



Intended or new parenthood? The child's best interest: Italy and the European Court of Human Rights

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Abstract

The article investigates domestic and supranational responses towards *new* forms of parenthood in the light of the child's best interest. Examining the case law of the European Court of Human Rights and the Italian Courts on artificial reproductive technologies and surrogacy agreements, this article contends that the European Court of Human Rights did not abandon the ideal type of families based on biological bonds despite efforts to ensure the paramount relevance of children's rights. Interlacing the Italian case and the European Court of Human Rights' judgments against Italy, this article argues that persists a long way before the full recognition of forms of parenthood lacking genetic links, despite the willingness to safeguard the legal *status* of the child.

Keywords Child, rights of · Child, best interest of · Intended parenthood · Private life · Right of identity

1 Introduction: parenting and children's rights

Alongside the broader debate on the transformation of parenthood connected to the progress of technological innovation, there is always a key discourse worth considering. The legal *status* of the child born as a result of increasing resort to methods of procreation other than the natural process of conceiving has brought about new challenges not yet effectively solved either at the domestic or at the supranational level.

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Despite the efforts of legislators and courts to tackle the phenomenon, gaps persist in terms of a truthful and shared acknowledgment of the rights granted to children regardless of how they came to be born, and in light of the lack of consensus among member States of the European Union and the Council of Europe.

No significant difference seems to be traceable when comparing artificial reproductive technologies and surrogate motherhood [1], on the one hand, and adoption, on the other. The admissibility and legality of families and parental relationships other than those based on biological bonds continue to constitute the focus of a debate featuring the case law of the European Court of Justice as well as domestic realities.

This article considers the debate concerning the recognition and safeguarding of children's rights in the era of "new" and intended forms of parenthood. It first features a theoretical analysis of the fundamental rights that international human rights law attributes to children. The investigation sheds light especially on those rights that are still deprived of proper legal recognition and on those "unstable" rights, the enforcement of which continues to be largely dependent on heterogeneous domestic legislation. The article then proceeds to compare the Italian legal order with the system under the European Convention on Human Rights, highlighting convergences and disagreements between Italian law and the European Court of Human Rights (ECtHR) case law.

The article will seek to demonstrate that homogenous safeguarding of the child's best interests at the Italian and supranational level has not yet been achieved and that its procedural dimension, interpreted as a paramount criterion to guide legislators and Courts in granting children protection without discrimination based on their biological or social bonds with their parent(s), has been poorly realised.

2 Biological parenthood?

Placing the child's best interest in the broader picture of the new forms of parenthood requires moving from its ontological causes. As is well known, the fracture between the biological and social reality of parenthood is largely responsible for all forms of old and "new" or intended forms of parenting. The sterility or infertility of the couple, the death of one member of a couple wishing to conceive a child by way of artificial insemination technologies (so-called *post-mortem* insemination), the homosexuality of the couple or single parenting, represent the main reasons for the absence of a perfect overlap between biological and social parenthood.

In such a wide set of life conditions, the options to which recourse is had can be different and dependent on the couples' or individual choices, on the one hand, and those of the law, on the other. On this, legislative responses are neither homogeneous nor coherent. Despite cross-border movements of individuals and couples within and outside Europe constituting an unavoidable phenomenon of globalised societies, and one increasing the options available to avoid any obstacle to natural means of procreation, at the same time, they unravel tensions and criticisms resulting from national legislation and interpretations by domestic courts.

This is true for all forms of parenthood. States regulate adoption differently, and it is still debated whether single persons and homosexual couples can access adoption

procedures. There is no difference when it comes to artificial reproductive technologies and surrogacy agreements [5]. Divergences, here, are even more relevant in light of their ethical and moral implications, which often take precedence over a neutral safeguard of the fundamental rights of the individuals involved. The European Union and the Council of Europe have not endorsed homogeneous regulations in terms of identifying who can or cannot access alternative forms of reproduction or parenting, leaving a wide margin of appreciation to the State. Although it goes beyond the scope of this article to tackle all the legal consequences of the absence of supranational regulation of parental rights, one should, nonetheless, keep in mind the challenges posed by multilevel systems of fundamental rights protection, which can favour higher guarantees, but can also increase inequalities across Europe and for its citizens.

3 The child, the parent(s), and new forms of parenting

Another point to be addressed is the legal *status* of the child in cases of a non-overlap between social and biological parenthood.

Such a theoretical premise will enable us to verify whether and to what extent domestic and supranational responses comply with the principle of the child's best interests, as interpreted under Article 3 of the United Nations Convention on the Rights of the Child [6].

The UN Convention represents a cornerstone for the legal recognition of the rights of the child and describes the principle of the child's best interests as possessing a threefold nature: substantive; interpretative; and procedural.¹

The centrality of the child's best interest has been acknowledged in Europe by the European Union and the Council of Europe, whose initiatives on the legislative and jurisprudential sides have progressively attempted to comply with the United Nations Convention.

Beyond the common trend of willingness to strengthen the safeguards for the rights of the child in all spheres ranging from the private to the public, the emergence of new forms of parenthood has unravelled new challenges. Moreover, it demonstrates the urge to redefine the boundaries of the child's best interests, the features of which have progressively changed to meet the divergent needs of bonds that are not necessarily based on biological links.

In a nutshell, an overview of the *new* rights of the child associated with the new forms of parenthood covers some of the following.

