Essays

The Italian Reform of the Law on Filiation and Constitutional Legality

Cristiano Cicero*

Abstract

There is a tendency within modern legal systems towards mitigating or eliminating the differences between filiation within or outside of wedlock. The Italian law on filiation has been subject to important reforms driven by constitutional law, with the aim of guaranteeing equality between children. The endpoint of this legislative process has been to stipulate one single status for all children. The absolute equivalence between the legal status of all children, with no distinction between those born within or outside of wedlock, parental responsibility, the right of the child to be heard, the obligation to provide maintenance (*Unterhaltspflicht*), the principle of the welfare of the child (*Kindeswohlprinzip*) and the relevance of natural parentage are principles enshrined within European law; however – from a more general perspective – the formation of a common European family law is still a distant prospect on account of the different social sensitivities inherent within each legal system.

I. The Principle of Uniform Status of Filiation

The tendency within modern legal systems, which is probably irreversible, is towards mitigating or eliminating the differences between filiation within or outside of wedlock.[1] German law established full equivalence between children in 1997, following the reform of the law on filiation (*Kindschaftsrecht*). Filiation (*Abstammung*) is the legal relationship between a natural person and the persons who conceived him.[2] The *Bürgerliches Gesetzbuch* (German Civil Code) states in relation to maternity (*Mutterschaft*) that the mother of a child is the woman who gave birth to that child (§ 1591: 'The mother of a

* Full Professor of Private Law, University of Cagliari. I am very grateful to Monica Iyer, Attorney and Researcher, for the language and stylistic revision and valuable comments on an earlier draft of this article.

[1] Within the Italian literature, see recently M. Dogliotti, 'La filiazione fuori del matrimonio', in F.D. Busnelli ed, *Il codice civile. Commentario* (Milano: Giuffrè, 2015), 7.

[2] At least in general. This is not biologically the case eg for adoption (some legal systems, eg Spain, distinguish between *filiación por naturaleza y por adopción* (Art 108 of the *Código Civil*)) or for heterologous medically assisted reproduction (see below, section VIII). This is not to speak in addition of the questions raised by so-called surrogate pregnancy, including in particular the preferential status of the right of the genetic mother over that of the mother who gave birth.

child is the woman who gave birth to it').[3] As far as paternity is concerned, the father is the man 1) who was married to the mother at the time of birth, 2) who recognised paternity or 3) whose paternity has been established by a court of law (§ 1592 BGB). There is a presumption of paternity in both the French *Code Civil* and in the Spanish *Código Civil*, according to which the father of a child conceived or born within marriage is the husband of the mother (Art 312 of the *Code Civil* and Art 116 of the *Código Civil*). This presumption is also present in the Italian *Codice Civile*, which provides that the father of a child conceived or born within marriage is the husband (Art 231 of the *Codice Civile*).

The Italian legislation on filiation, which has abolished the distinction between legitimate children and children born out of wedlock,[4] has been subject to important reforms driven by constitutional law, with the aim of guaranteeing equality between children. The endpoint of this legislative process has been to stipulate one single status for all children. The absolute equivalence between the legal status of all children, with no distinction between those born within or outside of wedlock, parental responsibility, the right of the child to be heard, the obligation to provide maintenance (*Unterhaltspflicht*), the principle of the welfare of the child (*Kindeswohlprinzip*) and the relevance of natural parentage are principles enshrined within European law; however – from a more general perspective – the formation of a common European family law is still a distant prospect on account of the different social sensitivities inherent within each legal system (according to the *motto* of Jean Carbonnier, 'to each his family, to each his law').

The provisions of § 42 of the Austrian ABGB (General Civil Code) classify all descendants related by birth as children (*Kinder*). In France, according to Art 310 of the *Code Civil*: 'All children whose parentage is lawfully established have the same rights and the same duties in their relations with their father and mother'. They enter into the family of each of them.[5] In the same way, the Spanish *Código Civil* provides – with the aim of establishing equivalent status for all children – that (Art 108) 'Matrimonial and non-matrimonial filiation, and adoptive filiation, shall have the same effect'.[6] The original normative framework of the 1942 Italian *Codice Civile* was

[3] '*Mutter eines Kindes ist die Frau, die es geboren hat*'.

[4] C.M. Bianca, 'La riforma del diritto della filiazione' *Nuove leggi civili commentate*, 437-440, 437 (2013); M. Mantovani, 'I fondamenti della filiazione', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2012), II, 3.

[5] '*Tous les enfants dont la filiation est légalement établie ont les mêmes droits et les mêmes devoirs dans leurs rapports avec leur père et mère. Ils entrent dans la famille de chacun d'eux*'.

