"LUCIAN BLAGA" UNIVERSITY OF SIBIU
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THE MEDICALLY ASSISTED HUMAN REPRODUCTION AND THE FILIATION

-Ph.D. thesis-

Summary

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Summary of the Ph.D. thesis

CONTENTS

2. Current legislation in the law of other states

2.1. The European Union

2.1.1. France

2.1.2. Switzerland

2.1.3. Italy

2.1.4. Germany

2.1.5. England

2.1.6. Spain

2.1.7. Belgium

2.1.8. The Netherlands

2.1.9. Austria

2.1.10. Russia

2.1.11. Greece

2.2. North America

U.S.

Canada / Quebec

2.3. Australia

3. Current issues arising from the use of techniques of medically assisted human reproduction

3.1. Legal issues

3.2. Bioethical issues

3.3. Access to technology (homoparentality)

IV. FILIATION IN THE CASE OF THE MEDICALLY ASSISTED HUMAN REPRODUCTION IN ROMANIA

1. Current regulations in the field of family and filiation:

1.1. The Family Code

1.2. Law no. 95/2006 on health reform

1.3. Law no. 272 of 21 June 2004 on the protection and promotion of children's rights

1.4. Law no. 273 of 21 June 2004 on the juridical regime of adoption

1.5. Other regulations

2. The situation of the specialized medical practice

3. The present state of the legislative demarche in the field:

3.1. The law project on reproductive health and medically assisted human reproduction

3.2. The new civil code project

The present society is one of paradoxes. Thus, the more we advance from a scientific and technological point of view, instead of becoming stronger, the weaker we become. This is also seen in the case of the process of human reproduction, the percentage of those who can not have offspring in a natural way increasing from one generation to another. Under these circumstances, mankind attempts to eliminate these negative effects of civilization through the infusion of technology. The more research and technology advance, the higher the number of children they will produce. The more such individuals the society receives, the more visible the moral, ethical, legal and even religious conflict becomes. It is certain that these people are appearing and will continue to appear in increasing numbers. The duty of the society is to receive and integrate them so that the negative effects of this phenomenon should be minimal.

The *medically assisted human reproduction* (MAHR) is an increasingly present reality in the Romanian society too. Because this new method of obtaining the quality of the subject of law has major implications on the present socio-juridical relations, the legal institutions that are affected or are related to this issue must be identified. These juridical institutions, such as filiation, kinship, adoption, early life, human rights, genetic security, etc. should be reconsidered in the light of medical reproductive techniques in order to find the best methods of integrating the new people into the social-juridical domain. The MAHR regulation involves a complex activity of remodeling of the existing norms, by inserting new provisions, by making special provisions and exceptions, by readjusting some of those that already exist. It is very important that these rules should not give special juridical status to the new subjects of

law. They should achieve a common regulatory space that does not establish any privileges or discrimination.

In the case of the techniques that involve the use of sexual cells that do not belong to the prospective parents or in the case of the surrogate mother, the laws of our country are not ready to deal with the new legal relations, a series of problems being likely to occur. Despite the fact that regulations regarding the harvesting and transplantation of cells have been issued, they are too general and too concise to clarify the juridical situation of the new children.

Under these circumstances, we wanted to make a study to understand the phenomenon and which will enable us to suggest a way of institutionalizing and regulating it. Our present research has four chapters, each chapter in turn containing more subchapters and sections.

The first chapter - I. *The medically assisted human reproduction* - is devoted to the studying of the phenomenon in terms of terminology and history (subchapter 1), from a medical (subchapter 2) and scientific (subchapter 3 and 4) point of view and it contains references to the moral and bioethical concepts and theses.

(1) The society makes a serious mistake if it accepts the interference of science in the act of conception without a strict legal control. It is not the moral, psychological, religious, economic, social problems that are vital in this process, but the biological ones. The protection of the human race is essential and so is the protection of each and every individual. A person conceived by MAHR needs to know what genes he carries in order to be protected from the union with another that carries the same genetic baggage. A donor may participate in the conception of several children that will belong to other people, but he/she may also have his/her own children. All these children are genetic brothers, although from a juridical point of view they have different parents. They must know of their genetic brothers' existence so that they should be safe from meeting them at the level of procreation. This must be the fundamental principle in the regulation of the new relations of kinship and filiation. Two principles could guide this protective regime: informing the children at a certain age that they come from a gene that is different from that of the legal parents' and the right of the child to know the identity of the donor, even if he is prohibited to get in touch with him/her without his/her permission.

Fertilization or procreation, in medical terms, represents the act through which a new being is brought into this world. When two spouses suffer from sterility, they have an established juridical modality to get a child: adoption. Modern science, however, has provided a new modality to those with reproductive deficiencies which fulfills their desire to have their

own children: *the medically assisted human reproduction*. Nevertheless, the act involves great moral and legal problems. It could be understood rather as a *treatment for infertility or sterility*, an argument often invoked by those who put it into effect. In this case, a third person is involved, the doctor who has a very important role in terms of applying the medical techniques.

Assisted reproduction does not have a unitary theory because there are many controversies due to the different fields involved (law, medicine, theology, ethics and bioethics, philosophy). Not even the definition of the concept has a generally accepted formulation. Therefore we believe that the name of "medically assisted human reproduction" should be viewed in its restricted sense of assisted reproduction, because the support involves not only the medical dimension, but the ethical, juridical, psychological, social and even religious ones as well.

MAHR represents all the clinical or biological techniques and procedures which enable the procreation outside the natural process (the sexual act is absent), through the intervention of the doctor and when he/she prescribes it. The MAHR techniques are used when the usual hormonal, surgical or drug treatments do not yield any results. There are several MAHR methods and procedures associated to them (artificial insemination (AI), *in vitro* fertilization (IVF), embryo transfer (ET), the gestational carrier or the substitution one), the differences being given both by the number of people involved in carrying out these procedures and by the place where the fertilization takes place. In general, the methods known so far, involve the spouses, the medical therapist, a donor, a "loan mother" or an adoptive family. The differences between these techniques involve differences in the legal-ethical approach.

