Bioethical aspects regarding filiation as a result of artificial fecundation

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Abstract: The remarkable scientific advances in human genetics embodied in what we shall define as artificial or assisted procreation provide an alternative to the frustrating situation of not having children. The medical solution culminated with what scientists called the triumph of technology over nature: in vitro pregnancy. Because science evolves faster than the law, the development of the abovementioned methods and techniques reveal a wide range of legal possibilities and problems regarding the status of the embryo, as well as the legitimacy of the techniques used. Moreover, the development of medical practices in the field, coupled with the socio-legal incongruities, generated a number of issues concerning reproductive responsibility. All these required the emergence of a bioethical legal framework, which, with all the imperfections inherent in any beginning, highlights the sensitive issue of human rights, namely the „best“ interests and rights of the child. Practically, bioethics offers some points of connection between the biomedical sciences and the law while establishing rules regarding donor anonymity, the prior consent of the sterile couple, and the impossibility of challenging artificial filiation.

Key Words: bioethics, assisted procreation, reproductive responsibility, filiation.

INTRODUCTION IN BIOETHICS

Whether we look at the development of “bioethics” as a science (in the early 60’s) from the perspective of philosophical expertise with “specific skills related to moral tradition” and “specific skills of applied ethics” [13] or as a theological science at the crossroads with the moral theology of the Church that analyzes biomedical technology to the intrinsic values of human life (in theosis there was expressed the very Trinitarian meaning of the human being, of the person who is in “eternal communion”), we find the same goals for the same objective, namely, the progress or “improvement of the quality of human life”, namely, “the creation and maintenance of bios” or people’s “physical life” [5]. These objectives are pursued in bioethics in the context of an unparalleled development and progress in the current field of biomedical sciences – for example, “the new biology” that revolutionized “the current medical treatment” in the mid twentieth century, then “the experimentation with human subjects”, and “the emergence and development of clinical ethics” [13].

Thus, the subject of bioethics emerged as a science that takes into account both the creation and the suppression of human life as relativized, desacralized, and regarded as “some product” in the multicultural and globalized context of a world in the process of secularization. Consequently, bioethics is based on the moral and spiritual values that must be protected and promoted from three perspectives, namely: “the beginning of life” (artificial procreation, embryo status, abortion, human sexuality in general, etc.); “the means of life support” (transplant of vital organs, dialysis, etc.) and “the end of life” (euthanasia, medically assisted suicide, etc.), which are all “major problems” [5]. Therefore, ever since the 1970’s, philosophers and theologians became involved in clinical medicine as collaborators with the medical staff, by participating, from the ethical perspective, in the decision making process regarding the care of patients. The danger signalled by specialists in contemporary medical ethics

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is that of the prevalence of socio-economic influences on bioethics at the expense of the spiritual ones, so that the person, from an “eclesial being” characterized by “otherness and communion” as well as the “dialectics between freedom and responsibility” is reduced to a “purely physical object”, which can be handled, a “man-machine” in terms of genetic engineering [5].

Therefore, given that the factors in the development of bioethics in general and of related sub-domains such as clinical ethics – not to be confused with “biomedical ethics” concerned especially with the public policy issues in this field – focused on “problematic medical cases” of everyday medical practice or the “ethics of attendance” [13] or care given to the patient promoted, for example, in assisted reproduction, our attention focuses on reproductive ethics. Thus, in addition to the traditional branches of bioethics developed in three directions – the issue of abortion, euthanasia and gene therapy – currently, reproductive ethics raises ample debates and controversies among researchers and specialists, along with other newly developed branches, such as “transplant ethics,” “the ethics of complementary and alternative medicine” or “the ethics of communication and informatics” [13].

Reproductive ethics and parental responsibility

Reproductive ethics aims, from our point of view, to match “the best interests” of children with those of the adults. Thus, “parental authority” as the legal basis of parental responsibility is defined between the child's right to protection – in the family environment, alternative care and special care – and the child's right to freedom of expression or opinion on any matter that concerns him. The expression of the child’s autonomy, depending on the age and degree of maturity that instills presumed discernment in varying degrees, can be achieved only in combination with the right to “establish and preserve his identity”, a right that includes “the right to name, right to citizenship, the children's right to know their parents and be cared for, raised and educated by them” [13]. More specifically, in the case of “artificial procreation”, the child's right to know his genetic origins is fundamental under the principle of the need to know the biological truth balanced against the need to maintain confidentiality.

