

A FEW REFLECTIONS REGARDING THE MEDICALLY-AIDED REPRODUCTIONS WITH REFERENCE TO THE PROVISIONS OF THE NEW CIVIL CODE

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Abstract:

Currently, the so fast evolution of the medical sciences and of the biotechnology has placed the right in front of a new challenge: medically-aided reproductions became increasingly more a reality in the Romanian society too. Not only the fast progress of the science generated this challenge, but also the fact that today a general tendency to place the person in the centre of the juridical universe manifests because to speak about freedom of procreation implies to place person's rights before those of the community.

This new way of obtaining the quality of subject of law gave birth to some ethical, moral, even religious, but mostly legal controversy through the major implications which it has on some institutions such as: filiation, kinship, adoption, human rights, etc.. Trying to answer this polemics, the New Civil Code consecrate as an absolutely novelty the general principles regarding the filiation regime, the responsibility of child's father, the conditions of action in denial of paternity, the confidentiality of informations, in an entire section titled "Medically-aided reproduction with third donor."

Thus, the present article urges to a reflection on this new regulations to see to what extent they manage to fill the legislative gap of this domaine.

Key-words: *medically-aided reproduction, filiation, the rights of personality, New Civil Code, the freedom of procreation*

1. The right to procreate – right of personality

1.1. General appreciations regarding the rights of personality

In the middle of actual juridical discourses we find more and more a new category of rights closely tied to man, indispensable to its biological existence and fulfillment of its personality, psychologically and socially, the so called personality rights.

Usually, in current language, the concept of *personality* supposes "all the mental features of an individual", "that which is personal, distinctive to each person" or is used to point out a person with special skills in a certain field, but from a juridical perspective, the notion of personality rights refers to those rights which are exercised on some inherent attributes to the individual, which belong to each person from the moment of their birth.

As it is stated in the doctrine¹, the personality to which these rights refer does not reduce to the technical notion of juridical personality, in the sense of being rightful subject.

¹ O. Ungureanu, C. Jugustru, Civil Right. Persons, Edition 2, Pub. Hamangiu, Bucharest, 2007, page 40.

It wants to express more, which is: the individual in its whole, in its biological, psychological and social reality.

In the attempt to form a more complex definition of the rights of personality, most pedants began from the definition of subjective rights and the limitations of the latter from civil freedoms.²

By civil subjective right it is understood the possibility of the active subject, within the limitations of civil juridical rules, to have a certain conduct and to pretend from the passive subject a similar conduct, and, if needed to call on the state's coercive force³. At the same time, rightfully it was stated that subjective right is a legal constraint of the other person's freedom, through juridical rule in favor of the subject who benefits as such of a field reserved for the exercise of prerogatives⁴.

In a general expression, freedoms consist in doing what you want, or, as a reputed author stated, "to not do what you do not want"⁵.

As such, besides rights there are also certain freedoms consecrated by penal law. These are not genuine subjective rights; they are in a way a sort of faculties or possibilities, because they do not have a precise determinant object. But because these civil freedoms have many common features with the rights of personality, they cannot be dissociated, which is exactly why they unite – as it is shown in the doctrine – in the category of the rights of personality.⁶

As far as we are concerned, we define the rights of personality as subjective civil non-patrimonial rights, indispensable to the person's biological existence and the fulfillment of its personality, psychologically or socially and which can be defended through justice.⁷

So, the rights of personality are part of the category of subjective non-patrimonial rights because they protect values without monetary interest, such as life, dignity, honor, image, private life and so forth, which are extra-patrimonial prerogatives and as a consequence cannot be included in the physical person's patrimonial content. Because they are part of the category of non-patrimonial personal rights, the rights of personality will have juridical features specific to this category, being non-transferable, non-transmissible, undetectable, not exercised by a representative, indefeasible, opposable to *erga omnes*.

By non-transferability of these rights it is to be understood that they cannot be the object through convention of a definite cession or renunciation.

Non-transmissibility implies that at the death of the person these rights are no longer valid and do not transmit to heirs.

Also they are undetectable just because they are not economical assets, so that is why it is said that they are taken out of the civil circuit.

Because they are closely related to the person, the rights of personality can only be exercised directly, and not through other persons.

