УДК: [173:34] (091) (4)

# Europe and free family: the role of the assistance of reproductive technologies in the collapse of the family*

C. Byk
Court of appeal Paris, France

The variety of European ethical and legal approaches towards the artificial insemination is also a subject for debates on the implementation of medical techniques connected with the socio-legal revolution, which after almost half a century has influenced the family law. Could the children that are born as a result of artificial insemination be a demonstration of growing autonomy of will (on the part of future parents) in establishing the parental bond or even kinship (providing that having a child would become possible for single parents or couples of the same gender)? Or conversely, should the government, taking into consideration interests of a yet unborn child and refusing to use medicine as an instrument, limit the reproductive freedom?

***Keywords:*** *medical ethics, history, reproductive technologies, family, Europe*

## Changes and Complications in European Family Law

Since the 1960s, the institution of the family has come under serious pressure in Western European society. An important feature of postmodern society is the impact of engineering and technology on social practices, transforming the widely accepted "obsolete" into the legitimate new, unknown or previously rejected. A purely legal path to deprive the family of its traditional formal roles and turn it into a private union of people freely choosing their rights and responsibilities was not possible. The law is simultaneously flexible and conservative. This explains the paradox of the dynamics of opposites, which is based on this effect. This legal paradox retains all its ambiguity with respect to the field of artificial insemination (AI) as a medical practice that emerged in the 1970s to 1980s, offering a solution to infertility. In most European countries, access to AI is associated with novel family models becoming the new reality. France[1], however, was one of the countries where access to this procedure was most strictly limited to heterosexual couples. A similar position was only held by Germany, Italy and Switzerland.

Over time, the situation became more complex. European legislation in the field of AI evolved towards crossing other dividing lines. There has been an increase in the number of countries where access to AI is open to all and information concerning people's origins or surrogacy is not hidden away. In Europe, on the whole, there is a trend towards rejecting anonymity[2]. For example, the Netherlands and the United Kingdom have joined Germany, Sweden and Switzerland in recognizing that children born as a result of the use of donor sperm or eggs have the right to know about their genetic origin and biological parents. Surrogacy[3], which is banned in France, Germany, Spain, Italy and Switzerland, is practised with a more flexible approach in Belgium, Denmark, the Netherlands and the United King-

* The translation from French was carried out by the journal's staff members under the editorship of D. A. Balalykin.



[1] Senate. Access to the procedure of artificial insemination, a comparative study of legislation, № 193, January 21, 2009

[2] Senate. Anonymity of the donor gametal cells, a comparative study of legislation, № 186, September 4, 2008

[3] Senate. Surrogacy, a comparative study of legislation, № 182, January 30, 2008

dom. However, in fact AI does not only affect the issue of the family institution, but also the problem of individual identity and the use of one individual's body by another.

### Access to AI: Is Government Interference Justified?

For some countries, legal «resistance» is equivalent to an ideological resistance to change which is considered too destructive to the institution of the family. This applies, for example, to the possibility of same sex marriage and adoption. Such marriages are allowed in the Netherlands (since 2000), Belgium (since 2003), Spain (since 2005), Sweden and Norway (since 2009) and Portugal (since 2010). In France, until recently, a Supreme Court ruling from 2007 underpinned the concept of marriage as a union of a man and a woman. Such legal «resistance» reflects the state's desire to retain the right to regulate the use of reproductive technologies, especially as access to AI is carried out within the framework of public health service politics and the interests of the unborn child are at stake.

In France, as in some other European countries, the law legalizing AI limited it to a family model that implied the existence of two biological parents.

### The "Medicalization" of Artificial Insemination

The first artificial insemination of a married woman with sperm from a third-party donor was performed in the United States in 1884. The introduction of such procedures in France met with significant opposition from society. Recognition of this practice would effectively mean the recognition of a man's inability to reproduce, which was a consequence of the mixing of two concepts – impotence and infertility. With this approach, AI would be "a genuine accusation of infertility."

