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Is there anything left of the Italian law governing medically-assisted procreation?

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Abstract

Medically-assisted-procreation via in vitro fertilization, an integral part of of the so-called "reproductive revolution", is a valuable option for couples with sterility or fertility issues. That has however brought about three relevant results: the rift between procreation and sexual intercourse, the opportunity to use heterologous fertilization through donated gametes, and the ensuing increase in the number of "reproductive contributors" (male and/or female gamete donors, surrogate mothers). In Italy, Law n. 40 has put in place several restrictions, stricter than in most other European countries. Before being declared partly unconstitutional, Law 40 used to impose an array of bans and restrictions other than the ones still currently in force, such as the still unchanged prohibition to use human embryos for experimentation purposes and the ban on surrogacy. For same-sex couples who travel abroad to get around the Italian ban on heterologous fertilization, surrogacy, and MAP for homosexual couples. The authors have attempted to lay out a short analysis of how Italian courts have attempted to uphold the best interests of children born abroad in homosexual families, by taking into account the latest decisions on the subject. ***Clin Ter 2021; 172 (1):e57-59. doi: 10.7417/CT.2021.2283***

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Dear Editor,

Medically-assisted-procreation via in vitro fertilization has grown increasingly common over time (1). Such techniques are part and parcel of the so-called "reproductive revolution", characterized by three key elements: the rift between procreation and sexual intercourse, the opportunity to use gametes donated by third parties outside the commissioning couple, and the ensuing increase in the number of reproductive contributors (male and/or female gamete donors, surrogate mothers). It appears likely that over time, similar interventions will get so far as to alter human genome and biological inheritance, so as to prevent diseases and abnormalities at the genetic level, or even "enhance" human beings yet to be born; that would of course give rise to even greater ethical and moral quandaries (2-4).

In Italy, Law n. 40, enacted on 19th February 2004, was designed to put in place a set of safeguards for embryos, by codifying several restrictions not found in most other European countries (5, 6). Before he issuance of rulings by the Italian Constitutional Court that declared many of the its provisions unconstitutional, Law 40 used to impose an array of bans and restrictions other than the ones still currently in force, such as the still unchanged prohibition to use human embryos for experimentation purposes and the ban on surrogacy (7, 8): freezing and storing embryos used to be forbidden; no more than three embryos could be produced and all of them had to be implanted in the womb in the same procedure; preimplantation diagnosis on embryos was also banned, even when the parents were carriers of genetically transmissible diseases; heterologous fertilization was also prohibited; lastly, access to medically-assisted procreation was limited to couples with documented sterility or infertility issues (9, 10).

Constitutional Court rulings have profoundly changed the scope of Law 40, rendering it compliant with Italian constitutional precepts as well as with the values enshrined in the Oviedo Convention on Human Rights and Biomedicine, and in the European Convention on Human Rights. In its ruling n. 151, issued on 8th May 2009, the European Court of Human Rights has done away with the 3-embryo limitation, entrusting doctors with determining how many embryos should be implanted, on a case-by-case basis and prioritizing the patient's health. The embryos that were produced but not implanted can be legally frozen and stored (11, 12). Following such a decision, the number of embryos stored in fertility clinics and assisted procreation facilities has substantially increased over the past years. An Italian Constitutional Court decision issued in 2014 has lifted the ban on heterologous fertilization, arguing that such a prohibition ran counter to the individual right to health and discriminated against the most vulnerable couples: those with major reproductive issues (13). Ruling n. 96/2015 has

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legalized preimplantation diagnosis and enabled fertile couples with major genetic transmissible conditions to access medically-assisted procreation procedures. For such couples, the only option used to be therapeutic abortion in case of adverse diagnosis (14).

Since the bans on surrogacy and MAP procedures for singles and same-sex couples are still in place, many engage in so-called "procreative tourism", i.e. travelling to countries with more permissive legislation, where such bans do not exist. In such cases, the child is born abroad through MAP procedures and his/her birth certificate shows the commissioning couple as the legal parents. When the newly-formed family comes back to Italy, however, that foreign certificate needs to be registered and recognized by the local authorities (15). Hence, an issue arises when same-sex couples attempt to do that: «the child of two mothers» or «the child of two fathers» are not legally recognized figures.