² For the presentation of evolution of the theory of the rights of personality, see: *F. Zenati-Castaing, Th. Revet, Manuel de droit des personnes*, Pub. Presses Universitaire de France, Paris, 2006, pages 210-213.

³ *G. Boroi, Civil Law. General Part. Persons*, Pub. Hamangiu, Bucharest, 2008, page 76.

⁴ *Jacques Ghestin, Gilles Goubeaux, Traite de droit civil. Introduction general*, 1977, page 141.

⁵ *G. Cornu, Droit Civil. Introductions. Les personnes. Les biens*, Edition XII, L.G.D.J., Montcrestien, Paris, 2005, page.185.

⁶ *O. Ungureanu, C. Jugastru*, op. cit., page 41.

⁷ Also see *E. Chelaru, Civil Law. Persons*, Pub. C.H.Beck, Bucharest, 2007, page 15, *R. Duminičă, A. Draghici*, General appreciations on the right of man to dispose of its own body with reference to the New Civil Code, in Scientific Session Proceedings "Challenges of the Knowledge Society", Pub. Pro Universitaria, Bucharest, 2010, pages 421-422.

Indifferent of the period in which the titular of such a right exercises it or not, it will never fade through prescription and can never be gained by another person.

And not last, the rights of personality are part of the category of absolute rights, being opposable to any subject of law, without being necessary the accomplishment of publicity formalities, which means that all the other persons, as undetermined passive subjects, have the general and negative obligation to refrain from any act or fact which could harm the right of the active subject, meaning that they have the obligation to not do anything to brake or hamper the exercise of these rights.

All these features have a value of principle because, in present, it is more and more discussed about a tendency to “give the right of heritage to non-patrimonial rights”, admitting, for example, the validity of conventions with questionable title, through which it is permitted the publication of details concerning the private life of a person or the use of its image or voice in commercial purposes.

Another problem approached in the specialty literature is about the possibility of making a classification and enumeration of these rights of the personality. A brief analysis of the Romanian and foreign doctrine allows us to establish the lack of a unitary agreement regarding this problem.

Most of the times, to do a typology of the rights of personality are used the criteria used for the classification of non-patrimonial rights.

From all the classifications proposed in the doctrine we appreciate that is worth to keep in mind the one which has as criterion the human structure triad – man as bio-mental-social being – which divides the rights of personality in the following categories:

- rights of personality which target the human being as a bio-mental entity (the right to life, the right to physical and mental integrity, the right to dispose of their own body, and more recently the right to speech);

- rights of personality which regard man as subject of emotional or affective states (the right to honor, the right to reputation, dignity, the right to respect the feelings of affection in the case of the death of a close one);

- rights regarding the protection of man as a social being (in a sub-division, we are talking about rights which belong to the physical person: the right to a name, the right to a residence, the right of respect to private life, the right to image, the rights to intellectual creation – the non-patrimonial side and rights which define the juridical person: the right to label, the right to headquarters, the right to its own firm, logo).⁸

Most pedants consider that it is practically impossible to make an inventory of all the rights of personality, the list remaining always open, talking about a real inflation of these rights alongside the rapid development of society, of science, but especially alongside the reconsideration of the individual’s place in the law, today, man and his rights finding themselves at the center of the juridical universe.

1.2. The right to procreate. The concept of human reproduction assisted medically.

Now the medical science’s progress in the field of human reproduction has generated the discussion of a new right – the right to procreate.

From a religious perspective, human reproduction constitutes one of the great blessings which God gave man from his creation, but also God “closed the wombs of some women”. To this day, the birth of a child is considered a blessing, and the suffering of the

⁸ See: *C. Jugustru*, Reflections on the notion and evolution of the rights of personality, in the Directory of the History Institute “G.Baritiu”, Series Humanistica, tom. V, Cluj-Napoca, 2007, page 329.

soul of those who cannot procreate naturally is unimaginable. Medicine came at the aid of these persons by creating techniques of human reproduction medically assisted. The juridical acknowledgment of the right to procreate will allow any person to call on the benefits of science to have a child.

The problems which guaranteeing this right raises are multiple and various: social, moral, psychological, ethical, religious, but especially juridical⁹ because the beneficiary of this right, in the end, it is the child. That is why we consider that the right to procreate must be analyzed closely to the most important rights of the child and in relation with the obligations of maintenance and education which belong to the parents.

