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## Medically Assisted Procreation

Ethical and Legal Aspects

MEDICALLY ASSISTED PROCREATION:  
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I am probably the only professional lawyer in this group. And furthermore, I have the honour of being the last speaker of this meeting. And this may give you the impression that lawyers always have to have the last word.

I would just like to rule out that misapprehension from the start by assuring you that the fact that I am speaking last is not something I asked for, but rather something that was decided upon by the organizers in their supreme wisdom. What I am going to say is not meant to be the last word, but merely a contribution to the discussion.

This brings me back to something that the Chairman said a moment ago. The legal situation, worldwide, is very uncertain, ill-defined and because our traditional principles do not necessarily cover the new realities. Consequently, I don't really think it is worthwhile talking a lot about existing legislation.

I think, what we ought to do instead is talk about the kind of new legislation we are going to have - in order to cover these new situations. And when it comes to drafting new legislation, of course, it is not just the lawyers that are supposed to do the job, but rather society as a whole. Therefore, you yourselves are as involved as the lawyers are. Legal experts in this context can be useful in order to define concepts, and perhaps pinpoint areas where there may be conflict with existing legislation. But otherwise, everyone is called upon to draft new legislation.

To avoid digressing and getting sidetracked, I would like to perhaps stick to my text. First of all, a word about freedom of scientific research and the limits thereto.

Artificial insemination, in vitro fertilization and embryo transfer as methods of reproductive medicine have indeed broken new ground, not only in science, but also in ethics and in law. The basic principles haven't changed, of course.

On the one hand, we have freedom of scientific research, which is in fact embodied in the constitution in a number of countries, like Germany and Italy. And no one is questioning scientific research freedom. After all, man is a rational being, and he should therefore be able to make maximum use of his mind.

The Bible says that one should replenish the earth and subdue it; that man should replenish the earth and subdue it. And this means that he should be allowed not just to observe the world, but also to act upon it, in order to discover it. In other words, he should be allowed to experiment with what exists. And I think that this legitimizes scientific research in the area we are talking about.

But of course, there are limits to that, because we do have to take into account the limits imposed by human dignity and by the necessity of maintaining social institutions, such as marriage and the family, which are the very foundations of our society, and therefore need to be protected.

"Respect for nature" requires, in fact, that we protect human dignity and these social institutions, because if either of them were changed, it would mean a change in nature. From this point of view it is rather irrelevant whether you see man as being part and parcel of a broader nature, or whether you see man as being the master of nature. Some societies, such as the Japanese, as we were told, see man as being only a part of nature, whereas other societies see man as being the master of nature. But this distinction is irrelevant when it comes to the protection that we must give man and nature. Whether you are more anxious to preserve the dignity of mankind as an integral part of nature or the dignity of man as the master of nature, is six of one and half a dozen of the other, because both have to be protected, and you cannot protect one without the other.

So though the principles have not changed, we are nevertheless faced with a number of very complicated problems.

The medical profession has not really adopted standards for itself yet, nor has the legislature come up with the standards that need to be applied. And though certain principles are clear, it is very difficult to decide how these principles

should be put into practice. For example, prior consent and risk-benefit-assessment are necessary, but it is unclear to what extent the interest of the future child is taken into account when we are applying these principles to in vitro fertilization, for example. Ultimately it is the child who is the major party involved. Has the child been taken into account in the principles that we are now applying? In other words, there are very few self-imposed standards by scientists or found in law that cover these situations in detail. Consequently, I cannot give you any answers to questions. All I can do is just try to expose the relevant questions.

It seems to me that there are a number of issues when it comes to medically assisted-procreation, and I'd like to list them. —

First of all, biotechnology in general. Now, contrary to what happens in animal experiments, using human beings for experimental purposes, leads to a number of questions. There is a limit to scientific research where one can consider that human dignity has been violated: the human being has a right to dignity, to life, and to bodily integrity. If these are encroached upon, then one could consider that a punishable offense has been committed. However, where do you define the punishable offense? The definition of the offense will depend on the sort of activity that you are talking about.

Now, when it comes to human procreation, I think that we need to analyze a number of separate cases: AID, AIH (artificial insemination by the husband), and intracorporeal or extracorporeal fertilization, for example. That would be four cases.

First of all, let us take AIH. AIH is, of course, not as much of a problem as the other cases. In AIH, a husband's sperm is artificially inseminated into his wife. Now, this could be considered simple medical therapy. If you consider that infertility on the part of a male is a disease, then you could consider that this procedure is simply a therapy used to cure that disease.

If, however, the sperm is frozen before it is inseminated, and the man dies before the egg of his wife is fertilized, then you have a problem because the fertilization is a posthumous

one. This should be perhaps covered by considering that the husband intended for the sperm to be used to fertilized his wife. So that may not be that much of a problem.