[6] '*La filiación matrimonial y la no matrimonial, así como la adoptiva surten los mismos efectos*'.

characterised by considerable disparities between so-called 'legitimate' and 'illegitimate' children. Drawing on the Napoleonic tradition, the 1942 *Codice Civile* drew a sharp distinction between the status of a legitimate child conceived by married parents, and an illegitimate child born out of the union of persons who were not married.[7] There were also further categories which received even less protection, such as so-called 'adulterous' children and so-called 'incestuous' children.[8] The Italian law on the reform of family law (legge 19 May 1975 no 151) reformulated the issue, but did not provide for equivalent treatment between the various categories of child.[9] It is firmly established that the legal status of children born out of wedlock has traditionally been worse than that of legitimate children.[10] Protection for the legitimate family has always been a fixed point within the social conscience, with the result that illegitimate children were accorded a lesser status than that of legitimate children.[11] This aversion towards natural filiation started to be reversed with the adoption of the Italian Constitution, which sought to provide better rights to biological children while still respecting the overriding requirements of the legitimate family,[12] but remained particularly severe in some instances, for example in relation to children born out of incestuous relationships (see section V below).[13] The law on the reform of filiation (legge 10 December 2012 no 219) enshrined the principle of the uniform status of filiation. Art 315 of the Italian *Codice Civile* provides that all children shall have the same legal status. The child consequently has a fundamental right to equality of treatment and protection, which is expressed through the principle of the uniform status of filiation. Equality between children thus is definitively detached from the status of the parents.[14]

Art 315 in amended form represents a genuine Copernican revolution within the system of family law and creates a clean break with the past, laying

[7] M. Dogliotti, n 1 above, 29.

[8] D. Carusi, 'La filiazione fuori del matrimonio nel diritto italiano (1865-2013)' *Rassegna di diritto civile*, 369-389, 369 (2015); M. Porcelli, 'Note preliminari allo studio sull'unificazione dello stato giuridico dei figli' *Diritto di famiglia e delle persone*, 654-675, 654 (2013); R. Pane, 'Il nuovo diritto di filiazione tra modernità e tradizione', in Id, *Nuove frontiere della famiglia* (Napoli: Edizioni Scientifiche Italiane, 2014), 11.

[9] M. Sesta, 'La parità dei figli nell'opera di Rosario Nicolò' *Rivista trimestrale di diritto e di procedura civile*, 141-158, 141 (2012).

[10] C.M. Bianca, n 4 above, 437.

[11] R. Nicoló, 'La filiazione illegittima nel quadro dell'art. 30 della Costituzione' *Democrazia e diritto*, II, 3 (1960); M. Paradiso, 'Filiazione, stato di figlio e gruppi familiari tra innovazioni normative e riforme annunciate' *Diritto delle successioni e della famiglia*, 101-118, 101 (2016).

[12] U. Majello, *Profili costituzionali della filiazione legittima e naturale* (Napoli: Morano, 1965), passim; M. Sesta, 'La filiazione', in M. Bessone ed, *Trattato di diritto privato, Il diritto di famiglia* (Torino: Giappichelli, 1999), IV, 3.

[13] M. Costanza, 'Filiazione naturale' *Enciclopedia giuridica* (Roma: Treccani, 1989), XIV, 1.

[14] R. Amagliani, 'L'unicità dello stato giuridico di figlio' *Rivista di diritto civile*, 554-574, 554 (2015).

the basis for the reconstruction of the entire body of rules on family law and inheritance. The assertion of the principle laid down in the provision under examination expresses the policy manifesto of the new law and has the status of a general canon of interpretation throughout the area of law.[15]

II. The Legal Significance of Biological Family Relations

Before the reform of Art 315, one of the residual differences in treatment between children born within wedlock and those born to unmarried parents resulted from the lack of recognition for biological family relations. The Italian reform removed the discrimination against children born to unmarried parents, which prevented the establishment of legal relations (biological family relations) between a child born out of wedlock and the relatives of the parent who had recognised the child.[16] The reform was enacted against the backdrop of the ongoing refusal for some time, on the basis of the combined provisions of the previously applicable Arts 74 and 258 of the Italian *Codice Civile*, to acknowledge the legal significance of biological parentage.[17] According to those resistant to acknowledging biological parentage, the institution of marriage and the legitimate family had to be safeguarded, taking care to ensure that any excessively beneficial treatment of the new social arrangements was not detrimental to the protection afforded to marriage. The entry into force of the Constitution, followed by the 1975 reform of family law, gave rise to a progressive development of the principles, thereby leading to a change in the interpretation of the legislation based on the central focus on the individual as a human being and the principle of equality and non-discrimination. It is important from the outset to stress the importance of supranational law and to point to its impact on the development of the principle of the equal status of all children.[18] This includes in particular Art 21 (non-discrimination) of the Nice Charter of Fundamental Rights of the European Union, along with Arts 8 (Right to respect for private and family

[15] L. Lenti, 'La sedicente riforma della filiazione' *Nuova giurisprudenza civile commentata*, II, 201-217, 207 (2013).

[16] F. Prosperi, 'Parentela e famiglia nel prisma dell'unicità dello stato di filiazione', in R. Pane ed, *Il nuovo diritto di famiglia* (Napoli: Edizioni Scientifiche Italiane, 2015), 9; M.F. Tommasini, 'Parentela e filiazione nel nuovo sistema' *Diritto delle successioni e della famiglia*, 123-145, 124 (2015). In the area of inheritance law, L. Mengoni, 'Successioni per causa di morte. Successione legittima', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 1990), 118, wrote that in the event that 'the deceased does not leave a spouse, ascendants, descendants or relatives within the sixth degree (…) In such an eventuality there are no principles that contrast with the claim of the natural brother or sister'.

