

THE CONTRACTUALIZATION OF FILIATION AND MEDICALLY ASSISTED HUMAN REPRODUCTION TECHNIQUES

*Carmen Oana MIHĂILĂ**

Abstract

The last century has brought with it many scientific discoveries in the field of reproduction, which, besides being considered steps towards a new biological revolution, pose problems in the field of law, especially in the family (filiation) or succession. However, the conviction that all that means scientific or medical discovery is the equivalent of a moral, correct or legal fact must not be absolute. Is it ethical, is it moral to use these techniques? Who could answer this question? Probably a balance must be found between the scientific and the moral. Can we be afraid of what might happen, namely what some authors (Guțan 2011) call eugenic selection (Popescu 2013)? Since 1978, since the first assisted birth, progress has been made in all areas. Countries such as the UK, US or Belgium have permissive legislation on medically assisted human reproduction techniques, others like Italy or Germany only allow certain reproductive techniques.

With regard to the techniques of medically assisted human reproduction, the ECHR jurisprudence shows that they raise problems that are ethically and morally sensitive. Also, there is no uniform approach in Europe in this area, therefore the decision on the principles and policies to apply in this sensitive area has to be taken by each state.

Key Words: *maternal filiation, paternal filiation, MAHR, biological mother, child.*

JEL Classification: [K12, K15, K36]

1. Maternal and paternal filiation

The filiation represents the *offspring connection between a person and each of his parents* (Avram 2016). Despite all these, one can also discuss the lineage in the context of the adoption or lately of the medically assisted procreation methods.

The filiation, before being a legal relationship, is a natural relationship. It is legally regulated for social and legal reasons, in order to establish a series of rights and obligations. The division of the terms of natural filiation and legal filiation has made this notion unable to be conceptualized for a long time (Corral 2001).

The Roman law - principle *mater semper certa est* (the mother is always certain) is the basis of the regulation of the filiation in our law. The mother's role in this context is very clearly established from the moment of birth.

This explains the rule entered in art. 408 paragraph 1 Civil Code, which shows that the affiliation with the mother results from the fact of birth. The legal provision *does not say anything about the blood connection, but only about the*

*University lecturer Ph.D., Faculty of Law, Department of Juridical and Administrative Sciences, University of Oradea.

umbilical connection (Motica & Tec 2019), thus, it is possible for a woman to give birth to a child without having any blood or genetic connection with it or having the status of mother by birth, ignoring the genetic contribution. The presumption of motherhood is an absolute and irrefutable presumption.

It can be stated that the action in contesting the maternity by which it is desired to show that the woman who gave birth is not the same as the biological mother, cannot be admitted. Thus, the authors in the field show that "*in the field of law, in the contest between the "juridical" or "legal" mother and the "genetic" or "biological" mother the former will win*" (Motica & Tec 2019).

In terms of *establishing the filiation with the father*, things are a bit different. The degree of uncertainty is higher, so that the filiation with the father is established according to the mother's marital status at the time of conception or birth of the child (Moloman & Ureche 2016). The presumption of paternity, which has a relative character (Baias & Chelaru & Constantinovici & Macovei 2012),¹ can be formulated as follows: the mother's husband will be the father of the child born or conceived during the marriage. The affiliation with the father outside the marriage is established by recognition or court decision (Lupașcu & Crăciunescu 2017).

Our legislator stipulates in art. 435 Civil Code that the filiation to the mother and to the father, once established and uncontested in court, no other affiliation can be established, by any other way (doubling of motherhood or paternity is inadmissible).

The emergence of assisted reproduction technology with the help of third parties is not easy to harmonize with the principle of *biological truth*, which must lead to determining the paternity or motherhood of the gamete donor.

2. Filiation in the context of medically assisted human reproduction (MAHR)

Scientific researches and discoveries of the last decades have led to the possibility of bringing a child into the world through various techniques².

Medically Assisted Human Reproduction (MAHR) is "the set of clinical or biological techniques and practices intended for in vitro procreation, embryo transfer and artificial insemination, as well as any other technique having an equivalent effect" (Guțan 2011).

MAHR is justified by the needs of married couples or single mothers who cannot procreate naturally. However, criticism of these techniques is not small. It has even been stated that the future child becomes the object of a contract, that it would become an artificial creation (Turcu 2013). The concept is thus criticized

¹In the doctrine it is considered that this presumption is of mixed character, being neither absolute nor relative because it can be overturned exclusively by the action in the denial of paternity, which can be introduced only by certain persons

²Louise Brown is the British girl whom the press called the first "in-vitro baby" because she was the first human being ever conceived through in vitro fertilization in 1978

because it leads the affiliation to the realm of contractualization, which is not desirable. The child and his or her best interests should be protected and the risk of this being part of a market for human beings that could result from the application of assisted reproduction techniques should be avoided (Corral 2011).

MAHR techniques allow homosexual couples, women of a certain age or menopausal women to have children, which was not possible decades ago.

Reproductive medicine works with a relatively new concept, namely the will / intention to procreate, which is considered a victory over reason and nature (Hernández 1998). The starting point is very simple.

If natural reproduction is not possible, these technologies are a real remedy (whether it is infertility or the lack of an opposite sex partner).