The natural desire to have children, which in the socio-legal plane is supported by the recognition and observance of the right to reproduction, reproductive autonomy, respectively, must be accompanied by reproductive responsibility, “circumstantial” to avoiding “authoritarianism” and prevention of discrimination of any kind, which considers four elements that the researcher Robertson (1994) refers to, namely [16] [13]:

- the importance of [medically assisted] reproduction for the patient;
- probability and possibility to avoid artificial reproduction;
- anticipating the positive effects outweighed by the negative effects on “the descendants”, that is, the child thus procreated;
- the cost / benefit prospective on the community members with an emphasis on “the burdens” or “the costs” for the society in general.

We note that the leverages of reproductive responsibility with respect to medically assisted reproduction consider the patient's autonomy in making “the reproductive decision”, but within the firm conditions of “informed consent” [13]. In this respect, it requires a relationship of partnership and mutual information between patient and physician assisted in turn by “independent ethics commission” so that “the medical expertise” is accompanied by an “independent ethical expertise” complementary to the first [13]. For our part, we consider that the necessity of interdisciplinary psycho-socio-legal teams consisting of doctors, lawyers, philosophers, priests, psychologists, social workers, etc. is justified, in order to provide information to the potential patient and the mediation of intra-familial relations – see the role of family support worker, as well as patient relations with each of the specialists mentioned above.

Thus, the potential patient is able to make an informed choice as regards the reproductive mode from among the known alternatives and, also, to assume the potential implicit or explicit risks due to choosing the most advantageous mode in well-defined circumstances. Of course, we cannot neglect the aspects related to the broader context of demographic policies and those regarding the family – for example, pro-natalist policies within the so-called “pro-reproductive culture” [8] – or the social pressures dependent on “the social patterns”, “the dominant mentalities” or media influences [13]. In conclusion, only in this way can we analyse and evaluate the reproductive autonomy in relation to the responsibility/ irresponsibility manifested in reproductive practices.

The fictitious filiation between the right to reproduction and the right to identity

The issue of parenting and family in modernity and post-modernity begins with the definition and analysis of filiation broadly understood as “a person's lineage, from one to another” or “the direct link between parents and children” [3] closely related to motherhood or filiation to the mother based on “the fact of birth” and to paternity or filiation to the father based on “the fact of conception.” In the context of restructuring the family system as a whole, we have in view the analysis of the interdependence between familial subsystems with reference to the couple sub-system – consensual, conjugal or marital – and the filiation sub-system associated to motherhood, and fatherhood, respectively. Because today it is very difficult to define family, as it clearly steps away from the traditional approach, the specialized authors highlight the role of “family discourse” or “family rhetoric,” focusing on “interpretive practices” [6] to identify and describe specific processes and phenomena of family life.
In this sense, “gender arrangements in family” or “kinship” or “post-familial family” propose to redefine family whose legal basis is not longer marriage, but alternatives, some legal, such as “free union” or “civil solidarity pact” in France. The law does what it can, in a world torn by extreme individualism and selfishness, to put order in the situations in concrete reality that remove themselves from anything that is natural and normal to make room for “illusions” and the unnatural such as “unnatural filiations” and “homo-parenting” [19]. Thus, we are witnessing what the theologians call “secularization” expressed by alienation, reification, utilitarianism and removal from the expression of “Theo-cosmicity” of the family reduced to “anthropos” in a destructive process of “breaking” and “de-spiritualization” [21]. The same issue is expressed by sociologists, for example, Max Weber refers to the prevalence of “cognitive-instrumental rationality” over “moral-practical rationality,” including in the loss of religious references, the life of the contemporary man is guided by ultra-pragmatic, unrealistic and sometimes illicit purposes, the human action becomes irrational, immoral and abnormal [15].

The amendment of family law to “adapt its status in contemporary society” [21], which was, in Paris in 2000, the subject of a comprehensive report requested at that time by the Prime Minister of France, brings back into focus the danger of redefining family, with some authors, such as Cheal (1993), even foreseeing “the end of family,” which would mean “the end of the social,” family disorder inducing social disorder [6]. The report entitled “Renewal of family law” focused, from the perspective of legal solutions, on “strengthening parental authority,” which in the current Romanian Civil Code (2011) is included in the legal matter of “parental authority” replacing the old regulation of The Family Code on “parental care.”

