

## **Maternity for another Italy**

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### **I. Does the Law of your country accept Maternity for another?**

No, but the real and effective situation is not simple and the statutory law doesn't cover all the aspects of the question. In fact the surrogate motherhood and the artificial insemination is tolerated instead of permitted.

### **II. If the answer is yes, what is the legal situation?**

After a very long time (about 15 years), the Italian Parliament, on 19<sup>th</sup> Feb 2004, enacted the first and long awaited for Human Fertilisation and Embryology Act. The statute try to regulate bio-medically assisted reproductive technology that is now available only to very limited groups, being legally married couple based and hetero-centric in its approach.

This Act attracted much criticism both from juridical and political point of view. The statute was submitted to a popular referendum to modify some controversial aspects but the vote (largely in favour of the proposed modifications) was not valid as only 25% of voters expressed their opinion.<sup>i</sup> The Act is, as consequence, full in force but the socio-political and juridical debates are yet strong and far from an ending. The principal question, indeed, seems to be whether the statutory law, as a instrument of social control pursuing policy priorities, should regulate and restrain even private life's aspects and the individual's rights, and whether it should inspect, limit and restrict the scientific research.

#### *A. Overview of the 2004 Human Fertilisation and Embryology Act*

The Italian Human Fertilisation Act was one of the "priorities" of the centre-right Government majority and it was enacted after a very short Parliamentary debate. Furthermore, the usual support of Parliamentary

Commission and panel of “experts” was very weak while their works were fast especially if confronted with the works of precedent Commissions that take about 10 years to lead, it is just the case to say, to an “aborted” proposal.

The first impression is that this statute was enacted more to give a political answer to part of the electorate and public opinion (especially the Catholic oriented part and who was afraid of the unlimited scientific and technological developments) vigorously asking for a “legal regulation” of human fertilisation services and practices than on the basis of a precise, accurate analysis of the problems and their juridical implications and, specifically, of the real needs and expectations of the actual Italian society. It seems, in other words, that the Government and the Parliament majority wanted to enact on *in vitro* fertilisation “a” statutory regulation instead of “the” statutory regulation.

The most important point and provision of this statute are:

- a) The statute ensures the fundamental individual rights of each subject and of the conceived.
- b) Medically assisted reproduction is legally permitted only if there is no therapeutic alternative to the sterility; the infertility, even if it is due to natural or unexplained reasons, must be certified by a doctor.
- c) Heterologous artificial fecundation has been forbidden.
- d) Only adult couples (with legal capacity) of different sexes, legally married or living together (de facto couples), in a potential fertile age, both of them living at the moment of fecundation are entitled to ask for the medically assisted reproduction. This, in other words, means that same sex couples have been excluded from access to artificial reproduction techniques. Furthermore this means that no post-mortem treatment is admitted and, also, that the fecundation is barred when the age of the applicants (both of them or only one, it is not clear) is out from the potential fertility status, i.e. for the woman when she is in menopause.
- e) Applicants must express their consent in writing. The consent must be “informed” (i.e. there is an obligation for the doctor to show and explain all the consequences, including the legal and psychological ones). It is not possible to repeal the consent after the ovule’s fecundation.
- f) Artificial fecundation must be executed according to the medical standards and it is up to the doctor to choose times and methodologies but the statute requires respect of the “graduality” principle (i.e. the time and method less invasive from the psycho-physical point of view of the patient), and suggests a single and simultaneous implant of all the produced embryos. These embryos must be limited to three (maximum) for each procedure, and their cryo-preservation or suppression is not

allowed unless it is the unavoidable consequence of “a serious and documented circumstance of absolutely necessity unforeseeable at the time of fecundation” and, of course, it will be impracticable to proceed to the implant in uterus in a very short time, as soon as possible.

- g) Last but not least, any kind of test or experiment on embryos is absolutely prohibited like the production of embryos for researches, uses or purposes different from the reproductive finality; this will include, of course, clonation and genetic manipulation as the creation of hybrids but inhibit also the researches on stem cells.