[17] F. Santoro-Passarelli, 'Parentela naturale, famiglia e successione' *Rivista trimestrale di diritto e di procedura civile*, 27-37, 33 (1981).

[18] A. Morace Pinelli, 'Il problema della rilevanza giuridica della c.d. parentela naturale' *Rivista di diritto civile*, 345-358, 345 (2012).

life) and 14 (Prohibition of discrimination) of the European Convention on Human Rights (ECHR). The Italian law reforming the provisions governing filiation reformulated Art 74 of the *Codice Civile*, which stipulates that *parentela* (ie relationship by birth) is the bond between persons with a common ascendant, by adding the following phrase: 'irrespective of whether filiation arose within marriage, outside of marriage, or if the child was adopted', thereby redefining also the content of Art 258 by extending the effects of recognition to the parent's relatives.[19] Accordingly, following the entry into force of the amended legislation, all children are equal not only as regards their relations with their parents but also *vis-a-vis* other persons related to them by birth. The fact that children benefit from uniform legal status also implies uniform legal status for relationships with biological relatives arising as a result of recognition by a biological parent or a court order recognising filiation.

In reforming Art 74, Italian lawmakers adjusted the concept of *stirpes* – the branch of a family originating from an individual ascendant, establishing descendants and persons related by birth – enshrining the principle that a relationship by birth is associated with the fact of biological descent, irrespective of whether this was established within or out of wedlock. Following the amendments to Arts 74 and 258, the very notion of family as a matter of law has now changed, as it is no longer necessarily founded on marriage.[20] Thus there appears to be an increasingly strong tendency to set aside marriage as the constitutive locus of family law status. Accordingly, a question arises concerning the consistency of that new framework with Art 29 of the Constitution, which stipulates that marriage is a constituent and foundational element of the family, and with the part of the last paragraph of Art 30 of the Constitution that guarantees full legal and social protection to children born out of wedlock, insofar as compatible with the rights of the members of the legitimate family.

III. Recognition by a Biological Parent and Court Orders Recognising Filiation

As referenced above, the 1942 *Codice Civile* discriminated heavily against children born out of adulterous and incestuous relationships, who could not be recognised and to whom it was forbidden to make donations, and to some extent also to designate as beneficiaries of a will. The 1975 law on the reform of family law eliminated the prohibition on the recognition of

[19] G. Frezza, 'Gli effetti del riconoscimento' *Nuove leggi civili commentate*, 493-498, 493 (2013).

[20] M. Sesta, 'Stato unico di filiazione e diritto ereditario' *Rivista di diritto civile*, 1-34, 7-8 (2014).

adulterous children and established in Art 261 of the *Codice Civile* that recognition entails the assumption by the parent of all duties and rights that apply to legitimate children. The new law on filiation, in Art 251 of the *Codice Civile*, permitted the recognition of incestuous children born to persons who are related either by direct descent or ascent or related by collateral descent or ascent to the second degree, or by direct descent or ascent with the spouse of the other person, subject to authorisation by a court of law, considering the interest of the child and the need to avoid any detriment to him.

The prevailing view within the literature is that the legal status of a child born out of wedlock is not an immediate effect of conception, as it is necessary that the relationship of filiation be recognised by one or both of the parents or by a court of law.[21] In other words, conception becomes relevant for the right to recognise a child. According to the general view within the literature following the reform, the institution of recognition may be considered to reflect the development towards the separation of filiation from marriage, and an assertion of the protection of the relationship of filiation as a value that is self-standing and independent of the relationship between the parents.[22] The new Art 250 of the *Codice Civile* permits the joint or separate recognition of a child born out of wedlock, provided that the effective assent of the child is obtained if he is older than fourteen (para 2). If the child is not older than fourteen, he cannot be recognised without the consent of the other parent, where that parent has already recognised the child; however, that consent cannot be refused if the interests of the child so dictate (paras 3-4). The amendment thereby acknowledges the child's right to participate in the choices of existential significance for him.[23] Prior to the reform, the purported recognition of a child by an individual under the age of sixteen was void due to lack of capacity. This law violated the right to the status of parent, and correspondingly the right of the child to the status of son or daughter, with the result that the child was ineligible for recognition.[24] The last paragraph of Art 250 of the *Codice Civile* now stipulates that parents younger than the age of sixteen cannot recognise a child unless authorised by a court.

IV. Codification of the 'Right to Be Oneself'

[21] C.M. Bianca, *Diritto civile*, 2, I, *La famiglia* (Milano: Giuffrè, 2014), 364.

[22] G. Ferrando, 'La nuova legge sulla filiazione. Profili sostanziali' *Corriere giuridico*, 525-535, 527 (2013).

