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Medically Assisted Procreation and Same-Sex Couples: The Italian *Corte di Cassazione* Stands its Ground

Note to: Corte di Cassazione* (*Sezioni Unite Civili*), *4 April 2022, No. 10844

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Abstract

This contribution examines a recent ruling of the Italian *Corte di Cassazione*, concerning the recognition of parentage resulting from medically assisted procreation ("MAP") techniques performed abroad by female same-sex couples. In cases where the birth of the child occurs in Italy, the Italian birth certificate usually contains the indication of the woman who gave birth, but does not mention the intentional mother, even when the latter has a biological relationship with the child. The *Corte di Cassazione* has confirmed its consolidated position in denying the amendment of the birth certificate, on the basis of a rigorous interpretation of the limits provided by the Law No. 40/2004. The Italian law prohibits the access of MAP techniques by same-sex couples, because their condition cannot be equated to a pathological infertility. The ruling under review overlooks the human rights implications possibly deriving from the recognition of intentional motherhood: in rejecting the allegations concerning the infringment of the fundamental rights enshrined by the European Convention on Human Rights ("ECHR"), the court has stated that the gaps in protection that may result from the application of Italian law may only be solved through an intervention of the lawmaker.

Keywords

medically assisted procreation – same-sex parents – continuity of family status – birth certificate rectification – biological parent

Abstract of the Decision

Article 4(3) of the Italian Law No. 40/2004 prohibits the use of medically assisted procreation techniques by same-sex couples. The recourse to those techniques is allowed only in presence of pathological infertility, which cannot be equated to the infertility of same-sex couples. With reference to the child conceived abroad through the use of heterologous medically assisted procreation, but born in Italy, the birth certificate cannot report, in addition to the indication as the mother of the woman who gave birth, also the woman linked to her by a stable emotional relationship. This principle applies not only in absence of any biological link between the intended parent and the child, but also in presence of a genetical link due to ova donation. Therefore, the refusal of the civil registrar to form a birth certificate containing the indication of same-sex parentage is legitimate.

Key Passages from the Ruling

(Paragraph 9.1) The sixth ground of appeal alleges that the judgment is null and void for breach and misapplication of Articles 2, 3, 30 and 31 of the Constitution, of Law No 40 of 2004, Articles 8 and 9, in so far as the contested decree ruled out the possibility of considering m.a.p. an alternative means of access to filiation for the intending parent who has given consent, on the same footing as adoption and ordinary filiation, a hermeneutical outcome that should be reached by a combined and extensive interpretation of Law No 40 of 2004, Articles 8 and 9.

(Paragraph 9.2) The seventh plea alleges, in relation to Articles 117 and 11 of the Constitution and Articles 8 and 14 ECHR, the infringement both of the fundamental right to the personal identity of minors, which is also inherent in children wanted by two cohabiting women who have had recourse to a specific reproductive method, and of the right to family life, which should also be recognised in respect of intentional offspring; it complains of discrimination on grounds of gender and sexual orientation against the cohabiting woman who has given consent to heterologous fertilisation with male gamete donation, unlike the man in a heterosexual couple who, by giving similar consent, is recognised as a parent of intention.

(Paragraph 9.3) Both grounds are inadmissible, pursuant to Article 360-bis of the Code of Civil Procedure, no. 1, as they do not offer any elements to change the orientation according to which, in the case of a child conceived through the use of heterologous medically assisted procreation techniques practised

abroad and born in Italy, the application for rectification of the Italian birth certificate aimed at obtaining the indication as mother of the child, in addition to the woman who gave birth to the child, also of the woman to whom she is linked in a stable emotional relationship, is not admissible, as it is contrary to Law No. 40 of 2004, art. 4, paragraph 3, which excludes recourse to the aforesaid techniques by same-sex couples, since forms of parenthood which esulate from a biological relationship are not allowed, except in the cases provided for by law, by means of the same legal instruments provided for children born in wedlock or recognised (see *Corte di Cassazione* No. 7668 and 8029 of 2020, No. 7413 of 2022).