Obviously, the right to procreate can be included in the category of the rights of personality, more exactly in the category of those who target the human being as a bio-mental entity, alongside the right to life, the right to physical and mental integrity and the right of man to dispose of its own body, having all the juridical features of those, listed above.

The term of procreation medically assisted has appeared after 1985, as a result of using new techniques of human reproduction and the appearance of new notions, like: gamete donors, gamete banks, embryo donors, maternity replacements, surrogate mother etc. From an etymological perspective, this term contains all the modalities and conditions to enforce these new techniques.¹⁰

Definition of the concept of assisted reproduction is not unitary, being numerous controversies because of the different sphere of domains which it implies: medicine, law, ethics, and theology.

As far as we are concerned, we consider human reproduction medically assisted as a modern way to treatment couple infertility, consisting in the biological or medical treatments and techniques which allow procreation outside the natural process, under the assistance of a doctor.

The most used methods of medically assisted procreation are: artificial insemination, *in vitro* fertilization and the surrogate.

Artificial insemination is a reproduction technique used in some cases of sterility and consists in sampling and insertion, through medical methods, of sperm cells into the mother's body, where the fertilization will produce, while the *in vitro* fertilization (IVF) is the technique through which it is accomplished the fertilization of an egg with a male gamete (sperm cell) in a laboratory (in vitro), the embryo arose from this process being later transferred into the womb.¹¹

As regards to the surrogate, it is actually, a convention through which a woman agrees to be artificially inseminated, to carry the pregnancy, to give birth to the respective child and to voluntarily yield her legal rights on that child to the beneficiary party (person or couple). The juridical nature of such a convention and its validity are extremely controversial, which is exactly why there are very few legislations which allow it.

2. The actual stage of the Romanian legislation in matter of medically assisted human reproduction

⁹ With reference to the proliferation of human rights, category which also contains the rights of personality, it was said that we assist at a relative moralization of law. See: *D. Terre*, Les questions morales du droit, Pub. Presses Universitaire de France, Paris, 2007, page 25.

¹⁰ See: *Vasile Astarastoaie, Maria-Christina Ungureanu, Ortansa Stoica*, Ethical and legal problems of new reproductive technologies, Romanian Bio-ethical Magazine, vol.1, no.2, 2003.

¹¹ See: *D. Cuisine*, New Reproductive Technologies, Dartmouth, 1990, page 245.

Because the rights of personality have just recently appeared in the Romanian juridical scenery, they do not benefit just yet of a unitary and coherent juridical system of protection, unrelated regulations consecrated to this protection being spread at the level of various laws: the Romanian Constitution; Decree no.31/1954; Family Code; Law no.95/2006 regarding reform in the field of health, Law no.46/2003 of the patient's rights, but also in the international origins of law, like: the Convention regarding the child's rights, ratified by Romania through Law no.18/1990; The International Pact regarding the civil and political rights of man, ratified by Romania through Decree no.212/1974; the European Convention for the defense of human rights and fundamental freedoms, completed in Rome at November 4th 1950 and ratified by Romania through Law no.30/1994; the European Convention regarding the human rights and biomedicine, signed at Oviedo in April 4th 1997 and ratified by Romania through Law no. 17/2001.

In present, in our country, human reproduction assisted medically is a reality but it is made only on the basis of the Hippocrates oath and on the dispositions of Law no.95/2006 regarding the reform in the field of health, Title VI – which states that this title which refers to the sampling and transplant of organs, tissues and human cells also applies to techniques of *in vitro* fertilization, not yet existing a special law to regulate all problems of juridical nature which such a technique raises.

So, Law no.95/2006 allows the procreation assisted medically through the *in vitro* fertilization mainly through depositions of Art.142-e, but it does not give the legal frame regarding the consequences of this procreation technique over the filiation of the conceived child.

The legislator, rightly, consecrated the free character of the sampling of organs, tissues and/or cells of human origin through Art.158, paragraph 1 of the law which states: *“the organization and/or making the sampling of organs and/or tissues and/or cells of human origin for transplant, with the goal of obtaining a material profit for the donor or organizer, constitutes the infraction of organ trafficking (...)”*.