How do Italian courts uphold the best interests of children born abroad in homosexual families? Law n.40/2004 offers no indication as to the legal status of children born through MAP procedures abroad and brought back to Italy by the commissioning parents. Law n. 76, issued on 20th May 2016, has harmonized Italian regulations along the lines of European norms, even allowing homosexual couples to enter into a legally sanctioned civil union. Nonetheless, such a piece of legislation does not go so far as to legalize second-parent adoption. A key question therefore lingers: how can Italian courts guarantee donor-conceived children born abroad an acceptable degree of family stability if Law 40/2004 bans surrogacy altogether, under all circumstances? Article 44, subsection 1, letter b) of Law n. 184, enacted on 4th May 1983, has codified the legal possibility of adopting the child of one's partner (the so-called "adoption under extraordinary circumstances"). By that norm, the lawmakers have sought to uphold the right of children to rely on a family to raise them. Still, the decision to grant adoption under extraordinary circumstances is for the court to make, on a case-by-case basis and prioritizing the children's interest and well-being.

The European Court of Human Rights has also weighed in on this thorny issue, urging member states to acknowledge and allow for the legal registration of donor-conceived children born abroad, who would then be fully entitled to full citizenship status, the social parent's surname, family relationships, inheritance rights, freedom of movement and the like. Such wide-ranging recognition should be granted, the European Court argued, even if legislation in the intended parents' country of origin does not allow it, because it holds surrogacy to run counter to public order (16, 17). The European judges have first and foremost decided with the children's best interest at heart, as it is enshrined in the 1989 United Nations Convention on the Rights of the Child and the 2000 Charter of Fundamental Rights of the European Union.

The children's best interest is constituted by the opportunity to maintain and nurture stable family relationships, in keeping with the fundamental values enshrined in article 8 of the European Convention on Human Rights; according to the European judges, even homosexual unions fall within the family category: a legally acknowledged relation is not essential, according to that rationale, while it is imperative not to deprive the children of a well-established family setting and relationship started abroad. Hence, the very essence in the notion of family has evolved (18, 19): a stable, consolidated relationship between two partners of the same sex can indeed constitute a family, provided that both partners share and work towards the same life project, aspirations, wishes and propositions for a common future, in addition to daily life routines. The notion of family is therefore untied from biological links, and is rather centered around an affective and enduring bond among all its components (20). Such innovative relationships are not necessarily based on marriage. The parents' sexual orientation is irrelevant: what truly counts is the connection established between them and the child (21-23).

Most Italian courts have dealt with requests of legal registration for birth certificates issued abroad. Decisions in that regard have been uneven and conflicting at times, which required the Supreme Court of Cassation to step in and settle the cases. The most recent such instance saw two women who had traveled to Denmark in order to circumvent the Italian legislation banning homosexual couples from seeking parenthood through MAP procedures. Afterwards, one of them gave birth to a baby girl in Italy, who obviously took her surname. There was of course no problem in legally recognizing the parental relationship between the child and the woman who bore her; the mother's partner, however, i.e. the woman who had shared with her the life plan based on starting their own family, and consented to the MAP procedure, was denied parental status. The Supreme Court issued a decision on the case, ruling n. 7668, on 6th April 2020, denying the intentional parents' request to amend the birth certificate on the grounds that Italian statutes prohibit same-sex couples from resorting to MAP techniques. Just a few days later, however, the Rome Court of Appeals reversed that decision, aligning Italy to the European prevailing trend.

The Court of Appeals has buttressed an important point that had been affirmed in Constitutional Court ruling n. 221, on 23rd October 2019: donor-conceived children are entitled to the same legal status as children born from married couples or as children recognized by the social parents who manifested the intention to resort to MAP techniques in order to achieve parenthood"; moreover, the Court moves past the limit of identifying parenthood as a mere biological act, thus solely ascribable to heterosexual couples.

The Rome Court of Appeals has overcome that discrepancy by prioritizing the rights of the children, who most need legal safeguards. The Court contends that donor- conceived children, even in countries where such practices are illegal, should never be penalized compared to children born through legal procedures.

The primacy of the children's best interests thus pave the way for the recognition of new form of parenthood disconnected from sexual intercourse. Hence, intentional parenthood comes to outweigh biological parenthood (24, 25).

In light of the developments herein analyzed, it is worth wondering whether something meaningful still remains of the Italian legislation on MAP.

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