But on the other hand, supposing you had to consider the question of whether you can expect a child to grow up without a father : it seems to me that even if the mother wants a child, nevertheless what the doctor has to take into account is the interest of the child, and not just the interest of the mother. Even if a couple can do something, and even if both partners consent, nevertheless the doctor has to take into account broader considerations.

Now, of course, all of these things become even more complicated when we are talking about artificial insemination by donor (AID), because here a third party is involved, and you have a sort of "double fatherhood". You have the biological father and the legal father - or at least he is considered to be the legal father under German law.

Now, in a procedure like this, you could consider that what you have got is therapy as well, because what you are trying to do is to cure infertility. But there may be social and psychological problems. There may be problems with family life, and with the psychology of the married couple: who is considered the father of the child? Whose consent should be ultimately sought? And should the husband be allowed subsequently to contest the legitimacy of the child, even if he did give his consent to this sort of procedure ? Should one be allowed, after the birth of the child, to contest one's own responsibility? Should one be allowed, in fact, to forego in advance any ability to have legal recourse after the fact?

On the other hand, the child should have a right to know who his parents were, his genetic parents. And how does this fit in with the right of the donor to anonymity?

These, too, are questions of major relevance, which also imply the question of who is to be responsible for child support if there is a dispute?

Furthermore, suppose you have a donor who wants to go on donating sperm. This may be contrary to population policy. Then you may have donors who want to donate sperm maybe thirty times. How do you limit that sort of thing?

Now, although all of these are difficult problems to solve, these difficulties should not lead us to prohibit AID as a matter of principle. But at any rate, we should have a clear-cut legal definition of all of these various relationships: in the interest of the child and in the interest of society at large. So, after all, it is in the interest of society to maintain the integrity of the family and marriage.

However, even if all these legal problems have been solved, the psychological problem remains as to whether a couple can actually survive if there is a third party involved in their progeny. One will also have to ask oneself to what extent the donor can actually be expected simply to alienate himself from his own progeny and his "genetic responsibility" for it: donating sperm is not the same as donating blood. When you donate blood, you are donating something that is incorporated into and merges in a foreign body. Whereas when you donate sperm, you are procreating, and you yourself continue in another being.

Let me digress here for a moment. I think I would disagree with some of what was said here before. One of the previous speakers drew an analogy between every type of donation. So, for example, Dr Leroy said that any kind of donation was such that you would have no subsequent responsibility. Now, it seems to me that if you take that position, and it is debatable, then you have to take it to the limit and be consistent. At another point, Dr Leroy said that an ovum donor or a sperm donor should have a say in what happens to what they have donated. I think that that is inconsistent: either you have a say in what happens to your own sperm, in which case you should also assume a certain amount of responsibility for what happens to your sperm; or else you say that the minute you have given your sperm you have nothing more to do with it, but then -consequently - this applies both to responsibility and to a say-so. And I think the first position is probably the right one to take.

Now, let us have a look at extracorporeal insemination. As far as the relations of the parties involved are concerned we have the same problems as with intracorporeal insemination discussed before. But, beyond that, the fertilization technique may be problematical. As an example, I would just point out

that cryoconservation is problematical, as Dr Leroy described to us before; so I don't think I need to go into this in detail.

Therefore I will only say a word about ovum donation and embryo transfer. Here things become much more complicated, as in cases where a woman will donate an egg which is implanted into a different woman, and then fertilized intracorporeally. Beyond that, you also have cases where you have AIH or AID of an ovum which has been flushed out and transplanted into a different woman. Or you also have cases of in vitro fertilization of an ovum which is then transplanted into a different woman after extracorporeal fertilization. In "surrogate motherhood" of this type you have a problem that is similar to the problem of AID, only it is a woman who is involved, rather than a man: here you have a physical mother, which is not the same as the genetic mother. And in fact, you could even have a third mother, if an ovum is donated by one woman, carried by a second woman, and adopted by a third woman. Now, all of this becomes a problem if there's been an arrangement that doesn't work out. For example, the mother that carried the child to term would not want to give it up. Or on the other hand, you could have someone who has promised to adopt a child, and then decides not to. In cases like this, cases of dispute, we don't have a law that will decide who is right and who is wrong. And even if you do adopt laws, you nevertheless have an ethical problem: the fate of a child who has no mother whatsoever, and is being passed around from hand to hand, as if he or she were just merchandise.

Furthermore, all of this tends to undermine motherhood, if you like, emotionally speaking.

Now, some might object that adoption is more or less the same thing. But this is not a good argument to use, because after all, in adoption, the whole point is to help out a child who exists and who doesn't have a mother. And you are only providing an already existing child with a mother. Whereas in the case of embryo transfer, what you are doing is planning ahead, and deliberately creating a child for your own sake; and this means degrading the child to an object.

