

## The human embryo, subjectivity and legal capacity. Notes in the light of art. 1 of the Italian law on “medically assisted procreation”

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### Abstract

**Aim.** This paper aims to examine the legal status of the human embryo taking into consideration Article 1 of the Italian law on medically assisted procreation, which protects the human embryo, which is recognised as an individual holding the same rights as already born children. The progressive increase in legal decisions regarding reproductive technologies requires a re-examination of the traditional legal categories of “subjectivity” and legal capacity, and a deeper understanding of the status of the human embryo as a subject, or individual.

**Materials and methods.** The following sources were searched: Institutional websites, Research Centre for Social Investments reports, updated jurisprudence and Rulings of Italian Constitutional Court and European Court of Human Rights. In addition, also the following databases were searched: PubMed and Scopus, using the following keywords: medically assisted procreation (MAP) and embryo.

**Results.** The authors believe that the best orientation is the modern principle of equality (non-discrimination); according to them, the need to protect unborn life requires therefore the consideration of interests which can no longer be confined to the solely patrimonial ones held by the embryo. The paper draws attention to a series of non-patrimonial interests, for whose protection the legal expert has to adopt innovative safeguarding techniques. In this context, there emerge some rights worthy of protection whose potential holders are as yet unborn. *Clin Ter 2019; 170(2):e102-107. doi: 10.7417/CT.2019.2118*

**Key words:** embryo, artificial insemination, subject, legal capacity, human dignity, equality principle, right to life

### Introduction

Over the past forty years, technological advancements in the biomedical realm have made giant strides, particularly as it pertains to end of life and beginning of life issues. As a matter of fact, improved techniques in organ transplants, intensive care and resuscitation procedures make it possible to keep patients alive who would have otherwise perished (1). Yet the most revolutionary changes have occurred in the field of procreation and childbirth.

The United Nations Department of Economic and Social Affairs, in its World Fertility Report (2) has stressed the tendency to postpone motherhood. According to findings and data provided by the Italian Centro Studi Investimenti Sociali (Research Center on Social Investments, Censis) and by the Institut Biochimique SA (Ibsa) in a recent report (3), childless couples in Italy account for roughly 20%, which makes it clear that infertility should be deemed a disease in and of itself (4). Censis has conducted extensive research centered around infertility, concluding that in Italy, as well as in other developed countries, infertility and sterility-related issues have been on the rise, despite substantial medical advancements in that regard (5). Medically-assisted procreation (MAP) has been instrumental in solving infertility for an ever greater number of couples. Latest available data reflect that in 2012, 54,458 couples resorted to MAP procedures, compared to 30,749 in 2005: a 77% increase over seven years. Success rates, however, are still relatively low (only 23.2% of cases ultimately result in pregnancy) and only over the past few years positive signs have been recorded, with 9,818 newborns having been conceived through in-vitro fertilization techniques in 2012 (a 169% rise compared to 3,649 in 2005) (3,6). The phrase «medically assisted procreation» is a reference to the treatment of infertility. Lawmakers, in fact, have seen fit to highlight, through the adverb “medically”, the kind of care that should be provided to those who are seeking parenthood. It is an array of medical procedures that span the whole process and its various stages, from diagnosis to the actual implementation of treatment. MAP therefore constitutes a complex course of action that makes reproduction a real, informed and heart-felt choice, starting from fertilization and all its implications. Nothing related to MAP is random or natural. In fact, guidelines issued by the Italian Health Care Ministry lay out that «Medically Assisted Procreation procedures are to be intended as any technique that entails the treatment of human gametes or embryos for the ultimate purpose of achieving pregnancy» (7). The methodologies that are harnessed are highly complex, and impact not only the rights of prospective parents, but those belonging to the newborn children as well. In

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particular, access to innovative procreation procedures has deeply affected the very concept of parenthood, leading to the creation of social parents, in addition to biological ones (8). That in turn gives rise to new issues, such as the right of donor-conceived children to know their biological origins (9,10,11).

