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**HOW ARE BABIES BORN?
JURIDICAL REFLECTIONS ON ASSISTED PROCREATION**

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How are babies born? The question may seem banal, or at least provocative, yet for some years now, the issues relating to the definition of what a parent is have been protagonists in the courtrooms. Some of them have even come to be debated by the constitutional court.

The reason for this situation is medical progress. Medical progress has made possible a variety of assisted procreation solutions. These were not even remotely imaginable before. And these solutions now require a legislative framework to regulate their effects.

But, one could say that this need for regulation is common to all legal systems since they are natural human fact which causes effects. And it is these effects that must be governed by law.

The problem, here, is that the fact is procreation, whose effect is the birth of a human being!

Therefore, we cannot simply make a legal argument, because we must also consider the ethical and moral aspects of the issue.

But let's start from the beginning.

The civil code (that of 1942, but also the reformed versions of 1975 and 2012) accepts, and it could not do otherwise, the traditional idea of filiation.

The mother is the one who gives birth, the father is the husband of the woman.

But what if they aren't married?

Well, the father used to have to recognize the child. This is a very personal and absolutely voluntary act, not coercible. Recognition is a juridical action by which the man says: this is my child!

And if the husband or partner was not really the father of the child?

In this case, the man can deny paternity with the juridical action of "disavowal of paternity". Initially, fathers could do this at any time in the child's life today they can only do this in the child's first year. The child, on the other hand, can disavow a parent at any time in their life, there are no time limitations.

The aim of disavowal is to establish "the truth"!

And for the Italian legislator, the truth is based on a biological bond.

In this system, no proof was needed for the mother because it was absolutely unthinkable that a woman would give birth to a child who was not hers.

For the father, the presumptive criterion was offset by the possibility of disavowal

- based on scientific evaluations

- aimed at demonstrating the non-existence of the biological link.

Social evolution then burst onto this peaceful landscape. This evolution completely undermined the Italian law code's previous presuppositions. It is no longer only natural procreation that generates a child, but also artificial procreation techniques.

So, it is now necessary to conceptually distinguish between several types of mothers and several types of fathers.

• ex latere matris: can mean three types of "mother":

1) the genetic mother: the one who provides the ovum intended for fertilization and, therefore, the one who transfers her genetic patrimony; 2) the biological or uterine mother: the one who carries out the gestation until the moment of delivery; and 3) the social mother or client: the one who gives consent to the medically assisted procreation. This normally coincides with the biological mother, except in the technique, prohibited in Italy, of surrogacy;

• ex latere patris: can mean 2 types of "father": 1) the genetic father: the one who provides the semen to fertilize the ovum to create the embryo. Therefore, he is the one who transfers his genetic patrimony; and 2) the social father or client: the one who gives his consent to MAP. We don't have a biological father because men cannot give birth ... yet.

The legislative approach initially was to try to stem the phenomenon with a law (Law n. 40/2004) that initially imposed more prohibitions than rights.

In reality, an overall reading of the law shows that there was an arduous attempt to treat assisted procreation like natural procreation, but limiting access only to married or cohabiting couples of

different sexes who have infertility problems. In addition, it prohibited heterologous procreation, that is the procreation carried out with the genetic material of a donor external to the couple.

The legislators thought they could sleep peacefully,

But, as we know, reality often exceeds imagination and the possibilities offered by new procreative techniques have paved the way for new claims of rights and important assessments of the constitutional legitimacy of the law. Consequently, the law fell to shreds!

What is left today is an incomplete regulatory provision that creates more problems than solutions.

There is also another problem:

what is prohibited in Italy can be done elsewhere so our judges are left with the problem of deciding on the effects of acts carried out abroad.

Effects that, however, let's remember, are children!

3 problems:

1) How should we treat the children of those who have used, abroad, techniques that are not accepted in Italy?

2) What about the compatibility of previous regulations with MAP law?

3) Post mortem procreation is permissible?

L'et' go in order.

1) How should we treat the children of those who have used, abroad, techniques that are not accepted in Italy?

This means that if a couple undergoes a MAP abroad and returns with a child, we have different legal solutions if:

- the couple is heterosexual;
- the couple is homosexual;
- it is a male or female homosexual couple.

For example, let's consider this real case:

two women in Spain use artificial insemination

the embryo was formed with the semen of an anonymous donor and the ovum of one of the women of the couple

Then, the embryo was implanted in the uterus of the other woman in the couple. She then gave birth. In Spain, the law considers both the two women as mothers of the child, and when they arrived in Italy the decision was confirmed.

But in other, different cases, such as when the couple arrived in Italy with the pregnant mother and the child was born in Italy, only the woman who gave birth was considered a mother.

Is this right in your opinion?

But this is due to how the law was interpreted.

The ambiguity and unreasonableness of these 2 different situations is revealed in all its fullness when we look at the question from the point of view of the child. There are two absolutely identical situations (two mothers who use outside Italy a technique that is prohibited in Italy), but the child suffers due to the judge's sentencing of profoundly different filiation relationships.

Judges, to try to get around the law, use adoption. In other words, they allow the other woman to adopt the child. But this is a sop!

2) Problems of compatibility between internal regulations and what has been established by MAP law.

In our civil code, the father who has made a false recognition, even if in bad faith, can disown the child.

But, a father who has consented to Assisted reproduction cannot withdraw his consent and cannot disavow the newborn.

Do you think this is right?

Yet if the criterion is biological descent, in both cases the man is not the "real" father of the child.

Our Constitutional Court, which was called to judge the constitutionality of this difference, considered it justified by the interest of the child.

In fact, the law on MAP attributes parenthood only based on consent. therefore this consent is not easily or freely revocable.

3) The admissibility of post mortem procreation.

For this topic, some clarifications and differences are necessary:

- Case 1: the artificial insemination of a woman with the semen taken from the corpse of her husband or cohabitant;
- Case 2: the artificial insemination of a woman with the semen taken from the husband or cohabitant before death in a MAP procedure;
- Case 3: intrauterine implantation of a cryopreserved embryo from the couple, formed before the death of the husband or cohabitant.

The first two cases are more properly classified as post mortem "fertilization", while the third is simply related to post mortem "implantation".

Let's leave aside the cases of a deceased mother whose problems absorb those of the (forbidden) surrogacy since for our Italian legislator this technique is prohibited.

Actually, there is no explicit prohibition, but law 40 establishes that only couples formed by both living subjects can access the techniques of medically assisted procreation.

So, the question is:

Up to what time must the members of the couple be alive?

The law doesn't tell us this!

Consequently, here too, the courts had to intervene. They chose the fertilization of the embryo as the defining moment. This means that only the third case remains lawful.

But this arise another question.

How long can pass between fertilization and implantation?

In natural procreation, this takes about 6 or 7 days.

But in an artificial one, we don't know. It may be years! Because the embryo can be frozen!

This is a problem because our legislation considers a person born within 300 days of the dissolution of a marriage as being born within the marriage. and the death of the husband causes dissolution.

Therefore, we will have different treatments if the embryo is implanted after a delay.

In conclusion: the medical field is constantly evolving and legislators and jurists just follow it. Unfortunately, the solutions often do not adequately protect children.