

Donation of the body and its parts in the construction of parenthood

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Abstract. The developments of science and technology make possible today unprecedented exchanges of body parts by multiplying the figures and links that intervene in the process of building parenthood and generating significant ethical and judicial controversies. Body donation in the procreative field constitutes an anthropological and social phenomenon of increasing attention, which contributes to one of the most intimate and profound aspirations of the human being and which requires a careful evaluation of the various interests involved and a thorough reflection on the statute and characteristics of the parental bond. The interest of the child, the dignity of women and the quality of human relations are the parameters of this analysis and, at the same time, the perimeter of the judgment. However, the approach to these issues is complicated not only by the extreme heterogeneity of legislation but also by suspicions and prejudices that hinder reflection appropriate to the complexity of the issues involved. Investigate the reasons for the choice of donation, the criticalities, and possible drifts, without closing in their subjective value horizon, is an unavoidable prerequisite for a comparison with the new social realities of the family that respects the fundamental rights of the person. (www.actabiomedica.it)

Key words: Motherhood, Reproductive choices, Best interest of the child, Surrogacy, Intra-family collaborative reproduction

Donation and reproductive medicine

Adoptive filiation, which has been made possible by the contributions of donors of genetic material or host wombs, is a particularly interesting field that raises questions regarding the mechanisms that regulate the exchange of body parts in the creation of new parental subjects.

Great technological advances have made new forms of conception possible, giving rise to previously unheard-of relationships that remain to be named: intended parents, surrogate mothers/parents, egg donors, sperm donors (1). These are not relationships that necessarily give rise to forms of kinship. Indeed, as shown by numerous studies in the psychological and anthropological fields, neither the sharing of genes nor the sharing of a womb are determining criteria for this

type of relationship, in which choice, personal desire, deliberate and conscious action, will and planning play a substantial role (2-4).

Within this panorama, surrogate motherhood is certainly a practice that arouses much ethical and juridical controversy, in view of the potential contraposition of the rights and interests of the various subjects involved (parents, children, donors, family members) (5). According to the European Court of Human Rights (ECHR), this practice, known as “surrogacy”, is the most morally controversial and divisive form of assisted procreation in Europe (6). Indeed, the possible risk of exploitation of surrogate mothers, and of the “commercialisation” of children, has prompted the vast majority of European countries to ban this form of reproduction for commercial purposes (7,8).

At the same time, however, it cannot be assumed that surrogacy always involves commercialisation of the body and of the function of pregnancy; nor can we exclude the possibility that this practice may stem from a feeling of solidarity or other altruistic motivations based on the logic of donation (9).

This issue has been addressed in different ways in various countries. Some (France, Germany, Italy, Sweden, Switzerland, Spain and, in part, the USA) have banned the practice; others (Belgium, the Czech Republic and the Netherlands) have refrained from passing legislation, thereby, in practice, tolerating it, while others again (Greece, England, Wales, Ukraine) have established a specific discipline that allows the practice (6,10).

In the face of such diverse approaches, and in the absence of shared moral ground, the ECHR has shown prudence in limiting the discretionary power of the various countries (6). Nevertheless, as illustrated by the judgements handed down in two cases of appeal against France (Labassee and Mennesson) and in one appeal against Italy (Paradiso and Campanelli), this broad discretionary power has been curbed in the interest of the child's right to identity. In the first two cases, the ECHR examined the appeals presented by two French couples who had utilised surrogacy in the United States, but who were then unable to have the children's foreign birth certificates registered in their country of origin, owing to the ban on surrogate motherhood imposed by article 16-7 of the French civil code. In both cases, the Strasbourg Court sanctioned the French authorities' violation of the right to respect of the private lives of children (art. 8 ECHR), on the grounds that this non-recognition of the bond of filiation impaired the development of the minor's identity.

The Italian case (Paradiso and Campanelli) involved the refusal to register the birth certificate of a child born in Russia to a surrogate mother (11). Mr. Campanelli had provided his sperm, but was unaware that it had not actually been used by the Russian clinic. Having ascertained that there was no biological bond between the newborn and Mr. Campanelli, the Strasbourg Court ruled that the child be taken away from the couple and placed with another family. In this case, while acknowledging the violation of the couple's right to private and family life, the Court deemed that

priority should be given to safeguarding the minor's interest, and that the continuity of the affective bond that had meanwhile been forged between the child and the foster family was to be preserved. This ruling, however, was based only on a majority decision, and was accompanied by the joint dissenting opinion of some judges, who noted that the ruling could strengthen the ancient distinction between legitimate families and *de facto* families.