First, regardless of whether conceived by natural or artificial means or adopted, the newborn should be granted the right to a personal identity, enshrined under Article 8 ECHR. Secondly comes the more recently established right of the child to know his/her biological origins, which the European Court of Human Rights introduced in *Godelli and Others v. Italy*,² following the dissatisfied response of the Italian Constitutional Court. Determining the relevance of the right, which has been placed under

¹ On this, see, extensively, the General Comment on Article 3(1), the text can be read entirely at the following link: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.

² ECtHR, *Godelli and Others v. Italy*, 25.9.2012.

the umbrella of Article 8 ECHR, is particularly challenging especially when coupled with the right to preserve the anonymity of the donor(s) in artificial reproduction or surrogacy motherhood procedures. Despite a comparative perspective providing a wide spectrum of solutions, Europe seems to have reached a *consensus* at least about the disclosure of the donor(s)'s information for medical and health purposes only.

Additionally, standing as the corollary of the right to family life is the right of the child not to be forcibly removed from a family with which he/she has established an effective relationship, despite the lack of biological bonds. More recently, in *C v. Italy*,³ the European Court of Human Rights focused on the right of the child, born abroad as a result of a surrogacy agreement, to be granted the right to citizenship so as to avoid the statelessness resulting from the refusal of national authorities to recognise the legal bonds with the intended parent(s). Once again, the right "to citizenship" has been linked to the right to private life and the personal identity of the child under Article 8 ECHR. However, the proposed interpretation of the right at issue, as an additional corollary of the right to private life, does not alter the novelty and autonomy of the right, which is expected to gain broader attention by legislators and Courts as a result of global procreative tourism.

Lastly, given the multicultural scenario featuring contemporary societies, adoptive and intended parents may also face challenges in safeguarding the right of the child not to be discriminated against because of his/her racial or ethnic background, including religious and cultural traits.

In conclusion, beyond the above-described and non-exhaustive list of children's rights emerging alongside the evolution in forms of parenthood, there are guiding questions that orient the following investigation. The first is whether and to what extent the child's best interests prevail in the balance among the competing interests at stake, especially when confronted with public order, ethics, and morals. Secondly, the question arises of how to avoid differences in treatment among children, depending on the existence or, conversely, the lack of biological bonds with at least one parent. Lastly, there is the question of the role that legislators and domestic and supranational Courts should attribute to ethics and morals in cases where the child's best interest has a role to play. In other words, which interest is recessive, as between that of society and that of the child.⁴

4 Italian contradictions

At the outset of this analysis, it can be said that there is an element that has always been present in the Italian legal system, namely the preference for so-called traditional forms of family relationships, as envisaged by the Constitutional Assembly during the drafting of the Constitution, and which resulted from a literal interpretation of the wording of Article 29 of the Italian Constitution. Such an interpretation of family relations became even clearer after the adoption of the first regulation on artificial reproductive technologies in 2004.

³ECtHR, *C. v. Italy*, 31.8.2023.

⁴On this and, more specifically, on the most recent developments of the ECtHR's case-law on legal relationships between the child and his/her legal or intended parents, see [9].

Scepticism and opposition towards family relationships other than the “traditional ones”, based on marriage and biological bonds, have for a long time been an obstacle to the recognition of alternative families. Nowadays, despite (slow) legislative developments and the efforts of domestic courts, Italy remains far from acknowledging the reality of same-sex parenthood, single parenting, and non-biological relationships in favour of social or intended bonds. One way to understand the Italian scenario is by considering the phenomena causing the rupture of biological bonds between the parents and the child in light of the child's best interest. Reference is made to the adoption, of artificial reproductive technologies (ARTs), and surrogacy agreements.

Adoption is the legal institution possessing the longest legal history and one that part of the literature argues should be separated from artificial reproductive technologies and surrogacy. In contrast with artificial reproductive technologies and surrogacy, adoption rests on a rationale fully directed towards the safeguard of the child's best interests, while artificial reproductive technologies and surrogacy are conceived as strategies to allow intended parent(s), unable to conceive naturally, to pursue their “wish” to have a child. Whereas adoption, therefore, revolves around the child *vis-à-vis* the adopting parents, artificial reproductive technologies, and surrogacy are interpreted by some as mechanisms to guarantee the unrecognisable right to “have a child” or procreate.

What is missing, however, is the primary role and conceptualisation of artificial reproductive technologies, which are first and foremost medical treatments to overcome couples' infertility and sterility. Such a definition of artificial reproductive technologies challenges the contrast maintained by some between adoption and artificial reproductive technologies and the related argument that adoption should be legal because it is in the best interests of the child, while artificial reproductive technologies should be prohibited or restricted because they are not in the best interests of the child.

The situation is even more complex than this. Although the above-described rationale persists in the Italian legal debate, adoption is not recognised without limitations, confirming that, probably, there are competing reasons other than the child's best interest at play. Just think of the above-mentioned willingness to ensure the uniqueness of traditional families over “new” ones.

The argument that only biological families should be lawful and are ontologically inclined to serve the child's best interests explains Italian legislation on adoption well. First, under Italian law, there is a prohibition on singles adopting. Secondly, before the judgment of the Constitutional Court No. 79 of 2022, allowing the applicability of Article 44, Law No. 184 of 1984, regulating adoption in “special cases”, there was no chance of resorting to second-parent adoption. In fact, second-parent adoption is a separate type of adoption that allows the partner of a couple to adopt the son or daughter of their respective partner. This mechanism applies equally to married and unmarried couples, i.e. cohabiting couples.

