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The prohibition of medically assisted heterologous insemination and the so-called "penal paternalism"

The Author will deal with the prohibition of medically assisted heterologous insemination and investigate which legal good such prohibition aims at protecting.
In this regard, it is necessary to observe that when it comes to medically assisted insemination, the heterologous insemination concerns, as it is well known, the fecundation of a sterile woman through the semen of a man third to the couple who, once his semen has been donated, shall remain rigorously anonymous.
The son who will be born from such a fecundation, therefore, will have two parents of different sex, that is, the gestating mother and her husband or partner, although he is not the natural father of the child, who, we repeat it, must remain anonymous.
From these necessary premises it follows that the legal good generally underlying such types of artificial insemination, which is the right of the conceived to be born in a familiar nucleus composed by two parents of different sex, cannot be considered harmed.
It is assumed, in fact, on the basis of medical-psycho-pedagogic sciences, that the best way to educate a child is that offered precisely by the presence of two parents of different sex.
Thus, if that corresponds to precise and well-grounded scientific beliefs, it follows that the prohibition of medically assisted heterologous insemination is not harmful for any legal good concerning the conceived, precisely because of the above-mentioned reasons, which indeed cannot be extended to other cases, such as those of medically assisted insemination of a woman alone, or of a woman with the semen of the dead husband, or again of homosexual couples, where instead the harm of such legal good requires to find other justifications or excuses.
If, therefore, the medically assisted heterologous insemination does not harm any legal good of the conceived, it follows that the prohibition thereof implies the unavoidable inclusion of such issue within the so called «penal paternalism», meaning that, to say it with Feinberg, the behaviour concerned does not appear to constitute a «harm to others», otherwise, paradoxically, adoption should be forbidden too, given that the adoptive parents are different than the natural ones, who shall keep anonymous.
From this we can infer how the interested prohibition, of which it cannot even be maintained that it may cause an «offense» in the sense of disgust or disproval or disturb to others, following Feinberg's thought and the correlative legitimatisation of criminal law, is a mere expression of a certain ethical-religious conviction unavoidably leading to a conception of criminal law subordinated to morals and, thus, to a criminal law or anyway a punitive law not at all secular, but still of confessional imprinting.
The confirmation of what we have been maintaining so far is given by a brief comparative overview, from which we can observe that amongst European Countries only Italy represses medically assisted heterologous insemination, so that the prohibition thereof unavoidably assumes a paradoxical «criminogenic» function, since it favours, of course only with regard to those that dispose of the necessary financial

means, a sort of overseas tourism in order to go in those Countries where such a type of insemination is not forbidden and where, therefore, sterility may be cured so to allow the couple to legitimately obtain what they desire most, a son.
From this perspective, it seems we may conclude also that such a prohibition not only is an expression of so called «penal paternalism», but consequently it is also in strong contrast with the principle of secularism, which is not a mere character but, in our opinion, an immediately justiciable constitutional principle, as it may derive from articles 19 and 21 of the Constitution.
Article 19, in fact, concerns the freedom of religion and article 21 concerns the freedom of manifestation of thought, in the sense that law in general and especially criminal law, at least dating from Enlightenment, shall necessarily be distinguished both from morals and religion, and must have as a main, albeit not exclusive, reference the Constitution itself, to say it with a great catholic lawyer such as Federico Stella, while we have the clear impression that law n. 40 in general and particularly the prohibition of medically assisted fecundation, the object of our analysis, are the result of precise ethical-religious choices instead of being guided by constitutional and supranational principles.