The Italian Constitutional Court, in its recent ruling N° 33 of 2021, examined a series of questions of constitutional legitimacy regarding the civil status of children born through surrogacy; the Court exhorted legislators to reappraise current legislation, in order to protect the higher interest of the minor and to avoid the risk that the discrepancy among the various legal systems might give rise to stateless children, deprived of the possibility to maintain an already established family relationship (12, 13).

On 18 May 2021, the ECHR examined the case of Fjölnisdóttir et al. Like that of Paradiso and Campanelli, this involved transnational surrogate motherhood commissioned in California by a same-sex Icelandic couple (7). In this case, too, the child had no biological link with the intended parents, despite having been recognised as the couple's child according to Californian legislation. The Strasbourg Court acknowledged the right to family life of both the child and the couple. Nevertheless, it endorsed the orientation of Icelandic legislation aimed at safeguarding both the interests of those women who might be prompted by poverty to undertake surrogate motherhood and the right of children to know who their natural parents are. Again in this case, as highlighted by the above-mentioned joint dissenting opinion in the Court's ruling on the Campanelli appeal, the conclusions of the ECHR raise concerns regarding the possibility that attaching too much importance to the biological bond may give rise to a stereotyped view of the minor's interest.

Another ethical question that is debated in the sphere of procreation concerns the child's possibility to access information on his/her own origins (14). This question prompts thorough scrutiny and implies a delicate balance between opposing interests and rights: children's right to discover or, on the contrary, not to discover their own origins; the rights of family

members, who may fear the repercussions that recognition of their parental role might have, and the rights of donors, who may wish to remain anonymous.

Moreover, the particular vulnerability of the minor, who can be seen as the weak link in the process of procreation, implies the need for uniform regulations whereby the minor's request to access all important information takes priority over the right to confidentiality and anonymity (15). In addition, it has been pointed out that evading the minor's request to know the truth implies a specific form of violence perpetrated on the minor by those who refuse to communicate relevant information concerning another person, even when they are in a position to do so, thereby exercising undue power over that person (15).

In Italy, the National Bioethics Committee (16) has encouraged such revelation, claiming that it is in the child's "best interest", while recommending that information be communicated in a manner appropriate to the minor's sensitivity and, if necessary, with the aid of psychological counselling. However, with regard to the possible recognition of the minor's right to know a donor's personal data, the Committee failed to agree upon an answer that would satisfy all parties: those who feared that the family equilibrium might be upset and that genetic material might be commercialised, and those who stressed the minor's right to full information concerning his or her own birth. The Ethics Committee of the American Society for Reproductive Medicine has also encouraged parents to inform their children, and has underlined both the advantages of informing them early and the risks of delaying this decision or allowing them to find out the truth for themselves (17).

In any case, the right of minors to be informed of their own biological origins, as opposed to the various private rights of parents and donors, is now considered indispensable to the construction of personal identity. Thus, despite the heterogeneity of the various national legal systems, this right has been codified and upheld by numerous international treaties and conventions as a fundamental human right (15). In particular, the Convention on the Rights of the Child has played an essential role in recognising the importance of granting access to personal data. Indeed, in addition to the right to be registered, to have a name and to acquire

citizenship, the Convention upholds the right of minors to know who their parents are and to safeguard their own identity.

The right to know one's own origins can also be linked to legislation on the protection of personal data (art. 8 ECHR and art. 8 of the EU Charter of Fundamental Rights). Moreover, it fits in with a dynamic interpretation of the right to health (art. 10 of the Oviedo Convention), which includes free access to relevant information, such as a family history of hereditary disease.

From an analysis of the rulings of the Strasbourg Court (Mikulić case), it emerges that subjects who seek to obtain data regarding their genetic ancestors are considered to have a "vital interest" in receiving the information needed in order to reconstruct a central aspect of their identity. Similarly, in the case of Godelli v Italy, which involved a woman who claimed the right to obtain information concerning her natural mother, who had abandoned her at birth, the Court acknowledged that there had been a violation of art. 8 of the Convention ECHR; according to the Court, the Italian legal system had not safeguarded the rights of the plaintiff, in that it had neither granted her access to non-identifying data nor verified the persistence of her mother's desire for confidentiality.

In April 2019, the Parliamentary Assembly of the Council of Europe deemed the right to know one's origins to be an integral part of the right to respect for private life, and recommended that the use of anonymously donated sperm and eggs should be prospectively prohibited (18).