Although there have been attempts to regulate the human reproduction assisted medically (we refer to the Law regarding the health of reproduction and human reproduction assisted medically from 2004 which made the object of the control of constitutionality, at the referral of the Romanian President, and the Constitutional Court through decision no.418/2005 it was stated that more articles from this law are unconstitutional), and in present we are all in front of a legislative void on this matter.

3. Human reproduction medically assisted with a third donor in the regulation of the New Civil Code

Trying to give answer to the deep questions aroused in Romanian society, in 2009 the Romanian Parliament adopted through Law no.287/2009 the New Civil Code. It was wanted for this new code to be a modern instrument in regulating fundamental aspects of the individual and social existence, consisting of all the depositions regarding persons, family relations, commercial relations and even relations of international private law, promoting as such a monistic conception in regulating the reports of private law.

In the field under discussion, the New Civil Code truly brings a series of news through the express consecration of the rights of personality and by setting general principles in the matter of human reproduction assisted medically, establishing the regime of filiation, the father's commitment, the conditions of action in the case of the denial of paternity, information confidentiality, in a whole section entitled “Human reproduction medically assisted” from Title III “Kinship”, Chapter II “Filiation”.

Also, through the depositions of Art.63 N.C.C., the Romanian legislator went for the solution of guaranteeing the respect of the human being even from its conception, banning the creation of human embryos for research. From the acknowledgement of the provisions of Art.63 paragraph2, thesis II of the N.C.C. with those from paragraph3 of the same article results that it is still permitted the creation of human embryos in the purpose of human reproduction medically assisted.

The New Civil Code through Art.441-446 states, as shown above, the general legal frame of human reproduction medically assisted with a third donor.

In the content of Art.442 we find the conditions which need met by future parents in order to call on this method: *“Parents who want to resort to medically assisted reproduction with a third donor will have to give their consent previously, under the conditions which ensure full confidentiality, before a public notary who will explain them, expressly, the consequences of their actions regarding filiation”*. Still, in paragraph 2 it is stated: *“The consent will have no effect in the case of decease, the formulation of divorce or of the actual separation, previously occurred to human reproduction medically assisted. The consent can be revoked at any time, in written, also in front of the physician who assures assistance for the reproduction with a third donor”*.

The legislator establishes that through “parents” it is understood a man and a woman, or a single woman. As such, this method can be use not only by married couples, but also those living together, as well as single women. At the same time, it is forbidden for gay couples to use this method.

Regarding the consent, correctly, it was stated that this must be previous to the undergoing of the procedure, in authentic form. We great the establishing by the legislator of an authentic form for the manifestation of consent, thereby aiming at: the warning of parts on the special importance which this juridical act has, insurance of the consent’s freedoms and certitudes, exercising a society’s control, through the state’s authorities, regarding the juridical acts which are of an importance that exceeds the strict frame of the parties’ interests.¹²

Instead, the annulment of consent can be made at any time, as well as in front of the physician, the written form being sufficient (Art.442, paragraph2, thesis II of the NCC). Practically, the law gives a solemn character to the consent, and its withdrawal gives it a consensual one.

The anticipated consent given by the mother’s husband is the same with an anticipated acknowledgement of the paternity of the child which is about to be born, being impossible for him to do anything regarding the denial of the child’s paternity. This results from the interpretation of the provisions of Art.443 NCC.

The single man, who consented to the assisted reproduction with a third donor, is forced to acknowledge the paternity of the child, if not his responsibility through Art. 444 of the NCC are enforced.

The given consent for the medically assisted procreation excludes the possibility of exercising an action to contest the filiation of the child for reasons belonging to reproduction assisted medically and neither the child born as a result of this procedure will not be able to contest his filiation, excepting the case in which this child was not the result of medically assisted procreation or the case in which the consent is without effect.

¹² For the rationalities which determined the legislator to constitute the authentic form of *ad validitatem* in the case of closing certain juridical papers, see: *G. Boroi*, Civil Law. General Part. Persons, Pub. Hamangiu, Bucharest, 2008, page 248.

Regarding to Art.442 paragraph 2, thesis I of the N.C.C., the consent lacks the effect in the case of decease, of divorce or actual separation, occurred before the human reproduction assisted medically. If the mother's husband has not expressed his consent to the medically assisted reproduction, then he could form an action in denying paternity.