*B. Analysis of the 2004 Human Fertilisation and Embryology Act*

As already noted, this statute is particularly weak just from a “juridical” or technical point of view. In certain circumstances, the statute will be not applicable in particular according to some erroneous or misleading provisions. In my opinion, with mention to the depicted points, we can observe:

- a) The generic reference to “individual rights” and to the “rights of the conceived” is only pleonastic and not conclusive: indeed there is no indication that the relative priority of individual rights provided in our legal system is modified by this new statute, nor that a new particular “legal personality” -i.e. the power to be considered as human being with rights and duties according to the law- is granted to the conceived. From a “political” point of view, this statute was intended by the “majority” as the first legal recognition to the embryo of the “legal personality”. However, the letter of the statute, here again, does not permit such an interpretation. On the contrary the generic assertion of the “rights” of “all the subjects including the “conceived” adds no more to the general rules of the Italian legal system where the “legal personality” is acquired only at the moment of the birth while the “conceived” –or, even, the “concepturus” according to the Roman law tradition- get only specific and single protection and uphold. It seems that the Act tries, on one hand, to consider the fecundated and cryo-preserved cells as “subjects” of law and regular holders in particular circumstances of an effective right to life or to be born (or perhaps more correctly to a right in trying to come into the existence) and, on the other hand, to stay within the order of the general rules respecting the first right of the woman to psycho-physical integrity and to “responsible” maternity - i.e. her right to chose to become or not become mother. The general rights granted to the mother, according to the Constitution, are logically pre-eminent over the particular right to be born of the pre-embryo. No different reconstruction, overturning this priority is logically and juridically possible: indeed the legislator may acknowledge a woman’s right not to become a mother but cannot certainly impose to her the duty to be it anyway (and, personally, I think

that before the implant i.e. before a pregnancy starts, the father too has the same right to not procreate).

- b) In case of infertility due to natural causes or unexplained reasons, a medical certification is needed to obtain access to artificial reproductive practises. According to the Guidelines and Rules of Practise of the Health Ministry, a couple is infertile when there is no pregnancy after a year or more of regular non-protected sexual intercourses. Furthermore, the Guidelines entrust the doctor (and in particular family doctor or general practitioner) with the duty to certify the “natural infertility”. It is frankly difficult to understand in which way the doctor would “check and control” if the couple had unprotected sexual intercourses for more than a year and if they do so with daily (or more) regularity!
- c) The prohibition of heterologous fecundation is a choice of policy but it has no foundation in private law rules; indeed, if we look at the rules of our civil code, there are provisions on “natural” filiation in order to protect children (and their parents) born outside of the marriage or born as consequence of an “adultery”, even if that birth was planned with the agreement and consent of all the parties. Furthermore there is today an obviously possibility, according to the European rules (the Blood’s case it is emblematic of the question) to ask for “heterologous” treatment in many Medical Centres throughout Europe.
- d) A question of policy, again, is evident on the prohibition for same sex or not legally married or living together couples to obtain medical assisted reproduction. The rules seems to be against European provision for equality and non-discrimination but it is possible to argue that in Italy there is a Constitutional “pre-eminence” of the “paramount” interest of children to be raised in a “real family” or to be brought up in a nurturing environment conducive to their full development. This argument needs a deep analysis too. From a merely technical point of view, we can observe that the “letter” of the rule is really misleading: in a Country like Italy where the “letter” of the statutory law is paramount and where all the interpreters should respect it (we have only one source of law, i.e. the statutes!) words are very important. The rule grants the possibility to ask for a medical assisted reproduction to “legally married” or “living together” couples with no further prescription. From a literal point of view a legally married couples, in this case, may be even the couple consisting of a man and a woman both of them legally married ... with their respective different (same-sex) partners!
- e) The requirement of “informed consent” is again a question of policy: it seems that far from protecting the “consumer” right to make his choose freely and with a complete evaluation of “pro and cons”, the statute encourages doctors to “discourage” the practice. According to the

