court, 30 September 2016, n. 19599 § 7, p. 22, cit.
45. P. Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad', *Diritti Umani e Diritto Internazionale* 3 (2011), pp. 615–638.
46. G. Luccioli, 'Il caso del figlio nato da due madri. L'interesse del minore e il limite dell'ordine pubblico' (2016). Available at: http://www.giudicedonna.it/2016/numero-quattro/index.htm (accessed 1 September 2019).
47. Italian Supreme Court, 30 September 2016, n. 19599, § 7, p. 22.
48. Op. cit., p. 22.
49. Op. cit., § 11.1, p. 47.
50. Op. cit., § 11.1, pp. 48–49.

the foreign birth certificate must be registered along with the indication of two mothers.[51]

The Naples Court issued a ruling on a similar case on 11 November 2016.[52] A child had been born through *in vitro* fertilization using sperm from a donor and the oocytes of the intended mother, who had carried the pregnancy to term. The child was not biologically related to both mothers. The Naples Court ruling reinforced the broader notion of public order which was laid out by the Italian Supreme Court in its ruling n. 19599, issued on 30 September 2016, and stressed the importance of the family bond that had been developed and shared, as proven by the non-biological mother's consent to the MAP procedure.[53] By doing so, she took on parental responsibility. Based on that rationale, the Naples Court came to the conclusion that public order cannot prevent the legal registration of a foreign birth certificate of a child born within a same-sex parented family, where both partners have freely chosen to share in and carry forward their family plans.[54] The family tie is therefore based on the fundamental freedom and right to self-determination and to start a family without being discriminated against in any way.[55] After all, according to European Court of Human Rights jurisprudence, the best interests of the child outweigh any legal restriction imposed under national statutes, in cases such as the ones mentioned here.[56]

51. See, however, *R (On the Application Of) TT v. The Registrar General for England and Wales* [2019] EWHC 2384, a recent UK case which presents substantial differences: a female underwent gender reassignment surgery while choosing to retain her uterus. He then gave birth to a child via intrauterine insemination, and asked to be legally registered as the newborn's father. The High Court of England and Wales ruled that motherhood is not gender-specific, but it is rather biologically grounded: it is based on who brought the pregnancy to term and gave birth. The Court arrived at that conclusion following a thorough analysis of the 2004 Gender Recognition Act and the 1990 Human Fertilisation and Embryology Act, in addition to drawing upon European Court of Human Rights jurisprudence on the subject.
52. Court of Naples, 11 November 2016, pp. 6–7. Available at: http://www.articolo29.it/trascrizione-atto-nascitamerito (accessed 3 September 2019).
53. A. Schillaci, 'Il Tribunale di Napoli ordina la trascrizione di un atto di nascita straniero con due madri' (7 December 2016). Available at: http://www.articolo29.it/2016/il-tribunale-di-napoli-ordina-la-trascrizione-di-un-atto-di-nascita-straniero-con-due-madri/ (accessed 5 September 2019).
54. I. Rivera, 'La trascrizione dell'atto di nascita formato all'estero tra tutela dell'ordine pubblico internazionale e superiore interesse del minore', *GenIUS* 4(1) (2017), pp. 70–81.
55. Italian Supreme Court, 30 September 2016, n. 19599, § 7, p. 22, cit.
56. The same principle applies to rulings such as *Wagner v. Luxembourg* European Court of Human Rights, 28 June 1997, *Wagner and J.M.W.L. v. Lussembourg*, Application n. 76240/01. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22001-81328%22]} (accessed 6 September 2019) and *Negrepontis-Giannisis v. Greece* European Court of Human Rights, 3 May 2011, Negrepontis-Giannisis v. Grecia, Application n. 56759/08. Available at: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-3523574-3975974%22]} (accessed 6 September 2019).