(Paragraph 9.4) This principle was expressed in cases in which the intended parent had not offered a biological contribution in implementation of the m.a.p. that had allowed conception to take place and, *a fortiori*, must be reaffirmed here, since it has also been transposed in cases in which such a biological contribution was offered by the intended parent. Indeed, this Court [...] recently ruled that an application for rectification of the birth certificate seeking to have the woman to whom the egg implanted in the woman giving birth belonged listed as mother of the child, alongside the woman who gave birth, is inadmissible on the ground that it is contrary to Law No. 40 of 2004, art. 4, paragraph 3, which excludes recourse to the aforesaid techniques by homosexual couples, even in the presence of a genetic link between the child born and the woman who is sentimentally linked to the one who gave birth. The lawmaker's choice (Law No. 40 of 2004, Articles 4 and 5) is to limit access to these techniques to situations of pathological infertility, to which the same-sex couple's infertility condition cannot be homologated. Nor can a constitutionally oriented interpretation of Article 8 of Law No. 40 of 2004 be invoked, given that a different interpretation of the rules relating to the formation of the birth certificate is not imposed by the need for the judicial authority to fill a gap in protection that necessarily requires, in an ethically sensitive matter, the intervention of the lawmaker (see *Corte di Cassazione*, No. 6383 of 2022).

(Paragraph 9.5) By the fifth ground of appeal, which alleges infringement and misapplication of various provisions of EU Regulation No 2016/679 (on the protection of personal data), Article 8 of the Charter of Fundamental Rights of the EU, Article 2 of the Constitution and Article 8 of the ECHR, in relation to the right of the children and of the appellants to have a correct and accurate representation of their personal data, the unfounded complaints put forward in the grounds already examined are reiterated from another perspective. The request for a preliminary reference to the European Court of Justice is not admissible, since the queries are irrelevant for the purposes of the decision,

considering that the interpretation of the national legislation adopted by the territorial court does not infringe the principle of correct and accurate representation of personal data processed in birth certificates.

Comment:

1 Facts of the Case

The case at hand stems from the decision of two women, who had been in a stable relationship for a long time, to resort to medically assisted procreation ("MAP") in order to have a child. The operation took place in Denmark where, with the written consent of both, the ovule of one of the women had been implanted on the other and fertilized with the sperm of an anonymus donour (heterologous embryo transfer). As a result, two children were born in Italy. The civil registrar released a birth certificate, which only mentioned the first woman as the mother of childbirth. In order to obtain the additional reference of the second woman as the intended mother, the couple asked for an amendment. However, the civil registrar refused to modify the birth certificate. In the face of the administrative refusal, an appeal pursuant to Article 95 of the *Decreto del Presidente della Repubblica* No. 396/2000[1] was brought before the *Tribunale di Piacenza*, which rejected it by decree of 15 October 2019. The complaint against this decision, brought before the *Corte d'Appello di Bologna*, was also dismissed by decree of 6–19 March 2020. The two women appealed to the *Corte di Cassazione* on the basis of various grounds, invoking an extensive and constitutionally oriented interpretation of the Law No. 40/2004, as well as claiming the infringment of Articles 8 and 14 of the European Convention on Human Rights (hereinafter, "ECHR").

The *Corte di Cassazione* has found all the pleas inadmissible on the basis of multiple grounds, affirming the lack of significant elements capable of changing its traditional orientation, as expressed in previous rulings.

1 *Decreto del Presidente della Repubblica* of 3 November 2000, No. 396, *Regolamento per la revisione e la semplificazione dell'ordinamento dello stato civile, a norma dell'articolo 2, comma 12, della legge 15 maggio 1997, n. 127*, Gazzetta Ufficiale, 31 December 20000, No. 303.

2 The Italian Case Law on Same-Sex Couple's Access to Parentage

With the decision at hand, the Italian *Corte di Cassazione* consolidates its position in denying same-sex couples the access to any form of MAP[2] or surrogacy and in stressing the incompatibility between Italian law and those techniques in those kind of circumstances. The decision touches upon many issues, concerning not only the parental projects of the aforementioned families, but also the perspective of the best interests of the child.

On the other hand, as it will be stressed in the following Sections, the issue is far from being confined within the national borders. The debate over the access to parentage by same-sex couples, as well as on the continuity of family status legitimately acquired abroad, has brought many issues from the perspective of private international law, human rights law and even European Union ("EU") law.[3]

Italian law is firm and steady in refusing the recognition of parentage involving same sex couples and recourse to surrogacy or MAP techniques. As known, the Italian Law No. 40/2004 prohibits surrogate motherhood in Italy and admits the recourse to MAP techniques – in some cases – only by married or cohabiting couples of the opposite sex, provided that they are of potentially fertile age.[4] On the same page, the Law No. 76/2016[5] has granted same-sex couples the access to registered partnership, but has left the existing rules on filiation and adoption substantially unchanged. In particular, Article 1(20) of the aforementioned Law prevents same-sex couples from having access to full adoption.