MAP techniques have integrated, and at times supplanted, natural reproductive practices. In modern societies, it is not uncommon for families to delay having children, sometimes trusting that it will be possible to do so later on, resorting to assisted reproductive technologies. Nonetheless, nature sets strict limitations that are impossible to overcome and, as the ageing process goes on, pregnancy may well entail unforeseeable complications (12,13,14), despite the modern, sophisticated medical techniques currently available (15). Assisted fertilization is the only possibility for those who want to have children. In fact, uterus transplantation is still undergoing experimentation (16).

Embryos are separate from women's bodies, they are tantamount to "products", manipulated and kept alive through the technical interventions of specialists (17, 18). Embryos turn into "children" once they have been implanted into the wombs of intended mothers, following either homologous or heterologous in vitro fertilization. Heterologous fertilization gives rise to several additional issues, in that it entails couples, whether married or in civil unions, relying on at least one donor-provided gamete.

Scientific progress has made death no longer solely subjected to the laws of nature. Such advancements have made the unsuitability of current legislative frameworks all the more blatant, since they were tailored to a scientific and social setting that has now profoundly evolved, while at the same time highlighting the pressing need for a sweeping regulatory upgrade.

The Italian legal system has no specific legislative framework, which sets out the status of the human embryo in a single regulatory *corpus*. A fragmentary and piecemeal disciplinary approach prevails, aiming to regulate some aspects of the status of the embryo, with regard to both the state of pregnancy and specific requirements brought about, from time to time, by the development of new technologies in the field of life sciences. Thus, the task of systematically mapping out the legislative status of the human embryo, precisely identifying how traditional concepts such as those of capacity and existence as a legal entity can be used, falls to the interpreter. The legal expert can tackle this difficult task in the awareness of how useful an ontological evaluation must prove. Pondering the legal status to give the human embryo, determining whether it should be recognised as a person entitled to fundamental human rights - in particular the right to live - or whether, instead, it should be simply considered as a focus for the allocation of protected interests. For the legal expert, the distinction is not a minor issue: recognising the human embryo as entitled to hold rights as an individual would necessarily entail the autonomy of the protected asset, with regard to which the legal entity would be protected "as of itself", not as a means or tool for the use of others. Giving it protection without recognizing the human embryo as a "subject" can therefore only be instrumental with regard to interests other than those to which the unborn is entitled. Even more difficult is the fact that the concept of person is

not clearly defined: on the one hand there is a tendency to conceive of a person in functionalistic and procedural terms, enhancing certain features involving psychological make-up and awareness as well as rational-volitive aspects; on the other hand, some others consider the person as existing since conception (19). Consequently, ontological solutions affect the interpretation of the regulations, and a need to establish rules, which respect the key values of the legal system in force, i.e. rules guided by constitutional personalism and solidarity, arises. The kind of personalism and solidarity set at the foundation of the current Italian constitution, together with the principles extrapolated from the ordinary legislation, would allow us to identify rules, which could resolve a large number of problems posed by the question of the status of the human embryo. More specifically and significantly, the jurisprudence has produced more or less widely debated or debatable interpretative orientations, which have provided solutions to issues posed by surrogate motherhood and the manipulation and/or elimination of the embryo.

The need to provide rigorous guidelines to protect the «weakest» in these legal relationships, namely the human embryo brought into life by recourse to these techniques, was the main concern of the legislation introduced with the law on MAP approved in 2004. Over ten years after its introduction, Law 40 proves to be very different as regards structure and application due to the measures taken by a jurisprudence called upon to weigh up and balance the effects of constitutional and European principles (20). The case of Law 40 provides an example of the difficulties involved in drawing up appropriate legal solutions when the interests at stake are definitely not patrimonial in nature and those interpreting are called upon to identify elements within the concept of person, which can be protected to a greater or lesser extent and are more or less predominant.

This paper aims to examine the legal status of the human embryo taking into consideration Art. 1 of the Italian law on medically assisted procreation, which protects the human embryo, which is recognised as an individual holding the same rights as already born children. The progressive increase in legal decisions regarding reproductive technologies requires a re-examination of the traditional legal categories of "subjectivity" and legal capacity, and a deeper understanding of the status of the human embryo as a subject, or individual.

