

Biotechnologies and the Case of Surrogate Motherhood: Axiological Implications and Their Connection with the Law

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Abstract

Science and technology have had groundbreaking advancements especially in recent years, and this is a cause for concern for both legal specialists and the specialists in the field of (bio)ethics and medicine. The situations that arise as a result of these developments make us wonder whether the person is a subject of law, an object of research, a part of a contract and so on. This paper aims to analyze the (bio)ethical and legal consequences of the use of new technologies for human bio-improvement in surrogacy and at the same time to reflect the epistemological space of moral dilemmas that are intrinsically related to research and scientific experimentation. Ultimately, any technical discussion must go through the filter of axiology, which we will do further.

Keywords: bioethical dilemmas, normality, surrogacy, axiology, family, epistemology

1. Introduction

We live in postmodern times, that bring along profound and permanent changes in all fields of human activity (Lamm 2013), where science and technology are advancing rapidly (cf. Colang 2018). The current Covid-19 crisis, that impacts human way of life on the entire planet, and the attempts to find solutions in order to put an end to a pandemic that causes

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thousands of deaths every day, lead us to ask ourselves questions about the meaning of life, of saving others and so forth. As it is well known, man is a unique and unrepeatable being, the only being that we know of gifted with reason and morality. However, history has shown us that human actions, and especially scientific discoveries are not always used in a positive manner, but sometimes for what seems to be a Machiavellian purpose of destroying or harming others only for the sake of doing harm, or perhaps out of *barbarism* (Colang 2018). An example in this regard are the atomic bombs dropped over Hiroshima and Nagasaki and also the chemical, biological, nuclear and radiological weapons the humanity is still developing nowadays. At the same time, we can enlist here the Nazi experiments and all their barbaric implications – the work of man, who claims to appeal to science in the name of evolution and progress. All these aspects indicate a kind of infatuation of human beings, who claim to be civilized and to have reached a certain degree of sophistication. Due to science and the technologies associated with it, man has created a paradox: the more technologically advanced we are, the more we seem to move away from axiological ideals.

The new fields of research that have become more and more highlighted are linked to the human nature and implicitly to the decryption of the human consciousness; as it is known, the decryption of the human genome has determined the occurrence of more and more problems that man wants to solve, such as: the human longevity, the human bio-improvement, the creation of artificial intelligence and so on. Under these conditions, both the legal framework and the (bio)ethics come to supervise the actions of the individual, so that science does not turn against man or not to be used for barbaric purposes. Insofar as in postmodernity values are relative and often used only for pecuniary purposes, then let us no longer be surprised, as John Gray (2009) states that science promotes the cult of anthropocentrism, and with it the idea that man is above nature and that he can change it as he pleases. Hannah Arendt is even clearer on this topic: „Not only has the progress of science ceased to coincide with the progress of mankind (whatever that may mean), but it could even spell mankind's

end, just as the further progress of scholarship may well end with the destruction of everything that made scholarship worth our while. Progress, in other words, can no longer serve as the standard by which to evaluate the disastrously rapid change-processes we have let loose.” (Arendt 1972, 132)

In this article we aim to talk about the issue of biotechnology from an ethical / legal perspective, in one word, from an axiological viewpoint. First of all, we are interested in the morality of the creation and development of new human bio-improvement technologies, especially the medically assisted human reproduction technologies (Huidu 2017). As this is a sensitive topic, we will try to highlight the perspectives of different epistemological approaches in the field of biotechnology, but we will also focus upon the jurisprudence of the ECHR. No activity can take place without morality. Beyond codes of conduct, specific bioethical approaches, law and conventions, there must always be an axiological dimension related to *elementary moral values* (Morar 2011). Morality is key to the proper perception of this article.

The method we use in order to make the analysis of the proposed topic is by referring to *the ethical matrix for evaluating technologies* formulated by Beauchamp and Childress (2019), called *the principled method* or the basic four principles of bioethics. This is the widest used method, today, to analyze the axiological implications of biotechnologies. According to this method, we will first present the basic arguments supporting and combating surrogacy, in order to assess how these arguments, influence the application of the general principles of law.

