

“Regulating assisted procreation: the Italian case”

Giulia Zanini
European University Institute

Legal national or regional context is crucial in defining the rules for the application of assisted reproductive technologies (ARTs) in a given territory. Like all scientific discoveries, ARTs are generally part of a transnational scientific knowledge system but are necessarily applied within a specific cultural, social and legal framework. As these new technologies deal with the reproduction and maintenance of society (affecting kinship-relations and notions of body, substance, and sexuality), they also enter the sphere of competence of political actors, such as politicians, law-makers and lawyers. These actors focus on the consequences of the application of these techniques on the social order and moral values in society. In fact, the choices national and regional legislators make in the regulation of assisted reproduction can be seen as the expression of local, morally oriented answers to the globally available science or knowledge system.

This paper focuses on the Italian law on assisted procreation, assuming that the acknowledgement of the law regulating assisted procreation of a given state leads to the understanding of the attitude of this state towards the control of its citizens' reproductive matters. The analysis of the parliamentary debates and the wordings of both the laws regulating ARTs and of other laws on related matters (legislation concerning motherhood and fatherhood, adoption, public health services)¹ reveals the cultural model which is the basis for the formulation of the law and highlights what might be seen to be the dominant national social model in matters of family and procreation. By

¹ See Franklin, 1999; Melhuus, 2003; Sandor, 2000, 2005; Salazar forthcoming.

briefly introducing Italian law on assisted procreation and analysing the principles on which it seems to lie, I will try to identify which model of reproduction those institutions tend to convey. The reference to some parliamentary speeches and religious positions on the same matter will help the depiction of the context in which such a model has been formulated.

The Italian parliament passed the first national law on medically assisted procreation (commonly known as Law 40) in February 2004, after a lengthy parliamentary and public debate. This is the first Italian organic law on the use of ARTs, which were previously regulated only by governmental decrees.

The promulgation of this law came after a controversial period in which, on the one hand, scientific discoveries were enhancing the possibilities of technologies in the reproductive field, nourishing the fervid imagination of some who started to talk about an all-powerful technology and its exceptional or catastrophic effects. On the other hand, Italy was becoming famous in the international press as being an exceptional place in Europe where procreative miracles could take place. There were, for instance, women giving birth to quintuplets or sextuplets and women who gave birth in their sixties. Before the promulgation of Law 40, Italian jurisprudence was famous for being involved in cases of disownment of paternity following assisted reproduction, children born by insemination after the death of the father, and surrogate motherhood. Italy was known as the 'Far West' of procreation, where everything was possible, thanks to the complicity and competence of some notorious doctors and the lack of a specific legislation in this field. The promulgation of a specific law regulating ARTs was urgently requested.

The result was the approval of Law 40/2004, which defines a sort of ethical code

for the application of reproductive technologies, establishing the conditions for the access to treatments, the statute of the soon-to-be born baby, the obligations of the would-be parents, the fate of the non-implanted embryos and the sanctions for breaches of law. The text of this law is recognized as being one of the more restrictive ones in Europe, characterized by a very long list of prohibitions.

Consequently, a severe discontent has risen, which is reflected in the commitment that some activists and politicians put in organizing a referendum that, just one year after the promulgation of the Law 40, aimed at modifying some measures, considered particularly inadequate.² The four proposals of the referendum were meant to relax the provisions forbidding fecundation with donors as well as the use of exceeding embryos for scientific research and limiting the access to the ARTs. Due to insufficient voter turnout, the referendum failed to modify the text of the law, which has since remained as it was issued in 2004. Only in April 2008 the incumbent Ministry of Health Livia Turco signed and circulated new guidelines that introduced very few but extremely important modifications in the application of the law.

In its very first article, Law 40 states that assisted procreation is allowed with the unique goal of solving reproductive problems arising as a result of human sterility or infertility,³ in case any other possible types of therapy has failed. The law explicitly guarantees the rights of all the involved subjects, including the foetus.⁴

² Promoted especially by the Radical party, representatives of parties of the centre-left, the Green Party, and other interested parties, The Referendum took place the 12th and 13th June 2005.