MAHR techniques are used when regular, hormonal, drug or surgical treatments do not work (Ciochină & Iftimie 2003). As for "*the male genetic material, it can come from a so-called donor whose identity most often remains under the shadow of anonymity.*" (Sarchizian 2012)

The most widespread technique of MAHR is *artificial insemination (AI)*. *In vitro fertilization (IVF)* is not in itself a human mode of reproduction, but a scientific process by which the extracorporeal egg is fertilized in a laboratory. *In vitro* fertilization must be followed by another procedure, called embryo transfer in the uterus of the woman. The intrafallopian transfer of gametes (GIFT) is a more natural version of IVF. Other methods of medically assisted reproduction are ovulation induction (OI), sperm, ova or embryos donation, intracytoplasmic sperm injection (ICSI), subzonal sperm insertion (SUZI), tubular embryo transfer (TET), pre-implantation genetic diagnosis (PGD) – a technique used in IVF to help detect genetic diseases in order to remove these genes, the surrogate.

There are also other methods of medically assisted reproduction, such as post-mortem reproduction or pre-embryo cryogenesis.

*The gestation for another and substitution maternity*³, not regulated by the Romanian law, is performed by the same techniques of MAHR, the intention of the parties involved being different. The gestation agreement for another is also concluded between the persons involved in the procedure (the single pregnant woman or the spouse and the donor couple of gametes or embryos, persons who will become the parents of the child) and the medical services company.

The child thus born could have a genetic mother besides the one who gives birth to him or could have a legal father, based on the presumption of paternity but also a biological father (Motica & Tec 2019).

The MAHR techniques are considered to have a *therapeutic purpose* for infertility or to prevent serious hereditary *genetic* diseases. However, MAHR does not heal, so it cannot be considered a genuine therapy but a medical service. "*Reproductive medicine does not cure or prolong life.*" (Guțan 2011).

³These conventions are neither accepted nor prohibited in the Romanian law, but they are considered to undermine human dignity, they are a form of exploitation of the human body, and the children are in fact the object of a contract. The carrier woman is physically and morally exploited.

In another order of ideas, the right to be a parent is confined to the concept of private life (Article 8 of the Convention), it is even considered that *it exceeds the private life in terms of the means necessary for the fulfillment of this desire, means that belong to the public sphere of the right to private and family life* (Popescu 2013). The ECHR jurisprudence, in *Costa and Pavan v Italy*⁴, established that *the notion of private life includes the right to respect the decision to become or not a parent, to respect the right to become genetic parents, the right of access to heterologous artificial procreation techniques for the purpose of in vitro fertilization*. The specialists state that the MAHR recognizes the right to become the parent of those who want a child and, on the other hand, the right to renounce the affiliation of gamete donors is recognized.

But the ECHR, given that the family is at the interference between the public and private spheres, did not expressly recognize that the right to marriage or the right to private and family life would necessarily imply the right to procreation (SH and others c. Austria, no. 57813 / 00 the decision of 03.11.2011). It has also been shown that states are not required to regulate or agree on the use of artificial procreation.

Also on the ECHR decision line it can be stated that there is no right to a child, instead there is the right of the child to have a family (Popescu 2013). The protection granted by art. 8 of the Convention does not differentiate between the legitimate family and the natural family (family life is not related only to legal commitments) (Huidu 2010).

The decision to submit to these medical techniques (the right to autonomy) comes as a corollary of the right to reproduction.

3. Internal regulations regarding MAHR

Romania briefly regulates the MAHR issue, even if the reality related to the scientific development has made to meet enough practical cases in our country. There have been attempts at regulation in the field and at national level⁵. Even though our country has ratified the Oviedo Convention of 1997 (for the protection of human rights and human dignity with regard to the applications of biology and medicine, the Convention on Human Rights and Biomedicine) by Law 17/2001, that law was not adopted to take steps to implement this convention.

The *Civil Code* generally regulates *medically assisted human reproduction with a third party donor* (in articles 441 - 447) (*it is about the exogenous form of the medical procedure in which the conception is realized with the help of the*

⁴CEDO, Case *Costa and Pavan v Italy*, no 5427/28 August 2012, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-112993%22%5D%7D>, accessed on 12.02.2020.

⁵A draft law on the health of reproduction and medically assisted human reproduction which was rejected by the Senate and which was blocked by declaring certain provisions in its contents as unconstitutional

*genetic material outside the parental couple*⁶) (Florian 2018; Motica & Tec 2019). From the interpretation of the phrase third-party donor it may be understood that a plurality of donors is not possible (Motica & Tec 2019)⁷.

As it can be seen, the Romanian regulation refers only to the MAHR with a third party donor. But the fact that it did not regulate the other techniques of MAHR does not mean in the acceptance of some authors that they are forbidden⁸. However,

⁶Through the MAHR with a third-party donor the affiliation is acquired through the act of will of the persons who wish to be parents (the parents named by the *intention* are presumed to be the biological ones). The third donor may even be the woman, so we could be in the situation where the married woman who will give birth to the child does not have any genetic contribution to the conception of the child (an embryo formed by in vitro fertilization of another woman's egg was implanted). She will be the child's mother based on the legal will, the consent statement in front of the notary. The contract is concluded between the future parents and the medical services company

⁷In Greece, the UK or Ukraine it is known as the IVF technique with three parents

⁸ In the Romanian jurisprudence there is a case in which the court is requested to establish the filiation of two minors legally represented by the carrying mother in contradiction with the two biological parents. It should be noted that the mother is the sister of the biological mother and that the two children were taken after birth for raise by the spouses (parents of intent) who made the contract with a specialized clinic in assisted reproduction in Timisoara. The court (Timișoara District Court) rejects the plaintiffs' action, showing that the affiliation with the mother results from the material fact of the birth, the elements of establishing the motherhood being the birth of the child and the identity of the child. If another recognition were to be made, the inadmissible situation would be reached to establish that the mother who gave birth to those children is not actually their mother. The court of appeal admits the appeal of the plaintiffs (denial and establishment of paternity) and establishes the exercise of parental authority by the father (the biological and intentional parent). What is particularly interesting is that in 2013 the Timișoara Court of Appeal upheld the appeal, finding that the plaintiff is not the biological mother of the minors and decides the making of mentions in their birth documents.

