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THE NEED FOR COHERENCE IN THE ALBANIAN FAMILY LAW

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Abstract

Scientific developments have always troubled societies. The principles on which the society believes and it is based have faded because of the scientific developments, as well as scientific developments had led to the modification of the moral and social principles. But immediate changes usually shock the society and therefore it is necessary to make a compromise between technology development and social morality. Society utilises the "law" to legalize its attitudes and moral principles. In this sense governments adopt laws to regulate what is fair or not, what is accepted or band in relation to the general social morality by aiming through their implementation the legal security. The artificial reproductive technology is still a shocking development. This is also reflected in a very few laws that are adopted to regulate this field. My presentation involves specifically the Albanian law on "The Reproductive Health" which confirms the application of the artificial reproductive technologies and the Albanian Family Law which is not still adapted to the necessary changes which invoke the application of these techniques.
Through the hypothesis which may arise, the aim of this paper is to pay the necessary attention to the need for changes in the Albanian family law, in order to avoid future problems that can be associated with the application of artificial technologies and which are related with the main institute of the family law such as parenthood.

Keywords: Artificial Reproduction, Parenthood, Albanian Family Law, Morality

This paper aims to analyze by rasing various hypotheses the impact that will cause the application of artificial reproduction techniques in Albania in the absence of the implementation of necessary changes in the Family Code. The paper through these hypotheses aims to approach the legislations of different countries by bringing to the attention their provisions not only to the Albanian legislator but also to the lawyers in order to provide solutions for such hipothesys.

The law "On Reproductive Health" of 2002 has provided the possibility of application of the artificial reproduction techniques. Despite the fact that the implementation of artificial reproduction techniques is not reflected in any regulation the law itself has tried to introduce a general meaning of them. The law provides that these techniques will be applicable to individuals who are infertile or for those whom despite fertility risk transferring to the child a serious genetically inheritable disease. (Law 8876/2002, art 30,33) Under this provision are excluded from the application of artificial reproduction techniques those individuals who do not meet one

of the two criteria above such as homosexuals, women in the age of menopause and post-mortem artificial reproduction.
The Albanian Law "On Reproductive Health" establishes two forms of artificial reproduction technologies;

- Artificial Insemination is made by using semen by a donor or spouse and injecting it into a woman. Artificial insemination can be realized from a donor or spouse in the only cases when the couple inability to bear children does not depend on the reproductive ability of the spouse. (Law 8876/2002, art 34; 35)

- Artificial fertilization or in vitro fertilization means the experimentally fertilization of female eggs with the sperm of the man, of a couple, outside the body of the woman. (Law 8876/2002Art 40)

The law doesn't provide any surrogative techniques as artificial reproductive techniques and it provides that these techniques are applicable only if the woman's husband is affected by infertility causes. In any of these provisions isn't mentioned the possibility to donate oocytes, leaving so this case of infertility untreated and uncovered by the law. In fact, France, Great Britain, Spain, Greece and Belgium allow oocyte procedures. Consequently, couples are able to seek treatments that are not allowed in Albania by travelling to other EU countries, circumventing the prohibition by resorting to so-called 'reproductive tourism' (Pennings, 2004). Despite the fact that reproductive tourism can bring a realization of their moral rights in terms of reproductive rights this can bring to numerous legal problems. Such a case could be the application of the surrogative techniques somewhere outside the Albanian territory. This applicationa will have no legal effect as according to the Alabanian legislation the contract of surrogacy has no legal effects and it is contrary to the public order. Such a contract should be invalid.

The law does not provide for a maximum age of access in the artificial reproduction techniques. Article 32 of the Law provides that "the implementation of the reproduction techniques is applied when the individual has reached the age to marry" (Law8876/2002, art 32) This provision refers to the provisions of the Family Code which determin the age to marry.

According to Article 7 of the F.C the age to marry is 18 years unless the court for important reasons may decide to reduce the age of marriage. (Albanian Family Code, art 7) Such a reference on the marriage age is not casual. Procreation is one of the functions of marriage and the legislation shall help all those couples which can not fulfill such a function in a natural manner irrelevant of their desire to become parents.

There is not a limit for the maximum age at which a woman can access to artificial reproduction techniques, although it is understood that as long as the legislation does not give to the menopausal women the opportunity to undergo on such techniques it means that this is the time limit required for their application.

The application of the provisions of artificial reproduction is closely linked with the application of the provisions of the Family Code. This is because the relationship which is brought by the application of artificial reproduction techniques should be regulated by the provisions of the Family Code. The use of this techniques lead to the emergence of parenthood relationships which

are regulated by the maternity and paternity institute. Another relationship that needs to be regulated by law is that between the donor and the offspring.

Taking account of the artificial reproduction technologies which are adopted in our law and by avoiding the analyze on the maternity definition by asserting the principle *"madre es sempre certa",* the definition of the father is of a great importance in both the cases of artificial insemination and artificial fecondation.

