

# Same-sex parenting according to the Italian Constitutional Court: the need for legislative solutions

*Alessandro Del Rio*

Department of Anatomical, Histological, Forensic and Orthopedic Sciences, "Sapienza" University of Rome, Rome, Italy

**Abstract.** The authors have set out to analyze the most recent Italian Constitutional Court jurisprudence (rulings n. 32 and 33/2021) on the issue of surrogacy, by contextualizing the underlying factors and possible implications. The judges argue that their decisions are grounded in the best interest of the minor, whether born from surrogate motherhood or from heterologous fertilization, and believe that a legislative intervention to regulate the issue can no longer be postponed. According to that rationale, the legislator should take into account the difference between surrogacy and heterologous fertilization, and therefore the recognition of intentional parenthood cannot be unconditional, but must be differentiated, depending on the fertilization technique used. ([www.actabiomedica.it](http://www.actabiomedica.it))

**Key words:** Surrogacy, best interest of the minor, legislative intervention, Italian Constitutional Court

## Introduction

Medically assisted procreation (MAP) techniques have undoubtedly enabled countless people to fulfill their procreative potential. There is no denying that couple infertility can severely affect the lives of those involved, estimated to be between 48 million couples and 186 million individuals globally and often causing distress, frustration and spousal issues (1). Assisted reproductive technology (ART) has substantially evolved over the years, and ART techniques are among the most valuable and consequential scientific achievements of modern times. ART has in fact made it possible for couples to achieve parenthood despite a condition of infertility, which used to be considered unsolvable, and to even postpone parenthood and somehow overcome age-related limitations through the cryopreservation of gametes or even embryos (2, 3). Female infertility can be caused by uterine factors (e. g. absolute uterine factor infertility, AEFI (4)) or major complications damaging reproductive organs during previous pregnancies (5-7). Innovative practices such

as uterus transplantation (8) and tissue engineering (9, 10) will likely pave the way for many more patients to overcome their infertility in ever greater numbers in the foreseeable future, although such practices do entail numerous ethical (11-13) and moral quandaries that need to be addressed (14-17).

The management of infertility is a medical process requiring a well-defined path of diagnosis and treatment, which cannot be limited to the mere restoration of procreative capabilities (18). In that regard, it is incumbent upon doctors and specialists to provide their patients with all the information needed to make a fully informed decision and gain awareness as to the many complexities inherent in such therapeutic options (19, 20).

## ART for same-sex couples: a contentious and polarizing issue

These techniques may in fact also entail gamete donors or surrogate mothers outside the couple, and

for that very reason they have led to a rather polarizing debate concerning the issue of same-sex parenting and its compatibility with the fundamental principles enshrined in art. 2 of the Italian Constitution, centered around inalienable individual rights, with particular regard to the dignity of the pregnant woman and of the minor born through such controversial techniques. It is worth remarking that although Law no. 40/2004 has banned surrogacy and made it a criminal offence (Article 12 paragraph 6), it did not deal with the extremely contentious issue of recognition of children born through surrogacy abroad and the legal registration of their birth certificates by Italian authorities (21-24).

Hence, given the lack of any targeted legislation in that respect, and in light of the proliferation of transnational surrogacy agreements, it was the judges who intervened to decide whether to grant legal recognition to the surrogacy agreements established abroad, via the verification of steady family connections (25, 26).

As far as surrogacy is concerned, the Constitutional Court has repeatedly stated that it constitutes an intolerable offence, a blot on women's dignity, since it exploits their social and/or economic vulnerabilities thus deriving them of self-determination and ability to make free choices. As part of the recognition of social parenting determined by surrogacy, the Constitutional Court has always taken a stance that prioritizes the children's best interest in their relations with the intended parents. The core principle of the children's best interest is now fully acknowledged by the United Nations Convention on the Rights of the Child, in addition to art. 24 of the EU Charter of Fundamental Rights, and must be understood as the solution that best guarantees, from a moral as well as material perspective, the best "care of the child" (27-31).

Therefore, the intended parents' sexual orientation is irrelevant, provided that they have shared the parenting project from the beginning with day-to-day dedication and commitment, and that the surrogacy procedure was carried out in a country where the practice is lawful.