The court's arguments are set out and interpreted widely in (Barac 2014) of which we extracted several considerations from <https://www.juridice.ro/311847/cateva-consideratii-privind-implicatiile-juridice-ale-tehnicilor-de-reproducereumana-asistata-medical-ruam.html>, accessed on 09.02.2020.

In short, it is shown that the hypothesis in this case is not regulated by the Romanian law, and, in civil matters, what is not forbidden is permitted. The court of appeal evokes a draft law on the health of reproductive health and medically assisted reproduction, initiated in 2004, rejected and declared unconstitutional in 2005. Another argument in favor of the decision is that the principle "mater semper certa est, pater incertus", needs to be amended in relation to the advances of medicine in the field of medically assisted human reproduction (MAHR). Given that there is no internal regulation in the positive law, the court considered itself entitled, even obliged to settle the dispute from the perspective of the provisions of art. 8 of the European Convention on Human Rights, respectively of the international pacts / treaties to which Romania is a party. The Court's arguments concern: the right of any person to know and establish his real ancestry as a component of his right to private life, guaranteed by art. 8 of the Convention. The appeal court concludes that the Romanian State should develop more relevant special regulations. The claimants in question cannot be denied the request to sue as long as the medically certified procreation method was the only chance of medical treatment, which could guarantee the biological mother the right to have children. The court of appeal, as well, emphasizes the interference of the state in the right of the minor claimants to private life, interference manifested by omitting the establishment of a legal framework for all the MAHR procedures, which, in fact, the Romanian State accepts, interference,

the current provision is confined to the principle of unavailability of the human body, which is why gestational agreements are struck by absolute nullity (elements related to civil status or public health are traded). The eventual nullity of such a convention does not, however, retroactively erase the existence of the child born as a result of this void contract⁹. The European law does not, in principle, regulate these surrogate conventions, but even under these conditions in some states these conventions have been deemed to be in absolute nullity¹⁰.

Art. 441 Civil Code allows only the confident woman or the woman and the man to make use of this procedure¹¹.

The parents¹² who use the medically assisted reproduction procedure with a third party donor *must give their consent in advance, under conditions that will ensure complete confidentiality, in front of a notary public explaining to them, explicitly, the consequences of their act regarding the affiliation* (art. 442 Civil Code) (Motica & Tec 2019; Statsky 2013). The expression of the consent must thus have the solemn form. It is enough the consent of the single woman, unmarried, but regarding the affiliation the provisions of the law contained in art. 442 para. 2 and 444 Civil Code are applied (Florian 2018).

In the event of death or in the case of divorce, the express will remain without effect if they occur before the time of conception realized within the MAHR. The consent can be revoked at any time, in writing, including in front of the doctor called to provide assistance for reproduction with a third donor (art. 442 paragraph 2 Civil Code).

which is disproportionate in relation to the supreme interest of the child. A final argument of the court of appeal concerns the acceptance by the court of the petition of the petitioner regarding the denial, namely the establishment of the paternity of the minors concerned, which represents a half-truth, under the conditions in which the gestational conventions were not denied. In this context, it is claimed that the adoption recommendation is excessive, the reason for the adoption being to find a substitution family for those born without a family, to which would be added the costs of the adoption procedure, much higher, as well as the duration of the procedure.

⁹The adoption would be considered the solution to give the parents or the woman who wants the child a preference over the donor (woman or man) and to the one who gave the child life. It is actually a pre-adoption before the conception. However, the role of adoption is to protect an orphan or abandoned child, while that of the assisted reproduction is to create a child to satisfy the wishes of future parents.

¹⁰In Canada or Spain they are considered null and void, in the US the court solutions differ depending on the content of the surrogacy agreement

¹¹ “Parents, in the sense given by this section, can only be a man and a woman or a single woman”. It is observed that the quality of husband is not required. See for reason identity point 5 of the decision of the Constitutional Court no. 418/2005, Official Gazette no 664 of 26.07.2005 regarding the unconstitutionality of the Law on reproduction’s health and assisted human reproduction (the provisions of the law refer to partners, without mentioning the individual, as the holder of the right, thus violating Article 16 of the Constitution).

¹²There are authors who consider that a more appropriate name would be *parents of intent*, given that they are only potential future parents. The phrase is found in the foreign doctrine of family law.

In art. 447 the Civil Code it is shown that the legal regime of medically assisted human reproduction with a third party donor is established by a special law. The special law, as we have mentioned, was unfortunately not adopted. Moreover, the Civil Code does not foresee what the modalities of human reproduction with a third party donor would be. It is not regulated in any way the legal way by which this procedure is performed. It is assumed that this would be a contract that would include the woman or the woman and her husband and the medical services company.