These practices have become widespread because the rate of sterility and infertility of couples is growing, 10-15% of couples being unable to have children naturally (*sterility* is the inability to achieve pregnancy, and *infertility* is the inability to give birth to children, i.e. keep a pregnancy and to give birth to a live child).

In reality, the *therapeutic* purpose of these techniques is unfulfilled. They do not offer solutions or treatments for eliminating sterility or infertility. MAHR does no cure; it only offers a solution to bypass the respective problems and to achieve the goal by using other means. Thus, it is not a therapy, but a medical service. The therapeutic goal may exist for the future child, but only when MAHR seeks the elimination of untreatable serious illnesses that are hereditary.

In order to support the people who can not have children naturally (and justify other rights, such as procreation outside marriage, the right to abortion), the assisted reproduction devotees have invented a new right, the right *to procreate*. This could lead to the regulation and protection of the rights of this *minority*. Guaranteeing the right to procreate as a fundamental human right will allow anyone to appeal to science in order to get offspring. However, the question that arises is: how much freedom can be granted in this area? After all, the beneficiary of this is the resulted child and his/her status must be well founded. The child has a number of rights, which often come into conflict with his parents' wishes. One of the most important rights of the child is the filiation, which involves the establishment of juridical connections with the parents, the parental obligations, the name, the respect of blood relations, which implies the child's knowledge about them, etc..

We consider that the right to procreate should be linked to the obligation to maintain and educate the child properly. Procreation is the means by which the natural person appears, which means that it must involve a higher level of responsibility both of the parents and of the society. The filiation link must have such a foundation as well. Many children suffer because of the ignorance and incompetence of their parents or because of their absence.

(2) The *MAHR techniques* are those medical procedures by means of which the harvesting, processing and preservation of gametes, the fertilization, the (pre)embryo, the genetic diagnosis, the embryo transfer and the reduction are achieved. MAHR techniques can be classified according to several criteria. These are extremely important when it comes to the natural, social and juridical status of the resulted child:

I. According to the place where the fertilization occurs, these techniques can be *endogenous* (intracorporal) and *exogenous* (extracorporal):

1. ***endogenous*** techniques (fertilization takes place inside the woman's body):

a. *artificial insemination* (AI), with its variants (intracervical, intrauterine, intraperitoneal);

b. *intrafallopian transfer of gametes* (IFTG)

2. ***exogenous*** techniques (fertilization takes place outside the woman's body):

a. *"in vitro" fertilization embryo transfer* (IVF-ET);

b. *zygote intrafallopian transfer* (ZIFT);

c. *tubal embryo transfer* (TET);

d. *intracytoplasmic sperm injection* (ICSI).

II. According to the genetic material that is used (the origin of gametes), the assisted reproduction techniques are *homogeneous* (intraconjugal) and *heterogeneous* (with donor):

1. ***homogenous*** techniques (*homologous*) (fertilization is achieved only with the gametes of the beneficiary couple):

a. artificial insemination with the gametes of the couple;

b. in vitro fertilization with the gametes of the couple;

2. ***heterogeneous*** techniques (heterologous) (fertilization occurs with the gametes from the donor of sperm, ova or embryo):

a. Artificial insemination with donor sperm;

b. zygote or embryo transfer obtained by in vitro fertilization with donor sperm, ova, or both, separately or as embryo or zygote.

One should notice that some techniques are complex, involving for their achievement both intracorporal stages as well as extracorporal ones, like IFTG, ZIFT, TET, ICSI.

AI is the most popular MAHR technique. The seminal fluid is treated, frozen and mechanically transferred into the uterus or vagina of the woman. In general, the use of fresh sperm untreated in the laboratory for the achievement of AI is prohibited for health reasons - in some countries there are even penal sanctions in this respect (France).

IVF is not a means of human reproduction per se, it is only a scientific process during which the ovum is fecundated extracorporally in a controlled environment (laboratory). IVF should be followed by another procedure, called the (pre)embryo transfer (the embryotransfer) (ET) (in the woman's uterus), in order for the medical reproduction act to be completed.

Intracytoplasmic sperm injection (ICSI) is the most utilized technique of assisted reproduction used to successfully solve the cases of severe male infertility. The technique was developed recently (1994) and consists in the harvesting of sperm by microsurgical techniques, selecting one of them and injecting it (or a fragment of it, the nucleus) into the cytoplasm around the nucleus of an ovum (procedure performed under a microscope with special instruments).

The success rate for each AI is the same as in the case of a healthy couple with no reproductive problems: 15-20% per menstrual cycle. Therefore, the operation will be repeated every month until it is successful. The rate of pregnancies after IVF-ET is dependent on the causes that determine the sterility. Another important factor is the female patient’s age. It is considered worldwide that the rate of success in the case of embryotransfer is 25% -35%.

The technique with the highest degree of risk is IVF-ET. The risks for the mother and the child can be diverse: complications due to ovarian overstimulation, spontaneous abortion,

multiple or extrauterine pregnancies, high mortality of the embryo or fetus, premature births, the risk of disease transmission.

(3) The *gametes* are human cells carrying sexual chromosomes: the ovum (the female reproductive cell) and the spermatozoon (the male reproductive cell). The fertilized ovum is called *zygote*. The pre-embryo occurs as a result of the cell division of the zygote and it becomes an *embryo* on the 14th day.

The way to the conceptualization of the identity of the embryo - and of the man before birth - is ponderous and complicated, because of the consequences that may result if one accepts one idea or another. Even though the international treaties define life and the person, they fail to shed light on the juridical status of the unborn human being. *The Universal Declaration of Human Rights* states in Article 3 that "every individual has the right to life, liberty and the security of person" and the *European Convention of Human Rights* states in Article 21 that "everyone's right to life shall be protected by law." Moreover, the *United Nations International Covenant on Civil and Political Rights* stipulates in art. 6 that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life". Under these conditions, the problem of determining the moment of the human person starts to exist occurs.

At present, the principle of respecting any human being from the beginning of his/her life is not applicable in the case of the *in vitro* fertilized embryos. Therefore, one may be a human being without being a human person. Furthermore, the supernumerary embryos that have not been used or that have exceeded the maximum period of preservation are destroyed.