Lastly, and going back to the discrimination discourse grounded on sexual orientation and gender identity, same-sex couples are prevented from adopting.

As regards artificial reproductive technologies, from 2004 until 2015, the law underwent a variety of amendments as a result of three judgments of the Constitutional Court. It goes beyond the scope of this article to examine each of these judgments. However, it is useful to briefly describe the major goals achieved from 2009 onwards.

2009 was the year of the first judgment of the Constitutional Court, No. 151 of 2009, which declared the non-conformity with the Italian Constitution of the legal provision of Law No. 40 of 2004, limiting the fertilisation and the implantation into the woman's uterus to the fixed number of three under Article 14, § 2. The judgment went on to state that no embryo transfer should proceed in case of a risk to the health of the woman under § 3 and, as a consequence of the amendment introduced under § 2, the Constitutional Court introduced a derogation from the absolute ban on embryo freezing previously provided for under § 1.

Beyond the containment of the limits to homologous artificial procreation technologies, in 2014, the Italian Constitution Court delivered a second landmark decision, No. 162 of 2014, on the absolute prohibition of gamete donation established under Article 3, § 4, Law No. 40 of 2004. Departing from the unreasonable difference in treatment between couples depending on the seriousness of sterility and infertility pathologies, denying access to artificial reproductive technologies to couples whose sterility and infertility require them to resort to gamete donation, the Constitutional Court affirmed the non-compliance of Law No. 40 of 2004 with the Italian Constitution, relying extensively on the right to equality and non-discrimination enshrined in Article 3 of the Italian Constitution; and the violation of the right to health under Article 32 (looking at both members of the couple); and, lastly, the violation of the so-called right to fulfil couples' need for reproduction, provided for under Article 31 of the Constitution.

A final positive step along the way towards the realignment of the law on artificial reproductive technologies with the Italian Constitution was reached in 2015 with Judgment No. 96 of 2015. In this judgment, following the ECtHR's condemnation of Italy in the case *Costa and Pavan v. Italy*,⁵ the Constitutional Court intervened concerning the subjective criteria for making use of artificial reproductive technologies, allowing even fertile couples with genetic diseases – originally excluded from the ambit of application of the Law – to have access to pre-implantation genetic diagnosis before resorting to artificial reproductive technologies.

Although other questions of constitutional legitimacy have found their way to the Constitutional Court, these same questions of constitutional legitimacy have never succeeded in modifying some of the additional and most important prohibitions of the original text of the Italian law on artificial reproductive technologies.

One of the major bans, which has never successfully challenged before domestic Courts, is the prohibition of the undertaking of scientific research on human embryos under Article 13 of Italian Law. In Judgment No. 84 of 2016, delivered right after the well-known case held by the European Court of Human Rights in *Parrillo v. Italy*,⁶ the Constitutional Court relied extensively on the legislature having neglected to provide its views and interpretation regarding the beginning of life and, more specifically, on the possible equation between human embryos and human life *per se*.

⁵ECtHR, *Costa and Pavan v. Italy*, 28.8.2012. The European Court of Human Rights condemned Italy for violating Article 8 of the ECHR in light of the inconsistency of Italian law, which allowed for the termination of pregnancy in cases of foetal diseases that could pose a risk to the woman's health and life, but at the same time prohibited pre-implantation genetic diagnosis of the embryo fertilised following IVF procedures.

⁶ECtHR, *Parrillo v. Italy*, 27.8.2015.

The importance of the non-response of the Constitutional Court needs to be chiefly understood from the broader picture of the undeniable benefits that scientific progress brings to artificial reproductive technologies and to the development of the treatments that couples and primarily women are subjected to. The less scientific research that is allowed, the less sterile and infertile couples, as well as fertile couples carrying genetic diseases, will be granted the best medical treatment existing on a global scale. Moreover, the prohibition of scientific research eventually also impacts the newborn as scientific and technological developments will reduce the chances of giving birth to children with disabilities. This has certainly nothing to do with eugenics as is argued by some. On the contrary, allowing resort to the best available artificial reproductive technologies will serve the purpose of protecting the right to health of a baby born as a result of artificial reproductive technologies.

Unfortunately, such a link between progress in scientific research and the right to health of the couple and the newborn has been very poorly discussed, in favour of framing the analysis on the quite challenging question of the qualification of the embryo as a human life.

In Judgment No. 84 of 2016, the Constitutional Court made an additional relevant choice that in a way distanced its decision from the *Parrillo* case. Whereas the European Court of Human Rights established that Article 1, Protocol No. 1 did not apply to the embryo, as the latter cannot be conceived as a “possession” within the meaning of the Convention, it did not go as far as to state that, as a result, the embryo should be granted the right to life under Article 2 ECHR.

In short, the Constitutional Court took a stand in favour of a broader interpretation of what is life and what it is not, juxtaposing scientific research with the safeguarding of the fundamental - but questionable - rights attributed to the embryo.

After 2016, the Constitutional Court never returned to the issue, but the future will hopefully bring new cases aimed at reshaping even this critical element of the law. The same unfortunate destiny was shared by the questions of constitutionality regarding the additional and not yet challenged prohibitions set forth under Law No. 40 of 2004. These are the cases of access to artificial reproductive technologies for singles, couples beyond the fertile age, and *post-mortem* insemination together with the impossibility for the couple and/or woman to withdraw the consent to the transfer following the fertilisation of the embryo.