In this opinion, to which we subscribe, “affective conjugality” and assumed parenting are the premises for the reconstruction of modern family, regaining its status of “broken or changing sovereignty” [17]. We think that the answer to the question whether couple, filiation and parenting “can rely on willpower alone” is negative, on the grounds that “individual will” and “family law” promoted to the rank of “fundamental realities” deny precisely “the meaning and the depth of [human] becoming” [21].

We observe that the solutions of “renewing family law,” focused on enhancing “parental authority,” are accompanied by the democratization of the couple relationship by making divorce flexible, legalizing consensual unions, even if unnatural, as an alternative to marriage, through the protection and promotion of the right to opinion both of children and of women, as well as of anyone interested in expressing an opinion on family. The issue of the couple is current; the arrangements for regulating it changed the law of parenthood, including fictitious filiation as a result of artificial procreation. The link is expressed by what some authors define as “separating logos”, as a manifestation of the tendency of levelling or even abolishing the differences between the sexes resulting in socio-emotional disturbances in all family sub-systems, from the consensual or conjugal couple up to the filial or parental one, culminating in the so-called “crisis of parental authority”; especially fatherhood [17].

The idea of consensual couple or conjugal / marital couple offset by “non-couple” is correlated, in terms of artificial fertilization, with the right to reproduction whose legal recognition is conditional on the proof or evidence, for example, of the relationship between “a man and a woman both alive, with the age within the limits for the ability to procreate, married or able to prove a common life of at least two years” [11]. The novelty brought by the legal definition of the couple is that it gives the same meaning to separated, married or freely joined couples as regards parental authority, legally establishing parental co-responsibility or joint parental authority.

By virtue of the autonomy conferred under the right to reproduction and which involves reproductive responsibility on reproductive practices, some authors [16] distinguish between “reproductive rights”, associated with the freedom of decision on descendants and “parental rights” as a parent [13]. Moreover, other authors [20] argue that the very existence of a “negative right derived from freedom of reproduction” [13] that removes certain people (e.g., widows, single or old women) or certain couples (e.g., unproven consensual unions or gay couples) from access to medically assisted methods and techniques of reproduction. For example, in France, where “the free union” is legal, only the couple considered stable has access to approved in vitro fertilization. In this way, the law on fictitious or artificial filiation, taking into account the risks both for the children procreated artificially, and for the prospective “foster” parents or fictitious family (as we will see, with or without any genetic or biological input to the procreation), opens the subject of the complex and disputed issue of “reproductive irresponsibility” [2, 13].

Given the issues presented above, it seems that the methods and techniques of “medically assisted procreation” (MAP) have emerged and developed, even if for treatment needs, based on a great ethical dilemma: shall one treat the disease with “the risk of sacrificing lives” or respect life “by giving up the search for remedies” [3]. For example, to treat sterility, as unfitness to procreate, the various remedies were first of a social nature – setting up the institution of adoption, then that of the mother “nourricieres” (nurse, nanny) – and then, biomedical, culminating with what scientists have called the triumph of technology over nature: in vitro pregnancy. To summarize the methods and techniques described in detail ever since 2003 in a monography of paternity dedicated to filiation to the father, in a sub-chapter of which we analyzed in filiation and assisted procreation, they are as follows:

a. Assisted or artificial procreation is a method in which fertilization is not achieved by natural union between man and woman, but artificially, by specific techniques
involving operations and manipulations of human gametes and embryos. The specific techniques of artificial procreation, known since the seventeenth century (England) and the end of nineteenth century (France) can be summarized essentially as artificial insemination with genetic material taken within the couple and artificial insemination with a third donor.

b. Artificial insemination, that is, approved in vitro fertilization, is fertilization by introducing male gametes in the female genitals, outside any sexual intercourse; artificial insemination can take place within the couple (AIC) or outside it – in vitro fertilization (IVF) – starting from the gametes of the two partners followed by the re-implantation of the embryo. In this case, the fertilization is performed under medical supervision for "stable couples", the technique is applied without the intervention of a third party and, if it does not raise ethical issues, such as "negative side effects" and "risks" related to hormonal therapy or / and "multiple pregnancy" [7], it remains without consequences regarding conception, filiation, and pregnancy; in this case, they are provided by the parental couple.

c. Artificial insemination by donor (AID) is currently used maintaining donor anonymity; the technique consists in the conception or gestation by one of the parents with a third party; the AID technique raises a number of issues related to filiation, such as access to knowledge of genetic origins, the valid consent of the couple, the incontestability of the paternity thus established, etc.

d. When sterility pertains to the woman, there is the possibility to use maternity replacement, which involves in fact two different practices, that is: pregnancy for another, or "surrogate mother" of an embryo conceived using the gametes of the parents (full surrogacy); real maternity replacement, when the woman accepts the insemination with the gametes of the husband or partner in the applicant couple and will "give up" the baby she gives birth to (partial surrogacy) [9].