Secondly, the scientific community was reluctant to use AI. Doctors perceived a married woman who made such a request to be a patient who required, "in accordance with the commonly held beliefs, psychiatric treatment" [1]. Medicine remained a purveyor of morality and value judgments.

An important factor explaining this rejection was the need to collect semen by masturbation. This was characterized by a number of liberals as "19th-century preachy nonsense, as well as a judgment by the Roman Catholic Church." [2] In the early days of the development of AI in 1897, the Inquisition did not approve of the procedure. Therefore, unlike England and the Scandinavian countries, where the AI continued to develop, in France it could only be carried out illegally. This situation continued until the beginning of the 1970s when the first sperm banks appeared (established in France in 1973, when sperm was frozen, as had been practised in the United States since 1968). However, it was the emergence of in vitro fertilization in the early 1980s that gave impetus to further development of this procedure. As lawyers may well note, unlike science, which pushes the boundaries of the impossible, the law sometimes seems "set in stone." Legal reforms significantly changed the rules in the field of family relations (step by step moving to a common understanding of equal rights for children, who were previously divided into different categories: illegitimate children, children born out of wedlock, and legitimate children), but did not account for such new phenomena as AI.

In any case, despite the recent changes in the practice of law, we believe that the adoption of new medical requirements necessitates legitimization by society.

### Social Recognition of the Desire to Have Children

The medicalization of AI does not ignore the desire to have children. Rather, the use of this procedure conceals personal opinions or even a militant approach in the behavior of the doctor.

Only the serious changes in the institution of the family that took place in European society can explain the social acceptance of these methods: the assertion of individualism, control of sexuality, women's free will, the disappearance of a unified family model and freedom of expression recognized in the reproduction process.

In France, the public consciousness gradually incorporated sexual freedom, which separated women from the social function of motherhood.

Specifically, the birth control law of December 28, 1967, the repeal of the crime of adultery in 1972, as well as the law of January 17, 1975 on the voluntary termination of pregnancies, reconfirmed on December 31, 1979, and further relaxed in 2001. The recognition of the freedom to be childfree, of sexual desire not leading to procreation, paved the way for the separation of sexuality from the need to procreate.

In addition, adoption reforms (legislation of July 11, 1966) and legislation in the area of family ties (1972) bestowed various family members a large role in establishing or challenging relationships, prompting the development of genuine "family strategies." Legal opportunities to select one's choice of kin were now widely recognized in the case of adoption and with AI. Even the procedure for establishing paternity as a way to confirm kinship was legally simplified thanks to advances in biology and genetics. In this context, AI became a social phenomenon, which towards the end of the 1980s accounted for about 2 percent of births in France.

### The Law Guarantees the Protection of the Interests of the Child

The desire to have children must be balanced with preserving legitimate social goals when assisted reproductive technologies are involved, which is why the majority of European countries have adopted regulations to control access to AI.

However, if Belgium, Denmark, Spain, the Netherlands and the United Kingdom provided access to these methods for single women and single-sex couples, France, like Germany, Italy and Switzerland, until recently preferred to allow access to AI only for heterosexual married couples or couples in long-term de facto relationships (in France this is considered to be a two-year period). However, after same-sex marriage was legalized on May 17, 2013, a legislative initiative was developed, allowing for the use of assisted reproductive technologies by such couples. Reducing AI to a purely medical procedure, a service provided by the health care system, can only take place with a clear understanding of the significance of these measures as a way to help infertile couples. It should be remembered that medicine is not a consumer service and not a tool to fulfill the simple desire to have children. As sociologist Dominique Memmi pointed out, «AI techniques continue to evolve, despite the fact that their legality has not yet been established.» [3] This, no doubt, explains the purpose of the law – to ensure that doctors do not simply become the fulfillers of «medical desires.»