Lastly, a special note should be dedicated to the prohibition of accessing artificial reproductive technologies for same-sex couples, which recently gained more attention as it was brought before the Italian Constitutional Court, first, with Judgment No. 221 of 2019, and, a few years later, with Judgments Nos. 32 and 33 of 2021. Unlike Judgment No. 84 of 2016, these judgments not only invoked a legislative intervention on the eligibility even for same-sex couples to make use of artificial reproductive technologies, but they did it hinging the rationale of the decisions on the best interests of the child. The question asked of the Court was not merely a demand to open up the list of those allowed to have access to artificial reproductive technologies under Articles 1 and 4, § 1, of the Law. The crucial point here was how to regulate the *status* of the child born abroad in case of a denial of the registration of the birth certificates formed outside of the State, because the certificates at issue were considered contrary to the domestic principle of public order.

Unfortunately, the child's best interests were deemed recessive in the balance of the interests at stake or, more precisely, a matter in need of legislative choices placed far beyond the Constitutional Court's competencies as a negative legislator. As often happens in Italy, the legislator did not intervene on the matter with the consequence that all such babies born outside Italy are sons or daughters only to the member of the couple whose biological links can be established.

Beyond the history of Law No. 40 of 2004, which is necessary to understand the actual *status quo* and the ongoing challenges for the protection of the child's best interests, it is of key relevance to turn now to a prohibition that is nowadays causing major criticisms and a structural lack of protection of children's rights. What is referred to here is the criminal prohibition of surrogate motherhood, examined in the following section.

4.1 Prohibiting surrogacy beyond domestic borders?

As has been mentioned above, one of the most recent and crucial criticisms featuring the Italian legal system regarding the best interests of the child associated with new forms of parenthood concerns the legal consequences resulting from the criminal prohibition of surrogate motherhood provided under Article 12, § 6, of Law No. 40 of 2004.

Apart from the issue of the rationale behind the legislative choice (which is not isolated in the European context) the increasing resort by Italian couples to surrogate motherhood in countries where the practice is legal, is progressively exposing children to severe human rights violations and extensive uncertainty in terms of the recognition of their legal status within their "home" country.

The Italian Constitutional Court first had a chance to deal with the issue in Judgment No. 272 of 2017. At that time, the question of constitutional legitimacy centred on the legislative provision of the Italian Civil Code, Article 263, "insofar as it d[id] not provide that a challenge to the recognition of an underage child, because he was not the biological child, may only be accepted where this reflects the child's best interests".

The Constitutional Court was not asked, therefore, to respond regarding the constitutional legitimacy of the prohibition set forth under Law No. 40 of 2004, in other words, on the constitutional non-compliance of the legislative criminalisation of surrogate motherhood. Rather, the question of constitutionality was entirely focused on the legal consequences arising from the widespread trend of Italian couples, once they had returned to Italy, to be neglected by domestic authorities regarding the transcription of the birth certificate issued abroad on the ground that there were no biological bonds between at least one of the members of the couple. According to the Italian criminal code, the request for transcription of the birth certificate issued abroad violated Italian law as Italian couples performing surrogacy abroad were making a false declaration about the identity of the newborn.

This was particularly challenging especially for heterosexual couples, as homosexual couples for a long time did not ask for the legal transcription of a birth certificate formed abroad stating that the newborn was the son or the daughter of two mothers or two fathers.

Interestingly, in the case of Judgment No. 272 of 2017, the requested intervention of the Italian Constitutional Court did not solely hinge on domestic constitutional provisions, but rather on the most recent case law of the European Court of Human Rights against France where the Strasbourg Court had been asked to decide on very similar cases. Without anticipating the main guidelines emerging from the case law of the European Court of Human Rights on surrogate motherhood in light of the child's best interests, it is worth mentioning that in both cases, a domestic and a supranational Court were almost simultaneously required to deal with the prejudicial consequences for a child's best interest of the legislative choice to ban surrogate motherhood [12].

The positive outcomes of the European Court of Human Rights' cases against France – *Mennesson, and Labassee*⁷ – were valued highly in the arguments brought before the Constitutional Court. Without taking sides as to the compliance or non-compliance of surrogate motherhood *per se* with the Constitution, the question of constitutionality was rightly narrowed to the effects of the criminal prohibition on the rights of the child.

Unfortunately, despite the attempt to delimit the boundaries of the request, which was not about the (un)constitutionality of surrogacy, the Italian Constitutional Court declared the question of constitutionality manifestly ill-founded. It rejected the question of constitutionality on points of law, stating on the merits that the Italian legal system rightly considered surrogate motherhood an immoral practice contrary to the Constitution.

The disappointment following the judgment, which was partially supported by judgment of the European Court of Human Rights against Italy – *Paradiso, and Campanelli*⁸ – which was however very different regards the factual circumstances, did not prevent further initiatives to bring new cases before the Constitutional Court.

The urge to provide a child born abroad as a result of surrogacy with some form of legal recognition to ensure the protection of his or her fundamental rights came before the Italian Constitutional Court once again in 2021 with Judgment No. 33. Unlike five years earlier, the Constitutional Court took a slightly different approach. Although the outcome was partly similar, this time the Court was directly asked to rule for or against the constitutional legitimacy of the legislative ban on surrogate motherhood. Specifically, the Italian Court of Cassation challenged the law insofar as it did not allow for the recognition of the parental bond between the child born abroad as a result of surrogacy and the so-called intended parent(s).