³ In the ministerial guidelines linked to Law 40, infertility is defined as a reduced or lost ability to conceive and carry a baby, either temporarily or permanently. Sterility refers to the people or couples who are permanently not able to conceive by reason of physical hindrances. In general, infertility and sterility do not change the ability or desire to have sexual intercourse. In the text of the law, the terms infertility and sterility are used as synonyms and refer to the incapacity or impossibility to conceive after a period of some months up to two years, depending on the medical situation of the patients.

⁴ The text of the law refers literally to the 'conceived being' (*concepito*). This term is used only in this article, while the rest of the law speaks about either the 'to-be-born child' (*nascituro*) or the embryo (*embrione*).

This first article is particularly important because it presents the two main principles the law has been grounded on.⁵ First, ARTs are primarily medical therapeutic acts directed at safeguarding the health of sterile couples. Assistance is not available for people who do not prove their disease and the failure of other healing therapies: thus, single women and homosexual couples are excluded from the treatments. Second, the foetus is characterised as a carrier of rights: even if the jurists are still debating on the meaning of this particular sentence about the rights of the foetus, it nevertheless gives evidence to the new intensity with which the law guarantees the juridical protection of the foetus (Camassa and Casonato 2005).

Access to treatments is allowed only to couples composed of heterosexual adults, married or living together, of reproductive age, who have been formally declared medically infertile or sterile, and who are both alive. Before starting any treatment, these couples must sign a written consent, which can be withdrawn by either of the partners up until the moment of fertilisation of the egg but not thereafter. This document states that the patients accept the treatments and what follows, namely they declare that they will be the legal parents of the hypothetical offspring.

Cryopreservation of embryos and donation of gametes and embryos are banned as well as the destruction of fertilized eggs, while pre-implantation genetic diagnosis (PGD) has been possible since March 2008, after the new guidelines mentioned above were issued.⁶ Other techniques, like inseminations, In-Vitro Fertilization (IVF) and Intracytoplasmic Sperm Injection (ICSI) are admitted if they imply the use of

⁵ According to the analysis of some lawyers, the law presents, however, evident contradictions concerning the definition of MAP as therapeutic means.

⁶ Some infectious diseases (for example, in the presence of the viruses of HIV and Hepatitis B and C) are being compared to a condition of infertility due to the high risk of contagion and transmission that may occur in a fecundation obtained through sexual intercourse. This is the justification that allows the application of PGD.

reproductive material of the couple. In other words, assisted procreation is open to heterosexual couples with certified medical problems of infertility, which do not require the use of donated gametes.

The principle of the protection of the 'conceived being' justifies partially the choice of these measures and some ensuing restrictions concerning the treatment of the embryos. For example the law limits the number of eggs that can be fertilized to three and each one of them must be transferred into the womb of the woman who produced it.⁷

Making the rules for the application of new reproductive technologies, legislators seem to express their preference for a particular model of family and establish a specific paradigm of legitimate procreation, namely the biological procreation within a heterosexual couple. By restricting the access to heterosexual couples of reproductive age who demonstrate to have medical problems of infertility they exclude other people in all other conditions from the treatments. In other words, the legislators allow assisted procreation only in the cases where they deem the environment for procreation to comply with a specific (family) ideal.

Reproductive technologies have the role of helping the replication of the biological model of procreation in the occurrence of specific reproductive medical problems. This very interpretation of technologies and the preference for the biological principle of descent is more explicitly supported in the text of the Degan's circular that partially regulated assisted reproduction in the public hospitals from 1985 to 2004. 'The essential foundation of descent has a biological origin. This is why it is not possible that

⁷ The original text of the law does not allow the use of embryos for scientific research nor the selection and destruction of any of them. However, in the new guidelines (30th April 2008) selection is allowed in order to avoid the transmission of certain infectious diseases.

the law allows the transfer of genetic heritage from outside the couple (donation)'.⁸

The declared preference for the biological procreation seems to go hand by hand with an other element, that characterises Italian legislation concerning descent: the law allows the application of social (non-biological) relationships of descent (for example in adoption). Notwithstanding, analysing the provisions regarding the applicability of these social ties, it emerges that, in reality, these can be applied and are valid only if they can trace a potential biological tie. For example, adoption is possible only for heterosexual married couples.