The national case law follows the same path, albeit with some distinctions as to the factual situation that is brought to the attention of the courts. As underlined by the *Corte Costituzionale* in its decision No. 221 of 2019,[6] it is

2 CARPANETO, "Procreazione assistita e nuovi rapporti parentali", in CAGNAZZO, PREITE (eds.), *Il riconoscimento degli status familiari acquisiti all'estero*, Milano, 2017, p. 273 ff.

3 On the topic, see the contributions in PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, Napoli, 2022.

4 See Art. 4 of the Law No. 40/2004. With the decision No. 221 of 23 October 2019, the Italian *Corte Costituzionale* has confirmed the constitutional legitimacy of the Law No. 40/2004 preventing same-sex couples from having access to medically assisted procreation techniques. On the decision, see BIANCA, "Il best interest of the child nel dialogo tra le Corti", in BIANCA (ed.), *The best interest of the child*, Roma, 2021, pp. 669–693.

5 Law of 20 May 2016, No. 76, *Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*, Gazzetta Ufficiale, 21 May 2016, No. 118.

6 *Corte Costituzionale*, 23 October 2019, No. 221, on which RECINTO, "La legittimità del divieto per le coppie 'same sex' di accedere alla PMA: la Consulta tra qualche 'chiarimento' ed alcuni 'revirement'", Corriere Giuridico, 2019, p. 1466 ff.; BARONE, "Fecondazione eterologa e coppie

necessary to differentiate between the cases in which a recognition of a parentage link established abroad is sought, and the situations that only concern the Italian legal system.

2.1 *The First Scenario: The Recognition in Italy of Parentage Links Established Abroad*

The first scenario describes cross-border cases, in which the applicants request the recognition in Italy of a birth certificate or a judicial decision establishing the parent-child relationship between a child and two mothers or two fathers. This happens when the parents undertake the MAP or surrogacy procedure abroad and the child is also born in a foreign country. In this hypotesis, the request may be rejected for public policy reasons, according to Articles 16 and 64 of the Law No. 218/1995.

Indeed, the *Corte di Cassazione* has adopted different approaches. In its decision No. 19599/2016,[7] hearing an application for recognition of a Spanish birth certificate which listed two women as mothers, the Court held that the transcription was not contrary to public policy, based on the prevalence of the child's best interests in the form of the right to continuity of family status. In that case, one of the mothers had given birth to the child, while the other resulted the donor of the implanted *ovum*.

However, the conclusions reached with reference to a female same-sex couple did not result in equal rulings when a similar request (although concerning a surrogacy practice) was filed by two fathers. In the landmark decision No. 12193/2019, the court (*Sezioni Unite*)[8] has rejected the transcription of a foreign birth certificate, formed through a Canadian jurisdictional order recognizing co-parenting rights of a male same-sex couple towards two children born in

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di donne: per la Consulta il divieto è legittimo", La nuova giurisprudenza civile commentata, 2020, p. 555 ff.; VENUTI, "La genitorialità procreativa nella coppia omoaffettiva (femminile). Riflessioni a margine di Corte cost. n. 221/2019", La nuova giurisprudenza civile commentata, 2020, p. 664 ff.; PICCHI, "Il divieto per le coppie omosessuali di accedere alla PMA: la Corte costituzionale compie un'interpretazione autentica della pregressa giurisprudenza. (Riflessioni sulla sentenza n. 221/2019)", Forum di Quaderni Costituzionali, 2020, p. 143 ff.

7 *Corte di cassazione* (*Sez. I civile*), 30 September 2016, No. 19599, Foro Italiano, 2016, p. 3329 ff., commented by CASABURI. See also FERACI, "Ordine pubblico e riconoscimento in Italia dello status di figlio 'nato da due madri' all'estero: considerazioni critiche sulla sentenza della Corte di cassazione n. 19599/2016", Rivista di diritto internazionale, 2017, p. 169 ff. The same reasoning can be found in *Corte di cassazione* (*Sez. I civile*), 15 June 2017, No. 14878; *Corte di cassazione* (*Sez. I civile*), 23 August 2021, No. 23319.