#### **Art. 1 of Law 40/2004 and the "rights of the human embryo"**

Up to now, even after the rulings of the Constitutional Court n. 151 of 2009 (21), n. 162 of 2014 (22), n. 96 and n. 229 of 2015 (23) and n. 84 of 2016 (24), the provision contained in Art. 1 of the law on MAP, where it is established that the law «safeguards the rights of all subjects involved, including the human embryo» is still of great significance. Essentially, this provision is based on allowing that every human being possesses the same dignity, which thus extends to the human being which has only just been conceived: for this reason, it includes the human embryo amongst the subjects whose rights are to be protected (Art. 1). Hence, the original prohibition on the destruction of embryos and against experimental use of them, on the production of

supernumerary embryos, on freezing (save in the case of an unforeseen force majeure, but then embryos should be transferred as soon as possible), on withdrawal of consent once fertilization has taken place, against the genetic selection of embryos, on embryo-foetal “reduction” in the case of multiple conceptions and on artificial insemination by a donor. These prohibitions were established to protect the right to life and the right of children conceived by MAP to have both parental figures. This last right is connected with “identity rights”: the right to genetic identity and the right to a personal and family identity (psychological and existential identity) (25, 26).

Law 40/2004 disciplined the matter taking into consideration also the human embryo conceived by means of reproductive technologies: the aim of “facilitating the solution of reproductive problems deriving from human sterility or lack of fertility” is to be pursued guaranteeing the “rights of all individuals involved, including the human embryo” (Art. 1). Therefore, the aim of the law includes protecting the human embryo-subject from the moment of fertilization.

The expression “*diritti del concepito*” (rights of the human embryo) is not a new addition to the Italian legal system. It is used in Art. 1 of the Civil Code which, however, makes the rights given by law to the human embryo subject to its birth. Indeed, in the Civil Code, it is provided that the unborn, if born, may hold the right to own property received by legitimate or testamentary inheritance (Art. 462 Civil Code) or by means of donation (Art. 784 Civil Code). In the light of this patrimonial approach, which naturally highlights the certainty of relationships, it should be pointed out that there is a difference between the human embryo which has been conceived and that which is as yet unconceived. Only the former can inherit in the case of intestate succession and, therefore, also has the right to be part of the estate reserved for those legally entitled to inherit, whereas the latter may only receive by means of a will or donation. The reasoning behind the difference is obvious: as regards the child as yet unconceived, it is a question of extending the willing power of the testator or donator (and thus, here, the interests of the adult are being protected), whereas the inclusion of the human embryo in the category of legitimate and mandatory heirs protects, in the first place, the interests of the human embryo themselves. This proves that the biological existence of the unborn baby is recognised by the law.

Art. 1 Civil Code plays a prominent role in a series of issues involving much deliberation in jurisprudential and doctrinal reflections, together with second thoughts and contrasting results. On the one hand, the classification of the human embryo as an individual holding rights - acknowledged in Law No. 40 of 2004 - is connected to the recognition that the human embryo is a biological reality, the unitary focus of interests already emerging from the Civil Code; on the other hand, it is new because it does not make the child's rights related to its birth. However, this classification does not change Art. 1 Civil Code in any way, nor can the latter restrict the provision in Art. 1 of Law 40/2004, because the two provisions are on different levels (27, 28).

Indeed, Art. 1 of Civil Code refers to patrimonial property rights and to the change in ownership of assets, whereas Art. 1 of Law 40/2004 specifically concerns the field of MAP and, more generally speaking – as emphasized by the

Constitutional Court – highly personal rights which are constitutionally significant and of public interest. The European Parliament in the Resolution on *ethical and legal issues of human artificial reproduction* passed on 16 March 1989 clarified which are the rights of the human embryo. They are: human embryo “right to life and to personal integrity, the right to have a family, and the right to its own genetic identity” (29). Moreover, it should not be forgotten that the Italian National Bioethics Committee (NBC), a purely advisory but authoritative body, in its document of 11 April 2003 (25, 26) relating to research using human embryos and stem cells, after having declared that “human embryos are human lives in every sense”, stated that “we therefore have a duty to respect them at all times and to always protect them in their right to life irrespective of the way in which they have been procreated and regardless of the fact that some of them may be described – using a questionable term, because it is devoid of ontological value – as supernumerary” (30).

### The human embryo as an individual

The classification of the human embryo as a “subject” is rather significant, and even more so if this definition is connected with the ownership of human rights. This would entail setting it on the same level as the other individuals involved.