Furthermore, looking at the disposals of Law 40 and, more widely, at the legal framework concerning descent it seems that a 'voluntary declaration', and not necessarily a biological (or genetic) bond, eventually decides and activates descent ties. The obligation of signing a written consent is crucial in the definition of the relation of descent in case of assisted procreation. However, it seems to support the biological model, as the only allowed treatments concern the heterosexual couple, and to simply avoid the abandonment of the child. Nevertheless, it is very interesting to notice that, as established by Law 40, the written consent is the couple's legal parenthood warrant if a donation of sperm is performed, in violation of the law. As stated in the law, the potential donor has no right to acquire the *status* of father of the born child. Thus, in this case, the biological (genetic) relationship of descent is not, from a legal point of view, as valid as the relationship set up by the will expressed through the signature of the consent.

The legislators, being aware of the existence and diffusion of donation, forbid its employment but regulate the consequences of its illegal application. In this way they

⁸ Ministero della sanità, Circolare March, 1st 1985 , su *Limiti e condizioni di legittimità dei servizi per l'inseminazione artificiale nell'ambito del Ssn.*, in: LIZI F. (a cura di), *Riproduzione umana assistita e embriologia*, Roma, Senato della Repubblica italiana, 1991, 157-162.

support, on the one hand, the choice of limiting the access to assisted procreation to certain people; on the other hand, they deny *de facto* the supremacy of the biological principle in the creation of descent ties. This is a demonstration of how the institutional position supports biological procreation as an ideal model, but gives priority to a 'voluntary declaration' in the actual activation of descent ties. At the same time, the voluntary declaration can occur only in specific cases where a biological tie could be imagined.

Therefore, homosexual couples, single women and healthy post-menopausal women are excluded from assisted procreation, given that, following the principles of biological reproduction, treatments are only available for people who would be potentially fertile, if not affected by medical problems. On the other hand, the law states that each woman who gives birth to a child is given the possibility not to recognise this child as hers despite the biological tie established through the pregnancy and the act of delivery⁹ – in this case the anonymity of the mother is applied and the child is declared adoptable. Moreover, a non-married father has to declare his paternity although he does not have to prove his biological relation to the child.¹⁰ Only if the court is called to invest somebody with the role of parent for a child who has not been recognised by any one at its birth, the procedure can include a genetic test in order to identify the biological parents. In all the other cases the relationship of descent is confirmed through a voluntary declaration.¹¹ Thus the relationship of descent is confirmed through an act

⁹ The only exception is for the women who have conceived their child during an assisted procreation treatment. In this case they are obliged to be the legal mothers of the child they give birth to.

¹⁰ A married man is automatically considered the father of his wife's child, unless he denies his paternity. In this case the judge can dispose a genetic test to find out the genetic father who subsequently becomes the legal father. See Art. 231 Civil Code and Art. 269 to 279 Civil Code.

¹¹ I wonder whether this institutional attitude towards descent might be interpreted as the preference for a sort of 'biological fiction'. This concept could help the understanding of the combination of two elements. The first is that biological procreation within a heterosexual couple is considered as the ideal model of reproduction; the second is that the law allows other, non-biological, ways of creating descent ties, albeit

of will.

The ideal preference expressed by Italian legislators in favour of the biological model of reproduction is justified by various arguments that can be found in the parliamentary debates that preceded the promulgation of Law 40. Bearing in mind that many different and opposite positions had been presented in the Parliament, which did not necessarily consider the heterosexual couple as the given 'natural' environment for procreation, it is interesting to focus on those issues that still support this institutional perspective, in order to distinguish which kind of discourses are produced in its defence.