[23] S. Troiano, 'Le innovazioni alla disciplina del riconoscimento del figlio naturale' *Nuove leggi civili commentate*, 451-474, 460 (2013); P. Virgadamo, 'Il riconoscimento del figlio a séguito della riforma della filiazione', in R. Pane ed, *Il nuovo diritto di famiglia* n 16 above, 193.

[24] C.M. Bianca, 'La crescita di personalità del minore nel nuovo diritto della filiazione', in G. Chiappetta ed, *Lo stato unico di figlio* (Napoli: Edizioni Scientifiche Italiane, 2014), 34.

The surname has the function of identifying a person.[25] The right to a surname satisfies the interest of the individual in the enjoyment of his own identity within society, and is a particularly important aspect of the right to personal identity. A change in surname may prevent the attribution to a person, within the social context in which he moves, of the full range of his conduct; it is the means by which the individual is commonly known within social relations. In addition, the surname offers a potential means for identifying any member of the family.[26]

The case law of the Italian *Corte Costituzionale* has stressed for some time in relation to the issue of the allocation by the courts of the surname to a child born out of wedlock that the criteria for identifying the child's surname were dependent upon his interest in avoiding harm being caused to his personal identity.[27]

Under Art 262 of the *Codice Civile*, the child takes the surname of the parent who recognised him. If both parents recognize the child at the same time, the child takes the father's name.[28] The right of the child to the maintenance of his personal identity and the expression of the family tie is broadly protected, as he is able to take his father's surname by adding it to that of the mother, replacing that of the mother, or placing it before that of the mother (para 2).

V. Children Born of Incestuous Relationships

The provision for a uniform status of filiation, (Art 315 of the *Codice Civile*) which completes the cultural process of establishing equality of filiation,[29] requires an end to the prohibition on the recognition of incestuous children, within the context of a clear distinction between the conduct of the parents and the dignity of the child, who is a person and certainly not a mere by-product of incest.[30] The repulsion towards the *damnatus coitus* is an

[25] L. Lenti, 'Nome e cognome' *Digesto delle discipline privatistiche, Sezione civile* (Torino: Utet, 1995), XII, 136.

[26] P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), II, 784.

[27] Corte costituzionale 23 July 1996 no 297, *Giurisprudenza costituzionale*, 2475 (1996). Within the literature, M. Dogliotti, n 1 above, 332.

[28] Eur. Court H.R., *Cusan and Fazzo* v *Italy*, Judgment of 7 January 2014, available at www.hudoc.echr.coe.it, ruled that the Italian legislation which allocates the male surname to legitimate children violates Art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Pending the publication of the essay, the Italian Constitutional Court held the unconstitutionality of the rule which provides for the automatic attribution of father's name to the legitimate son, in presence of a different wish of the parents.

[29] C.M. Bianca, *Diritto civile* n 21 above, 325.

[30] L. Bardaro, *La filiazione non riconoscibile tra istanze di tutela e valori giuridici* (Napoli: Edizioni Scientifiche Italiane, 2015), 44.

objective fact: the fear and disgust aroused by incest cannot be denied.[31] Incest is still a taboo at the root of social cohabitation.[32] The prohibition on incestuous unions reflects the passage from nature to culture.[33] According to general rules, the child's express consent is required for recognition of an incestuous child if the child is a minor over the age of fourteen; moreover, if the child is younger than fourteen he must be consulted, with the appropriate precautions.[34] In the event that an action is brought by a child over the age of eighteen seeking recognition, there is no need for authorisation by the courts. The relationship between recognition and the commission of an offence pursuant to Art 564 of the Italian *Codice Penale*, in other words if recognition in itself will result in the criminal responsibility of the parents, is a delicate issue, which cannot be considered here in the depth that it would deserve.[35] It would be preferable for this not to be the result, which appears to be a more balanced solution. The abolition of the prohibition on the recognition of incestuous children is hailed today as one of the most significant innovations introduced by legge 10 December 2012 no 219.[36]

VI. Parental Responsibility

Decreto legislativo 28 December 2013 no 154 replaced the concept of parental authority with the model of parental responsibility (*parental responsibility*, in the United Kingdom; *elterliche Sorge*, in Germany; *Obsorge*, in Austria; *autorité parentale*, in France; *Ouderlijk gezag* in the Netherlands).[37] The amendment stipulated that within all provisions of the *Codice Civile*, the *Codice di Procedura Civile*, the *Codice Penale* and in any legislation in force, the expressions 'authority' and 'parental authority' should be replaced by the expression 'parental responsibility'. The aim of this legislative change was to place the focus on the child and his rights. In other words, to move beyond a perspective centred on the parent. The replacement

[31] C. Cicero, 'Il problema della filiazione incestuosa' *Rivista giuridica sarda*, 851 - 870, 854 (2003).

[32] A. Horkheimer and T. Adorno, *Lezioni di sociologia* (Torino: Einaudi, 1966), 151.

[33] C. Lévi Strauss, *Le strutture elementari della parentela* (Milano: Feltrinelli, 1969), 67.

[34] C.M. Bianca, *Diritto civile* n 21 above, 367.