Discussions on the legalization of voluntary abortion, and some rulings on the constitutionality of the laws on the voluntary termination of pregnancy made by the Constitutional Courts of various nations have carefully avoided even considering this question.

Obviously, if the embryo has a legal status, this presupposes that it has been defined as a biological - ontological entity. This is not the right place to examine the endless discussions which have taken place on the subject (31). We should, however, bear in mind that these discussions have affected the Italian legal system and indicate the legal categories which may allow the law to offer its own contribution.

In the very recent constitutional ruling 84 of 2016, the Constitutional Court again answered the fundamental question – Is the human embryo a subject or an object? – by replying: it is a subject. Moreover, the decisiveness of this conclusion can be deduced from the definite nature of the negative statements: “it is not merely biological material”, “it is not a thing”. The logical consequence is that the embryo is an individual. However, the self-evidence of this is set about with linguistic embarrassment. The expression “whatever the more or less restricted recognisable degree of subjectivity may be, correlated with the genesis of life”, could allude to gradations of human dignity, which would be unacceptable because it is in contrast with the principle of equality (32).

In 1996, the Italian NBC replied with far greater clarity in its opinion on the “Identity and status of the human embryo”. In this document, we can find the explicit question: “is the human embryo a full *human being*”? The reply is: “it is not a thing, since its own material and biological nature sets it amongst the beings belonging to the human species”, just as it cannot be set on a lower level than those already born, because this theory “in actual fact, surreptitiously confirms

the legitimacy of discrimination pertaining to certain abilities and functions". The unanimous conclusion is very significant: "*The Committee has unanimously come to recognize the moral duty to treat the human embryo, since fertilization, according to criteria of respect and protection that must be adopted towards human beings who are recognized as persons*" (33).

It should be observed that the Italian NCB reaches this conclusion utilising two fundamental legal categories which constitute the means by which the law provides its own specific contribution to the definition of the status of the embryo: *the principle of equality* (or non-discrimination) and *the principle of precaution*. The former - consecrated in the Universal Declaration of Human Rights and in the Pacts and Conventions which have arisen out of it and have been repeated in many Constitutions (including the Italian Constitution) - is based on the idea that merely belonging to the human species implies a dignity, a value which is so high that it cannot be qualified or quantified in a different way, but it is equal for everyone. The principle of non-discrimination does not allow for a category lying half way between objects and subjects. Modern thought can no longer introduce into law any category of "semi-human being" or "an individual that is not a person", as existed in the past for slaves, blacks, women, children or foreigners.

The second principle, which is of precaution, is invoked particularly in the sphere of environmental protection and public health and rests on the idea that if there is any uncertainty regarding possible harmful effects it could derive from possible biotechnological applications. This should determine a cautious approach or even abstention from the interventions. This principle helps us to understand what should be decided when in doubt. Presently, the identity of the human embryo as a human being is beyond dispute. However, there are several different opinions to reach the conclusion that the law cannot oblige anyone to change their mind without placing unwarranted restrictions on individual freedom. In the field of ecology, the principle of precaution implies an inversion of the burden of proof: no innovation that manipulates nature should be enacted when there is any uncertainty as to whether it will have any negative effect either on the current environment or on future generations.

## Discussion

The law on artificial procreation *de facto* considers the human embryo to be among those people whose rights should be protected. On the other hand, these questions are a consequence of scientific development, which has simultaneously exposed the human being from its development to possible manipulative interventions.

The term "human embryo" crops up in a series of provisions contained in the Civil Code, where the category of legal capacity comes into play. Art. 1 of Civil Code, in particular, takes on a great importance as, although it establishes that legal capacity is acquired by birth, it does provide for cases in which the legislator can endow the human embryo with rights. Combining Art. 1 of the Civil Code with Art. 462 subsection 1 Art. 456 and Art. 784 of the same Code, we

find that the human embryo may receive assets or property by donation or inheritance. Therefore, the legal system contemplates situations where assets and/or property are protected, even if the recipient is an unborn holder. In Italian legal doctrine, these provisions have given rise to a widespread debate which has led to various different conclusions. Our major concern here is the question: in the light of Art. 1 of Law 40/2004 is the human embryo thus invested with legal capacity?