2. Bioethical and Postmodern Approaches about Normality

In this part, we will address *the issue of health*, more precisely of the individual who is considered *normal* in society. Our thesis is that *the medical normalcy* is not only psychosomatic, but also social. Ultimately, depending upon how the individual is perceived in the social life that is beyond his medical problems one must consider how he interacts with *others* and how he is perceived by *others*. So, in this sense, we

see the problem of normalcy as actually being a problem of how the subject is perceived; therefore it is a problem in the space of *otherness*.

Normalcy is defined (Levit Ades 2022) as something that is a trait of most people or is generally accepted by society. Normalcy means, in terms of surrogate motherhood, having children with one's spouse, during married life. Lack of normalcy might mean, in a traditional society, having children out of wedlock. In postmodern society, this is not the case, as the family is perceived as being the same, qualitatively speaking, both in the case of married or unmarried people.

Normalcy might also mean to be monogamous and only have children with one's partner for life. Surrogacy, on the other hand, means that one's children are born by another person than the man's wife/female companion, which might not be regarded as normal, again, depending on the type of society we refer to.

Partially, the lack of normalcy in surrogacy is given by the fact that the child does not have the same genetic identity as its social parents. The genotype or genomic identity is the complete hereditary genetic identity.

As Jackie Leach Scully points out in her research on the human condition and how we perceive the problem of medical normalcy, that is, what it means to be normal or abnormal, by extension, the biomedicine can no longer just look at the human diversity technically, but it must be in accordance with the principles of bioethics, as philosophically applied as possible, in order to arrive at the fundamental question of *the human condition* (Downie & Macnaughton 2007, 58-60).

In this sense, the author shows us: "Bioethics can therefore no longer avoid questioning the meaning of terms like 'normality' and 'abnormality' as they are used within biomedicine and bioethical debate. The need to do so has become more acute, especially in terms of biomedicine's ideological function, because recent advances in genetic medicine and the implementation of the Human Genome Project (HGP) have shifted the perspective from which the relationship between genomes and identity is considered" (Scully 2005, 49-68). Thus, starting from here, we must

understand that the way we look at *the human nature* is also reduced to a certain ideology. In fact, it must be borne in mind, as Jean Bethke Elshtain (2005) pointed out, that the perception of the human being, especially the ideology in which he or she is viewed and understood, cannot be broken from the social, philosophical, theological, more precisely the axiological context.

Thus, *the normalcy*, seen as a kind of *concept in itself*, cannot be qualified only medically, exclusively, but it must also be regarded as ethical, because the purpose of a diagnosis is social: “Philosophers and cultural critics indebted to Christianity among whom I number myself, are poised as a matter of principle and faithfulness in a tension between *contra mundum* and *amor mundi* in ways that may be fruitful or frustrating, or both. This tension begins with the recognition that uncritical identification with the currents of one’s own time is easily understood because so many of those currents speak to real human needs, fears, and desires, and the goods associated with these” (Bethke Elshtain 2005, 155). So, beyond axiological interpretations, the human life must not be reduced to a certain ideology, but it must be seen in its social depth, where the individual struggles with his fears.

According to the World Health Organization, normalcy, seen as health, is the complete condition of physical, mental and social well-being and not just the absence of an illness or infirmity (cf. Saracci 1997). Thus, in these terms, we must see the condition of the human being beyond his psychosomatic aspects and look at it in social terms; because most discrimination starts from here, from the way we look at the *Other*; therefore, it all comes down to a discussion about the otherness. In this sense, there were various sociological interpretations that showed how the human being was discriminated according to his condition, or simply out of financial interest (cf. Colang 2018, 124-146).