(Pre)supernumerary embryos resulting from IVF are frozen after two-three days of development, after they have already divided into 8 up to 16 cells. Before the transfer they are thawed and selected. (Pre)embryos may be cryopreserved for long periods of time, however, because of the risk of deterioration, the freezing period was limited to a maximum of 5 years, after which they are destroyed. The present conservation technology through cryogenics does not have a high success rate; after the thawing, depending on a number of factors, the survival rate can fall to 35%.

The *surrogate* is an option for infertile couples or individuals, as well as for homosexual or single men who want to have children. When the law permits it, the surrogate is achieved after the conclusion of an agreement between the parties involved prior to the completion of the proceedings. The surrogate is not considered a MAHR procedure or technique, but rather an agreement, a social convention. This agreement commits a woman to bear the pregnancy and give birth to a child whom she has previously consented to give after

birth to the beneficiary (single person or couple), who assumes all the rights and duties of parenthood.

The *post-mortem reproduction* is a procedure which can lead to the appearance of a child after one of the donor parents is deceased, using his/her cryopreserved gametes. The situations can be diverse and involve a number of collateral issues, such as the right over the gametes and (pre)embryos which are outside the human body, the post-mortem filiation, the child's right to inheritance, etc..

In the field MAHR one can encounter a medical procedure called *genetic diagnosis*. It consists in studying the genetic heritage of the (pre)embryo for various purposes. The genetic diagnosis may be of two kinds, according to the time it is performed, namely: preimplantation (PIGD) and prenatal (NGD). The legal purpose of this diagnostic is the identification of any possible health problems that may occur at this level (hereditary transmitted genetic diseases, malformations, etc.) and the attempt to treat them. In case serious illnesses are identified, which can not be treated during pregnancy or after birth, or when risks for the mother's life are identified, the termination of the pregnancy is recommended.

The donation contract or agreement is made, directly or indirectly, between the donors and the beneficiary and the purpose of this is the transmission of genetic material from the donor (a healthy individual) to the beneficiary (a person with reproductive disabilities). Moreover, a controversial contract is the one of maternal substitution, the finality of which being the transmission of the child and the filiation right to another woman, with all the effects arising from this. The justification of the legality of these contracts would be their purpose, which is similar to that of the adoption.

(4) *Genetic engineering*, also known as genetic manipulation, is a filed of the science of heredity (genetics) dedicated to some experiences of inserting genes from one species into an organism of the same species or of another species. This field is developing more and more. Scientists dig deeper into the cell and achieve a progress that sometimes is downright terrifying. The scientific progress in this field nowadays enables the scientists to go beyond the limits of nature. Nevertheless, the man's dream of becoming a creator is dangerous for the balance of life. Genetic experiments can be diverse. These may include research on the human genome, on the non-human genome, on *transgenic* methods (combining human and non-human genes - *hybrids*), on combining human genes or non-human genes (the so-called *chimera* - contains cells from several organisms from its species or from other species).

The *additional protocol to the Convention on Human Rights and Biomedicine on the prohibition of cloning human beings* prohibits *reproductive* human cloning. The permitted

cloning technologies are called *therapeutic* cloning. If therapeutic cloning is justified by the fact that it can create certain elements of the human body (stem cell, for example) that may help cure certain diseases otherwise untreatable and does not lead to changes in the person's genome, the reproductive cloning can only achieve biological copies of other people, which has no rational justification.

In **Chapter II** – *Filiation in the present Romanian law* - we focus our attention on the presentation and analysis of traditional concepts of kinship and affinity (subchapter 1), natural filiation (subchapter 2), adoptive filiation (subchapter 3) as they are analyzed in the Romanian doctrine, and in subchapter 4 (*"artificial" filiation*) we apply these present concepts and regulations to the case of the children resulted from medically assisted human reproduction.

(1) According to the provisions of art. 45 paragraph 1 of the Family Code, *kinship* represents the relationship based on the lineage of a person from another person or on the fact that more persons have a common ancestor. In fact, this article defines only the natural kinship based on blood (genetic) relations between two persons, namely the fact of birth or conception, but this also results from the legal act of adoption – civil kinship. It consists of the relationship resulted from adoption between the adoptee and his/her descendants, on the one hand, and the adopter and his relatives, on the other hand.

The kinship institution is very important because the legislator conditions the production of juridical effects on the existence of family relationships. Such regulations can be found in both the family law and in other branches of law.

The exogamy principle has imposed itself on all the modern law systems due to moral and medical reasons. This principle is reinforced by scientific research, which shows the danger of combining close genes for the health of the children.

One can question the kinship of the children resulted from MAHR who not have the same genetic material. In terms of blood link these children are different; they become relatives only through the juridical bond with their unnatural common parents. One can appreciate that only the provisions established by the law of adoption are used in this case, in the sense that two adopted people (with full effects) by the same adopter, are relatives. A juridical issue arises in the case when one of these children establishes his/her maternity and/or paternity in relation to the biological parents. Although born by a woman within a marriage, the child may, according to the law, claim natural kinship to donor parents. Under these circumstances, the birth fact can no longer be an absolute condition of kinship.

Therefore we consider that, at present, the adoption procedures must be followed for all the MAHR cases with other gametes than those of the spouses.

The *affinity* is the connection of one of the spouses with the relatives of other spouse. Between the relatives of the two spouses there is no such connection and between the spouses there is no kinship or affinity, only the special relationships resulting from marriage. The degree of affinity does not represent the subject of any legal regulation, thus only the rules established in the case of kinship will be applied.

(2) The **natural filiation** is the biological relationship resulting from procreation and birth. The filiation on the mother's side is called maternity and is based on the fact of birth and the filiation on the father's side is called paternity and is based on that fact of conception. Filiation can occur either within marriage or outside marriage.

Defining filiation as the juridical bond between parent and child is the closest to the requirements of the modern society. However the term "parent" must have its meaning restricted to the sense of legal parent, because in the case of MAHR we encounter several categories of parents, even more than in the case of adoption (biological parents or donors, surrogate mother, adoptive parents). These new methods of procreation have led to the appearance of new juridical concepts. Thus, filiation can be classified, according to its source, into *natural* (based on the fact of natural procreation or on biological truth), *adoptive* (resulting from adoption) and *artificial* (in the case of MAHR with or without donor). The *artificial filiation* could be defined as the juridical bond between child and legal parents, based on their consent, according to the law, to conceive and regardless of the origin of the sexual cells.