[35] Art 564 of the Criminal Code: '(*Incesto*) 1) *Chiunque, in modo che ne derivi pubblico scandalo, commette incesto con un discendente o un ascendente, o con un affine in linea retta, ovvero con una sorella o un fratello, è punito con la reclusione da uno a cinque anni.* 2) *La pena è della reclusione da due a otto anni nel caso di relazione incestuosa*'.

[36] T. Auletta, 'Riconoscimento dei figli incestuosi' *Nuove leggi civili commentate*, 475-492, 475 (2013).

[37] G. De Cristofaro, 'Dalla potestà alla responsabilità genitoriale: profili problematici di una innovazione discutibile' *Nuove leggi civili commentate*, 782-803, 782, (2014); G. Recinto, *Le genitorialità* (Napoli: Edizioni Scientifiche Italiane, 2016), 16; M. Dogliotti, n 1 above, 137.

of the term 'authority' with 'responsibility' indicates that the duties of parents are no longer strictly related to the legally subordinate status of the child.[38] It must however be stressed that the conception of parental authority according to the authoritarian conception of subjection had been in decline for a significant period before the reform.[39] The Italian literature has stressed the difficulties in classifying on a conceptual level the revocation of the parental responsibility.[40]

It is a general principle that an underage child falls under the responsibility of the parents. A logical corollary of this, enshrined in Art 318 of the *Codice Civile*, is that the child cannot leave the family home definitively or temporarily without their consent.[41] Under Art 316 of the *Codice Civile*, parental responsibility attaches to both parents, who must exercise it by mutual agreement, taking account of the abilities, natural inclinations and aspirations of the child. In the event of any differences of opinion relating to questions of particular importance, each parent may apply to the courts, which, after hearing the parents and ordering that the underage child be consulted if aged over twelve (or if younger but able to understand the situation), will suggest the solutions that are best capable of pursuing the interest of the child and family unity. If the dispute persists, the court will vest decision-making authority in the parent considered more capable of attending to the interests of the child in the specific case.[42] Accordingly, the father is no longer attributed a more important role in situations in which it is necessary to take urgent action in relation to the child.

Under the new version of Art 315-*bis* of the *Codice Civile*, the child has the right to be maintained, educated and instructed and to receive moral assistance from his parents, taking due account of his abilities, inclinations and aspirations (para 1). This provision has now been incorporated into ordinary European law, establishing duties for the parent as a result of the filiation relationship, irrespective of the issue of parental responsibility. It should be pointed out that the right to moral assistance embraces the right of the child to receive loving care from his parents. The German BGB obliges direct ascendants and descendants to provide one another with maintenance and support (§ 1601: 'Lineal relatives are under an obligation to maintain

[38] E. Al Mureden, 'La responsabilità genitoriale tra condizione unica del figlio e pluralità di modelli familiari' *Famiglia e diritto*, 466 (2014).

[39] A.G. Cianci, *Diritto privato e libertà costituzionali* (Napoli: Jovene, 2016), 157.

[40] M. Giacobbe, 'Il prevalente interesse del minore e la responsabilità genitoriale. Riflessioni sulla riforma "Bianca" ' *Diritto di famiglia e delle persone*, 817-840, 818 (2014).

[41] M. Porcelli, 'Figli minori e divieto di abbandono della casa familiare', in G. Carapezza Figlia, J.R. De Verda y Beamonte et al eds, *La casa familiare nelle esperienze giuridiche latine* (Napoli: Edizioni Scientifiche Italiane, 2016), 39-48, 39.

[42] F. Ruscello, 'Autonomia dei genitori, responsabilità genitoriale e intervento «pubblico»' *Nuova giurisprudenza civile*, II, 717-727, 717 (2015).

each other').[43] In Austria, the ABGB subjects both spouses to the obligation to provide for the needs of the children on a level commensurate with the financial and intellectual capabilities of the parent. Taking care of an underage child involves in particular attending both to his physical wellbeing and health, as well as his education, along with the development of his physical, mental, spiritual and moral capacity, in addition to the promotion of investments, abilities, inclinations and the child's potential for development and his schooling and preparation for work (ABGB, § 160).[44] Similarly, Art 203 of the French *Code Civil* subjects parents to the obligation to provide maintenance, instruction and education ('The spouses contract together, by the sole fact of marriage, the obligation of feeding, supporting and educating their children').[45] In Spain, Art 110 of the *Código Civil* provides that 'the father and the mother, even if they do not hold parental authority, are obliged to care for their underage children and to provide them with support'.[46]

The Italian case law stipulates that the violation of the parental duties of maintenance, instruction and education towards their children may constitute a civil offence, resulting in the violation of rights protected under constitutional law. It may thus give rise to a self-standing action seeking the award of non-pecuniary damages pursuant to Art 2059 of the *Codice Civile*.[47] The traditional Italian view of family and civil liability as mutually exclusive appears to lie firmly in the past.[48]

An underage child who is older than the age of twelve, or younger provided that he is able to understand the situation, has a right to be heard in relation to all questions and procedures that affect him (para 3).[49] The right to be heard, which is enshrined on the international level by Art 12 of the Convention on the Rights of the Child and Art 24 of the Nice Charter, has thus been established as a right of the child, and encompasses a right to the

[43] '*Verwandte in gerader Linie sind verpflichtet, einander Unterhalt zu gewähren*'.