Further problems exist when you have ova that have been fertilized but not implanted. Under German law - and I assume that this is the case in other countries as well -this being has no legal protection, because life is considered to exist as from the time that the fertilized egg is implanted in the uterus. Prior to implantation in the uterus, whatever it is, is not defined and has no legal protection so far.

Surplus embryos may exist, because you may be removing more ova from women than you actually need for implantation, just to make sure that you have enough fertilized eggs. These surplus embryos may become a legal problem if they are not used subsequently for embryo transplant, though even in those cases, you may have some long-term damage to the foetus itself because of the long wait. Thus we have had a lot of discussion in the Federal Republic of Germany as to whether there is long-term psychological damage, in fact, to a foetus like that.

Beyond that, in other cases you may get surplus embryos because the mother no longer wants implantation or dies in the meantime. These surplus embryos, however, are indeed a legal and an ethical problem. They are especially going to be a problem if the original intent was not to transplant them, but rather to use them for scientific research purposes. In cases like that, then the fertilized egg does represent human life which is to be used as an object, and which was created for a purpose, for the purpose of being used as an object.

Faced with this problem, some people think that life can only be said to begin at birth. But even people who hold that view would agree that a human egg fertilized by human sperm constitutes species-specific human (and not purely vegetative) life. This brings me back to what Prof. Boeckle said a moment ago: the moral status of human life is different from the moral status of non-human life. Yet this has nothing to do with absolute values or absolute views or any other sort of "absolutism", because even if you say this is human life, then this does not necessarily mean that life could not be experimented with, since you can experiment even with human beings after they are born. So, all I want to say at this moment is that, once you have recognized a fertilized egg as being of human nature, you also have to concede to it a human (as different from a non-human) status.



Now, this being the case, the question is whether you can actually do any sort of experiments with it that you want. If you think you can, since it doesn't have any legal rights yet because it hasn't been implanted in the uterus, then you should ask yourself whether this justifies leaving it completely unprotected. After all, there are certain objects which are legally protected even against their owners, such as works of art. Is it fair to protect works of art from their owners, and not to protect human life from any sort of experiment?

If quite a few people think so, it might be due to the fact that the scientist feels that if he creates something, then he can do with it what he wants. And this may be the kind of attitude that is virtually the most dangerous in biotechnology: the scientist as creator, master and judge; the proposition of some people that if they create human life, then they should be able to do with it what they want.

These objections are not to mean that I am trying to rule out scientific experimentation with human matter at all. It simply means that we need to have some sort of standards to protect it from being abused. All of these problems become even more difficult when we talk about fertilizing a human egg with an animal sperm or vice-versa something that seems to have been done already.

This is different from the cases discussed heretofore, where we were talking about human eggs and human sperm: now we have to speak about interspecies or extraspecies fertilization. Here, you have a very, very difficult problem with regard to legal and ethical aspects. The European Medical Research Council has made some recommendations that this sort of thing should be allowed only for diagnostic purposes, in order to figure out the potency of particular sperm, for example, or the chromosomal complement of sperm; and that one should not allow the fertilized egg to develop beyond a certain very early stage of cell division. This might perhaps be feasible as long as it is only used for therapeutic purposes. But the minute you go beyond and start to think about fertilizing higher animals with a human being, crossing higher animals with human beings, then you are talking about creating creatures which would contain human genes. Then, however, the question arises as to whether this being is

"human" or "animal". Since there seems to be a lot of ambiguity and ambivalence, I think it would be fair to say that if human dignity is affected in any way, anywhere, then it certainly is the case in animal/human hybrids. And the same would apply as to chimeras by the fusion of man/animal zygotes.

Whereas so far the subject was primarily the protection of individual interests like life, self-determination and partner relations, lastly we have to consider detriments to the society as well. Because artificial insemination and fertilization may tend to lead to eugenic selection and to standardization of the human gene pool. This danger already arises when sperm or egg donors are recruited and selected for a specific fertilization; and it also occurs when you have several different fertilized eggs and have to choose among them. In cases like this, the doctor is the one who plays God, who makes the choice: either he uses his own discretion, or else he does what the parents want. The minute this is done, and the minute it is not aimed at simply eliminating mutant genes, then you have the problem of the temptation to improve the human race by using these techniques.

But who is to decide what constitutes an improvement and what does not? Isn't there the danger that any sort of unusual or unconventional behaviour might be considered to be an inherited abnormality and in a case like that you might try to exclude it? Now, eliminating an undesirable or diseased trait is one thing, but breeding for positive traits is something entirely different. Here you are getting into eugenics. But who is supposed to be responsible for defining the standards? I think that making these choices could not be left to the subjective discretion of the individual doctor. Because the minute you start selecting according to criteria of what is inferior or superior, you are making a value judgment. These value judgments cannot be made objectively on a purely empirical basis, but are rather subjective, even if unconsciously so. And when value judgments are made that affect society, society should be the one to take responsibility for it.