The rationale was, again, based on the need to afford a higher level of protection to the child on the basis that the “guilt” of the parents of intention could not negatively impact the child. Contrary to its previous judgment, the Constitutional Court acknowledged the lack of protection of the child's best interest, but it recalled the legislative intervention to regulate the legal status of the child born as a result of surrogate motherhood performed abroad. Put differently, it was not within the Constitutional Court's competencies to regulate the matter differently or to rewrite the challenged legal provision.

Eventually, the Constitutional Court opted for a judgment of inadmissibility, invoking the action of the legislator to amend the existing legislation in a way consistent

⁷ECtHR, *Mennesson, and Labassee v. France*, 26.6.2014.

⁸ECtHR, *Paradiso and Campanelli v. Italy*, [GC], 24.1.2017.

with the protection of the rights of the child. A few years passed following judgment No. 33 of 2021 and nothing happened, at least not in the way solicited by the Constitutional Court.

Recent times have witnessed, in fact, at least two legislative proposals aimed at introducing a further ban. The proposals were intended to criminally sanction even the conduct of those performing surrogacy abroad, pushing for an extra-territorial application of Italian Law. The most recent legislative proposal went even further, depicting surrogate motherhood as a “universal crime”.

In short, the legislator took the opposite approach to that invoked by the Constitutional Court with an attempt to introduce a legislative amendment to Law No. 40 of 2004 featuring several violations of the Italian Constitution.

At present, the parliamentary debate is not yet over and it is widely uncertain whether the legislative proposal will eventually be adopted. Despite the worries surrounding the prospect of the approval of the legislative proposal at issue, it should be noted that, apart from the position of the Constitutional Court, Italy has chosen to avoid any form of dialogue with the European Court of Human Rights, rejecting the ratification of Protocol No. 16 to the Convention [3].

Such a decision is worth recalling here because, in the event of the applicability of Protocol No. 16, domestic courts would have been provided with an additional mechanism to highlight the human rights violation of domestic law. Moreover, it comes, therefore, as no surprise that the first opinions delivered by the Grand Chamber were about surrogacy.

In a way, and in conclusion, Italy is slowly moving towards a very strict regulation of surrogacy and, in order to do so, at the same time, is interrupting any sort of relationship with the other levels of fundamental rights protection, starting with the European Court of Human Rights [13, 14]. Needless to say, this approach contradicts the general and global trend towards increased and interlaced relationships between individuals of different citizenships, States, and supranational organisations [4].

5 The European Court of Human Rights on non-traditional forms of parenthood

In order to investigate developments in the European Court of Human Rights when that Court has been confronted with new forms of parenthood, this analysis will briefly recall that Court’s major judgments on artificial reproductive technologies and surrogate motherhood [10], including those in which Italy was directly involved.

As is well known, the first time the European Court of Human Rights dealt with alternative forms of reproduction concerned homologous artificial procreation. In 2007, in *Evans v. United Kingdom*,⁹ the Grand Chamber was asked to verify whether there was an interference in the applicant’s right to private and family life under Article 8 ECHR, in the light of her husband’s withdrawal of his consent to have their frozen embryos implanted.

Although no child, or his/her rights, were at stake, the judgment is worth recalling, as it established that Article 8 ECHR safeguards the right both to become and not to

⁹ECtHR, *Evans v. the United Kingdom*, 10.4.2007.

become a genetic parent. The Court denied any violation of Article 8 ECHR had occurred. Without going too much into detail, the status of the embryos was not considered, nor did the European Court of Human Rights question the existence of a potential right to life on the part of embryos which were not implanted.

The second landmark case, concerning access to artificial reproductive technologies was *Dickson v. the United Kingdom*.¹⁰ In this case, the European Court of Human Rights held that the refusal of domestic authorities to allow a couple to become parents via artificial reproductive technologies because one of them had been sentenced to life imprisonment violated Article 8 ECHR. From the perspective of the interest in guaranteeing family rights and those of a newborn, *Dickson* testifies to a significant inclination on the part of the European Court of Human Rights to favour the establishment of parental links even in cases where the coexistence of both parents, during the child's life, cannot be guaranteed. What *Dickson* seems to leave open in the light of the finding of the European Court of Human Rights finding is what is, thus, the difference in the child's best interest between growing up with one parent in prison and being raised by just one parent by virtue of allowing single persons to access artificial reproductive technologies or adoption.

Although featuring prospective situations and not actual children, the cases show a more progressive approach if compared to those arrived at years later starting with the controversial *S.H. and Others v. Austria* [11].¹¹

In a case about the denial of access to gamete donation, the Grand Chamber attributed more weight to ethics and morals than to all other interests at stake. Hinging its decision on the margin of appreciation doctrine and on deference to the Contracting States, the Grand Chamber concluded that there had been no violation of Article 8 ECHR.

For the purposes of the present investigation, it seems that, in *S.H.*, the European Court of Human Rights was more concerned about the rupture of the biological bonds between the parents and the prospective child than about the violation of the right to become a parent recognised in *Evans*: as if the right to become a parent deserved protection only in cases of biological parental links, while, conversely, the safeguarding of this same right under Article 8 ECHR should not be absolute, depending on the genetic or social relationship between the parents and the child. The question, then, is whether Article 8 ECHR should or does protect only traditional families, as characterised by biological or genetic links between the parents and the son or daughter, or even, as could be the case, where there is no perfect overlap between genetic and social parenthood, as in the case of gamete donation or maternal surrogacy. In other words, whether Article 8 ECHR also protects so-called intentional forms of parenthood.