[44] ABGB, §160: '(1) *Die Pflege des minderjährigen Kindes umfasst besonders die Wahrnehmung des körperlichen Wohles und der Gesundheit sowie die unmittelbare Aufsicht, die Erziehung besonders die Entfaltung der körperlichen, geistigen, seelischen und sittlichen Kräfte, die Förderung der Anlagen, Fähigkeiten, Neigungen und Entwicklungsmöglichkeiten des Kindes sowie dessen Ausbildung in Schule und Beruf*'.

[45] Art 203 French *Code Civil*: '*Les époux contractent ensemble, par le fait seul du mariage, l'obligation de nourrir, entretenir et élever leurs enfants*'.

[46] Art 110 *Código Civil*: '*el padre y la madre, aunque no ostenten la patria potestad, están obligados a velar por los hijos menores y a prestarles alimentos*'.

[47] Corte di Cassazione 22 July 2014, no 16657, *Foro italiano*, 2015 (2015); Corte di Cassazione 16 February 2015 no 1625, *Giurisprudenza italiana*, 2333 (2015); Corte di Cassazione 12 April 2016 no 7168, available at www.iusexplorer.it.

[48] A.C. Jemolo, 'La famiglia e il diritto' *Annali Seminario Giuridico dell'Università di Catania* (Napoli: Jovene, 1948-1949), III, 38; C. Cicero, 'Responsabilità civile e tutela dei diritti coniugali: verso la configurazione del diritto al risarcimento del danno per violazione della serenità familiare' *Responsabilità civile e previdenza*, 2449-2459, 2449 (2007).

[49] Corte di Cassazione 5 March 2014 no 5097, *Foro italiano*, 1067 (2014).

free expression of his own opinion in order to protect his overriding interests.

Finally, the child must respect the parents and must contribute, in line with his own capacities, his own belongings and his own income, to the maintenance of the family for as long as he lives within it (para 4).[50]

The child has the right to grow up within the family and to maintain meaningful relations with relatives (Art 315-*bis*, para 2). The provision should be construed as recognising the fundamental contribution that relatives can make to the physical and psychological development of the child. The rule laid down in Art 317-*bis* of the *Codice Civile* is particularly significant in this regard in recognising that ascendants (grandparents) have the right to maintain significant relations with underage grandchildren. The case law of the European Court of Human Rights now includes relations between grandparents and grandchildren within the protection provided for under Art 8 ECHR (right to respect for private and family life).[51] In France, the *Code Civil* recognises the right of the child to a relationship with his ascendants (Art 371-4: 'A child has the right to have personal relations with his ascendants').[52] Section 1685 of the German BGB establishes a right in these terms for the grandparents, siblings and even for the previous 'registered' cohabitant of the parent, if this furthers the interests of the child ('(1) Grandparents and siblings have a right to contact with the child if this serves the best interests of the child. (2) The same applies to persons to whom the child relates closely if these have or have had actual responsibility for the child (social and family relationship)'. It is in general to be assumed that actual responsibility has been taken on if the person has been living for a long period in domestic community with the child).[53] The Italian case law has recently stressed the significance of the so-called social parent, in accordance with Arts 7 and 24 of the Nice Charter and Art 8 ECHR, recognising the interest of the child in a stable and meaningful relationship with the cohabitant of the biological parent.[54]

The child's right to maintenance, which may be provided in various ways, for example through the transfer of ownership of particular assets,[55]

[50] A. Bellelli, 'I doveri del figlio verso i genitori nella legge di riforma della filiazione' *Diritto di famiglia e delle persone*, 645-653, 649 (2013).

[51] Eur. Court H.R., *Manuello and Nevi* v *Italy*, Judgment of 20 January 2015, available at www.hudoc.echr.coe.int; M. Bianca, 'Il diritto del minore all'«amore» dei nonni' *Rivista di diritto civile*, 155-178, 155 (2006); L. Lenti, 'La sedicente riforma della filiazione' *Nuova giurisprudenza civile commentata,* II, 201-217, 213 (2013).

[52] '*L'enfant a le droit d'entretenir des relations personnelles avec ses ascendants*'.

[53] '1. *Großeltern und Geschwister haben ein Recht auf Umgang mit dem Kind, wenn dieser dem Wohl des Kindes dient*. 2. *Gleiches gilt für enge Bezugspersonen des Kindes, wenn diese für das Kind tatsächliche Verantwortung tragen oder getragen haben (sozial-familiäre Beziehung)*'.

[54] Corte d'Appello di Palermo 17 July 2015, *Corriere Giuridico*, 1549 (2015).

[55] Corte di Cassazione 23 September 2013 no 21736, *Diritto di famiglia e delle persone*, 590 (2013).

applies not only to underage children but also to adult children who have not yet become financially independent.[56] In some European legal systems there is a presumption that financial independence has been achieved at the twenty-first birthday; for example, in the Netherlands the obligation to provide maintenance extends until the twenty-first birthday of the child, but only if he remains in education, and otherwise ends at the age of eighteen (*Burgerlijk Wetboek Boek 1, Personen - en familierecht*, Art 394).