The contract that has as its object the MAHR with a third-party donor has the effect of replacing the affiliation of the third-party donor with that of the parents named *by intention, of the legal parents*. Art. 443 Civil Code deals with the issue of contesting the MAHR affiliation as follows: “*no one can challenge the child's affiliation for reasons related to medically assisted reproduction and the child thus born cannot challenge his affiliation. However, the mother's husband may deny the paternity of the child, according to the law, if he has not consented to the medically assisted reproduction performed with the help of a third donor. If the child was not conceived in this way, the provisions regarding the denial of paternity remain applicable*”.

Art. 63 Civil Code also contains some prohibition provisions, namely “*the prohibition of any medical interventions on the genetic characters aimed at modifying the offspring of the person, except those regarding the prevention and treatment of genetic diseases. Any intervention aimed at creating a human being genetically identical to another living or dead human being, as well as creating human embryos for research purposes, is prohibited. The use of medically assisted human reproduction techniques is not allowed for the choice of the sex of the future child except for the purpose of avoiding a serious hereditary disease related to its sex*”.

Law no. 95/2006 regarding the reform in the field of health stipulates in art. 142(u) the fact that “*a transplant means that medical activity which, for therapeutic purposes, in the body of a patient, hereinafter referred to as recipient, an organ, tissue or cell taken from another person, called a donor, is implanted or grafted*.”

The aforementioned law, however, does not include any sanctions against assisted human reproduction techniques. In art. 154 and 156 the sanction is regulated regarding the collecting of tissues, organs or cells without having the express consent of the injured person, by constraint, or for a certain patrimonial interest. The lack of therapeutic purpose, as provided in art. 142(u), is not a crime.

The regulations of this law also apply to *in vitro* fertilization techniques. It follows that law permits several *in vitro* fertilization techniques. However, the *in vitro* fertilization is not sufficient for the birth of a child, also a uterus is needed to implant the embryo: the uterus of the woman who brought her genetic contribution to the *in vitro* conception (the *genetic mother* is the carrier mother in this case) or the uterus of another woman, without genetic input (in this case being only the physiological or carrier mother). What it is not regulated in any way, as we have

mentioned before, are the medical contracts for these techniques and the legal effects in the matter of filiation.

Chapter V of Law 46/2003 on the rights of the patient¹³, regulates the right of the woman to decide whether or not to have children. It is shown that this right is guaranteed. Also, "*the patient, through the health services, has the right to choose the safest methods regarding the health of reproduction*" (art. 28 of the Law).

4. Does MAHR have any effect on the affiliation? Can the birth of a child born by such medically assisted reproduction techniques be challenged?

Does MAHR with a third-party donor determine a child-donor connection? Is it impossible to establish any relationship between the child and the donor?

If in the natural reproduction the filiation is constituted by the biological element of the blood descendency, in the medically assisted reproduction, the filiation rests on the element of the biological reality (Corral 2001)¹⁴.

In the case of applying heterologous technologies (the procedures that involve the use of male or female gametes of persons other than parents), paternity or maternity are dissociated from the resulting child. Beyond the provisions of the law or the judgments of judges, the nature of the child if we can call it this is divided: social and legal. He may be the offspring of someone who has not made a physical contribution to his establishment as a human being. The intervention of a pregnant mother brings an additional dissociative element to it, two separate elements, specific to the biology of reproduction, these being the genetic contribution and the gestational contribution (Corral 2001). If we look at things from this perspective, we could find the following situation: a child has three mothers and two fathers, namely the man and the woman who want the birth of the child, the donor of the male gamete, the woman who donated the egg, the mother who bears the child.

The maternity of the child born by these techniques is established on the basis of the birth. If in the birth certificate another woman was registered as a mother other than the one who gave birth and the court ascertains this fact, the actual filiation of the child can be proved by any means of proof (art. 411 para. 3 of the Civil Code). It can be interpreted in the context of our current legislation that although there is no express prohibition of pregnancy for another, of maternity substitution, it would be impossible to transfer the legal affiliation of the child from the woman who gave birth to the beneficiary woman or spouses (Florin 2018).

¹³Official Gazette no 51 of 29 January 2003.

¹⁴It is considered that *the main criteria for recomposing the filiation link of a child conceived by MAHR are: the genetic contribution, the affection of the parents who want the child, the preliminary judgment on the legality or illegality of the technologies, the analogy with the adoption, the best interest of the child and the will to procreate.*

The aforementioned provisions regarding the consent regulated by art. 442 Civil Code can be interpreted in the sense of establishing a relationship of affiliation with the father by the notarial act of expressing the consent.

Also, regarding the relations between father and child, art. 446 Civil Code provides that "*the father has the same rights and obligations towards the child born through medically assisted reproduction with a third party donor as with a child born by natural conception.*" The children born through the MAHR have the same legal status as the natural children (the same rights and obligations on both sides).

"The one who, after consenting to medically assisted reproduction with a third party donor, does not recognize the child thus born outside the marriage is responsible to the mother and to the child" (art. 444 Civil Code). A special case of father's liability to the mother and the child is consecrated (Baiaș & Chelaru & Constantinovici & Macovei 2012)¹⁵ if he has consented to the medical procedure but no longer recognizes the child (the paternity will be established by court and can be requested by both mother and child).