8 *Corte di Cassazione* (*Sezioni Unite Civili*), 8 May 2019, No. 12193, Foro Italiano, 2019, p. 1951 ff., commented by LUCCIOLI.

Canada as a result of gestational surrogacy, in favour of the intended non-biological parent. Indeed, the *Corte di Cassazione* has stated that the prohibition of surrogacy laid down by the Law No. 40/2004 is a principle of public policy, since it protects fundamental values such has the dignity of the woman who gives birth and the institute of adoption.[9] In this context, it has been affirmed that the law already balances the aforementioned values with the best interests of the children involved, leaving no margin of appreciation to the judge. On the other hand, the court has suggested the recourse to the special form of adoption (*adozione in casi particolari*) provided by Article 44 of the Italian Law No. 184/1983, in order to re-establish the intended parental relationship towards the non-biological father.

The solution proposed by the *Corte di Cassazione* in 2019 is to be reconsidered in the light of the decision of the *Corte Costituzionale* No. 33 of 2021,[10] where the court has been asked to evaluate the compatibility of the Italian ban on surrogacy contained in Article 12(6) of the Law No. 40/2004 (as well as of Article 64 of the Law No. 218/1995 and the Italian rules on civil status) with some provisions of the Italian Constitution, as well as with Article 8 ECHR, several provisions of the 1989 Convention on the Rights of the Child ("CRC") and Article 24 of the Charter of fundamental rights of the European Union ("EU Charter"). Indeed, the *Corte Costituzionale* has established that the ban on surrogacy, as part of the Italian public policy, shall be balanced with the need to take the best interests of the child into primary consideration. The latter is not adequately protected through the possibility to formalize the relationship with the intentional parent through the *adozione in casi particolari.* Therefore, the *Corte Costituzionale* has urged the Italian lawmaker to regulate the situation in order to adequately protect the rights of children born out of surrogacy.

2.2 *The Second Scenario, Addressed by the Corte di Cassazione: When the Birth of the Child Occurs in Italy*

The second scenario comprehends the case in which a couple undertakes surrogacy or MAP abroad, but the birth of the child occurs in Italy. In presence of a same-sex relationship, this only happens when the parents are two

9 DOGLIOTTI, "Le Sezioni Unite condannano i due padri e assolvono le due madri", Famiglia e Diritto, 2019, p. 653 ff.

10 *Corte Costituzionale*, 28 January 2021, No. 33. Indeed, see the different approach of *Corte di Cassazione* (*Sezioni Unite*), 31 March 2021, No. 9006, who has concluded for the recognition of an adoption order given by the Surrogate Court of New York (US): in that case, the child had been adopted by two men without recourse to surrogacy. See TONOLO, "Adoption v. Surrogacy: New Perspectives on the Parental Projects of Same-Sex Couples", The Italian Review of International and Comparative Law, 2021, p. 132 ff.

women. Since the place of conception has no relevance for the purposes of private international law rules on filiation,[11] in absence of other transnational elements, Italian law applies. The issuance *ab initio* of a birth certificate, eventually followed by a request for rectification, follows Italian law as well. The position of the woman who gave birth to the child is not controversial, since national law identifies her as the "mother".[12] On the other hand, the intentional mother rarely finds a place in the birth certificate: even though first instance judges have sometimes adopted a forward-looking position,[13] the *Corte di Cassazione* has always adhered to a strict approach.[14] The reasoning of the court often built upon the absence of biological ties, which prevents the objective and subjective limits of the Law No. 40/2004 from being crossed. However, those conclusions have been confirmed also in presence of a biological tie, and specifically when the intentional mother had donated the ovule that had been implanted on the birthing mother.[15]

The decision under review conforms to this position. In the case at hand, the children were born in Italy and the request for birth registration had been presented to the competent civil registrar. One of the mothers (the donor of the ovule) had been denied the indication as such in the certificate. The *Corte*