3. Surrogate motherhood: bioethical dilemmas

Infertility has been considered a disease by the World Health Organization since 2009. Internationally between 10 and 15% of couples are infertile, and 40-45% of women are relative. The woman is the only being capable of giving birth –

at least that's what the holy books and the traditional perspective of biology supports. Over time, however, new technologies have changed the way people are in the world, and some fields "come in handy" to help people, in order to make their lives easier, and so on; whether it's about medical technologies that helps man recover faster from an illness, whether there are the ICT technologies that help man communicate in real time with other people in other parts of the world, these artifacts were created in order to help man in all of his activities. From this perspective, Pinker (2007, 76) shows us that: "The way language works, then, is that each person's brain contains a lexicon of words and the concepts they stand for (a mental dictionary) and a set of rules that combine the words to convey relationships among concepts (a mental grammar)". Accordingly, in the game of communication it is essential not to forget that the means of communication should help us to socialize more easily, not to become addicted, not for them to become, practically, a goal in itself. At the same time, throughout history it has been found that man can use new technologies in order to harm other fellow men.

The surrogacy motherhood is not a new concept in history, since from the ancient times people have been helping each other to have heirs. With the development of medically assisted human reproduction technologies, however, the data of the problem have changed; the human individual and the life of the human being are reduced to simple parts of a contract within the surrogacy motherhood.

In 1975, an advertisement in a California newspaper for a couple with infertility problems called for a woman's help to be artificially inseminated for a fee. In 1976, lawyer Noel Keane drafted the first surrogate maternity contract / agreement, and also creates the Surrogate Family Service INC. With the advent of the in vitro fertilization, surrogacy motherhood takes on another dimension, in the sense that from this moment on, the biological connection that existed until then with the surrogate mother is broken. The first reported case occurred in 1984: the ovules of a woman without a uterus were transferred to the uterus of another woman who later gave birth to a child with

whom she had no genetic connection (Utian, Sheean, Godfarb, and Kiwi 1985).

Starting from here, moral / ethical as well as legal problems occurred; the legislation of each country raises the issue in one way or another: either the decision of the surrogate mother takes precedence regardless of the situation and whether there is a genetic link or not, or the genetic link prevails, as the delivery of the “finished product” is key especially when there is a blood connection between the natural mother and the child.

The (bio)ethical dilemmas that arise in the context of surrogacy derive from the way we relate to the birth itself: on the one hand there is the issue of concluding a contract; on the other hand, it relates to a commercial transaction as the child and life themselves are treated instrumentally, as the object of a contract. Other ethical dilemmas that arise in the context of surrogacy are related to the human trafficking, the organ trafficking of juveniles born to a surrogate mother, and so on.

All existing ethical theories developed by philosophical traditions refer to the way in which we must act in order not to harm our neighbor, his or her dignity, his or her rights or freedoms. Even if we talk about the ethics of virtues, the Christian ethics, about the Kantian ethics, the utilitarianism or the ethics of care (Vlad 2019), we must keep in mind that our neighbor is always a person and not a thing or tool easily manipulated by the will of each of us.

The human beings have rights, and the right to dignity cannot be alienated. As the human being is considered to be the object of a contract, he or she decays from his or her status, i.e. that of subject or person, to that of object. In this sense, we forget the essential, as Kant also pointed out, namely that the humanity is holy (Kant 2015).

4. Surrogate motherhood: legal approaches

Before proceeding to talk about the legal implication that surrogacy entails, we must first discuss *the correlation between the theoretical bioethical and axiological discourse and its applications in the field of law*. First of all, Romania does not have a comprehensive legislation regarding surrogacy, and the

existing one is not ready to solve the complex problems that surrogacy raises. Therefore, the courts, when solving such cases, must refer to the general principles of law. These principles are not only legal rules, but also basic ethical guidelines. This is where the connection between bioethics and law is made, because bioethics gives consistency to the general principles of law regarding surrogacy.

Second, *the international dimension of our research* is given by the fact that we will analyze cases that have been solved by other courts, in countries such as The United States of America, that have more evolved legislation on the topic and can be an inspiration for legislators and courts worldwide. Also, the problems that Romania faces today in its legislative system regarding the topic of biotechnology, surrogacy, and regulation is the same problem that all countries have. Therefore, this paper addresses topics that are topical not only for Romania but for a larger audience internationally.