This crucial question has never been explicitly or fully addressed in the subsequent case law. The European Court of Human Rights has not, therefore, challenged its strict interpretation of parenthood in situations where this has originated from artificial reproductive technologies or surrogacy. It is as if it is only in adoption cases the best interest of the child matters or deserves protection.

¹⁰ECtHR, *Dickson v. the United Kingdom*, [GC], 4.12.2007.

¹¹ECtHR, *S.H. and Others v. Austria*, [GC], 3.11.2011.

Something else could be interfered with by the case law on surrogacy. The European Court of Human Rights thus proved to be more careful in securing the legal status of the child, regardless of the biological or social nature of the relationship existing with the parents.

Before moving to the case law of the European Court of Human Rights on surrogacy, there have been additional cases about artificial reproductive technologies, in which the European Court of Human Rights has added new elements to its views concerning alternative forms of family relations. Apart from the rulings delivered against Italy – *Costa and Pavan*¹² and *Parrillo* – recent judgments have touched upon three separate issues that had never before been discussed by the European Court of Human Rights.

*Baret and Carabellero v. France*¹³ concerned the refusal to allow the export of embryos from France to Spain so as to allow a widow to undergo posthumous insemination. In a controversial judgment, the European Court of Human Rights rejected the argument that there had been a violation of Article 8 ECHR, stating that the domestic authorities had struck a fair balance between the right of the applicant to found a family by way of artificial reproductive technologies, as a right safeguarded under Article 8 ECHR, and the ethics and morals endorsed by French society.

Similarly to its approach in *S.H. and Others v. Austria*, the European Court of Human Rights argued that States should be granted a wide margin of appreciation in cases where morals and ethics come into play, but, at the same time, adopted the view that, once again, when a prospective alternative form of family is making its space in the legal scenario, the right to private and family life should be subjected to an inferior level of protection. Again, no child is directly involved and, nonetheless, we see a judgment that seems to speak in favour of traditional parental bonds. In other words, in *Baret*, the European Court of Human Rights implicitly favoured forms of family based on the existence of a couple rather than on single parenthood.

The second case concerned Malta and concerned the legislatively-imposed age limits on access to medically-assisted reproduction under Maltese law. In this case, the European Court of Human Rights ruled in favour of a married couple, who were refused a second *in vitro* fertilisation due to the age of the woman, because this was not considered by domestic authorities to be in compliance with the law. The European Court of Human Rights relied essentially on the inadequate quality of the law prescribing the age limit as a reason to find a violation of Article 8 ECHR.

Whether this argument – which goes beyond the merits of actually stating when a woman is too old to undergo *in vitro* fertilisation treatments – will diminish the impact of the judgment it will be for subsequent case law to establish. At this point, willingness on the part of the European Court of Human Rights to relax its views – at least on when a couple could have a child – would be welcome.

Lastly, in 2023, the European Court of Human Rights delivered another judgment against France, this time concerning the right of children born as a result of artificial reproductive technologies to know the identity of the donors. In *Gauvin-Fournais and Silliau v. France*,¹⁴ the applicants complained about the impossibility of having

¹²ECtHR, *Costa and Pavan v. Italy*, 28.8.2012.

¹³ECtHR, *Baret and Carabellero v. France*, 14.9.2023.

¹⁴ECtHR, *Gauvin-Fournais and Silliau v. France*, 7.9.2023.

access to information regarding their donors, alleging the violation of Article 8 ECHR in the light of the lack of disclosure of medical information. The European Court of Human Rights did not find any violation of Article 8 ECHR, arguing that domestic law was the result of a public debate that should not be undermined especially when ethics and morals were directly involved. According to the Court, therefore, the State did not overstep its margin of appreciation, but, conversely, it struck a fair balance among the interests at stake.

Beyond artificial reproductive technologies and their role in establishing alternative and non-biological forms of parenthood, the European Court of Human Rights has delivered a number of interesting judgments on the legal status of a child born as a result of surrogacy.

Before examining the key features of each of these cases, it is worth recalling two key features of the case law of the European Court of Human Rights. The first is that in none of these cases has the ECtHR been called upon to examine the compatibility of the practice in question with the Convention. The second is the ECtHR's attempt to give practical effect to the content of the principle of the best interests of the child as interpreted by the UN Convention on the Rights of the Child, emphasising its substantive, procedural and interpretative dimensions.

The first time a case involving surrogate motherhood found its way to the European Court of Human Rights dates back to 2014.

In the very well-known case, *Labasee and Mennesson v. France*, the Strasbourg Court was asked to decide whether the refusal of domestic authorities to transcribe the birth certificates of babies born abroad as a result of surrogate motherhood could be in breach of Article 8 ECHR. The issue at stake was twofold: on the one hand, there was the child with his/her right to enjoy a private life; on the other, there was that of the intended couple, who were not both the biological parents of the newborn.

In both cases, the European Court of Human Rights decided to endorse a dichotomic understanding of the circumstances of the facts. The violation of Article 8 ECHR was established in both cases only as regards the child's position under French law. The Court of Strasbourg acknowledged, in fact, the alleged violation of Article 8 ECHR under the sole perspective of the right to a private life, because the refusal of the French authorities to recognise the birth certificate legally issued in another country undermined the right of the child to his or her identity, placing him or her in a status of unacceptable legal uncertainty [15].

In contrast, the Court denied that the cases raised an issue from the standpoint of the right to family life under Article 8 ECHR. In the Court's view, the Convention does not impose any positive obligation on the contracting States to recognise the parental relationship between a child and his/her parent of intention. Although it did not judge the conventionality of surrogate motherhood, the European Court of Human Rights, nevertheless, dealt with the rights of the child in a manner consistent with his or her paramount interest.