A. *Filiation on the mother's side*, results, according to the stipulations of art. 47 paragraph 1 of the Family Code from the fact of birth. The certainty of maternity is also expressed by the Latin adage *mater in iure semper certa est*. The new concept of artificial filiation undermines this adage especially in the case of the surrogate mother and of the ova and (pre)embryo donation. However, the law is clear in this respect: the maternity is determined by the fact of birth, thus any contrary agreement is absolutely null. The proof of maternity involves, firstly, the fact of birth, evidence that the beneficiary mother of the surrogate can not produce.

The fact of the child's birth is one of the three elements for establishing the filiation on the mother's side, along with the identity of the born child with that of the child whose filiation is under discussion, as well as the proof of marriage in the case of the marriage filiation.

a) *The establishment and the proof of filiation on the mother's side by means of the birth certificate.* Following the registration of the child's birth in the civil registry, the birth paper is drawn up and the birth certificate is issued. The proof of filiation on the mother's side is made by means of the birth certificate and birth paper on condition of the existence of a concordance between the birth certificate and the use of the civil status. The opinion of the majority as far as the doctrine is concerned is that the birth certificate proves both the fact of birth and the identity of the child; it shows that that child was born from the mother.

The state of facts which leads to the conclusion that a child is of a woman represents the use of the civil status or the state possession. According to art. 51 paragraph 1 of the Family Code, the child can not claim a civil status contrary to that resulting from the birth certificate of civil status and from the use of the civil status in accordance with this certificate. The conformity of the civil status with the birth certificate implies the cumulative meeting of the following conditions: *nomen* – the child has the name of the mother, *tractatus* - the child is considered as such by the mother and his/her family, *fama* – the child and is considered as such by other persons.

The impugnment of the maternity resulting from the birth certificate issued on the basis of the registration of the birth can be formulated in the following situations: the birth certificate and the use of the civil status do not concord (e.g. the substitution of the child after birth by mistake or by fraud), the child has a birth certificate, but does not have the use of the civil status.

b) *Establishing the filiation on the mother's side by recognition* (art. 48 of the Family Code) - if the birth was not recorded in the ledger or if the child was recorded in the ledger as born of unknown parents, the mother can recognize the child. The birth may not be recorded under the following circumstances: there never existed a ledger, the mother did not declare the birth. Article 48 paragraph 2 stipulates that the forms of recognition are the declaration made at the civil service office, the authentic document, the will.

Recognition of the filiation on the mother's side is unilateral juridical act by which a woman declares the filiation connection between her and a child she declares as hers. The recognition is irrevocable, declarative, personal, voluntary, unilateral. Moreover, the recognition is not a mere juridical act, it is a solemn act, it is contrary to erga omnes.

One can recognize minor children and adults, the deceased children, the conceived children. The conceived children, at birth, have to meet one of the hypotheses covered by Art. 48 of the Family Code.

The establishment of maternity through recognition is written on the birth certificate of the child whose maternity was recognized. The establishment of maternity through recognition, which does not correspond to the truth, may be contested by any interested person under art. 49 of the Family Code. The action is indefeasible and one can use any legal means of proof.

Not respecting the content and form conditions for the recognition of maternity may be the premise of applying the absolute or relative nullity sanction.

c) *The establishment and the proving of the filiation on the mother's side by court order* - the action can be exercised, in general, in the cases stipulated by art.50 of the Family Code: if, under any circumstances, the filiation on the mother's side can not be determined by the birth certificate; when the truth of the data specified by the act that ascertains the birth is contested.

The establishment of maternity in court has a personal character and belongs only to the child. The action of establishing the filiation on the mother's side is indefeasible during the child's life and, in terms of probation; one can use any legal means of proof.

B. *The filiation on the father's side* is the juridical connection between father and child and is based on conception. Since paternity can be within a marriage or outside marriage, there are children born within a marriage and outside of a marriage.

Under the new juridical and social conditions (when the act of conception is no longer related to the sexual act) the term "conception" from the aforementioned definition should be interpreted or even replaced by the syntagm "the will to conceive". Thus, notions like "natural procreation / or conception" could be promoted for those who conceive for themselves and "juridical or civil procreation / or conception" for those who conceive for another. In this sense, if there does not exist a convention that will prove the will of conceiving for another, the absolute presumption of conceiving for oneself could be established Furthermore, in the case of artificial conception (medically assisted), the fact of conception is certain and can be proved directly by medical documents.

Under the Family Code (art.53), the child is born within the marriage is if she/he was born during the marriage, regardless of time of conception. Also, the child is born within marriage is if he/she was conceived during the marriage and born after the dissolution, termination, declaration of nullity or annulment of marriage, subject to the condition that the birth must have occurred before the mother completed a new marriage.

The child is outside of marriage if he/she was conceived and born before the conclusion of the marriage or after the dissolution, termination, declaration of nullity or annulment of marriage, also taking into account the legal time of the conception.

The method of determining the paternity within marriage is different from the manner of establishing the paternity outside marriage. The paternity within marriage is determined by applying the presumptions of paternity, and the paternity outside of marriage is established by court decision and recognition.

a) *The paternity within marriage* is established by the Romanian legislator by the mechanism of applying the presumptions of paternity established by art. 53 of the Family Code. These presumptions must be related to the presumption of the legal time of conception regulated by art. 61 of the Family Code .

The presumption established by art. 53 of the Family Code may be reversed only in the case of the denial of paternity. The denial of paternity has the purpose of eliminating or reversing the presumption of paternity. At present the action can be initiated by the mother, the real father, the child or any other person who shows an interest in this respect.

According to art. 55 paragraph 1 of the Family Code, the action for the denial of paternity is prescribed within 6 months from the date the father knew about the birth of the child. The action of denial of paternity can be proved by any means of evidence. The medico-legal expertise - serological, anthropological, dermatoglyphic, genetic - has an important role in the processes of denial of paternity. We appreciate that, at present, the donor of sexual cells (the biological father), may also show an interest. He, for various reasons, may change his mind regarding the charitable deed he did for another and can claim the paternity of the child.