Recognition of foreign certification of second-parent adoption

The use of heterologous fertilization abroad by same-sex couples generates a further scenario which has not been legislated for the recognition by foreign authorities of second-parent adoption in a same-sex family. The looming issue in such cases is whether such recognition can be validated and registered by Italian institutional bodies, and more controversially, how such acknowledgement affects Italian law statutes. Specifically, it is unclear whether an adoption that was allowed and sanctioned by foreign institutions can be regarded as fully effective in Italy as well, or whether that status should be legally viewed as adoption under extraordinary conditions.

Italian jurisprudence has been predominantly favourable in terms of registering such adoption cases. A decision by the Milan Court of Appeals appears particularly telling in this regard.[57] The case saw two women, Italian citizens living in Spain, who had a daughter conceived using donated sperm and carried by one of them. Upon moving back to Italy, the child's social mother filed an application to the Milan juvenile court in order to obtain legal recognition of the Spanish adoption order. The Italian court, however, denied that request, since the social mother could not be considered the biological mother's 'wife': same-sex marriage being illegal in Italy. The adoption granted by the Spanish court did not meet the requirements laid out in law n. 184/1983, Article 44, which regulates adoption rights in particular circumstances. The Milan Court of Appeals could only confirm that the two women's marriage in Spain could not be recognized, and neither could the following divorce. Nonetheless, the court ruled that the adoption granted in Spain should be legally registered in Italy. So, on the one hand, the same-sex marriage could not be recognized, due to its being contrary to public order provisions in effect in Italy; on the other, the adoption was to be acknowledged and legally registered, on the grounds that the child's best interests outweighed the need to safeguard public order, thus the well-developed parental relationship established abroad should not be discontinued.[58] Court of Appeals judges drew upon the reasoning of the Italian Supreme Court and the European Court of Human Rights, reasserting that growing up in a same-sex parented family does not entail any hazard or prejudice to children. The court had, of course, the responsibility to verify that the recognition of the adoption was really in the child's best interest, by maintaining the parental relationship with both mothers, having lived with both of them for a considerable length of time. In the case that we have elaborated on, the court believed that full adoption was the best possible solution, in that it established a parental relationship virtually identical to the one stemming from natural parenthood, with more rights than those ascribed to 'adoptions in extraordinary circumstances'. By virtue of such rights, the child would be able to maintain a relationship with her adoptive mother's family, with whom she had already

57. Court of Appeal of Milan, 16 October 2015, n. 2543. Available at: http://www.articolo29.it/2015/la-corte-dappello-di-milano-dispone-la-trascrizione-diuna-adozione-piena-da-parte-della-mamma-sociale (accessed 5 August 2019).

58. C. Benanti, 'L'adozione piena del figlio del partner dello stesso sesso, pronunciata all'estero, è efficace in Italia, nel superiore interesse del minore', *Nuova Giurisprudenza Civile Commentata* 32(5) (2016), pp. 725–737.

established a strong bond. Because of the recognition of the full adoption that had been granted by the Spanish Court, the child's position towards her biological mother and her family was left unchanged and in addition to that, the child would be able to rely on financial support from her adoptive mother and her family alike.

Following the same rationale, the Naples Court of Appeals recognized the adoption order for two children born in France, in a French-Italian couple.[59] The case differs from the ones previously discussed, in that it involves the registration of a dual co-parent adoption: both mothers had already obtained the adoption of each other's biological child and were seeking to have those adoption orders recognized in Italy as well. The Naples Court of Appeals ultimately ruled that the adoption was not incompatible with public order, because the recognition served the minor's best interests in maintaining the firmly established family relationship with both mothers, with whom he had lived since birth.