Mennesson and Labasee for quite some time represented a cornerstone in the case law of the European Court of Human Rights on the rights of the child in cases of social-biological dimensions of parenthood [7].

Leaving aside *Paradiso and Campanelli v. Italy*, the key features of which will be fully examined in the next paragraph and that were different on points of facts, the subsequent case law did not depart from a reading of the child's best interests as

incorporating a right for the child to enjoy his or her identity, as a corollary of the right to private life, through the recognition of the parental bonds with the biological parent.

However, the European Court of Human Rights up until now has never gone as far as to say: (a) that States should positively recognise the parental bonds with the intended parent, beyond establishing those with the biological one; (b) that States should acknowledge and protect the right to family life of the child, born as a result of a gestational surrogacy agreement, even beyond private life, by certifying the legality of parental bonds with the non-biological parent when the latter has not yet had the possibility to adopt the biological child of his/her partner.

Unsurprisingly, the European Court of Human Rights did not find any Article 8 ECHR violation in recent cases against France, *C. and E. and D. v. France*,¹⁵ where the intended mothers could not, at the time, benefit from second-parent adoption (which entered into force only later). Similarly, the Court found no Article 8 ECHR violation in 2021 in *Valdís Fjölfnisdóttir and Others v. Iceland* [2]¹⁶ which concerned the refusal of national authorities to recognise the existence of parental bonds between the intended parents and the minor, neither of whom was biologically related to a child born as a result of surrogacy. Although disappointing, it should be noted however that the case at issue focused almost solely on the intended parents' claims instead of the status of the child, with the consequence that the Strasbourg Court easily circumvented the consequences of the lack of recognition on the side of the child.

Although the case law of the Court of Human Rights on the matter at issue has continued to develop coherently – also in the light of the Advisory Opinion issued in 2019 by the Grand Chamber¹⁷ – there has been one recent case that departed from the jurisprudence described above.

Unlike in *C.E. and Others* and *D. v. France*, the European Court of Human Rights in *D.B. and Others v. Switzerland* [8],¹⁸ found a violation of Article 8 ECHR concerning the child's right to private life to have occurred because, at the time of the application, Switzerland did not allow unmarried and same-sex couples, as in the case at issue, to adopt the child of the partner, allowing such a possibility solely for married couples.

Hinging its ruling on the “time factor”, the Strasbourg Court concluded, that Switzerland had overstepped its margin of appreciation by failing to amend its legislation promptly in a way consistent with the protection of the right of the child regardless of the marital or cohabiting relationship of the couple. Therefore, the European Court of Human Rights recognised, reiterating *Mennesson v. France* and *Labassee v. France*, that “respect of private life requires every child [to] be able to establish the details of their identity as human beings, which includes their filiation”.¹⁹ However,

¹⁵ECtHR, *C. E. and Others* and *D. v. France*, respectively, 24.3.2022 and 16.7.2020.

¹⁶ECtHR, *Valdís Fjölfnisdóttir and Others v. Iceland*, 18.5.2021.

¹⁷See the Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], request no. P16-2018-001, French Court of Cassation, 10.5.2019.

¹⁸ECtHR, *D.B. and Others v. Switzerland*, 22.11.2022.

¹⁹§ 43.

the Court went further by stating that the violation was to be found in the legislative inertia and in the legal uncertainty that followed.

The occurrence of timely or untimely legislative intervention had not, however, been considered of sufficient relevance in the two above-mentioned cases against France. Whether and how this latest judgment will impact further cases is hard to say. While including time as a factor in the scrutiny of alleged violations of the rights of the child is reasonable, it would be advisable for the Court of Human Rights to reach a homogenous approach to specifying the duration of an adoption procedure considered detrimental to the child's best interest, and thus violating the Convention.

One last judgment, delivered in 2022 a few weeks later – *D.B.* – added another element to the case law of the Court of Human Rights on cross-border surrogacy. In a very controversial judgment, the European Court of Human Rights confirmed its willingness to separate the *status* of the child from that of the intended parent(s), stating that the refusal of national authorities to grant adoption rights to the intended mother violated the best interest of the child from the standpoint of Article 8 ECHR. At the same time, the Court upheld Danish law prohibiting commercial surrogacy. In the Court's view, commercial surrogacy fell within the notion of public interest, which contributed to widening the States' margin of appreciation. It therefore, rejected the assertion of a violation of Article 8 ECHR regarding the right to family life of the intended mother.

The complexity of the case also results from the narrow majority that supported the conclusion reached by the Court.²⁰ Only four judges voted in favour of the finding of the violation of Article 8, testifying to the not-yet-entirely-settled debate about the effective protection of the paramount interest of the child by way of recognising parental bonds with the intended parent in cases of commercial surrogacy. In other words, the new frontier for the European Court of Human Rights seems to be the necessity to take a clear stand regarding how to ensure the paramount relevance of the child's best interests even in cases of commercial surrogacy. Should, in future cases, States' margin of appreciation prevail, this will likely make the rights of the child recessive in the balance of interests at stake, with all the negative consequences and contradictions with the previous European Court of Human Rights case law that this will involve.