This question must be reformulated, as - since legal capacity is defined as the "capacity to be entitled to rights and obligations" - the attribution of rights amounts to acknowledging that a legal capacity exists: there is a well known saying which basically states that a right cannot exist without a person, just as there is no person without rights.

When answering, it should be remembered that the attribution of legal capacity is the way in which the law distinguishes subjects from objects. For the law, being a subject or individual, being a person and having legal capacity are synonymous expressions. On the other hand, formal recognition that all human beings have their own legal capacity is an initial, elementary way of acknowledging that they are equal, just as denying this obviously implies discrimination. In this regard, we should bear in mind that the matter of capacity-subjectivity has been strongly renewed by the Constitutional Charter. Subjectivity is an attribute which every physically existing person is inevitably entitled to, with no exception (Art. 22 of Italian Constitution). It is an inviolable right given to all persons regardless of the state in which they are found. In this light, to be a subject, it is enough to belong to the human species, and no distinction whatsoever may be made between one person and another, let alone on the basis of whether or not the person is an embryo. Again Art. 1 of Civil Code acquires a new value when interpreted in the light of the Constitution: it acknowledges that human beings are entitled to capacity-subjectivity, but this provision is no more than a mere formal repetition of what has already been sanctioned at a constitutional level. A key role in solving these issues is played by the concept of personality (being a person before the law), a value which receives maximum protection from the Constitution and, so being, is set in a predominant and primary position with respect to the concept of legal capacity as it is traditionally understood. In this perspective, no discrimination may be tolerated as regards the workings of personality-subjectivity based on the advent of birth.

Now, in Art. 1 of Law n. 40/2004, inheritance issues are not contemplated, but rather those interests of an existential nature, such as the interest in being born, in being healthy, the interest in one's own human and genetic identity, the interest in developing harmoniously in a satisfactory family context. It is obvious that the existential nature of the interests at stake and the particular condition of the human embryo requires an evaluation of these interests prior to birth and, in some cases, prior to the artificial creation of the human embryo, as a restriction on scientists and health workers. The legislation on the subject of artificial procreation consequently encompasses, within its evaluation of the rights at stake those belonging to a person who is brought into being by means of reproductive technologies and who, therefore, is destined to be born.

In this perspective, Art. 1 of Law n. 40/2004, confirms that subjectivity is anchored to the personality protected by Art. 2 of the Constitution and that all human individuals, even during their development as embryos, are worthy of protection, being in an existential situation whose protection is inevitable and imperative. It seems that a useful confirmation of this interpretation may be found by combining the protection of a person and the “development of personality” found in Art. 2 of the Constitution, where “full development” is guaranteed to every human being by Art 3. This law fills a regulatory gap, defining the terms of the protection given and marking out prohibitions regarding this functional protection. Indeed, it appears that there is no doubt as to what is presupposed and acknowledged by the law. In other words, the human embryo is entitled to rights. This conclusion is no innovation in the law on artificial procreation, because the concept has been repeatedly expressed, including in court hearings judging constitutional legitimacy: seeing the embryo as a person is a turning point for every normal legal system informed by constitutional values. The personalistic connotation of Italian legal system characterizes the legislation regarding the human embryo, to the extent that ruling n. 46470 made by the Grand Chamber of the European Court of Human Rights endorses the legitimacy of the Italian decision to classify the human embryo as a human being to all effects (34).

### Conclusions

Despite some serious setbacks and a troubled path toward enactment, the law on artificial procreation continues to be a valid frame of reference for any interpreter of law seeking to investigate the topic of subjectivity (individuality) while taking a careful look at a framework of sources and values which are radically different from those proposed by the Italian Code of 1942. In this perspective, the analysis carried out can be set within a wider and more complex phenomenon of “depatrimonialization” of the categories traditionally employed in civil law.

In this light, considering the Italian legal system, we should perhaps restate a reform of Art. 1 Civil Code so as to enable every person to possess legal capacity “from the moment of conception” (35). This is the first step along the road to civilisation and legislative progress in order to consolidate human rights and the principle of equality. In the same way, the initiative taken by European citizens, known as “One of us”, which has recently entered its second phase – where legal experts, scientists, health workers and politicians are involved and it deserves to be appreciated and supported (36).

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