The position within the case law that is most widely supported in Italy is that maintenance is no longer owed when the child is able to secure a dignified life for himself out of his own income,[57] or when the failure to engage in gainful activity is due to inertia on the part of or an unjustified refusal by the child.[58] The parents' obligation to contribute to the maintenance of the children does not cease *ipso facto* when they reach the age of majority but continues unchanged until the parent seeks a declaration that the obligation no longer applies and furnishes proof that the child has become financially independent or that the failure to engage in gainful activity is due to inertia on the part of or an unjustified refusal by the child.[59]

VII. Medically Assisted Reproduction

The biological relationship of filiation (characterised by a blood relationship between parents and children) and adoption are not the only forms of filiation recognised under Italian law.

Medically assisted reproduction (MAR) enables a relationship of filiation to be established without sexual intercourse between a man and a woman. Fertilisation may theoretically be homologous or heterologous, depending upon whether the gametes used originate from the couple or from third party donors.

Recourse to MAR is only permitted subject to the conditions and in the manner prescribed by law, which assures rights to all parties involved, including the embryo (legge 19 February 2004 no 40, Art 1, para 1). This form of fertilisation must be regarded as a therapeutic treatment aimed at resolving reproductive problems resulting from the couple's inability to carry a pregnancy to term. On this basis, in Italy medically assisted reproduction is only available to adult, heterosexual couples (both of whom must be alive), who must at least be cohabiting and of potentially fertile age (legge 19 February 2004 no 40, Art 5).

A child born as a result of the application of medically assisted

[56] Corte di Cassazione 8 February 2012 no 1773, available at www.iusexplorer.it.
[57] Corte di Cassazione 9 May 2013 no 11020, available at www.iusexplorer.it.
[58] Corte di Cassazione 2 April 2013 no 7970, available at www.iusexplorer.it.
[59] Corte di Cassazione 21 February 2007 no 4102, available at www.iusexplorer.it.

reproduction acquires the status of a child born of a marriage (if the couple was married at the time of birth) or of a child who has been recognised (if he was born when the couple was cohabiting). By contrast, children born to cohabitees not using MAR are not automatically recognised, and recognition by both parents is necessary.[60]

The *Corte Costituzionale* has found the prohibition of heterologous fertilization to be unconstitutional.[61] In cases involving heterologous reproduction, a spouse or cohabitee who has provided his consent (either expressly or if such consent can be implied from his actions) is prohibited from bringing an action to disclaim paternity (legge 19 February 2004 no 40, Art 9, para 1). The law also provides that a party who has donated gametes does not acquire any legal relationship with the newly born child (Art 9, para 3). The judgment of the *Corte Costituzionale* resulted from a long and lively debate centred on the need to balance and protect a variety of values, such as human life, freedom of self-determination in relation to reproductive choices, the family, health, freedom and scientific research. For a number of years, case law in Italy has acted as a substitute for the legislator; in some senses, Italian law endorses the provision contained in the Swiss Civil Code that enables a court to decide according to the rule that it would adopt as legislator in the event that no provision can be inferred either directly or by analogy from legislation.[62]

VIII. On the Rights of Children Born as a Result of MAR

Drawing on Norberto Bobbio's discussion of the 'age of rights',[63] there is a fundamental question as to whether there is actually a right to have children that is guaranteed under constitutional law. This position is not currently unconditionally supported in the literature.[64]

As discussed in Section VII, the *Corte Costituzionale*[65] has enabled couples who are completely sterile and infertile to resolve problems associated

[60] M. Dogliotti, n 1 above, 221; G. Ferrando, 'La fecondazione assistita nel dialogo fra le Corti' *Nuova giurisprudenza civile commentata*, 165 - 170, 165 (2016).

[61] Corte costituzionale 10 June 2014 no 162, *Diritto di famiglia e delle persone*, 973 (2014); C. Cicero and E. Peluffo, 'L'incredibile vita di Timothy Green e il giudice legislatore alla ricerca dei confini tra etica e diritto; ovverosia, quando diventare genitori non sembra (apparire) più un dono divino' *Diritto di famiglia e delle persone*, 1290-1318, 1290 (2014); M. Porcelli, *Accertamento della filiazione e interesse del minore* (Napoli: Edizioni Scientifiche italiane, 2016), 71.

[62] P. Rescigno, 'Il giudice come legislatore nel codice civile svizzero', in Id, *Codici. Storia e geografia di un'idea* (Roma-Bari: Laterza, 2013), 156.

[63] G. Vettori, 'Il tempo dei diritti' *Rivista trimestrale di diritto e di procedura civile*, 881-905, 881 (2014).

[64] S. Rodotà, *Tecnologie e diritti* (Bologna: Il mulino, 1995), 153.