New European family law facilitates the observance of children's rights (specifically, the prevalence of children's rights over the rights of the family as a whole). [4] The increasing individualization of the law is leading to, in effect, the infringement, or even disappearance of the concept of family as an autonomous unit and is transforming it into a framework of democratic rights. On the contrary, the legislature's concerns about the interests of the child take the form of serious intervention, including compelling divorced parents to continue to fulfill their obligations towards their children. This was particularly evident in France with the appearance of the institution of family affairs judges (since 1993) and their subsequent increase in authority. Since 1994, French law in the field of AI only reinforces the importance of this approach: it comprehensively examines the interests of the child, unlike most liberal governments, with the goal of justifying interference in the reproductive process. Naturally, this has a negative impact on access to AI for same-sex couples and single people. However, this legislation did not abolish anonymous donations that could be an argument in favor of the interests of the child.

### Conclusion. The Benefits of Legislative Policy That Takes Into Account Both Private and Public Interests

Under current European law, the state does not have unlimited freedom to make evaluations and judgments. In 2007, the European Court of Human Rights, examining a case of refusal to provide a prisoner with AI, recalled the principles and limits of state intervention. If «the state has an obligation to ensure effective protection of children ... it does not mean that it can obstruct parents who want to conceive a child in circumstances like those considered in the present case, furthermore the second plaintiff was not incar-

cerated and could, prior to the release of her husband, take care of the conceived child»[5]. In the ruling issued at the beginning of April 2010, the court stated that access to AI falls within the scope of the right to privacy, but the state has numerous possibilities for regulating the practice. Nevertheless, the court considers that differences established by law should not be classified as discriminatory as they are based on objective and reasonable evidence. Concluding that this case does not fall under Austrian law prohibiting the use of in vitro fertilization with donor sperm or donor eggs, the court condemned Austria for discriminatory treatment. However, reversing this decision in 2011, the Grand Chamber of the court nevertheless clearly stated that «the right of a couple to conceive a child, and to have recourse to an in vitro fertilization procedure, is not covered by Article 8 and, accordingly, such a choice is not a form of expression of private and family life.»[4]

These examples should lead us to be more attentive: when France raises the issue of access to AI procedures for same-sex couples and the resolution of surrogacy issues, we cannot and should not avoid discussing objective and reasonable justification for the choice of family policy. Preserving the state's wide freedom of choice in this matter must depend on maintaining a balance between private and public interests. Only its reliable preservation will allow us to continue to assert that «to each his own state; to each his own right» [5].[5]

[4] National Center for Scientific Research, November 3, 2011, in the case of "SH and others v. Austria", paragraph 81.

[5] The European Court of Human Rights. Grand Chamber, in the case of "Evans v. the United Kingdom", the petition number 6339/05, April 10, 2007

## REFERENCES


1. Merger R. L' insémination artificielle, La Semaine Juridique (JCP), année1957, Ière partie., N 1389.
2. David G. l'insémination artificielle : état de la science et problématique médico- psychologique, in Catherine Labrusse, Gérard Cornu, L'insémination artificielle humaine. ESF, Paris, 1984, p. 81.
3. Le journal du CNRS, N 233, juin 2009. Le débat bioéthique, p. 24.
4. Boucaud P. (dir.). L'évolution du concept de famille en Europe depuis trente ans. Edition Bruylant, Bruxelles, 2009.
5. Carbonnier J. *Essais sur les lois*, Répertoire du notariat Defrénois, Paris, 1979. 299 p.


Received: 10.02.14.

**About the author**

Byk C. – Ph. D in law, judge, Secretary-General of the International Association of law, ethics and science. A representative from France of the Intergovernmental Committee of bioethics of UNESCO.

The name of the article for the quotation: Evropa i «svobodnaya sem'ya»: vklad vspomogatel'nykh reproduktivnykh tekhnologiy v razrushenie sem'i. Istoriâ mediciny. 2014. N 1. P. 155–159.