11 CLERICI, "Stato di filiazione e diritto internazionale privato", in BONILINI (ed.), *Trattato di diritto di famiglia*, IV, *La filiazione e l'adozione*, Milano, 2016, p. 3783 ff. As observed by SALERNO, "The Identity and Continuity of Personal Status in Contemporary Private International Law", RCADI, 2019-I, Vol. 395, p. 9 ff., p. 191, "Since the child's status is normally regulated by the national law of the country where he or she was born, it also logically depends on the citizenship of the intentional parents (a substitute expression of the *jus sanguinis* citizenship criterion)". As concerns the different and specific issues surrounding surrogacy, from the perspective of private international law, see BARUFFI, "Gli effetti della maternità surrogata al vaglio della Corte di cassazione italiana e di altre corti", Rivista di diritto internazionale privato e processuale, 2020, p. 290 ff.; CAMPIGLIO, "Lo stato di figlio nato da contratto internazionale di maternità", Rivista di diritto internazionale privato e processuale, 2009, p. 589 ff.; HONORATI, "Maternità surrogata, status familiari e ruolo del diritto internazionale privato", in DI STASI (ed.), *Cittadinanza, cittadinanze e nuovi status: profili internazionalistici ed europei e sviluppi nazionali*, Napoli, 2018, p. 137 ff.

12 Art. 269(3) of the Italian Civil Code.

13 See recently *Tribunale di Brescia*, Decree 11 November 2020; *Corte d'appello di Cagliari*, Decree 29 April 2021; *Tribunale di Taranto*, Decree 31 May 2022; *contra Tribunale di Reggio Emilia*, Decree 28 April 2021. On the national case law deriving from the recourse to surrogacy and for considerations on the correct application of the best interests of the child in the different situations surrounding same-sex parentage, see CAMPIGLIO, "Surrogazione di maternità transnazionale e limite dell'ordine pubbico", in PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, *cit. supra* note 3, p. 61 ff.

14 See *Corte di Cassazione* (*Sez. I civile*), 3 April 2020, No. 7668; *Corte di Cassazione* (*Sez. I civile*), 22 April 2020, No. 8029; *Corte di Cassazione* (*Sez. I civile*), 7 March 2022, No. 7413.

15 *Corte di Cassazione* (*Sez. I civile*), 25 February 2022, No. 6383.

di Cassazione has confirmed the decision of the judge of first instance, denying the amendment of the birth certificate because Article 4, para. 3 of the Law No. 40/2004 excludes the recourse to MPA techniques by same-sex couples. According to the ruling,

> "[T]his principle was expressed in cases in which the intended parent had not offered a biological contribution in implementation of the m.a.p. that had allowed conception to take place and, *a fortiori*, must be reaffirmed here, since it has also been transposed in cases in which such a biological contribution was offered by the intended parent (emphasis added)".

On this basis, the court has refused the extensive and constitutionally oriented interpretation of the Law No. 40/2004 invoked by the applicants, according to which MAP techniques should be considered an alternative method of access to parentage on behalf of the intended parent, on the same level as adoption and ordinary parenthood. On the contrary, the *Corte di Cassazione* has affirmed that the existence of a genetic link is not enough to overcome the boundaries stated by the Law No. 40/2004, since the latter limits cases of parenthood without a biological link to a few strict and exhaustive hypotheses. In particular, recourse to PMA is allowed only in cases of pathological infertility (or genetically transmissible diseases):[16] in the words of the *Corte di Cassazione*, the infertility which characterizes same-sex couples is not equivalent to a pathological condition. Lastly, the court makes clear that the possible gaps in protection that may result from the application of Italian law cannot be solved through an extensive interpretation by the case law: the issue is ethically sensitive and requires the intervention of the Italian lawmaker.

3 The Human Rights Perspective Between the Silence of National Courts and the Uncertainties at the International Level

The reasoning of the court is quite unclear in the part where it states that the refusal to recognize the parent-child relationship in absence of biological ties shall be reaffirmed "a fortiori" when the latter is present.

16 As a consequence of the case law of the European Court of Human Rights and of the Italian *Corte Costituzionale*. See European Court of Human Rights, *Costa and Pavan v. Italy*, Application No. 54270/10, Judgment of 28 August 2012; *Corte Costituzionale*, 14 May - 5 June 2015, No. 96.