Closing remarks: Judicial safeguards offset the legislature's failure to act

The courts have mostly espoused a definition of family that prioritizes relationships that are already consolidated and well-developed, irrespective of the same-sex nature of such relationship. Moreover, the child's best interests, which in these cases has been construed as their interest in maintaining the legal parental relationship validated abroad and the bond between the child and the adult who has taken care of him or her, outweighs fundamental rules and norms, such as the one according to which the woman who bears a child is the only one who can be legally recognized as the mother. Legislatures in other EU member states have already enacted laws intended to provide safeguards for children born and raised in same-sex parented families.[60] Italian lawmakers have so far shirked the issue. For that reason, it became necessary for the courts to intervene, for the sake of the children's best interests.[61] The Italian pathway, until now, presents a symbolic and significant aspect, in our view: the children's rights have been acknowledged not through the concession of unresponsive lawmakers but by virtue of human rights that do not fall within the scope of national parliamentary majorities. Consequently, what has occurred in Italy may happen in any other European nation where only those individuals giving

59. Court of Appeal of Naples, 30 March 2016. Available at http://www.articolo29.it/corte-dappello-di-napoli-sentenza-del-30-marzo-2016/ (accessed 5 August 2019).
60. Holland has been allowing same-sex couples to adopt children since 2001. Other EU nations followed: Sweden (2003), Spain (2005), England and Wales (2005), Scotland (2009), Northern Ireland (2013), Belgium (2006), Denmark (2010), France (2013), Malta (2014), Luxembourg (2015), Austria (2016), Ireland (2016), Portugal (2016), Finland (2017) and Germany (since 2017). Available at: https://www.truenumbers.it/adozioni-gay-in-europa/ (accessed 3 September 2019).
61. M. Gattuso, 'Tribunale per i minorenni di Roma: sì all'adozione del figlio del partner ed al doppio cognome, l'omogenitorialità è ≪sana e meritevole di essere riconosciuta≫'. Available at: http://www.articolo29.it/tag/marco-gattuso/ (accessed 5 August 2019).

birth can have the legal status of mother. Hence, the great importance of the principle of the child's best interest may lead to similar court decisions elsewhere in Europe.

Obviously, courts cannot guarantee an acceptable degree of uniformity when it comes to safeguarding all those involved. In our view, however, protection from the courts is inadequate for at least two reasons. Firstly, it depends on the degree of open-mindedness and on the conscience of each judicial panel. In fact, following the Italian Supreme Court decision n. 12962/2016, juvenile court judges from Venezia, Palermo and Bologna[62] issued various rulings that ran counter to the Supreme Court's rationale, given the fact that under Italian statutes, legal precedents are not binding and do not influence the subsequent decisions of other courts. In addition, within the European Court of Human Rights itself, two conflicting decisions have been issued on similar cases decided only 1 year apart.[63] Secondly, it is an uneconomical way of upholding rights, since it entails costly legal proceedings. Hence, we firmly believe that new legislation is needed, which clearly contemplates that scientific advancements have given rise to multiple parental figures and roles, in order to ensure that same-sex parenting is dealt with in a consistent and rational fashion and to prevent decisions that may infringe upon human rights.[64]

Nonetheless, at this particular historical juncture, a decisive intervention from the legislature appears unlikely. A heated debate has been ongoing within Italian society between supporters of second-parent adoption and adoptions by same-sex couples and those who are fiercely opposed to any such recognition. At a political level, the government hinges on a narrow parliamentary majority, and such contentious social issues appear to be extremely divisive within the same party as well. Same-sex marriage and adoptions by same-sex couples are even more unlikely to be legalized anytime soon. In that respect, however, a compatibility issue may arise between Italian legislation and European/international standards.[65]

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62. Venice Juvenile Court, 31 May 2017; Palermo Juvenile Court, 30 July 2017; Bologna Juvenile Court, 20 July 2017.
63. As pointed out by F.R. Ammaturo, 'The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe', *Social and Legal Studies* 23(2) (2014), pp. 175–194, in reference to the cases *Others v. Austria*, 19 February 2013 (Application no. 19010/07), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-116735%22]} and *Gas and Dubois v. France*, 15 March 2012 (Application no. 25951/07), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109572%22]}.
64. Turin Juvenile Court, 11 September 2015; Milan Juvenile Court, 17 October 2016; Palermo Juvenile Court, 30 July 2017.
65. See Tobin, 'Incoherent Approach', pp. 64–67.

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