According to Cesare Ercole,¹² the criteria established for the access to assisted procreation represent 'the responsible choice of the law-makers' for protecting the family, considered the central fundamental unity of society and intended 'in its narrowly "natural" sense, composed of living heterosexual partners'. Ercole argues that the law cannot ensure the child a worthy normal life, following the parameters of a 'natural' normality and morality, if not providing him/her with a family that allows his/her development according to the model set up by nature and he adds that it is not possible, 'to offer the child a homosexual family, where this natural model is missing'. Ercole's discourse highlights the idea that nature establishes a particular model of relating human beings and that it is morally unacceptable to legislate in contrast to this model.

The same interpretation of natural dispositions about procreation appears in the discussion about donation, where this practice is often presented as contrasting the

following the ideal biological pattern. The term 'fiction' does not refer to the ignorance of the biological process of procreation, but rather to the juridical validity of the descent ties only under specific conditions. I must say that this is still a provisional concept.

¹² Deputy of Lega Nord, 12th June 2002.

natural procreative process. Rosy Bindi,¹³ for example, bases her parliamentary speech on the necessity of avoiding the ‘natural imbalance’ provoked by donation, through the intrusion of an ‘element which is naturally extraneous to the couple. Without explaining which ‘element’ she is referring to, Bindi argues that this ‘natural imbalance’ can lead to negative consequences on education and affective relations within the family. Likewise, an analogously diffused opinion sees the ghost of adultery in the practice of donation as the coming together of donated sperm with the egg of the mother potentially creates a biological gap between the social father and the child and represents the symbolic intrusion of another man into the partners’ relationship.

In addition, the act of donating gametes is seen by many as an act of escaping from responsibilities towards the child and described as a proper abandonment. Therefore, donor-conceived children are compared with abandoned adoptable children. Despite that, and opposite to what is the case in donation, adoption is broadly considered a successful evidence of the validity of social parenthood. People who do not support donation carefully highlight the differences between these two practices and tend to see adoption as, in Carla Castellani’s¹⁴ words, ‘a remedy for an existing evil, which is the abandonment of a child by the biological parents. It is not possible to predetermine the abandonment of a child by a donor and allocate the right of adoption to social parents’.

All these arguments against donation are based on the supposition of the existence of a ‘natural’ rule that establishes a unique particular pattern of procreation and on the presumption that approving measures which oppose or deviate from this ‘natural’ model would compromise the stability of the family and the development of

¹³ Deputy of La Margherita, 12th June 2002.

¹⁴ Deputy of AN, 12th June 2002.

the child. This is the core argument of many parliamentary speeches.

My knowledge and conviction make me say that fecundation with donors cannot be accepted because it does not respect nature: I can define it as unnatural.

Francesco Paolo Lucchese¹⁵

The prohibition to resort to fecundation with donor respects the biological dimension of motherhood and fatherhood. Being mother, father or offspring is a biologically defined condition. It is a given, which cannot be discussed, as it is the case for chemical and physical laws. A fact, which cannot be modified by man, is that a family must be based on two people of different sexes. [...] The right to identity, which is also the right for every newborn child to have two parents, is a natural right that cannot be modified by any law or parliamentary majority. [...] The social and individual risks linked to the fragmentation of parental characters lead to the prohibition of fecundation with donor.

Paolo Danieli¹⁶

These discourses concerning the morality and the legal treatment of assisted procreation have caused a particularly heated debate about the influences of Catholic doctrine on the principles underlying Law 40. Many different people - senators, deputies, representatives of the Roman Catholic Church, priests and the Pope himself as well as academics, technicians, doctors, and members of different associations - have tried to define whether the final text of Law 40 has a Catholic inspiration or a lay setting and, consequently, to determine which of them was suitable for an adequate law. Without entering the arguments of the debate, it is sufficient, for the purpose of this paper, to stress on the fact that this question has been repeatedly raised.