6 ... & Italy

Italy has also been at the centre of some of the most significant European Court of Human Rights judgments on surrogacy agreements. In *Paradiso and Campanelli*, for the first time, the European Court of Human Rights had to decide on the compliance with the European Convention on Human Rights of the removal of the newborn from the intended parents and his/her placement in foster care. The Grand Chamber found that Italy had not violated the right to a family and a private life of the intended parents, none of whom was biologically related to the newborn, nor that of the child placed in foster care, because no biological bonds existed with the intended *parents*;

²⁰It is interesting to note that the case was not referred to the Grand Chamber, which perhaps says something about the definitive acknowledgment of the final, although contested, judgment of the Section.

the child had spent limited time with the intended parents without the establishment of any effective relationship capable of violating the child's best interest.

Two aspects must be highlighted. The first is the wide discretion featuring the choice of the number of months necessary to establish an effective link between a child and his/her parents, whether biological or social. One might question whether the Court of Human Rights would have reached the same conclusion had at least one of the parents been biological. The response would not be clear-cut. Evaluation over "time" and its significance are seldom controversial in the case law of the European Court of Human Rights, but when the child's best interests are at stake, more caution would be advisable so as to avoid disparities and legal uncertainty.

The second aspect which must be highlighted concerns the weight attached to the lack of biological links between the child and both intended parents. This could be interpreted as the element that distinguishes *Paradiso* from *Mennesson* and *Labassee*. Yet, it remains questionable whether the best interest of the child should be taken for granted in the presence of biological bonds and (always?) not *vice versa*. The endorsement of this argument can hardly be reconciled with adoption, which undeniably serves the child's best interest despite the absence of a biological relationship with the adoptive parents.

The final case delivered by the European Court of Human Rights last year did not depart from the previous case law – and, similarly, did not answer the above questions. *C. v. Italy* closely resembles *Mennesson* and *Labassee* in terms of its facts and merits. The European Court of Human Rights stated once again that the refusal of domestic authorities to transcribe a birth certificate issued abroad as a result of a surrogacy agreement where this concerned the recognition of a parental bond with the biological parent violated the right of the child to private life.

The European Court of Human Rights emphasised the negative effects that the opposition of domestic authorities to the transcription of a birth certificate caused to a child's right to an identity. This was the first added value of the judgment in comparison with the cases against France. Also, building on the 2019 Grand Chamber's Advisory Opinion as well as domestic case law allowing for the mother's intention to adopt, the European Court of Human Rights rejected the contention that there had been a violation of Article 8 ECHR, insofar as this protects the right to a family life.

However, it remains an open question whether second-parent adoption can really fulfil the purpose of family life within the meaning of Article 8 ECHR as well as the best interests of the child. What seems to remain unclear is whether the reasoning of the European Court of Human Rights is simply based on the margin of appreciation doctrine, thus endorsing and reflecting the discretionary decisions of the States in each of the cases brought before it, or whether, conversely, it represents the real willingness of the Court to express its view on the merits in terms of compulsory recourse to second-parent adoption in order to comply with Article 8 ECHR.

7 Do the rights of the child always prevail? Concluding remarks at the time of the right to a birth certificate

Much has been said about the child's best interests and much has been done in recent years, especially by the European Court of Human Rights, in terms of prioritising the

child's interests over competing interests in the context of new forms of parenthood.

However, the European Court of Human Rights has at the same time adopted approaches not always fully consonant with the child's best interests. The prevalence of the child in the balance of the competing interests at stake has proven to be easier in cases where a biological link has existed with at least one parent. The European Court of Human Rights sees no reason to deny the parental link with the biological parent even in cases of artificial reproductive technologies or surrogacy agreements, despite the prohibition of these practices in the home country.

In contrast, even in the presence of social bonds with intended parent(s), the child's best interests are sidelined as if they could be protected only in the case of biological parenthood. Other interests prevail: ethics and morals and with them the wide margin of appreciation afforded to the State.

Paradiso and Campanelli v. Italy is emblematic of this, as it exemplifies the recessive role of the child's best interests when only social parenting comes into play *vis-à-vis* the predominance of the domestic reading of parenthood, which leaves no or very little space to intended parents. *C. v. Italy* does not alter this conclusion, as the guarantee of the child's best interest is considered satisfied by establishing a legal bond with the biological parent only.

Beyond the Italian cases, the European Court of Human Rights did likewise in the other cases, beginning with *Labassee* and *Mennesson*. Again, there was a juxtaposition between biological and social parenthood with the predominance of the former over the latter.

Whether and to what extent these judgments are the expression of persistent deference to the States when new forms of parenthood are under scrutiny, or else testify to the reluctance of the European Court of Human Rights to see the rights of the child protected in the context of intended parenthood is a question with an uncertain answer.

Very recent case law seems to not question the right to one's identity anymore. In *G.T.B. v. Spain* [16],²¹ the European Court of Human Rights spoke for the first time of a right to a birth certificate, sanctioning Spain for the delay in the transcription process. This was a new element to add to the scope of application of Article 8 ECHR and to the protection of children's right to legal certainty under the European Convention on Human Rights.

Despite the latest development, the dichotomy between biological and social parenthood and its impact on the child's best interests continues to present challenges as it is still challenging for the European Court of Human Rights to surrender its preference for biological over social parenthood.

Inasmuch as statistics show increasing resort to artificial reproductive technologies and surrogacy agreements, this will require a stronger effort on the part of the European Court of Human Rights to strengthen States' positive obligations under Article 8, ensuring the true predominance of the rights of the child, regardless of the nature, whether genetic or social, of parental bonds.

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²¹ECtHR, *G.T.B. v. Spain*, 16.11.2023.

Declarations

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