On the other hand, by rejecting an extensive and constitutionally oriented interpretation of the Law No. 40/2004 and by calling for legislative measures, the *Corte di Cassazione* conforms to the position of the Italian Constitutional court. The latter has rejected many arguments based on the alleged incompatibility between the Law No. 40/2004 and the Italian Constitution, in the part in which it prevents same-sex couples to have recourse to MAP.[17] However, as for surrogacy, the Constitutional court has stressed the necessity of an intervention by the Italian lawmaker to fill the gap in the protection of the child's best interests caused by the lack of recognition of an already established and durable family bond.[18] Again, the recourse to the special form of adoption (*adozione in casi particolari*) provided by Article 44 of the Law No. 184/1983 and sometimes invoked by the case law as an alternative – but not equivalent – form of recognition of parentage was deemed an inadequate solution to pursue the best interests of the child.[19]

In the ruling under review, the *Corte di Cassazione* does not mention alternative forms for the recognition of parentage. The decision not to suggest the road of the special adoption provided by Article 44 should be welcomed, in the light of the position of the *Corte Costituzionale* and the recent referral made by the same *Corte di Cassazione* to its *Sezioni Unite*, asking to rule on the legal vacuum:[20] if special adoption is not the solution, what are the valid alternatives pending a legislative action?

Indeed, the decision does not address the issue of the protection of children. The court seems to overlook the complaints raised by the applicants, lamenting the violation of the right to respect for private and family life (Article 8 ECHR), as well as the right to non-discrimination on grounds of gender and sexual orientation (Article 14 ECHR). On those matters, the European Court of Human Rights still settles on moderate positions (almost never addressing the

17 *Corte Costituzionale*, 23 October 2019, No. 221; *Corte Costituzionale*, 15 November 2019, No. 236; *Corte Costituzionale*, 4 November 2020, No. 230.

18 See *Corte Costituzionale*, 9 March 2021, No. 32.

19 On the ruling, see MARINELLI, DEL RIO, GULLO, "The best interest of children born through medically assisted procreation procedures as construed in 2021 Italian Constitutional Court rulings 32 and 33", Clinica terapeutica, 2022, p. 46 ff. On this form of adoption, the *Corte Costituzionale* has recently adopted the decision of 28 March 2022, No. 79: the Court has declared Article 55 of the Law No. 184/1983 unconstitutional, insofar as it provides that adoption in special cases does not establish any civil relationship between the adoptee and the adopter's relatives.

20 *Corte di Cassazione* (*Sez. I civile*), *Ordinanza* 21 January 2022, No. 1842.

issue of discrimination),[21] but nevertheless enhances the existence of a biological relationship in order to foster an adequate protection of family life.[22] Most importantly, the Court gives precedence to the best interests of the child. In fact, where a *de facto* parent-child relationship exists, the non-recognition of the *status filiationis* may generate detrimental results for children, at least from the perspective of the protection of their private life and their personal identity.[23] In those cases, the States shall not be obliged to grant same-sex couples access to parentage,[24] but they still have an obligation to pursue the best interests of children and to provide (at least) alternative forms of recognition

21 The issue of discrimination based on a parent's sexual orientation has been addressed by the Court in *Salgueiro da Silva Mouta v. Portugal*, Application No. 33290/96, Judgment of 21 December 1999, para. 35. However, the issue concerned the violation of art. 8 ECHR in respect of a father, whose sexual orientation had been influencing Portuguese courts in deciding on his contact rights with his daughter. On the decision see VITUCCI, "Orientamento sessuale e adozione nella giurisprudenza della Corte europea dei diritti umani', Diritti Umani e Diritto Internazionale, 2013, p. 481 ff.

22 In the recent ruling given in *C.E. & and others v. France*, Application No. 29775/18, Judgment of 24 March 2022, the European Court of Human Rights has concluded that French authorities did not violate Article 8 ECHR with the refusal to establish parentage between a child and its intentional parent, who was the former partner of the biological mother. However, the Court has stated that the effective respect for the right to private and family life depended on the fact that there were alternative instruments in French law that allowed for some legal recognition of the existing relationship between the applicants (two women). On the decision, see DERAVE, OUHNAOUI, "C.E. & AL. v. France: Legal Recognition of Intended Parenthood from Previous Same-Sex Relationships (Between Women)", Strasbourg Observers, 7 October 2022, available at <https://strasbourgobservers.com/2022/10/07/c-e-al-v-france-legal-recognition-of-intended-parenthood-from-previous-same-sex-relationships-between-women/>. A similar reasoning is to be found in *D. v. France*, Application No. 11288/18, Judgment of 16 July 2020, paras. 50 and 58, concerning the recognition in France of a birth certificate, which listed two women as mothers of a child. One of the mothers was also the ovule donor. See LOPES PEGNA, "*Mater* (*non*) *semper certa est!* L'impasse sulla verità biologica nella sentenza D. c. Francia della Corte europea", Diritti Umani e Diritto Internazionale, 2021, p. 709 ff. Last but not least, reference should be made to the Advisory Opinion of 10 April 2019, Request no. P16-2018-001 (the first advisory opinion given under Protocol No. 16 to the ECHR), on which see FERACI, "Il primo parere consultivo della CEDU su richiesta di un giudice nazionale e l'ordinamento giuridico italiano", Osservatorio sulle fonti, 2/2019; PESCE, "Gestazione per altri e discrezionalità nazionale "depotenziata" nella prospettiva della CEDU", in PESCE (ed.), *La surrogazione di maternità nel prisma del diritto*, *cit. supra* note 3, p. 155 ff.