The filiation of the child conceived through MAHR cannot be challenged by any person (nor by the child concerned). The provisions of art. 443 Civil Code expressly provide that "*no one may challenge the child's affiliation for reasons related to medically assisted reproduction, nor can the child so born challenge his or her affiliation.*"

Thus, the principle of the undeniable, immutable character of the child's filiation conceived through medically assisted reproduction with a third party donor is established. The reason for this express provision is based on the desire to ensure, "*based on the consent of each parent expressed to carry out the medical procedure, the immutability of the civil status of the child whose legal affiliation does not have the biological reality*" (Baiaș et al. 2012).

One might conclude that there are two types of filiation, the genetic one (the father is the donor) and the civil one (the father is the one legally established in the paternity). Compared to the previous provisions of art. 443, it can be stated that in the case of medically assisted reproduction, no other affiliation can be claimed than the civil one. In fact, the biological lineage, that of the third donor, is replaced by the power of the law with the lineage towards the parents who appealed to the MAHR.

"The mother's husband may deny the paternity of the child¹⁶, according to the law, if he has not consented to the medically assisted reproduction performed

¹⁵The liability towards the mother implies the right to compensation according to art. 428 Civil Code (establishing the paternity of the child outside the marriage in the court). The responsibility towards the child, in terms of heritage, refers to the father having to pay compensation representing the expenses incurred with the maintenance of the child up to the date of the filing of the action in establishing the paternity

¹⁶The right to action in the denial of paternity belongs to the husband of the mother, the mother, the child, the alleged biological father, as well as the heirs of each of them - art. 429 para. 1 Civil Code.

with the help of a third donor, the legal provisions regarding the action in the paternity denial being applicable" - art. 443 para. 2 Civil Code. Thus, the immutable character of the filiation thus born knows an exception, namely the possibility of challenging the paternal filiation from marriage under the conditions established by law. This exception may refer to the situation in which the mother's husband does not consent to the same procedure or disputes the fact that the child was born as a result of the respective procedure.

If the partners meaning the parents of the child are not married at the time of conception or birth of the child, it is considered that the child cannot benefit from the presumption of paternity, the affiliation with the father being established by way of recognition or court decision. In this case, the presumptive parenting can no longer be applied on the basis of the matrimonial relationship. The declaration of consent cannot thus represent a formal recognition of paternity (it would not be possible to recognize an unconceived, unborn child). A man who would express his consent and recognize a child could at any time challenge the paternity on the grounds that the blood connection is missing and that the donor's genetic material was used.

Last but not least, we should take into account the provisions of the law regarding the confidentiality of information regarding MAHR¹⁷. The fact that it is a medical act, MAHR falls within the type of confidential medical information that pertains to the right of any patient but also to the category of rights protected by law, namely the right to privacy¹⁸. In this case, too we encounter an exception regulated by art. 445 Civil Code: *"if, in the absence of such information, there is the risk of serious harm to the health of a person so conceived or of his descendants, the court may authorize their transmission, confidentially, to the doctor or competent authorities. Also, any of the descendants of the person thus conceived can take precedence over this right, if the fact of being deprived of the information he asks for can seriously harm his health or that of a person close to him."* The guardianship court will give the authorization.

The experience of comparative law shows that there are no uniform criteria to address the delicate problems of the filiation arising from the technology of reproduction.

MAHR techniques are not without risks and ethical or legal problems (Barac 2014; Dumea 1998).¹⁹

¹⁷ *"Any information regarding medically assisted human reproduction is confidential. However, if, in the case of absence of such information, there is a risk of serious harm to the health of a person thus conceived or his or her descendants, the court may authorize their transmission to the doctor or competent authorities in confidence. Also, any of the descendants of the person thus conceived can take precedence over this right, if the fact of being deprived of the information he asks for can seriously harm his health or that of a person close to him"* - art. 445 Civil Code.

¹⁸ Chapter IV of Law 46/2003 on patient rights.

¹⁹ Some of these problems are: high mortality of the embryo or fetus, premature births, the risk of transmitting diseases, ethical problems generated by the possibility of using the embryos thus created for research, experiments, with the possibility of cloning human beings, boycotting the

Ectogenesis is another delicate topic that is much talked about in the medical research environment. The pregnancy that can be carried out outside the womb will soon be a reality and a huge gain in survival rates in the case of premature births. It is assumed that the functional artificial womb could be a reality in 10 years (Hudson 2019)²⁰.

5. MAHR in other states

In *Switzerland*, there is a special law regarding medically assisted reproduction, the *Federal Act on Medically Assisted Reproduction* (18 Dec. 1988). Such a medical reproduction procedure can be used only if it aims to overcome the infertility problems of a couple, when other treatment methods have failed or are hopeless or the risk of a serious illness being transmitted to the offspring cannot be avoided otherwise.

Reproduction with a third party donor is allowed only to married couples (Article 3 of the Law). Reproductive cells or impregnated eggs cannot be used after the death of the person from whom they were obtained. Surrogate motherhood is forbidden (it is sanctioned by law including the mediation to find a surrogate mother). These reproduction techniques will only be used if the partners have given their written consent and only after they have been informed and advised. In the situation where the procedure involves the risk of giving birth to a multiple pregnancy, this can only take place if the spouses are prepared to accept a multiple birth. Only physicians who have the necessary training and experience in medically assisted reproduction methods (who have sufficient knowledge of medical genetics and have the necessary laboratory equipment) can be licensed to perform these medical procedures (Articles 8, 9 of the Law).