The Roman Catholic Church, trying to deliver the moral truth coming from God, has in different occasions defined the 'natural' model of procreation, respecting both morality and scientific biological laws. Catholic discourses about assisted procreation are clearly exposed in the 'Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation', known as the Instruction *Donum Vitae*, elaborated in 1987

¹⁵ Deputy of UDC, 12th June 2002

¹⁶ Senator of AN, 24th April 2003

by the Congregation for the Doctrine of the Faith, and signed by Cardinal Ratzinger, the current Pope.

Every human being is always to be accepted as a gift and blessing of God. However, from the moral point of view a truly responsible procreation vis-à-vis the unborn child must be the fruit of marriage. For human procreation has specific characteristics by virtue of the personal dignity of the parents and of the children: the procreation of a new person, whereby the man and the woman collaborate with the power of the Creator, must be the fruit and the sign of the mutual self-giving of the spouses, of their love and of their fidelity. [...] (35) By reason of the vocation and social responsibilities of the person, the good of the children and of the parents contributes to the good of civil society; the vitality and stability of society require that children come into the world within a family and that the family be firmly based on marriage. The tradition of the Church and anthropological reflection recognize in marriage and in its indissoluble unity the only setting worthy of truly responsible procreation.¹⁷

This little fragment of the Instruction describes what the Catholic Church proposes as the only ‘truly responsible procreation’. After that, the document states that assisted procreation, in particular procreation with a donor, cannot be considered morally licit. The similarity between this procreative model, supported by official Catholic position, and the one proposed by legislators in the final text of Law 40 explains why the question of its religious nature has been deeply discussed.

Without entering the discussion it is worth considering the religious aspect as one of the cultural elements that can intervene in the policy and rulemaking about the application of ARTs. An account of the discourses characterizing the establishment and promulgation of Law 40 discloses the cultural framework in which such a law has been approved and allows the comprehension of this law as the institutional means for the reproduction of a particular cultural model. This procedure pushes the understanding of

¹⁷ John Paul II, *The Gift of Life (Donum Vitae) Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day*. Rome: Vatican, 1987.
http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html

the attitude of a specific society towards reproduction beyond the study of the legal texts, which itself already unveils important information on the subject.

This is the case for the analysis of the text of the Italian law on assisted procreation, which brings to view a sort of mismatch between the ideal model of procreation that Law 40 seems to convey and the effective valid process of legally affirming descent. Combining the analysis of Law 40 with some meaningful discourses taken from parliamentary debates it is possible to identify a favourite model of procreation supported by institutions. It consists of the so-called 'biological reproduction', taking place within a family composed of two parents of different sex and their genetic offspring. Nevertheless, investigating the legal process of validating descent ties, it appears that an act of will is responsible for legalising this kind of kinship relations. This double-sided phenomenon has been called in this paper the 'biological fiction'. Its existence could be interpreted as the tension between the classical biological and social model of reproduction, but it is worth to consider it as a demonstration that this distinction as such cannot be a satisfactory description of the way in which societies organise kinship.

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Abstract

The actual Italian legislation on medically assisted procreation (Law 40 – February 19th 2004) is one of the most restrictive in Europe. Following an anthropological approach, this paper seeks to analyze the text of this law in relation to the respective public debate. The objective of the analysis is to highlight the moral values legislators want to convey, the role they attribute to the law as a means of influencing social practices, and the type of society they try to shape. The paper concentrates especially on the meanings that concepts like nature, reproduction and family acquire in the context of this law and provides an overview of the legal, political and moral framework in which this law is conceived.

Resumen

La presente legislación italiana sobre las técnicas de reproducción asistida (Ley 40 – 19 Febrero 2004) es una de las más restrictivas de Europa. Siguiendo un enfoque antropológico, este artículo intenta analizar el texto de esta ley en relación con sus respectivos debates públicos. El objetivo del análisis es señalar los valores morales que los legisladores quieren transmitir, el rol que ellos atribuyen a la ley como medida de influencia en las prácticas sociales, y el tipo de sociedad que ellos quieren modelar. El artículo se concentra especialmente en el significado que los conceptos de naturaleza, reproducción y familia adquieren en el contexto de esta ley y proporciona una visión general del marco legal, político y moral en el que esta ley fue concebida.