Types of filiation. Legal perspectives

From a legal perspective, in the case of artificial insemination by donor (in case of male sterility), the legislation on assisted procreation shows obvious disagreements between the followers of applying common law rules on paternity, who are in fact reluctant to these methods, and those who foresee the need for specific rules. In both cases there are many hesitations and inaccuracies. The outline of European filiation law reveals some relevant features of defining fictitious filiation and hence foster parenting with reference to the oscillation of natural filiation between socio-emotional truth and biological truth, "assimilation" of adoptive or civil filiation with natural filiation, the latter standing between natural and artificial fertilization and positioning fictitious filiation between biological truth and modern and post-modern utilitarianism. This latter feature on fictitious filiation as a result of artificial fertilization raises the question, correlative to the issue of reproductive autonomy and (i)responsibility, of the complex and disputed issue of the knowledge of genetic origin, a right recognized by law with reference to the "establishment and maintenance of identity" [3], which brings together "the right to a name, right to citizenship", as well as "the child's right to know their parents and be cared for, raised and educated by them" [12].

To this effect, the establishment and proof of fictitious filiation raise a number of inherent problems, such as: maternity replacement and the uncertainty of the filiation to the mother; the relativization of the presumption of paternity, that is, doubts about the fact that the husband or the partner of the mother is the father of the child; claiming filiation to the father out of wedlock and post-mortem examination with the introduction of the genetic sample or request for information on genitors, under conditions specifically mentioned by law. Therefore, given the equality of legal regimes both for types of filiation, and for forms of filiation specific to each type and non-discrimination, at least in legal terms, we witness a series of effects at a psycho-socio-moral level involved by the imposition of a duality of filiation (maternal and paternal), as well a super-filiation or overlapping filiations as a result of the impossibility to challenge paternity in fictitious filiation, which clearly changes the outlines of parenting or assuming parental roles performed not only by those who have the quality of parent, but also by those who are delegated in this capacity for objective or subjective reasons.

Thus, the existence of phenomena relevant to fictitious filiation and parenting refers to the generalization of common parental authority or "co-parenting" in the case of "free union" as well as the maintenance of co-parenting in case of the dissolution of the free union or the divorce. Also, "in-law parenting" in recomposed families and "complex residential categories," "trans-generational parenting" by the grandparents and "multi-parenting" highlight the problems related to the uncertain status of the foster parent or "the extra parent", as well as the difficulties caused by the overlapping of functions, roles and parental practices. From the point of view of filiations that are derived from "dissociation" or incongruence between the biological, legal and social, characteristic to recomposed families, adoptive families, and families with artificially procreated children, we think that a problem is presented by "unnatural filiations" and "homo-parenting" [19].

If, on the one hand, researchers admit that there are real advantages to using the previously presented techniques – the genetic techniques allow the examination of the hereditary factors of an individual and establishing a prenatal diagnosis to prevent some diseases or abnormalities, and the treatment of somatic cells, gametes or embryos; moreover, genetic manipulation can be used as a means of research – on the other hand, they announce the dangers of using the techniques of artificial procreation with reference to genetic manipulations with negative effects on human existence; the commercial use of the embryo and human fetus; the disputes aroused by assisted procreation methods in connection with
post-mortem insemination, donor anonymity, maternity replacement etc.