The taking and production of an embryo for purposes other than pregnancy is punishable by a sentence of imprisonment of up to 3 years or a fine. The same sanction punishes the development of embryos outside the body of the woman beyond the point where it is possible to implant in her uterus. The same punishment

natural selection, the possibility of fertilizing a female egg with another female egg, in the case of lesbian couples, the deprivation of the child of a normal family environment (the number of single women conceiving through IVF is increasing) the possibility of extending the “post-mortem” reproduction (the child is born after one of the donor parents is deceased), separation of sexuality from procreation, eugenic slippage (one can choose the sex of the child, the color of the skin, the color of the eyes), the dissociation of the maternity and the genetic paternity from the social one, with the confusion of the notion of mother, because the surrogate mother differs from the genetic mother and even from legal mother, overturning genealogies (the carrier mother may be the sister or the genetic mother's mother), embryo trafficking, ectogenesis, meaning the production of autonomous human beings outside a woman's womb, in a laboratory, creating identical twins, creation of children from same-sex persons, affecting the personality of the child in the case of MAHR techniques with mother carrier.

²⁰Dr. Carlo Bulletti, associate professor at Yale University's Obstetrics, Gynecology, and Reproductive Science Department.

is applicable to transferring a human embryo to an animal, creating a clone or hybrid.

The examination of the genetic makeup of germ cells and their selection to influence the sex or other characteristics of the child are only allowed to identify the chromosomal characteristics that may affect the viability of the embryo or if there is a risk that the predisposition to serious communicable diseases may not be avoided²¹.

In *Italy* (Fineschi, Neri & Turillazzi 2005, p. 536)²², law 40 on assisted procreation²³ was adopted in 2004 (the law arose as a result of multiple jurisprudential cases of births by surrogate mother or insemination after the father's death).

The law text is very restrictive, heterologous techniques are forbidden, the use of genetic material not belonging to the couple is not allowed. The access is only allowed to heterosexual couples, whether or not they are married. The informed consent of the future parents is required (the consent can be withdrawn until the oocyte insemination procedure is performed). According to art. 6 of the Law, the couple should be given the opportunity to resort to adoption procedures as an alternative to medically assisted procreation. These techniques will only be used for therapeutic purposes (infertility of the woman or the couple). No more than 3 embryos can be created simultaneously, embryos transferred together even if the partners do not want more children.

Scientific research on embryos is forbidden.

Children born in this way have the status of children from marriage or recognized children of the couple. The rules of common law will be applied to establish the affiliation, and the action in the denial of paternity is prohibited in this case. There will be no affiliate relationship between the donor and the child, there will be no rights and obligations in this regard.

The medically assisted procreation interventions are carried out in public and private structures authorized and registered in a special register (instituted by decree by the Minister of Health).

The penalties related to non-observance of the rules established in the medical assisted reproduction procedure are quite harsh from a financial point of view between 200,000-1,000,000,000 euros (for example, the use of gametes that are not related to the requesting persons for procreative purposes, the application of techniques on minor females or same-sex persons, advertising for the marketing of

²¹Federal Act on Medically Assisted Reproduction (Law of Reproductive Medicine, FMedG), amended December 12, 2014, <https://www.admin.ch/opc/de/official-compilation/2017/3641.pdf>, accessed on 10.02.2020.

²²One in 5 couples cannot have children, 1 in 100 babies are created in the test tube, the average cost for an intervention is 3000-10,000 euros and the number of children born through these assisted reproduction techniques every year is 6000.

²³ Legge 40 Sulla procreazione assistita, 19 feb 2004, (Gazzetta Ufficiale, Serie Generale n.45 del 24-02-2004).

embryos or maternity-surrogate). The prison sentence is provided for the attempt to obtain a human being from a single initial cell, possibly identical in terms of nuclear genetic inheritance with another living or dead being (prison sentence from 1 to 20 years and a fine of 600,000 to one million euros). The doctor will be punished in this case with the prohibition of ever pursuing the profession. There is a fund for assisted reproduction techniques set up at the Ministry of Health, which is distributed to the regions on the basis of criteria established by ministerial decree.

In 2009, the Constitutional Court declared unconstitutional the maximum limit of the number of embryos to be produced and transferred for each cycle (three), as specified in the initial version of the law. In 2014, the Court declared as unconstitutional the prohibition of donor insemination (thus opening the way to heterologically assisted reproduction). Thus, medically assisted heterosexual reproduction is perfectly legitimate in Italy. In 2015, another ruling of the Constitutional Court granted the right of access to these techniques also for fertile couples, but carrying genetic diseases. Many couples are still excluded from these procedures (same-sex couples, single women and those with advanced reproductive age are currently discriminated against by the fact that the Italian law denies the access of these subjects to medically assisted reproduction) (Riezzo & Neri & Bello & Pomara & Turillazz)²⁴.