The general effect of the admission of the denial of paternity consists in the fact that the respective child becomes, retroactively, a child outside marriage.

The action of the denial of paternity should not be mistaken with the action of contesting the paternity within the marriage. The latter action has as a purpose the unjustified application of the presumption of paternity. Thus, it is not the identity of the father that is contested, but the nature of the filiation bond between him and the child.

b) *Establishing the paternity outside marriage* can be done by recognition or by court order (Article 56 of the Family Code). The *recognition* is the personal act of a man who confesses that he is the father of a child conceived and born out of wedlock.

Just like the recognition of maternity, the juridical nature of the recognition of paternity is mixed, being a means of evidence and a unilateral juridical act. The recognition of paternity is irrevocable, declarative, contrary to erga omnes, personal, voluntary. It also

constitutes a juridical solemn act, as well as a juridical act in itself. The valid recognition of a child implies the existence of discernment.

One can recognize the child conceived and born out of wedlock, the deceased child only if he/she left natural descendants (Article 57 paragraph 1 of the Family Code), the minor child, and the adult one. The already recognized child can not be recognized by anyone else as long as the previously established filiation is not eliminated. The main effect of the recognition is the establishment of the paternity of the child to the respective man.

The court action that tends to prove that the already established recognition does not correspond to the truth is the action that challenges the recognition of paternity. In order to prove the action, any means of evidence is admissible. The main effect of the admission of the contestation of the recognition of paternity is the retroactive removal of the paternity established by the respective recognition.

The court action for the establishment of the paternity outside marriage is an action of civil status complaint and has as its object the determination of the filiation connection between the child outside marriage and his father. The cases in which the action for the establishment of paternity outside of marriage can be formulated are determined by law. One can appreciate that such an action can be introduced whenever there is a child outside marriage. This fact is considered normal, because the establishment of the truth about paternity may not be restricted. The titulary of the action for the establishment of paternity outside marriage is the minor or adult child. The right of action for the establishment of paternity outside marriage is prescriptible after a period of 1 year. The starting time of the respective term is identified by the Romanian legislature itself: the birth of the child (art. 60 paragraph 1 of the Family Code), from the final decision that led to the child's losing his/her quality of child born within marriage (art. 60 paragraph 2 of the Family Code), from the cessation of the mother's living with the alleged father or from the cessation of the support he provides for the child. The intention of the Romanian legislature to protect the interests of the minor child represents the cause for the establishment of a limitation period, provided that the civil status actions are imprescriptible.

The effects of the irrevocable acceptance of such actions are retroactive - from the birth of the child and from the moment of conception as far as his/her rights are regarded - and consist in the establishment of the paternity outside marriage.

(3) **Adoptive filiation** - the new juridical regime of adoption is established by the provisions of Law no. 273/21.06.2004 published in *Monitorul Oficial* (*The Official Gazette*), Part I, no. 557 of 23.06.2004. Adoption represents the juridical operation by means of which

the filiation connection between the adopter and the adoptee as well as kinship ties between the adoptee and the relatives of the adopter are created (art.1, L. 273/2004).

The principles whose observance is mandatory in case of adoption, according to the law, are the following: the principle of the best interest of the child, the principle of the child's rearing and education in a family environment, the principle of the continuity of the child's education, taking into account his/her ethnic, cultural and linguistic origin, the principle of informing the child and of taking into account his/her opinion according to its his/her age and his/her degree of maturity, as well as the principle of celerity in the making of any documents referring to the procedure of adoption.

The structure of adoption is a complex one, because it implies a series of formalities: the juridical acts by means of which the persons established by law express their consent for the completion of the adoption, the certificates and confirmations of the institutions that deal with adoptions, and the court order that approves the adoption. The nature of adoption is a mixed one, as all the above-mentioned procedures, taken together, have a common purpose: the finalizing of the adoption in the best interest of the child.

The adoption produces juridical effects only from the date when the court order that approved it became irrevocable. Moreover, one must bear in mind that the adoption establishes the filiation between the adopter and the adoptee and the relatives of the adopter.

The obligation to inform the child that he/she is adopted is explicitly established by art. 52 of Law no.273/2004. Bringing to the attention of the child the fact that he/she is adopted will be done when his/her age and degree of maturity permit this. As a rule, the identity of the natural parents of the adoptee can be disclosed after the acquiring of the full exercise capacity by the adoptee. By analogy, this rule must also be applied in the case of the children resulted from medically assisted human reproduction with a donor.

(4) The ***"artificial"*** **filiation** is not regulated in Romania. However, Romania has ratified, through Law no. 17/2001, the European Convention on Human Rights and Biomedicine, signed in Oviedo (Spain) on 4 April 1997 and the Additional Protocol to the European Convention for the protection of human rights and of the dignity of the human being from the biological and medicine applications, on the prohibition of cloning human beings, signed in Paris on 12 January 1982. These acts require the signatory countries to adopt national laws in the fields of biology and medicine.

The first rules applicable in Romania to the MAHR techniques are contained in Law no. 95/2006 on health reform. The activity of harvesting and transplantation of tissues and cells of human origin for therapeutic purposes is regulated under Title VI of the law (entitled

The harvesting and transplantation of organs, tissues and cells of human origin, for therapeutic purposes). The regulations contained in the law address even the *in vitro* fertilization techniques (Article 142, letter E) the harvesting and transplantation of organs, tissues and cells of human origin are made for therapeutic purposes. As one can see, the law in question seeks to cover legally the complex and controversial area of MAHR, but it does it in a marginal and incomplete manner. There exist in this normative act general provisions on the harvesting and transplantation, on the donor and the necessary consent, but there are no regulations about the MAHR techniques, the juridical relations determined by this, the juridical regime of the sexual cells and (pre)embryos, the filiation connections. Under these circumstances, we consider that the only regulations applicable to the regime of filiation remain all those covered by the Family Code and by the Law of adoptions.