In Italy, Law N° 40/2004 on medically assisted procreation, after years of uncertainty and debate over the status of the embryo (19), imposed a set of prohibitions (some of which were subsequently eliminated by the Constitutional Court) that strictly limited the practice of artificial insemination. However, only with the introduction of D.P.R. n. 1311/ 2019 (which implemented EU directive 2012/39) was the donation of reproductive cells by persons other than the partner regulated for the purpose of assisted procreation (20).

The issue of the identity of the human embryo and its use in procreation still poses ethical and political questions, and there is a need to establish shared

criteria regarding the boundaries of the intervention of science on nature.

The issue of the identity of the human embryo and its use in procreation is extremely controversial, as the ontological status of the embryo cannot be unequivocally defined. The plurality of conflicting interpretations of the ontology of the embryo is reflected in the ethical sphere, in that the issue has long been the subject of ongoing debate (21).

While the definition of human embryo is still hotly debated, rapid developments in the field of procreation have made this question a highly topical issue. In the absence of definitive answers to what will probably always remain an open question, and considering the current diversity of views, we cannot ignore the legal implications connected with the various ethical positions expressed and the role that the legislator is called upon to play.

Reproduction within the boundaries of the family

Those who participate in a couple's plans to procreate are usually anonymous outsiders. In many cases, however, a member of the same family may be involved. There may be many different reasons for this: to preserve the genetic heritage of the family as far as possible, to reduce the risk of genetic or sexually transmitted infections, to bring forward the pregnancy, and to avoid the costs of a third-party pregnancy.

In addition to its numerous advantages, however, this type of family collaboration may also give rise to complex ethical problems that impinge on the freedom of choice (22). While freedom of choice may be impaired even in the case of an outsider, who may be driven by financial hardship to become involved in procreation, it can also be conditioned by affective bonds and family ties.

The donation of body parts by one family member to another is already a consolidated practice, and one that shares features with intra-family participation in procreation; however, there are also differences between the two practices. Intra-family organ donation is widely accepted from an ethical point of view, even though it involves greater risks than the donation of gametes. Although procreation may seem a less urgent

need than the treatment of organ failure, satisfying the desire for parenthood also has a major impact on personal well-being and on the individual's development. From this perspective, it seems morally permissible to allow family members to decide whether to accept the risks associated with the donation of gametes or the loan of the uterus, provided that the decision is freely taken and the well-being of the future child is rigorously safeguarded.

According to the Ethics Committee of the American Society for Reproductive Medicine, the use of intra-family donors requires careful assessment of problems of consanguinity, the risks of undue influence on the decision to participate, and the possible effect on interpersonal dynamics. Specifically, the Committee believes that incestuous or consanguineous genetic unions between first-degree relatives should not be allowed (17).

Donation and "Fillus de anima"

In the sphere of procreation, the involvement of a subject external to the couple has long been a rather widespread phenomenon. In the past, it usually involved the complicity of a sister or a female friend, or of a man to whom the woman turned for help to conceive a child who could then be passed off as her husband's (23). The advent of procreative techniques subsequently modified this traditional method, eliminating the need for sexual intercourse.

There are numerous examples of female solidarity. These include the practice of wet-nursing and that of the so-called "Fillus de anima", an expression used in the Sardinian dialect to refer to a traditional custom that was widespread in several parts of Sardinia. This latter practice involved the voluntary placement of one or more children in the custody of adults who were not their biological parents; these custodians were generally members of the same community, whether or not they were members of the same family network. Only in recent decades has this deeply-rooted tradition been gradually abandoned.

A recent study of this phenomenon (24) has revealed that the decision to raise a child in a family other than the birth family was often prompted by a condition of material, economic, relational or

social difficulty in the family of origin. This arrangement was always consensual and did not involve any third party, whether institutional or informal; it was a private agreement that could be revoked at any time. Moreover, there was always a pre-existing relationship between the families involved: a family bond between relatives, or a relationship between neighbours. The host adults were often people who did not have children of their own and who could offer the child better living conditions.

But what we wish to underline here, through the analysis of the cases examined, is the presence of a logic of exchange between the families involved, which met the host family's personal and social need for parenthood and offered the minor (and sometimes his family) better living conditions. Indeed, a decisive feature of this custom, which was widespread in many regions of southern Italy, was the lack of children in the host family. This meant that natural parents felt a sort of "duty" to offer their peers the possibility to exercise a parental role, as if the "unjust lack" connected with sterility demanded reparation by the whole extended family and the whole community. The custom of "filius de anima" was therefore underpinned by a sort of restorative logic, whereby the community expressed its gratitude by preserving relations with the child's family of origin, even though the manner and frequency of contact varied from case to case. Thus, the community seemed to constitute a sort of "meta-family", in which parenting the children of others, and allowing others to do the same, was a way to forge and strengthen bonds, to create complex family systems in which the "structural sharing of parenthood" was accepted and sought after (25).