1. Paternity in artificial reproduction without the donor participation.

The Albanian Family Law describes the way in wich paternity and maternity are gained. All the provisions of the maternity and paternity institutions asserted that both of them are a status which can be gained in different times and by specific procedures.
Maternity is the one set in the act of birth and registered in the public registry office. (Albanian Family Code art 165) For a child born during the marriage of the mother or within 300 days from the dissolution of the marriage or from declaring invalid the marriage, the father of the child should be presumed. The presumed father of the child is the mother's husband if the child was born during the course of the marriage as well as in the above cases when the mother does not have a new marriage. If a child is born during the continuation of a second marriage of the mother, it is presumed that the husband of the second marriage is the father of the child, even if the child was born within 300 days from the dissolution of the first marriage or from a declaration voiding of the first marriage. (Albanian Family Code, art 180)

For a married woman or a woman who is in one of the above cases and which has undergone through the artificial reproduction techniques together with her spouse or her former spouse, the father of the offspring will be the spouse or the former spouse of the mother. (Law8876/2002, art 40)
It is easy the determination of maternity and paternity in such circumstances as every situation is predicted by the provisions of the Family Code. But a presumed paternity can be contested when it is not in accordance with the biological truth. (Albanian Family Code, art 184, 185, 186) The contestation of presumed paternity can be filed by the mother, the child on his majority age, when they pretend that the presumed father is not the biological one. A similar situation may be caused even in the cases of homologues artificial reproduction. If the genetic material is not that of the mother spouse but as a result of a medical error the reproductive material that should be utilize is erroneously confused. In such cases according to the Albanian Family Law, the husband of the wife is legitmated to file the contestation of paternity.

In such a hypothetical case the law does not specify whether the biological father of the child, (which in this case turns out to be a different donor from the husband of the mother), has or not the right to make voluntary or judicial recognition of paternity. By interpreting the provisions on the paternity recognition is obvious that the F.C knows the right of the man who pretend to be the father of the child to ask for recognition of paternity. (Albanian Family Code, art 189)
But this shouldn't be seen as a case related to the detection of the biological truth but more than a case of medical mistake. A medical mistake can not be sufficient to ask for a paternity recognition as paternity in itself is the intent to become a parent and to have rights and duties. The biological link between the father and the child is of a very importance but it is not the only

criteria that serve to determine paternity. The intent to become a father is also a criterion of a crucial importance.

2. Paternity in artificial reproduction with the donor partecipation

The Reproductive Health Law of Albania provides the possibility of application of artificial reproduction techniques with the donor participation when the woman's husband is infertile. (Law8876/2002, art 34) Neither the provisions of the Family Code nor those of the Law "On Reproductive Health" do not provide the principle of consent and the anonymity of the donor. Such a legal gap leads to complex situations where the participation of the donor is required.

a) When the mother undergoes to the artificial reproduction techniques with the donor participation, the father of the child is presumed to be the husband of the woman.

Such a provision is not sanctioned in the Family Code not in the Law "On Reproductive Health" but by interpreting the dispositions of the Family Code in determining the paternity of the child, the marital status of the mother is the criteria used to determine the father of the child. When the mother of the child is married, the presumption principle of paternity should be applied.

In the heterologues artificial reproduction the husband of the mother is aware of the lack of the biological link between him and the offspring, a fact that legitimates him to file a contestation of paternity.
Article 184 of the Family Code provides the right of the presumed father to file a contestation of the presumed paternity against the child who is represented by the mother if the contestation is filed within a period of 1 (one) year from the date of birth of the child. The contestation of paternity is legitimated only if the presumed father has reasonable facts to pretend that he is not the biological father of the child.

The aim of this provision and of all the provisions on recognition and contestation of paternity is to create the legal relationship between a father and his child, through the recognition of the truth on the biological link. However, the biological link between the parent and the child is not a sufficient criterion in determining parenting rights. In discussing socio-legally constructed forms of paternity, it should be borne in mind that 'biology' is but one 'fundament' next to the 'intention' to base legal parentage upon. (Vonk, 2007)
But if the definition of maternity is much closer to the truth with the implementation of the principle "madre es semper certa", the question becomes difficult in cases of determining the paternity. Although legislation have defined various principles for defining paternity that of the presumption remains "de rigueur" (Schewenzer 2007) The presumed paternity principle remains closely linked to the mother's marital status but at the same time it serves to the best interest of the child. This justifies that the man who consents to the woman being inseminated with semen from another man should be seen as the true father of the child, to the extent that he has consented to the technology. Many legal systems expressly forbid the consenting male to contest his paternity subsequently.[1]

[1] Civil Codes of European Countries; Belgium (art. 318), Netherlands (art. 201), Portugal (art. 1839), Switzerland (art. 256), and Greece (art. 1471). France (art. 311-20), Spanish law 35/1988 art 8.1.