When, regardless of technique (AI, IVF-ET), the cells of the prospective parents are used, no issue regarding the filiation is raised, because they are both biological parents and beneficiary parents. The only condition is that they should have expressed their legal consent. However an issue is raised regarding the object of the expression of the consent. Law 95/2006 requires its expression for harvesting and transplantation, but not for the recognition and the acceptance of the child. We consider that in this case the rules of the Family Code on the child born within marriage and on the child outside marriage may be applied.

First of all, we must outline all the principles according to which the filiation connections will be established in the case of MAHR. As far as the mother is concerned, the law is clear, the filiation is established by the fact of birth according to the principle *"mater in iure semper certa est*" (art. 47-52 of the Family Code). There is no other way to determine filiation on the mother's side in the Romanian law. The only exception is the adoptive filiation, but the legislation in this area does not contain any provisions regarding the MAHR case either. The filiation on the father's side has only the provisions from the Family Code, art. 53-55 for the establishment of the filiation on the side of the father within the marriage. and art.56-60 for the establishment of the filiation on the side of the father outside the marriage. The provisions in the field of adoption are also applicable. In both cases, however, prohibitions related to blood relations (biological truth) - such as impediments to marriage, incest - the child's right to know his/her origin are applicable. This entitles us to say that the current Romanian law does not have any provision regarding the anonymous donor of sexual cells for procreation.

A. *Artificial insemination* does not raise problems with regard to the establishment of the filiation on the mother's side, art. 47 of the Family Code being applicable. It results from

the fact of birth (the technique involving the use of the biological mother's ovum; the ovum follows the natural evolution and path and the conception takes place inside her body).

As far as the father is concerned, the problem will be solved differently, depending on whether the mother is married or not and on whether the man from which the genetic material comes from is known or not. We consider that the meaning of law 95/2006 does not exempt the donor father from the fulfillment of parental obligations, as long as the child does not have an established filiation connection with another man.

In the case of the *married woman*, in accordance with the presumptions stated in art. 53 paragraph 1 of the Family Code, the mother's husband becomes the child's rightful father. If the husband has given his consent under the conditions of law 95/2006 on insemination and has not taken it back until the carrying out of the technique, we consider that the aforementioned legal presumptions are applicable in this case and he will remain the father of the child within marriage. A delicate problem arises when the artificial insemination is done without the husband's consent. Normally the presumptions of paternity are applied, the mother's husband becoming the father of the child within marriage on the basis of the principle of biological truth.

If the mother uses the sperm of a donor without the consent of the husband, the action for the denial of paternity can be permitted, the nonpaternity of the husband being easily proved with medical documents.

If the sperm of a donor was used, we appreciate that, under the conditions of the present regulations, the mother's husband can successfully deny the paternity of the child conceived in such a way, a simple medical test exonerating the husband from liability even if he had previously given his consent, its expression not having as an effect the prohibition of the right of action for the denial of paternity, and the Romanian legislation does not provide any such impediment. Even if he admits that he has given his consent, the husband or partner can not be forced to become the father of another's child against his will.

In the case of the donor, anonymous or not, whom the married couple has appealed to, the relations between this and the child are similar to those between the biological parent and the child adopted by a couple, in the sense that there is no filiation relation between them, but observing the legal impediments arising from the blood relations.

In the case of the *unmarried woman*, there are two situations: when the donor's identity is known and when the donor's identity is not known. If the identity of the male donor is not known, the filiation on the father's side can not be determined. If on the basis of

art. 59 of the Family Code, the child promotes the court action in order to determine his/her paternity, it will be rejected because the father is not specified by the plaintiff.

If the donor is known, the action establishing paternity can be promoted or even the donor can recognize such a child under on the basis of art. 57 of the Family Code. However, in order to successfully promote an action for the establishment of paternity, the doctrine also imposes the condition that the male donor should have given his consent for artificial insemination in front of the doctor. Otherwise, the man from whom the biological material was harvested, even if known, remains only a biological father, that is not a rightful father. Although this reasoning would be the logical one, we consider that the Romanian law does not distinguish between father who intended to procreate and the one who did not intend to procreate, thus, the existence or inexistence of the consent should not be a condition for the admission of the action.

Currently, in the Romanian law, the anonymous donor who participates in the conception of a child by artificial insemination is not protected by law and the filiation on his side can be established, even against his consent, as long as after the child finds out the donor's identity nothing can prevent the child to establish his/her filiation with him.

Even if the known donor were protected from any claims of the child so conceived, the child (who does not have a filiation established on the side of another man) would benefit from the possibility that the donor may recognize him/her, or even if the donor does not recognize him/her legally he could support him/her.

B. The *in vitro fertilization* is a MAHR technique more complex than the artificial insemination and with more complicated juridical and ethical problems. The act of conception takes place outside the body of the future mother and only the medical staff actually takes part in it. In the case of the in vitro fertilization there are more problems regarding the filiation relation, because the ova, the zygotes or (pre)embryo donation can also occur. For the analysis of these relationships one must take account more situations than in the case of the artificial insemination. If in the case of AI the woman is always the child's biological mother, in the case of IVF-ET the woman can have several qualities: the donor and beneficiary of the technique, only donor, only beneficiary. Besides these situations, the woman may be married or unmarried. So is the case of the man, but he may have the same qualities as in the case of AI.

- The simplest situation is when for IVF-ET the gametes of the spouses are used. The relations of filiation are established just like in the case of the natural child within marriage.

Thus, for the mother, art. 47 of the Family Code is applied and for her husband art. 53 of the Family Code

- An intermediary situation is the one when the ovum of the wife and the sperm of a donor are used. The situation is similar with the AI with donor, in the sense that the mother's husband will be considered the father of the child on the basis of the legal presumption. We appreciate that, even if he expressed his consent with respect to the carrying out of the technique, the husband can successfully deny the paternity of the child. Moreover, art. 150 of Law 95/2006 requires for the transplantation only the consent of the recipient, not that of her husband. Under these circumstances, the husband is not bound by the consent given by the power law.

- There also exists the situation when the husband's sperm is used, but the ovum is donated by another woman. It should be noted that law no. 95/2006 does not mention anything about the donation of ova, only about the donation of sperm (Art. 146, para. 6). The legislator may have the intention to prohibit the harvesting and the use ova for this purpose, otherwise we face, again a new legislative mistake.