## How to identify the child's best interest?

The child's best interest consists in obtaining legal recognition of *de facto* family ties with the intended parents who have chosen to share the parenting project. By virtue of these ties, the minor is a member of that community of affections, even if made up of homosexual partners, because the couple's sexual orientation is not a parameter on which to base the suitability to assume parental responsibility. The Constitutional Court judges fully acknowledge the right to parenthood, and focus instead on the right of the child so that the intended parents' duties are legally outlined and identified. Such parental duties and responsibilities are in fact essential in upholding the child's best interest. According to the Court's line of reasoning, the children's best interest is only served if they have an opportunity to be raised by the couple who shared the parenting project from the very beginning, constantly nurturing and developing it, and thus effectively exercising parental responsibility.

In 2021, the Constitutional Court once again intervened on the subject with two rulings, n. 32 (relating to a case of double maternity) and n. 33/2021 (a case of double paternity), in which recognized that, to date, the degree of protection for children born through MAP techniques is inadequate (32).

In judgments n. 221/2019 and n. 230/2020, the Court limited itself to reiterating that the legislator could decide whether to legislate on the matter of same-sex parenting, since the Constitution does not prevent it. With the 2021 judgments, the Court has asserted in no uncertain terms that a legislative intervention is a duty of the lawmakers, and the continuation of this sort of legislative stalemate is no longer tolerable, because the minor's interest must be upheld and protected at all times. In these judgments, the Court has laid out possible solutions meant to guarantee the interests of children which the legislator, at the time of the enactment of the law, should take into account.

In cases of children born through heterologous fertilization in female homosexual couples, the Court has spelled out several solutions, e.g. a revision of the provisions regarding the recognition of the child in order to introduce the standard of "intentional adoption", and a radical intervention on the regulation of

so-called “adoption in particular cases”. In the case of children born through surrogacy in male homosexual couples however, the balance outlined by the Court is more complex, because of the unique peculiarities of both conception and birth (33, 34). Therefore, the Court implicitly draws a distinction between male homosexual couples (in which, inevitably, only one of the partners will be the intended parent) and couples of women who can have a genetic and biological link, respectively, with the child. The Court has thus concluded that female same-sex parenting does not conflict with the underlying principles of public order, while male same-sex parenting does, in that it runs counter to the surrogacy ban codified in Law 40/2004 (35).

In this case, the Court has reiterated its strongly negative judgment against surrogate motherhood (consistent with ruling no. 272/17) and has only admitted the “adoption in particular cases” option to be viable, despite the glaring limitations of such an option, namely that it requires the consent of the biological parent, which could cause problems in the event of a crisis within the couple.

In any case, the Court has deemed it necessary to strike a balance guided by the principle of proportionality between the interests of the minor and the objective of discouraging the use of surrogacy. Even the European Court of Human Rights (ECtHR) has acknowledged that the States may decide not to allow the registration of foreign birth certificates in order to discourage a practice such as surrogacy, which damages the dignity of the pregnant woman (35). Nonetheless, it is of utmost importance that each national legal system put in place a set of guarantees aimed at legally recognizing the family relationship between minors and intended parents, provided that such a relationship has become a “practical reality”. On the other hand, the choice of finding the tools to protect the children’s interests falls within the margin of appreciation granted to member States by the ECtHR. According to the Italian Constitutional Court, both the solution of adoption in particular cases and the transcription of the foreign birth certificate fall short in terms of protecting the children’s interests (35, 36).

Instead, an effective and speedy adoption procedure is needed that fully recognizes the filiation bond between the adopter and the adopted one, even after birth and following a concrete verification by the judge. According to the Constitutional Court it is preferable that the child may benefit from a special, specifically tailored adoption procedure, which must be devised and enacted by the national legislature.

## Conclusions

The Constitutional Court judges firmly believe that the intervention of the legislator can no longer be deferred. However, unlike the end-of-life Cappato case (37), they have not set a deadline within which the lawmakers should intervene, but have merely urged them to enact targeted legislation.

Should the lawmakers fail to live up to their responsibilities in that regard, the state could be held liable in a court of law, and monetary compensation for the child could be granted. Such a possible future scenario should constitute a further element of motivation for legislators to finally and decisively deal with the issue. In no way should the court’s prodding affect the legislative branch’s autonomy when devising and establishing the methods through which protection is to be granted to the children born through surrogacy abroad.