23 Lastly, see European Court of Human Rights, *C.E. and others v. France*, *cit. supra* note 22, paras. 49–55; European Court of Human Rights, *D.B. and others v. Switzerland*, Applications No. 58817/15 and No. 58252/15, Judgment of 22 November 2022, paras. 84 ff.

24 On the margin of appreciation of States in regulating access to artificial procreation, see European Court of Human Rights, *S.H. v. Austria*, Application No. 57813/00, Judgment of 3 November 2011, para. 97.

of the relationship between the child and the intentional parent. The same conclusions are to be found in the case law of the Court on surrogacy concerning heterosexual couples, where there was a genetic link between the children and their fathers.[25] Interestingly, in one of the last-mentioned cases, the principles established in the rulings from Strasbourg have led the French *Cour de cassation* to recognise the filiation relationship also with regard to the non-biological mother, excluding the recourse to alternative solutions (such as adoption).[26]

In its rulings, the *Corte di Cassazione* has demonstrated a lack of attention for the position of children, rather focusing on whether or not the couple could make use of MAP techniques.[27]

4 Conclusions

The Italian case law on the establishment or recognition of parenthood shows a few contradictions. Relevant variables are based on the gender of the (intended or biological) parents. The solutions reached are different if the case concerns a heterosexual couple or a same-sex couple, as well as couples composed by women or men. This could be problematic in the light of the right to non-discrimination enshrined in the ECHR (Article 14) and in the EU Charter (Article 21).

25 See the landmark decisions in *Mennesson v. France* and *Labassee v. France*, Applications No. 65192/11 and No. 65941/11, Judgments of 26 June 2014, as well as the Advisory Opinion of 10 April 2019, Request no. P16-2018-001, *cit. supra* note 22. It would be interesting to reflect on the soundness of the arguments differentiating between surrogacy and MAP situations, and between heterosexual and homosexual couples, at least from the perspective of respecting an established *de facto* relationship.

26 *Cour de cassation* (*assemblée plénière*), 4 October 2019, No. 10–19.053.

27 As observed by DI BLASE, "La genitorialità della coppia di sesso femminile in tre recenti sentenze della Corte di cassazione", Rivista di diritto internazionale, 2021, pp. 1111, the recognition of the family bond between the child and the intentional mother must be granted when parentage was established abroad (and shall therefore be granted continuity), as well as in cases that are internal to the Italian legal system, because of the international obligation to protect the child's family identity. *Inter alia*, concerning the continuity of family status acquired abroad, only a brief mention can be made to *i*) the recent initiative of the European Commission on a Proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final; *ii*) the Final report of the Experts' Group of Hague Conference for Private International Law working on the *Parentage/Surrogacy Project*, on the feasibility of one or more private international law instruments on legal parentage, Prel. Doc. No. 1 of November 2022.

The perspective of the child's best interests, which shall be of primary importance, is not sufficiently addressed in the ruling under review: the *Corte di Cassazione* recalls its previous decisions in order to strengthen the limits imposed by the Law No 40/2004 and the public policy principles. However, this approach may clash with the respect of the best interests of the child and her or his right to respect for private and family life, especially where a family tie is established on a long-term basis. Indeed, the refusal to indicate both mothers in the birth certificate does not prevent the future establishment of a family life (or at least a position that falls under the definition of private life) and subsequent violations of Article 8 ECHR. In absence of adequate forms of recognition of the family bond, the Italian practice may not pass the scrutiny of the European Court of Human Rights.

Indeed, it seems that the intervention of the Italian lawmaker can no longer be postponed.