In the cases when the ovum or the embryo is donated, the filiation on the mother's side will be established on the basis of art. 47 of the Family Code by the fact of birth. There also exists the possibility of litigation between the donor mother (the biological mother) and the mother who gave birth (the adoptive mother). Normally, the birth can not be reversed, thus the biological mother will not be able to obtain any rights in court over the child, because the principle *mater in iure semper certa est* is absolute and does not admit any exception. Under these circumstances, the child can be adopted by his biological mother, the one who gave birth to him/her being considered his natural mother. This rule also applies in the case of the surrogate.

In the case of the husband, he will be the father of the child within marriage by virtue of the presumptions of article 53 of the Family Code

- The last option in the case of the married couple is the conceiving of a child with ovum and sperm or (pre)embryo from third-party donors. In this case neither of the beneficiary parents will be blood-related to the child, only a juridical relation being established. Thus, the fact the wife gives birth to the child will lead to an establishing of the maternal filiation on her side. Similarly, her husband will become the father of the child within marriage, on the basis of the legal presumptions. Because maternity can not be denied, the woman who gave birth can not request the dissolution of the filiation connection between her and the child under any circumstances. However, according to art. 50 of the Family Code,

one can contest the reality of the facts stated in the certificate acknowledging the birth; the filiation on the mother's side can be proved in a court of law by any means of evidence. This means that the DNA expertise could overrule the fact of birth included in the certificate, the blood relation between the child and a woman who did not give birth to him/her being proved. It will be difficult for any court in our country to establish the filiation in such a manner, even if the scientific evidence is clear, because the juridical arguments in favor of the woman who gives birth are much too powerful and those which sustain the donor mother have no legal support.

C. The filiation problem in the case of the *surrogate* is even more complex, since, in addition to the beneficiary parents and third-party donors of gametes, one more person is involved - the mother who carries and gives birth to the child. The situation is complicated because the woman who gives birth to the child does not want to establish any filiation connection with the baby, despite the fact that she is the only one the law can name as natural mother.

In this process one may encounter more situations with regard to the relations between the participants:

- The simplest hypothesis is the use of the gametes of the beneficiary parents for the *in vitro* fertilization and the transfer of the embryo into the body of the surrogate mother. The child is genetically related to the beneficiary parents, from this point of view having the status of a natural child.

- Another situation is the use only of the husband's sperm with which the gestational carrier is inseminated or the in vitro fertilization of one of her ova, the resulting embryo being transferred into the uterus. In this case the child is genetically related to the gestational carrier and with the husband who is a beneficiary parent. The beneficiary mother has no blood relation with the child.

- Another case may be the use of gametes from third party donors, after the birth, the child being adopted by the beneficiary parents.

- One may also encounter situations when the beneficiary woman is not married, or when the couple is gay.

In all the cases the fact of birth is crucial for determining the filiation on the mother's side. Establishing the filiation on the side of a woman different from that that gave birth to the child may be done through adoption. This rule is applied even when the ovum was donated by the beneficiary mother.

The filiation on the father's side will be in favor of the husband of the gestational carrier if she is married or gets married till the birth of the child. If she is not married, the child can be recognized by any man, the male donor of the fertilizing material included. Thus, for the future father the establishment of the filiation with the child thus resulted is easier, just by recognition, without the need for an adoption procedure. The beneficiary mother can only follow the adoption procedures.

In **chapter III** *The medically assisted human reproduction and the filiation in the law of other states*, the analysis of international (subchapter 1) and domestic (subchapter2) regulations in the law of other states in the field of bioethics, medicine and assisted reproduction, as well as the identification of the current legal and bioethics problems arising from the use of the medically assisted human reproduction techniques (subchapter3) is relevant for the present research.

(1) At an international level one finds preoccupations for the protection of the embryos, the institutionalization of their production and manipulation, the creation of rules on MAHR, GI, cloning.

(2) Based on international regulations and recommendations, states have elaborated normative acts to regulate MAHR. It should be noted that not all the states which carry out such activities have legislation in this field, as is the case of Romania. In our paper we analyzed the legislation of some European countries (France, Switzerland, Italy, Germany, England, Spain, Belgium, the Netherlands, Austria, Russia, Greece) with different regulation systems and principles, and also the legislation of countries on other continents (the U.S.A., Canada , Australia) to form a broad perspective on the investigated phenomenon.

France has regulated the domain in 1994 by a law amending the Civil Code and the Code of Public Health. A rather restrictive system was promoted, allowing only the access of heterosexual couples, as a last therapeutic method. The donation of embryos is allowed as an exception, only for married couples, the embryos having to come from another couple. The anonymity of the donor is promoted; the child does not have the right to know his/her identity. The French filiation system has undergone a long process of transformation, which is not completed yet. The Napoleonian filiation (legitimate and illegitimate, depending on the marital status of the parents) was given up and a general system for all the cases (the legally established filiation) was introduced. In the case of MAHR, filiation is established according to special rules, the parties' prior informed consent being very important. The surrogate is forbidden; in this case the filiation is established according to the common law rules.

Switzerland has a wider regulation, starting with the Constitution (art.119), the Civil Code and the special law (1998). It has a system which is even more restrictive than the French one, the techniques involving a sperm donor being allowed only in the case of married couples. It prohibits the donation of ova and embryos. Under these conditions, the system of filiation has not changed, it was only adapted for the spouse who has not participated with genetic material. He is considered a father after he expresses his consent, without having the possibility to reverse the paternity in court. Although the law protects the donor, it does not guarantee the right to anonymity, the right to information and to the knowledge, which are superior. The future child can get access to his/her file, at the age of 18, but the donor can not be contacted without his consent, on the basis of the right to privacy.

Italy adopted the law in 2004, being very restrictive. The heterologous techniques are prohibited; the use of genetic material that does not belong to the couple is forbidden. Access is allowed only for heterosexual couples. The children born this way are blood relatives of the parents and, in this case, the common law rules for determining filiation are applied and the denial of paternity is prohibited in this case.