*Belgium*²⁵ has a special regulation in the field dating from 2007.²⁶ The legislation is permissive, having access to it both heterosexual couples as well as women couples and single women (the age limit of 47 years is required for women). The donation of gametes and embryos is allowed, under anonymity (but their marketing and donation for eugenic purposes is forbidden). In connection with the surplus of embryos, people may decide to keep them for their own reproduction, donate them for research or to other persons. In this regard, a contract will be concluded between the patients and the fertility company. This contract will contain provisions regarding the fate of embryos in case of divorce or death. It seems that the legal provision is intended to avoid the birth of a child in a couple where, for example, one of the partners no longer gives his/her consent, but has nothing against those embryos being transferred to other persons, thus, the child being born in another couple. The maximum retention period of the embryos is 5 years (Article 17 of the Law). Article 15 of the Law allows also the post-mortem implantation of embryos if there is a previous agreement in this regard (but not earlier than 6 months after the man's death). The Belgian law speaks about the so-called *conscience clause*, meaning the possibility of the doctor to refuse to perform such a procedure

²⁴<https://doi.org/10.1186/s12905-016-0324-4>, accessed on 10.02.2020

²⁵In Belgian fertilization centers, approx. 15,000 in vitro fertilizations are carried out and about 3,000 children are born annually following these procedures.

²⁶Loi relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes, din 6 iulie 2007

when he/she thinks that the child's interest could be affected by certain special circumstances of the case (Pennings 2007)²⁷.

The common law filiation rules provided by the Civil Code apply. The filiation ties are established exclusively for the beneficiary parents, following the expressed consent, permanently breaking any connection between the child and the biological donor parents. It is not allowed to introduce any action regarding the filiation neither from the child nor from the receiving parents (named *the authors of the parental project*) (art. 27 of the Law) or of the donor.

England (Weldon-Johns 2019)²⁸ is one of the few European countries with permissive legislation. There are special laws for the surrogate and MAHR, the last being radically amended in November 2008, namely the *Human Fertilisation and Embryology Act*²⁹. The Human Fertilization and Embryology Act 1990 (HFE) established as an offense the creation of an embryo, the use of an embryo for human reproduction, using an embryo that is not human, without having a special license.

The Human Embryology and Fertilization Authority (HEFA) oversees the use of gametes and embryos in fertility treatment and research, licenses clinics and fertility centers that perform in vitro fertilization (IVF), other assisted reproduction procedures, and human embryo research.

In the United Kingdom, the National Health Service (NHS) offers the opportunity to use publicly funded in vitro fertilization (IVF) techniques, available to people who meet the specific access criteria set out in the National Institute for Health and Care Excellence Guide (NICE) since 2013.

Although there is no age limit in fertility treatment in the UK law, the specialists have a responsibility to decide whether women's health will allow them to undergo treatment and pregnancy.

The access of heterosexual couples, couples of women and single women are allowed (IVF can be done including to women over 40, but the number of procedures is limited, instead the surrogate is the main solution in this field for same-sex male couples, and -AI or IVF artificial insemination are preferable in the case of lesbian couples). In the case of IVF, none of the partners should have children (even adopted). Donation of gametes and embryos is allowed, but by the new law of 2008, the donation is no longer anonymous, with the child's right to know his/her origin.

In the case of the child born through donor techniques, the law requires that the mention of *a donor* be entered in the birth certificate.

²⁷Catholic clinics refuse to perform the procedure for homosexual couples or single women.

²⁸The research published by Human Fertilization and Embryology Authority (HFEA) in 2019 showed that the number of treatments with assisted reproduction technologies performed in the United Kingdom has increased since 1990. These data show that in 2017, 54,760 patients underwent 75,425 treatments, indicating that some have undergone multiple treatment cycles (most being IVF), <https://doi.org/10.4324/9780429465895>, accessed on 11.02.2020.

²⁹ <http://www.legislation.gov.uk/ukpga/2008/22/contents>, accessed on 12.02.2020.

The research license may authorize the creation, preservation, and use of human embryos for research purposes. Research involving genetic modification of the embryo may also be authorized.

For the couples of women, a special system of filiation (first parent and second parent) was created. Moreover, in schools it is no longer allowed to use the words mother and father, but only the parent one, in order to avoid discriminating against children with same-sex parents. Both surrogate and post-mortem reproduction are allowed³⁰. At the time of treatment, the woman in a civil partnership is allowed to be treated as the parent of her partner's child, unless it is proved that she did not agree with assisted reproduction³¹.

Likewise, if the woman is married to a man at the time of treatment, he is presumed to be the father of the child unless he proves that he did not consent to the artificial reproduction procedure. Homosexual couples living in a long-term partnership relationship can become legal parents of a child carried by a surrogate mother.

In the UK court practice the question has been raised whether the right to resort to assisted reproduction techniques can be denied, justifying the child's interest. In this case it is about the refusal given in this regard in the case of a person who executes a sentence deprived of liberty (Gibson 2015)³². However, the European Court of Human Rights has had another opinion stating that the freedom of reproduction is not automatically lost when a person is incarcerated. The position of the ECHR can be justified because the prison itself is a punishment, which does not explicitly include the removal of the ability to have children³³.

In 2018 the Government proposed a draft law on human fertilization and embryology (Proposal for a Draft Human Fertilization and Embryology Act 2008 (Remedial) Order 2018).³⁴

In the British doctrine the right to procreative freedom is interpreted as a right of non-interference - the freedom of the person to make the decisions he/she

³⁰ To carry out this procedure the written consent of the man is necessary, and at the latest 42, respectively 21 days from the birth of the child in the case of Scotland, the woman must register him in the birth register as the father of the child, Section 39 of the HFE (*Use of sperm, or transfer of embryo, after death of man providing sperm*).

Section 40 tackles the case in which the *embryo was transferred after the death of husband etc. who did not provide sperm*. In this situation, this man can be considered the father of the child under the same conditions as in the previous section.