The first case in history that brings surrogacy to the forefront is called Baby M (In re Baby M - 109 N.J. 396, 537 A.2d 1227, 1988). Since then, an increasingly number of states have raised the issue of surrogacy motherhood, referring to the legality of this action and its (commercial or not commercial) purpose, whether the issue of human trafficking occurs, whether it violates the human rights and so forth. The legal perspectives that occur in the context of surrogacy motherhood differ from country to country; in some countries this practice is being accepted and therefore legal, and in other countries this practice is considered to be illegal.

In addition to these issues, there is also the issue of the parties concluding the maternity contract, as they are on the one hand natural persons and on the other hand legal persons (clinics specializing in medically assisted human reproduction). Another aspect refers to the object of the contract, as it must be handed over after birth in order to be registered as the son / daughter of the contracting persons, as the surrogate mother gives up the parentage.

In the jurisprudence of the ECHR, there are a series of cases that invite debates on human rights that bring to the fore situations such as: can a homosexual couple turn to a surrogate

mother? What is the status of both parents towards the child obtained through surrogacy motherhood, as there is only one donor? Are the ECHR decisions, while respecting the human rights, really moral?

In Romania, the surrogacy motherhood is not regulated, but the term “surrogate mother” is provided in a ministerial order (M.O. no. 377/2017, published in the Official Gazette no.24 of January 10, 2018); however, according to the Civil Code, “the natural person has the right to dispose of himself or herself” (Art. 60 of the Civil Code); this is an article that has the same provisions as Art. 26, paragraph 2 of the Romanian Constitution. Carmen Ungureanu analyzed the legal aspects of surrogacy motherhood and she emphasizes that in Romania the purpose of such services must be without a monetary benefit, given that Article 66 of the Civil Code states the following: “of patrimonial values of the human body, its elements or products are struck by absolute nullity, except for the cases provided by law” (cf. Ungureanu 2019).

Therefore, “although a woman can provide services as a surrogate mother, she cannot claim payment for them, because otherwise she would give a patrimonial value to her body. So, the surrogate mother carries a pregnancy for someone else for altruistic reasons. More precisely, the surrogate mother, animated by the desire to help an infertile couple who eagerly wants a child they cannot have otherwise, sacrifices herself out of generosity and kindness, exposing herself to serious risks that may affect her health and sometimes even her very life, without receiving anything in return if it were offered to her, because that would impact his dignity (Ungureanu 2019). In reality, the surrogacy motherhood is a market where “the economic laws of supply and demand operate” (Nicolescu 2018, apud. Ungureanu 2019).

From the above, it can be stated that there is a certain lack of legislation in the field of surrogacy motherhood, indirectly admitting the use of surrogacy motherhood. We therefore infer that the absence of a clear specification in this field determines the natural and/or legal persons to act at will, as most often the persons who “mediate” such contracts are the ones who enjoy the “benefits” of such actions.

5. Conclusion

We brought up a number of issues related to the surrogacy motherhood to highlight a number of bioethical dilemmas that focus upon the dignity of the human being, the fact that the human beings are often considered to be the object of a contract and in no case the subject thereof. The new medically assisted human reproduction technologies also bring along a multitude of problems to which the (bio)ethics and the legislation must respond and provide solutions in order to avoid serious human rights violations.

For the most part, the discussion takes place in the space of Kantianism, even if it is technical and tends to be viewed only technically. However, when it comes to the human life, especially in relation to new human assistance biotechnologies, it is very obvious that the issue can only be debated in the last instance in the field of axiology. At the same time, the substantive discussion again cannot be treated other than morally. From a legal viewpoint, things can be crystal clear, but the sensibilities of these activities will always remain moral and they will simply be thought and debated axiologically. Ultimately, from an epistemological standpoint, there will always be solutions for bio-improvement, human perfecting and human retouching. Certainly, the technique will advance and promote values that often tend to contradict a much more natural view of life.

We emphasize the fact that the surrogacy motherhood arouses controversy both at the level of the scientific community that analyzes the morality of such actions and also from the standpoint of legal specialists.

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