Moral economy, market economy and "fringe benefits"

These experiences of voluntary exchange of the body, of parts of it, of affections and of blood elicit important ethical, psychological and anthropological reflections on the theme of donation and its symbolic and sociopolitical meanings. A key conviction underlying the regulated and ethical use of body parts is that greater guarantees for both donor and recipient are obtained when such material is gratuitously provided and not subject to the rules of the market.

The debate on these issues began to spread with the publication of Mauss's "Essay on the gift" (26), in which, through the presentation of a series of ethnographic cases, the author shows that the exchange of such material is free from contractual constraints. According to Mauss, the purpose of the gift does not lie in its gratuitousness, but in the construction of a social relationship based on the principle of exchange, of barter, of reciprocity.

Present in ancient societies, the theme of the gift has gradually disappeared from modern societies, which are characterized by interactions between abstract, neutral subjects, united by the pursuit of profit and a market logic that favours the few. This detachment of morality from the economy is an unavoidable consequence of the rise of capitalist societies and of the need to preserve an equitable relationship between supply and demand.

The specific theme of the meaning of the donation of parts of the body is extensively treated in anthropology by Titmuss (27), who starts from the study of the problems connected with blood donation, and then investigates in depth the mechanisms underlying social donation. From Titmuss's analysis, it emerges that market forces can prompt the lowest social strata to sell their blood, even in an irresponsible way, concealing the presence of pathologies or other problems, thereby making costly analyses necessary. Unlike donation, this market mode hinders the creation of a space of "moral tension", discourages solidarity and undermines the bonds and compactness of the entire social fabric. On investigating the reasons that prompt donors to act, Titmuss underlines the sense of duty towards the community, a feeling of reciprocity and the need for belonging and acceptance, all of which transform the act of giving into a correct behavior that is worthy of moral and legal esteem.

Other authors have contested the idea that donation is motivated by an abstract sense of goodness towards others, claiming instead that it falls within that creation of social networks proposed by Mauss, whereby donation would be the means to strengthen relationships with the closest subjects in the community.

An authentic discussion of the principle of total gratuitousness in the donation of blood is provided by the anthropologist Fabio Dei (28), who sees the donor

as a member of a group, and the act of giving (blood) becomes a means of marking his active participation in the community; in this case, the gift he receives in exchange consists of the creation of bonds of trust and social recognition.

On investigating the reasons for altruistic choices, we can therefore observe that the practice of donation is related to an abstract conception of the “good citizen”; at the same time, it is also linked to a set of incentives (money, a day off work, a free blood test, ...) and the indirect benefits of status and recognition that go with this idea. While the possible gains associated with the moral economy of donation do not actually determine the practice of giving, they do confer upon it a high moral value: the result of collective agreements whereby a merely symbolic reward is consistent and acceptable.

Donation in the setting of reproduction and the law

With regard to solidarity-based contributions to the construction of the various forms of parenthood, just as in the donation of body parts in general, the world of law and ethics is called upon to find solutions consistent with the multiple socio-cultural realities of families - solutions that differ from stereotyped and preconceived visions, which are too often devoid of objective and empirical foundations. These practices show the socially constructed nature of some notions that, until a few decades ago, were taken for granted, and challenge the traditional concepts of parenthood, prompting us to reflect on the meanings of donation, genetics, biology, gestation and generative capacity, with all its possible relational connections.

The donation of parts of the body in the technological processes of transmitting life has caused the symbolic dismemberment of some categories, impacting on what was long regarded as the cornerstone of kinship: sexual intercourse (29). This opens up a specific discussion on the meaning of donation and conception, on the boundaries of solidarity within the generative capacity of bonds; a discussion that may even involve interpreting the donation of parts of the body throughout the entire chain of fertility as a possible expression of that broad array of forms of

commitment or voluntary service that use the body and human qualities as means of work and care.

Donation of the female body, in particular, is divisive and arouses interminable heated discussion. Indeed, there are those who defend the freedom of women to donate parts of themselves, those who see as acceptable only some of their contributions - eggs, milk, the newborn child (as in anonymous birth and in “*Fillius de anima*” while excluding others (e.g. the uterus), those who condemn every practice of sharing the body, and those who believe that solidarity is merely the facade of a ruthless market logic.

Indeed, several surveys (30,31) that report observations in this field have revealed that mothers who lend their uterus and a piece of their life, in order to give birth to children destined for others, do so for various reasons; some for money, others out of altruism, friendship and affection, or a mix of all these motivations. Moreover, anthropological studies have shown that the motivations of surrogate mothers in some more developed countries are not necessarily connected to forms of exploitation, but can be found in the logic of donation, and of female solidarity (32,33).