Guidelines, the doctor must explain the “alternative” possibility of to adoption or affiliation, then the juridical discipline of the medical assisted reproduction, and the bio-ethical problems linked to the artificial insemination. Only after that, the doctor shall explain in full the “technical” aspect of the practise. It is one more difficult to imagine how a “Clapham Common” doctor, usually not so expert in legal or philosophical questions, should give in a complete and correct way the requested information. If past experiences (in similar cases) hold true the couple probably will sign the written agreement without reading it at all. Nevertheless, this may not be the major problem with this part of the statute. The most controversial point is the “impossibility to revoke consent *after* the ovule’s fecundation”. The provision (art. 6) is in contrast with the right of the father and of the mother to not procreate: this right is granted until a pregnancy starts; a pregnancy starts only when there is the implant in uterus. Furthermore the rule of art. 6 of UFEA is in contrast with the fundamental (and Constitutionally granted) right of the individual to refuse any medical or invasive treatment. It will be impossible to proceed to an artificial fecundation if the woman refuses to be treated ... unless we imagine a kind of legalised (artificial) rape. The statute, cautiously, says no word on this point.

- f) A very difficult point is the restriction against the creation of more than three embryos that should be implanted in a single and simultaneous way. The rule seems to be very problematic from a medical point of view. The same statute, in the same article, lets the doctor decide case by case, in cases of “serious and documented unforeseeable circumstances of absolute necessity.” This may occur, for instance, when the embryo’s development is pathological and the mother (or the father) refuses to proceed with the implant. The point is not simple, and there are different judicial decisions that need to be studied in depth.
- g) Policy controversy exists regarding the prohibition, apparently to comply with the Oviedo Declaration, of any kind of test or experiment on embryos. We can, at least, agree on banning human cloning or genetic manipulation to create hybrids but it is more difficult understand why scientists must refrain to make their researches if, as the research on the stem cells, this seems to be useful for the knowledge and fight against diseases. Here, again, the lawmaker was acting on the behalf of what he intended to be a “social priority”, i.e. the need to stops “wild reproductions” (and probably to give an answer to the “Frankstein’s syndrome”). However, even if this corresponds with the absence in our legal system of an absolute “freedom of procreation,” such a general prohibition without any kind of control on the scientific research (the freedom of research is, fortunately, constitutionally granted and protected)

may be meaningless. For instance, we wonder who, other the researcher itself, will declare that his research is non-prohibited and complies with the “reproductive finality,” as the statute law requires?

Finally, all the provisions of the Italian statute are enforceable only in Italy. The European Union legal system allows people to receive medical assistance, even for artificial reproduction, from any centre in whatever part of the Union. It is extremely significant that from March 2004 onwards in Italy at least 3.610 couples (i.e. three times the prior figures) were leaving their home country and going to foreign specialised centres to obtain the assistance and support for artificial fecundation that is denied in Italy. Perhaps, the Italian legislature’s policy is intended to solve the crisis of tourism.

### **III. If the answer is no, are they any sanctions?**

Of course, the statute provides for some sanctions: it is a crime to research on embryos, to clone a human being, and it is also a crime to create more than three embryos for each procedure or not proceed to the implant in uterus as soon as possible. Persons who do heterologous fecundation should pay only a fine even if very heavy (about 450.000 euros); similar penalties apply in cases of same sex couples or couples non legally married or not living together or not living at all (post-mortem fecundation).

### **IV. Is your Law about to change?**

In which way?

The effective application of the statutory law on the assisted fertilization may be substantially different from a “narrow” and “literal” interpretation of the same rules. Thanks to the “guidelines” that the “Ministro della Salute” (Health Secretary of State) may enact, it is possible reconstrue the law in a more concrete and adequate way even if it is impossible to modify “radically” the plant of the statute.

Even the Courts, in particular the Cassazione and the Corte Costituzionale, have the possibility to implement the statutory law even if, again, it is impossible to modify or erase totally the law.

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<sup>i</sup> In Italy, the “referendum” is valid only if at least 50% of voters express their opinion.

H. Peter Mueller 8/8/06 13:39

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