**Conflicts of interest:** Each author declares that he or she has no commercial associations (e.g. consultancies, stock ownership, equity interest, patent/licensing arrangement etc.) that might pose a conflict of interest in connection with the submitted article.

## References

1. World Health Organization. Fact sheet: Infertility. Issued on 14th September 2020. Available online: <https://www.who.int/news-room/fact-sheets/detail/infertility> (Accessed on 10th October 2021).
2. Zaami S, Busardò FP. Elective egg freezing: can you really turn back the clock? *Eur Rev Med Pharmacol Sci* 2015; 19: 3537-8.
3. Zhang W, Xiao X, Zhang J, et al. Clinical outcomes of frozen embryo versus fresh embryo transfer following in vitro

- fertilization: a meta-analysis of randomized controlled trials. *Arch Gynecol Obstet* 2018; 298: 259-272.
4. Hur C, Rehmer J, Flyckt R, Falcone T. Uterine Factor Infertility: A Clinical Review. *Clin Obstet Gynecol* 2019; 62: 257-70.
  5. Zaami S, Montanari Vergallo G, Napoletano S, Signore F, Marinelli E. The issue of delivery room infections in the Italian law. A brief comparative study with English and French jurisprudence. *J Matern Fetal Neonatal Med* 2018; 31: 223-7.
  6. Buckett W, Sierra S. The management of unexplained infertility: an evidence-based guideline from the Canadian Fertility and Andrology Society. *Reprod Biomed Online* 2019; 39: 633-40.
  7. Valentini AL, Gui B, Ninivaggi V, et al. The morbidly adherent placenta: when and what association of signs can improve MRI diagnosis? Our experience. *Diagn Interv Radiol* 2017; 23: 180-6.
  8. Zaami S, Marinelli E, di Luca NM, Montanari Vergallo G. Ethical and medico-legal remarks on uterus transplantation: may it solve uterine factor infertility? *Eur Rev Med Pharmacol Sci* 2017; 21: 5290-6.
  9. Tiemann TT, Padma AM, Sehic E, Bäckdahl H, Oltean M, Song MJ, Brännström M, Hellström M. Towards uterus tissue engineering: a comparative study of sheep uterus decellularisation. *Mol Hum Reprod* 2020; 26: 167-78.
  10. Ghahremani-Nasab M, Ghanbari E, Jahanbani Y, Mehdi-zadeh A, Yousefi M. Premature ovarian failure and tissue engineering. *J Cell Physiol* 2020; 235: 4217-26.
  11. Ngaage LM, Ike S, Elegbede A, et al. The changing paradigm of ethics in uterus transplantation: a systematic review. *Transpl Int* 2020; 33: 260-69.
  12. Del Rio A, Negro F, Piersanti V, Tini A. Uterus transplant update: innovative fertility solutions and the widening horizons of bioengineering. *Eur Rev Med Pharmacol Sci* 2021; 25: 3405-10.
  13. Yoshimasa Y, Maruyama T. Bioengineering of the Uterus. *Reprod Sci* 2021; 28: 1596-1611.
  14. Varone MC, Napoletano G, Negro F. Decellularization and tissue engineering: viable therapeutic prospects for transplant patients and infertility? *Eur Rev Med Pharmacol Sci* 2021; 25: 6164-6166.
  15. Zaami S. Comment on the article by Del Rio et al. Uterus transplant update: innovative fertility solutions and the widening horizons of bioengineering. *Eur Rev Med Pharmacol Sci* 2021; 25: 3405-3410. *Eur Rev Med Pharmacol Sci* 2021; 25: 6149-6153.
  16. Baker HB, McQuilling JP, King NM. Ethical considerations in tissue engineering research: Case studies in translation. *Methods* 2016; 99: 135-44.
  17. Marinelli S, Nardi V, Varone MC. Uterus transplant and controversial assisted reproductive technologies: can the right to parenthood clash with ethical precepts? *Clin Ter* 2021; 172: 420-422.
  18. Malina A, Błaszczewicz A, Owczarz U. Psychosocial aspects of infertility and its treatment. *Ginek Pol* 2016; 87: 527-31.
  19. Montanari Vergallo G, Busardò FP, Zaami S, Marinelli E. The static evolution of the new Italian code of medical ethics. *Eur Rev Med Pharmacol Sci* 2016; 20: 575-80.