³¹ See section 42 (*Woman in civil partnership at the time of treatment*) and Section 35 (*Woman married to a man at the time of treatment*) of the HFE.

³² https://pdfs.semanticscholar.org/5bfc/c1dcfddf157785e2c9d629a4fc5cb0f68851.pdf?_ga=2.230500373.840721260.1581418407-6262215.1581418407, accessed on 11.02.2020.

³³ ECHR, Case Dickson v. The UK, application no. 44362/04 of December 4, 2007, violation of art. 8 of the Convention, on <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-83788%22%5D%7D>.

³⁴ Published on 2 March 2018 by authority of the House of Lords and House of Commons. Text on <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/645/645.pdf>, accessed on 11.02.2020

considers appropriate, if these decisions do not bring significant harm to others (Gibson 2015).

Conclusions

"Scientists have always tried to unravel the mystery of creation ... but medically assisted reproduction techniques force the upper limit of how humanity applies technology to themselves, in the supreme attempt to control the origins of life" (Huidu 2010).

It is desired and necessary to adopt an adequate regulation of these means of medically assisted human reproduction, with the showing of the allowed techniques, with the establishment of the contracting conditions, with the establishment of legal effects regarding the child's filiation.

Many questions can be asked where a legal clarification must be found: Is the donor, woman or man required to have other children? Can the number of these donations be limited? What happens to the surplus of embryos? What is the age at which the third donor can make the donation? What is the age of the woman who can use the MAHR? Can she do it from the age of 18? Can she call on the procedure if the woman is ill, is menopausal or is over 40? Will the state finance these techniques? How do we respond to those who say that adoption would be preferable to these procedures?

Let us not forget that this special law should take into account the needs and desires of the person to have a child and the best interests of the child, even if the child is not yet born. The best interests of the child should be taken into consideration when considering the problem of legitimizing these reproduction techniques. It must be legitimate in relation to the desire of the persons to have children or the researchers to fulfill their mission.

The issue of inbreeding and involuntary incest is of major importance in this area. The existence of special registers would avoid this problem, but the risk would be a breach of the donor's anonymity and the confidentiality of the procedure. In order to avoid the conclusion of marriages between persons who were born through MAHR procedures (from the same third party donor), the civil status officer should be allowed access to confidential information regarding the births carried out through these methods (Nicolae 2014). The risk of marriage between relatives should be an issue that is of interest to the whole society, and therefore would have a negative effect on the general interest.

Complete genetic testing of the embryo before implantation raises complex clinical and ethical issues. It is stated that as a result of these procedures the child is "created" as his parents wish. Thus, the *"biological ethics dilemmas"* appear (Huidu 2010).

The law does not recognize any effect of the genetic filiation (the donors of the genetic materials are the future parents). Thus, there is no legal relationship between them and the child if we refer to the provisions of art. 441 para. 1 Civil Code. Thus, there is the following dilemma: *can it be considered that the filiation*

is based on the biological connection that results from the procreation? (Sarchizian 2012). There is no filiation relationship between the third party donor and the child (the confidentiality of this information regarding MAHR and those regarding the donor (Gal 2014)³⁵). The filiation will represent the biological connection between the genetic father and the child resulting from the procedure.

In connection with the principle of confidentiality, a confrontation arises between the child's right to identity and that of the donor to privacy (the donor's anonymity is stipulated in many laws regulating MAHR³⁶).

Thus, it can be concluded that the paternal filiation cannot be based exclusively on the fact of conception, as long as in assisted reproduction, the filiation with the mother's husband will be established in the power of the consent expressed by him regarding the medical operation of reproduction (Sarchizian 2012).

Although the right to procreation is insisted upon, no European document or convention expressly establishes the right to have children or the right to use the MAHR techniques (Popescu 2013).

There have been various legal and doctrinal attempts to outline an absolute right to procreation (even the right to medically assisted procreation), but these are not convincing. However, there is certainly another right that is well defined, namely the right to health. The therapies for sterility and infertility fall within this area of the right to health. (Lockwood 1999)³⁷

The law that we expect should be the result of a full collaboration between lawyers, doctors, patients and other specialists. In the context of so many medical discoveries, the respect for privacy, the right to health and dignity must be guaranteed.

The concept of filiation and even that of the family will be reconfigured in the near future with the advent and use of these reproduction techniques. The image of the classical filiation makes place to the contracts that give rise to filiation and takes this matter little to the notion of market. The classic vision of the child born from the love of parents is also replaced by a controlled product and designed according to the rules of science.

³⁵It is considered that *"it would be advisable to inform the children that they come from a gene that is foreign to that of the parents and have the right to know the identity of the donor, even though they will be forbidden to contact him without his consent"*, http://ajust.ro/blog/2014/april/11/reproducerea-medical-asistata-principii/#_ftn8, accessed on 08.02.2020

³⁶In France the donor is anonymous, in Spain the child's right to obtain general information about the donor is recognized, without revealing his identity except in special cases, in Quebec the right to obtain information about the donor is also transmitted to the heirs of the child, in Sweden the child can know the identity of the donor, in Austria the child has the right to know the identity of the donor from the age of 14 years.

³⁷See comments on the application of these techniques in the cases of women suffering from certain diseases, in this case it is presented the case of a 34-year-old woman who was born with a kidney and who had kidney failure

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