The experience gained in Italian courts prior to the enactment of the law on assisted reproduction continues to be characterized by strong opposition to surrogacy agreements, particularly if remuneration is involved; at the same time, however, it displays a certain leniency towards those motivated by a spirit of solidarity. In its first ruling on this issue, the Italian Court of Monza (34) declared null and void a surrogacy contract stipulated between a married couple and a foreign woman who had undertaken, upon payment of a sum of money, to bear a child on behalf of the couple and to hand over the newborn to them at the time of delivery, renouncing her rights as a mother. Interestingly, one of the reasons behind the judges’ decision was that the agreement could have been valid if no payment had been involved, as in that case its objective would have been to fulfil one of the natural purposes of the family: procreation. Indeed, the judges asserted that “*the parts of the human body (gametes and reproductive organs) over which the subject has a personal right and not a property right*” could not be the subject of an act of private autonomy, while “*consent to disposal of the same, if the procedure does not permanently diminish*

physical integrity and is not contrary to the law, public order or morality, integrates not a legal transaction or a contract, but a genuine act of lawful will, albeit always revocable” (34).

The Italian Court of Rome (35) subsequently proved to be receptive to the new modalities of procreation. When called upon to settle a dispute between a married couple and a healthcare professional who had refused to implant the embryos obtained through *in vitro* fertilization in the womb of a surrogate mother, it sustained the couple’s plea, declaring the surrogacy contract valid.

Specifically, the judge, while defining the agreement as an atypical contract, stated that it could be considered to express the right to parental self-fulfillment and to be worthy of protection, given that the surrogate mother acted out of a spirit of solidarity and not for profit. The judge also noted that “it would be difficult to exclude the lawfulness of the mere loan of an organ, and moreover limited in time and under medical supervision, when the law permits organ donation between living subjects” (35).

However, examination of the laws subsequent to Law 40/2004, and of the relevant jurisprudence, reveals new closures on the issue of donation for reproductive purposes and a growing distance from the reality of the situation and the complexity of the emotions involved. Nevertheless, we can discern a few glimmers of light in response to the need to favour the social and legal regularisation of children, regardless of how they were “manufactured”.

But even in this new perspective, the Italian judiciary has reiterated its condemnation of donation (surrogacy), defining it as a practice that “intolerably offends the dignity of women and deeply undermines human relationships”, which feeds the risk of “exploitation of the vulnerability of women in disadvantaged social and economic situations”, without taking into account (Constitutional Court judgment N° 272 of 2017), at least not expressly, the possibility that the families involved, far from being victims of cold market logic, could be conscious parts of a network of solidarity and collective support processes.

Thus, Italian legislators continue to deny the legitimacy of some of the above-mentioned principles

of solidarity, despite recognizing as legitimate the donation of many biological substances, including semen and organs, which are evidently less charged with emotional values. In the eyes of the legislator, the principle to be protected seems to be that of the unity of motherhood, which must not be broken down into gestational motherhood, biological motherhood and social motherhood. This ideological affirmation is accompanied by the legislator’s claim to interpret the child’s good, which is still identified as the possibility of having a father and a mother in the traditional sense, a condition that must be ensured even if the only alternative for a woman who cannot bear children herself is to forgo motherhood.

Donation of the uterus is temporary and free from deleterious effects on the psycho-physical integrity of the surrogate mother. Nevertheless, it remains an insurmountable taboo that continues to raise questions regarding the meaning of procreation, personal integrity and the status of parenthood, even though the whole debate is already losing its relevance in the face of new experimental research on the biobag and the artificial uterus (36).

The logic of donation of the living and no longer living body has run through human history for a long time. The growing complexity of interventions on the body and their many associated variables calls for the adoption of a broader way of thinking that comprises knowledge from several disciplines and an open approach to the examination of various cases – an approach based on the inclusion of inputs from international experiences and on a thorough understanding of new realities of parenthood. The indispensable premise is recognition of the great civic, ethical and solidarity value of the donation of parts of the body, a gift that, owing to its universal nature, must be freed from narrow approaches based on the logic of suspicion or prejudice (37).

Unfortunately, in dealing with so-called “ethically sensitive issues”, we can still perceive (albeit to a lesser extent than in the past) an approach based on stereotypes and extremist positions that do not always understand and take into account the various experiences of procreation and parenthood, nor protect the interests of the child, whose specificity must be rigorously valued (38).

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