Germany, having had the tragic experience of racism and eugenics during the Nazi period, has preferred a restrictive legislation. Only the heterosexual couples and the donation of sperm are permitted. Consent is required, the direct effect of this being the determination of the filiation of the child. Embryos are considered human persons from the moment of conception; they may not be created for other purposes except for reproduction. The donor is not protected in terms of identity, due to the constitutional establishment of the right of knowing one's origin. Filiation is established with the parents who have expressed their consent. There also exists the possibility to establish filiation with the donor, as the biological parent; he is not protected by law, but the parental obligations remain the responsibility of the man who expressed his consent for the conception of a child.

England is one of the few European countries with permissive laws. There are special laws for surrogates and MAHR, the latter being radically changed in November 2008. It allows access to heterosexual couples, to couples of women and to single women. It allows the donation of gametes and embryos, but according to the new law in 2008, the donation is no longer anonymous because the child has the right to know his/her origin. For the children resulted from the techniques that involve donors, the law requires the writing in the birth certificate of the indication "with donor". For the couples of women, a particular filiation system was created (first parent and second parent). Moreover, in schools, the use of the words *mother* and *father* is no longer permitted; the word *parent* should be used instead in

order to avoid the discrimination of the children with same-sex parents. The surrogate and the post-mortem reproduction are both allowed.

Spain is another country with permissive legislation, with rules close to those of England. In Spain donation is made anonymously, the children conceived in this manner are treated the same way as the natural ones. The surrogate is banned, but the post-mortem reproduction is allowed.

Belgium has a recent regulation (2007) consisting of the special law and a section devoted to it in the Civil Code. The legislation is permissive, allowing the access of heterosexual couples, of couples of women and of single women. It allows the anonymous donation of gametes and embryos. The common law rules of filiation are kept intact. The special law creates the legal framework in which the common law filiation can be applied (the filiation connections are established solely as the responsibility of the beneficiary parents, after the freely expressed consent, any definitive connection between the child and the donor biological parents is broken).

(3) In general, MAHR raises juridical problems related to the handling of gametes and embryos, the rights and obligations of the parties involved, the child's rights, the filiation.

MAHR represents a problem of bioethics for the following reasons:

- the separation of sexuality from procreation is a technique that raises frontiers of an ethical, biological, and scientific nature;

- it involves the problem of the status of the embryo and of its rights, especially because these practices would lead to a large reserve of frozen embryos;

- it allows some eugenic slippages;

- the dissociation of the genetic maternity and paternity from the social ones;

- slippages may occur in the case of the marketing of embryos, which is practiced despite the fact that it was prohibited by the Convention on Human Rights and Biomedicine in 1997.

One of the most debated issues is that of the conditions of access to MAHR. The requirements may be medical, social, economic, ethical, and juridical. They differ from country to country, starting from the maximum restriction to access (only heterosexual married couples) to a broad permission (married couples or living in concubinage, heterosexual couples and even couples of women, single women). The biggest restrictions are in the case of couples of men and single men alone, who can only resort to a gestational carrier. Prohibiting the surrogate, they are excluded from the start.

The last chapter of the paper (IV. *The filiation in the case of medically assisted human reproduction in Romania*) is reserved to the study of the phenomenon in our country, by analyzing the basic normative acts that regard the filiation and the child's rights, the donation of elements of the human body (subchapter 1) the situation of the medical practice in the field (subchapter 2), the analysis of the current legislative demarche in the field of assisted reproduction (subchapter 3). Subchapter 4 of the last chapter is devoted to the propositions to regulate the medically assisted human reproduction by identifying those patterns and norms from the law of other states which correspond best to the social interest and to the juridical Romanian model.

(1) The blood kinship and natural filiation are regulated by the Family Code (Title II). Adoption is regulated by Law 273 of 2004. Regulations applicable to the filiation domain can also be found in the Law on the Rights of the Child (272/2004), decree 31/1954 regarding the natural persons and the corporate bodies, Law 119/1996 on the civil status documents. An attempt to regulate MAHR was achieved through the brief mention made by Law no. 95/2006 on the health reform, in art. 142 E, which states that the regulations contained in the law refer exclusively to the *in vitro* fertilization techniques. This regulation can be applied only in the case of the sexual cell harvesting and transplantation; the filiation problem remaining unsolved.

(2) In Romania there are medical clinics that provide MAHR services. Since there are no regulations, various techniques are practiced in our country, with and without donors, including the surrogate and regardless of the patients' age. The resulting children are declared as natural and the surrogate practices are better masked by various practices.

(3) In 2003 the Parliament was presented with a bill for a special law on MAHR, which has suffered a series of changes, ultimately being rejected by the Constitutional Court (2005). And the draft of the civil code of 2004 contained regulations in this field, but it remained at the level of debate.

Recently, the Parliament approved a new civil code, which contains regulations on MAHR (art. 441-447). These rules are taken from the French law, together with the new system of filiation (the filiation within marriage and the filiation outside marriage are eliminated). Since the French legislature has discovered a series of errors in the application of this system and has started a new process of reformation, it is expected that our country will produce such a situation. Moreover, the approach is wrong because the French have abandoned the Napoleonian system because there are more children born outside marriage

than within marriage. However, in our country, marriage is approved by the majority of the population.

(4) For the bill, we decided to follow a combination of the Swiss model, by proposing an amending of the Constitution, the French model, in terms of access and permitted techniques, the UK model, in relation to the regime of the donors. We have also taken elements from other studied countries regarding the access age, the age of the donor, the number of allowed donations, the number of embryos that can be created and transferred.

As far as the filiation is concerned, we tried not to stray from the common law more than necessary, by ensuring the cohesion of the family in the cases where the donor was used, respecting the right of the child to know his/her genetic origin. Although we followed a restrictive model, only for heterosexual couples, only with donation of male gametes and only as a last therapeutic solution, we also proposed, in parallel, variants regarding the wider access and the permission of donation of ova and embryos, and even the use of a surrogate. However, in all the variants, we propose a preservation of the rules regarding the blood relations and the child's right to know his/her origin, with the obligation of writing in the birth certificate of the child resulted from the donor techniques an indication in this respect. This also requires the following of some simplified adoption procedures for the parent who is not blood-related with the child.

Choosing a restrictive or permissive alternative will be decided by the civil society, following the public debates that will take place.

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