In a highly critical attitude, some authors referring to the negative influences of the medical techniques and practices on human reproduction, see it as an act of “barbarism” in a “global biological totalitarianism” that speculates on the subjectivity of the couples, especially women, maintained by a “non-ethics of desire” or a “whim” that “the technique strives to satisfy” increasing family instability even more [7]. From this point of view, in the answer to the question: “Why do you want a baby?” can be identified both the problem, and the solutions for a real and efficient social protection of the child, offered first of all within the family. In the case analysis of the “Suleman octuplets” in California, born on January 26, 2009, through in vitro fertilization, a widely publicized case in the American press, the Romanian researcher Frunză (2010) highlighted several areas of concern and “ethical dilemma” concerning assisted reproduction, as regards the unnaturalness and artificiality of the method, its failure, as well as the controversies surrounding “multiple pregnancies” insisting on “reproductive responsibility” [13].

On the one hand, there is another series of problems related to embryo status, which makes its protection necessary in order to stop the abuses caused by in vitro or in vivo manipulations. The uncertain status of the embryo, which has long been denied the right to life, as it is considered “not a thing, nor a person, but a zero” [14] provoked strong reactions from researchers and lawyers in making a clear distinction between “persons” and “things”. For example, in Germany, the embryo is protected by criminal law as opposed to the laws that choose the compromise, considering the abortion as lawful if made under certain and precise circumstances [1]. Consequently, the law on the legal status of the embryo, as it appears in some European countries like Spain and Great Britain, distinguishes between “pre-embryo” (up to the 14th day starting from fertilization) and embryo (after the deadline of 14 days). In this way there are prohibited genetic manipulations and in vitro experiments, while the cryo-conservation and storage for reuse, donation and, finally, destruction of embryos can be performed under circumstances expressly regulated [13].

On the other hand, the legitimacy of artificial procreation methods and techniques highlights serious problems not only on a social, but also on a philosophical, ethical, religious, economic, and, last but not least, legal level, regarding the protection of personality, the right to contract, liability and filiation. In this regard, at this time, in Europe there are two opposing positions underlying two legislative trends: one in which technological development prevails and which entails the acceptance in principle of any technical variations, the anonymity of the gametes donor, increasing the amount of time in which the embryo can be manipulated (the pre-embryo status), flexibility on special conditions for access to artificial procreation techniques (Spain, UK, France) – and one that emphasizes the interest of the individual, namely the interest of the child thus conceived (Germany, Austria, Sweden, Norway, Switzerland) [1].

The consequent guidelines vary widely not only in terms of criminal or civil law, but also in terms of the basic principles for the purposes of philosophical ethics or moral theology, under whose perspective these techniques are considered. Therefore, state authorities and civil society responded promptly by imposing certain directives in the field of embryonic life protection such as the French National Ethics Committee or the Swiss Association of Medical Sciences; the latter adopted a “complete” set of rules in this respect [7]. Also, the European Union Committee of Experts has developed principles on artificial procreation and the World Medical Association Statement on In-Vitro Fertilization and Embryo Transplantation (Madrid 1987) provides standards and legislative models [18].

Thus, after long controversies, the specialized literature shows that the solutions are offered by the bioethical perspective that comes to change the contours of filiation law in an attempt to prevent the filiation vacuum, while respecting the rights and interests of the child and of the family as a whole. This line of thought is also observed by the recommendations in principle of the Council of Europe, which, without decreeing intangible rules and taking into account the rapid evolution of biomedical science, offer a line of conduct regarding the following aspects: formal requirements on competence, organization of support services, etc; background conditions – the valid consent of heterosexual couples, donor anonymity, interdiction of paternity agreements; general recommendations regarding the limitation of the number of children born by medically assisted procreation (MAP) from the same donor; interdiction of post-mortem insemination; establishment of filiation relation; interdiction of genetic manipulations of the embryo – the length of storage, researches other than for diagnosis and therapy, embryo transfer from one woman to another, etc; mandatory security and privacy of such operations.

Generally, the provisions on filiation present technical-legalistic flaws, the ambivalence of the law on assisted procreation results from the fact that, on the one hand, it is impossible to ban these practices, and, on the other hand, the filiation of the children born in this way must be indisputable [10]. For example, in France there were adopted in 1994 two bioethical laws establishing the framework of assisted procreation with a donor and, therefore, the legal nature of the filiation of the child thus born, according to the following rules [18]: donor anonymity justified by protection against involuntary assumption of paternity, as well as maintaining family balance [10]; prior consent of the sterile couple as the basis of any health care operations of procreation; in case of a third donor, the consent must be genuine; the condition of prior consent requires incontestability of filiation for all forms of filiation while creating a super-filiation (biological filiation and fictitious filiation).

In Romanian law, the Civil Code (2009) established
References