  20. Patuzzo S, De Stefano F, Ciliberti R. The Italian Code of Medical Deontology. Historical, ethical and legal issues. *Acta Biomed* 2018; 89: 157-64.
  21. Rallo G, Negro F, Consalvo F, Piersanti V, Marinelli S. Medically assisted procreation in times of COVID-19: what impact on health care system organization and the reproductive rights of couples? *Acta Biomed* 2021; 92: e2021275.
  22. Delbon P, Conti A. Medically Assisted Procreation and Fast-Moving Developments in Science and Law: Ethical and Legal Issues in Heterologous Procreation in Italy. *J Public Health Res* 2015; 4: 554.
  23. Negro F, Marinelli S. Is there anything left of the Italian law governing medically-assisted procreation? *Clin Ter* 2021; 172: 57-9.
  24. Toverno S, Baiocco R, Lingiard V, Verrastro V, D'Amore S, Green RJ. Attitudes towards same-sex parenting in Italy: the influence of traditional gender ideology. *Cult Health Sex* 2019; 21: 188-204.
  25. Montanari Vergallo G. A child of two mothers: what about the father? Italian overview. *Acta Biomed* 2019; 90: 319-325.
  26. Klock SC, Lindheim SR. Gestational surrogacy: medical, psychosocial, and legal considerations. *Fertil Steril* 2020; 113: 889-891.
  27. Piersanti V, Consalvo F, Signore F, Del Rio A, Zaami S. Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspectives? *Medicina (Kaunas)* 2021; 57: 47.
  28. Montanari Vergallo G, Marinelli E, di Luca NM, Zaami S. Gamete Donation: Are Children Entitled to Know Their Genetic Origins? A Comparison of Opposing Views. *The Italian State of Affairs. Eur J Health Law* 2018; 25: 322-37.
  29. Greenfield DA, Seli E. Same-sex reproduction: medical treatment options and psychosocial considerations. *Curr Opin Obstet Gynecol* 2016; 28: 202-5.
  30. Zaami S. Assisted heterologous fertilization and the right of donor conceived children to know their biological origins. *Clin Ter* 2018; 169: e39-e43.
  31. Mackenzie SC, Wickins-Drazilova D, Wickins J. The ethics of fertility treatment for same-sex male couples: Considerations for a modern fertility clinic. *Eur J Obstet Gynecol Reprod Biol* 2020; 244: 71-75.
  32. Zaami S, Del Rio A, Negro F, Varone MC, Marinelli S, Montanari Vergallo G. The March 2021 Italian constitutional court ruling on surrogacy: a prelude to common European legislation for the sake of reproductive health? *Eur J Contracept Reprod Health Care*. 2021 Oct 13:1-6.
  33. Crawshaw M, Adams D, Allan S, et al. Disclosure and donor-conceived children. *Hum Reprod* 2017; 32: 1535-6.

34. Negro F, Varone MC, Del Rio A. Advances in Medically-assisted procreation technologies: can malpractice claims and “reproductive damage” be identified. *Clin Ter* 2020; 171: e225-e228.
35. Montanari Vergallo G. The transforming family: Heterologous fertilization and the new expressions of family relationships in Italian jurisprudence and European Court of Human Rights rulings. *Medical Law International* 2019; 19: 282–97.
36. Scheib JE, McCormick E. Adults from donor-conceived families: some good news (from a longitudinal study). *Fertil Steril* 2020; 114: 764-5.
37. Montanari Vergallo G. The Marco Cappato and Fabiano Antoniani (dj Fabo) Case Paves the Way for New Assisted

Suicide Legislation in Italy: An Overview of Statutes from Several European Countries. *Eur J Health Law* 2019; 26: 221-39.

**Correspondence:**

Received: 19 October 2021

Accepted: 4 November 2021

Alessandro Del Rio

Department of Anatomical, Histological, Forensic and Orthopedic Sciences, “Sapienza” University of Rome, Italy

Viale Regina Elena 336 – 00161 Roma

Tel 00390649912622 – 0039068411967

Email: alessandrodelrio70@gmail.com