We consider as justified the husband's right to exercise an action in denying paternity in the case in which the married woman uses medical techniques to procreate without his approval, because it is broken one of the conditions required for the access to techniques of medically assisted procreation: the parent's consent.

More than this, we believe, alongside other pedants¹³, that it would be useful to acknowledge to the child conceived the possibility to formulate an action in response to the donor, who, knowingly has consented that his genetic material be used by the couple or person who did not fulfill the conditions foreseen by the law in order to use such a reproduction technique. We do not exclude the possibility to stimulate the civil responsibility of the physician who assisted at the procreation under such circumstances.

Another problem raised by the procedure of medically assisted human reproduction with a third donor is that to establish filiation of the conceived child.

In the specialty literature¹⁴ filiation is defined as "either the string of descend of a person, one from the other, either as a direct relation between parents and children".

Presently, filiation is regulated by Art.47-61 of the Family Code, and in the New Civil Code through Art.408-450. If filiation towards the mother is easy to establish because it results from the exterior fact of birth, difficulties arise in establishing the filiation of the father, especially when we are facing human reproduction with a third donor. The New Civil Code approaches this problem in Art.441 paragraph 1, establishing that human reproduction medically assisted, with a third donor, will not determine any filiation between the child and the donor, thus being unable to pass responsibility onto the donor. Still, Art.443 states that "*No one can contest the filiation of the child for reasons belonging to medically assisted reproduction. Neither the child born as a consequence of this medical procedure will be able to contest his filiation*".

The child conceived during marriage with the participation of a third donor, but born after the dissolution, declaration of nullity, annulment or termination of marriage has as father the ex-husband, any action against the donor not being permitted.

We point out that the New Civil Code does not make any express reference to the identity of the donor of the genetic material, him being able to be known or anonymous. Still, the New Code consecrates at a general level the confidentiality regarding the whole procedure through Art.445: "*Any information regarding human reproduction assisted medically is confidential. However, in the case in which, in the lack of such information, there is the risk of grave prejudice for the health of a person conceived in such a manner or for his/her descendents, the court can authorize their transmission, confidentially, to the physician or the competent authorities.*"

Of the *lege ferenda*, we consider that the Romanian legislator should have stated and pleaded for the express consecration of the donor's anonymity, with the exception of the cases in which disclosure of information regarding this problem is necessary for the situations in which the child's health is endangered. On the other hand, regarding to Art.7-1 of the Convention of the child's rights from November 20th 1989, ratified in Romania

¹³ N. A. Daghie, D. M. Iorga, Medically assisted procreation-news and perspectives, Law Magazine, no.3/2010, page 93.

¹⁴ A. Bacaci, V. C. Dumitrache, C. C. Hageanu, Family Right, Pub. C.H. Beck, Bucharest, 2009, page 169.

through Law no.18/1990, the child has the right to know his parents, if it is possible, and to be raised by them. Indifferent of the attitude adopted by the legislator, we support the protection of the donor and any eventual action taken in establishing paternity of the donor to be rejected.

Still, the New Civil Code regulates the father's responsibility (Art.444) as well as the relations between father and child (Art.446). So, the one who, after consenting to human reproduction assisted medically with a third donor, does not acknowledge the born child under these conditions will answer to the mother as well as to the child. In such a situation, the child's paternity will be established through a court order, under the law. The father has the same rights and obligations to the child born under this method of reproduction as well as to the child born naturally.

Conclusions

The medically assisted reproduction has generated at the level of society not just enthusiasm and satisfaction towards the progress of medical sciences, but also many controversy of ethical, religious and especially juridical nature, the discussions on this topic being inexhaustible.

Until recently, although in our country there were children born through these new techniques, we were missing an appropriate regulatory framework. Following the countless warnings especially from the field of doctrine and from practice, today there is a medical legal regulation of "the techniques of *in vitro* fertilization" (Art.142e of Law no.95/2006) and a series of general depositions regarding the consequences of human reproduction medically assisted with a third donor on filiation (Art.441-447 of the New Civil Code, not yet in effect), but we are still waiting a special law to set the juridical regime for these techniques of human reproduction.

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