The determination of paternity and its contestation should be specifically regulated in cases of heterologues artificial reproduction. Two are the main criterias used in the determination of paternity in cases of artificial reproduction; the marital status of the mother and the consent of the husband. These two criteria are closely linked and are applicated together.
If the woman, who was undergone through the heterologues artificial reproduction techniques, is related married at the time of their application and her husband consent for the application of these techniques, it will be presumed that the father of the child is the husband of mother.

According to the Italian legislation, paternal rights belong to the mother's spouse rather than the natural father. Thus, the mother's spouse or partner who is the recipient of a different sperm or oocyte donation cannot exercise his right to refuse paternity, and the donor does not bear any legal relationship with the newborn and is neither entitled to paternal rights nor bears any obligation. (Italian Law 40/2004; art 8)
According to the Human Embriology Fertilization Act (1990) Art 28 "the husband of the women who has undergone through the techniques of artificial reproduction is the father of the child if he has given the consent for such techniques. (HFEA 1990, art 28)

The Albanian Family Code provides as legitimate parties to bring a contestation of the presumed paternity the presumed father, the mother of the child and the child when he reaches the age of majority. According to this provision the man who pretends to be the biological father of the child is not legitimate to bring a contestation for the presumed paternity but he has the right to ask for recognition of paternity if a contestation of the presumed paternity is made.
The Albanian Family Code and also the Law "On the Reproductive Health" doesn't provide any ban to the presumed father who has given his consent for the application of the artificial reproduction techniques to contest the presumed paternity. The consent given by the husband of the woman who has undergone through the artificial reproductive techniques is one of the main criterias that foreign legislations use to determine legal paternity.
On the other hand as far as it is a "sine qua non" condition for the presumed paternity, its absence is also a necessary condition to legitimate a contestation of the presumed paternity. Only if the woman's husband has not given his consent, he can claim a contestation of the presumed paternity.

b) The donor right to claim for recognition of paternity.

All legislations of European countries have the same approach regarding parental rights of sperm donors when he donated to a married couple. The donor can not claim for recognition of paternity. Such a prediction is linked at the same time with the fact that the donor must remain anonymous for the beneficiary couple and as such it is presumed that he has no interest to seek parental rights. Even in this case European legislations have provided such ban in their dispositions. (Civil Code of France, art. 311-19; Spain, law 35/1988 art 8.3) The Spanish legislation goes further with its provisions by providing that even in the cases when the identity of the donor should be disclosed this fact will not give him any paternal rights. (Spanish Law 35/1988, art 5,5) Even such a prediction can be claimed to affect or prejudice the right of the child to know his biological parents, it seems to find western legislations in an approximate approach in their attitude towards the identity of the donor and his rights to the child. Despite these pretense western legislations seems to share the same approach on the identity of the donor and the rights of the child. Even if some legislations seems to be more fanatic than others in

respecting the donor anonymity, none of them don't provide the right of the donor to ask for parental rights. (Civil Code of France art. 311-19; Spanish Law 35/1988, art 5,5)

Conclusions

The Albanian legislation does not provide for any limitation on the right of the donors to ask for recognition of paternity. The legal gap in this case is of a particular importance. There are no provisions in the Family Code or in the Law "On Reproductive Health" to provide the anonymity of donors and the preservation of the confidentiality of their identity. There are also no provisions to ban the right of the donor to ask for parental rights or for recognition of paternity. In a hypothesis if the presumed father will contest the presumed paternity than according to art 181 and 182 of the Albanian Family Code, the donor can ask for recognition of paternity of the child born out of wedlock in front of the official of the public registry office. The legislator sets the consent of the mother as a filter on the voluntary recognition of paternity. If the mother doesn't give her consent within a month to the voluntary recognition than the voluntary declaration doesn't have any conseguences for the child and the man won't be recognize as the legal father of the child. Taking account to the fact that the married woman who has undergone through the artificial reproductive technologis had no intend to have a child with the donor as the semen of the donor is used to achive the purpose of the application of this techniques, the woman wont give her consent to the voluntary recognition.

Our family legislation provides another form of paternity recognition in cases when the voluntary recognition is not achieved due to the not given consent of the mother. Art 189 of the Albanian Family Code provides as reasons that would legitimize the court to acknowledge paternity all those cases which prove that the man who pretend to be the father of the child has had a sexual relationship with the child's mother and these facts make his paternity reliable. In the artificial reproductive technologies there is no sexual intercourse between the mother of the child and the donor; on the contrary they exclude such a possibility. The absence of the sexual intercourse, which is a reason requried by art 189 and the absence of intend of the donor to become a father can be used as reasons by the judges to reject the request of the donor for recognition of paternity. It is to be mentioned that the Albanian judges tend to be empirical in interpreting literally the law; consequently it would be recommended that the law should provide dispositions on the determination of paternity in cases of artificial reproductive technologies by using as a model the experience of foreign legislations.

In Albania cases of artificial reproduction are increasing significantly as well as the number of clinics that offer such services. Very soon the Albanian judges will face one of the hypothetical cases and they should provide a decision in conformity with the Albanian legislation and respecting the best interest of the child.

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