[65] Corte costituzionale 10 June 2014 no 162, *Foro italiano*, 2324 (2014).

with the inability to procreate, thanks to the possibility of accessing systems of heterologous medically assisted reproduction. It is now important to understand what kind of protection the law guarantees to individuals born as a result of the use of those methods. This is a particularly emotive issue in Italy, especially following the enactment of the Law on civil unions between persons of the same sex (legge 20 May 2016 no 76). Legge 19 February 2004 no 40, regarding heterologous reproduction, intends to protection to the unborn not only by imposing a prohibition on the disclaimer of paternity and the prohibition on the mother's refusal to be designated as such (Art 9, paras 1 and 2), but also by guaranteeing the anonymity of the donor (Art 9, para 3). Within other European legal systems, protection is guaranteed by a general rule, for example within the *Code Civil* in France, which provides in relation to *assistance médicale à la procréation* (Art 311-19) that 'in case of a medically assisted procreation with a third party donor, no parental bonds may be established between the donor and the child born of the procreation (para 1); and consequently 'no claim in tort may lie against a donor (para 2)'.[66]

One key problem associated with the recourse to heterologous medically assisted reproduction is the right of the child to know his own origins. The need to know one's own generic identity is related to the biological and social dimensions of human procreation. Such risks are not limited solely to potential tensions with other relatives or the anxiety experienced by the parents, but also to possible identity problems that a child born in this manner could develop after becoming aware of the three persons involved in his very existence.[67] This is in addition to the possibility of negative psychological dynamics that may arise when the child becomes aware that he was conceived with the egg or sperm of a third party unknown to him, and whom he might never have the opportunity to know.[68] It is thus difficult to resolve the question as to whether it is ideal for a person to be recognised as a child of certain parents notwithstanding that he is unaware of his own genetic heritage, or whether by contrast it is preferable for a person to be able to know who he is, where he comes from and why he was born.[69] The right guaranteed to biological parents to conceal the manner in which their child was procreated is without doubt at odds with the need, which is being

[66] '*En cas de procréation médicalement assistée avec tiers donneur, aucun lien de filiation ne peut être établi entre l'auteur du don et l'enfant issu de la procréation. Aucune action en responsabilité ne peut être exercée à l'encontre du donneur*'.

[67] C. Flamigni, *Il secondo libro della sterilità. La fecondazione assistita* (Torino: Utet, 2008), 474; L. D'Avack, 'Diritti dell'uomo e biotecnologie: un conflitto da arbitrare' *Rivista di filosofia del diritto*, 9-30, 9 (2013).

[68] R. Pane, 'Ancóra sul diritto di conoscere le proprie origini' *Diritto delle successioni e della famiglia*, 435-455, 435 (2015).

[69] L. D'Avack, 'Il diritto alle proprie origini tra segreto, anonimato e verità nella P.M.A. con donatori/trici di gameti' *Diritto di famiglia e delle persone*, 815 - 836, 815 (2012).

increasingly felt within our society, to be able to know one's own origins.[70] It would be reasonable to treat the situation in a manner analogous to the legal regulation of adoption, where the identity of the biological parents can be revealed to adoptive parents, with the approval of the Juvenile Court, and to the adoptee. Certainly, in particular, the child should never be denied access to critical information that does not involve the identity of the parent.[71] For a child, the need to know one's own genetic identity is a need rooted in the depths of the human condition – a natural right which is vested in the person solely by virtue of his human dignity.[72] Additionally, a child born as a result of heterologous fertilisation may during his lifetime require access to genetic information that is relevant for his health.[73] However in such an eventuality it would be necessary to access this information without violating the confidential status of the various items of information relating to the identity of the donor.[74] In contrast to the current Italian law, Switzerland has not only established a right to access to ones own genetic data under constitutional law but also stipulates that, in situations involving heterologous fertilisation, the child has a right to know the identity of the donor once he has become an adult.[75] The situation is no different in Germany, where according to case law any agreement reached between doctors and parents seeking to exempt the former from the obligation to disclose information relating to the donor will be void as it is classified as causing harm to the third party.[76] This is not to mention the issues that would arrive from a request by the child to disclaim his parentage.

[70] R. Pane, 'Ancóra sul diritto di conoscere le proprie origini' n 68 above, 440.

[71] Legge 4 May 1983 no 184, Art 28, para 1. In literature, T. Auletta, *Diritto di famiglia* (Torino: Giappichelli, 2014), 396.

[72] The adoptee's right to know his own origin is a principle. In Italy, when the adopted person is twenty-five years old, he has the right to access information about his origin and get to know the identity of his biological parents (legge 4 May 1983 no 184, Art 28, para 5).

[73] U. Salanitro, 'Procreazione medicalmente assistita', in E. Gabrielli ed, *Commentario al codice civile* (Torino: Utet, 2010), IV, 505.

[74] The necessary balance between the right of the born to know his genetic origins and the right to anonymity of gamete donor, is legally defined by providing that the donor does not acquire any legal parental relationship with the born (legge 19 February 2004 no 40, Art. 9, para 3).

[75] The Swiss Federal Constitution, Art 119, para 2.

[76] OLG Hamm 6 February 2013.