



Current Challenges of Filiation Related to Assisted Human Reproduction Techniques. Ecuador and its need to be updated

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Abstract- Nowadays, filiation has become a challenge, this research work refers to transcendental issues regarding this important legal figure that currently plays a fundamental role due to the different forms in which it is presented: matrimonial, non-matrimonial, adoptive and those derived from assisted human reproduction techniques, since there is a need to examine its study, it is worth mentioning that in Ecuador this topic has not been deepened in its legal regime, causing a legal gap.

Keywords: filiation, biological truth, nature, adoption

I. INTRODUCTION

In order to carry out this research, relevant topics related to filiation were discussed, starting with its background and its evolution, and then focusing on the different types of filiation, pointing out its importance, especially in the conflicts that have been generated through the Assisted Human Reproduction Techniques (AHRT). In order to focus on a comparative law analysis, Spain is used as a basis, since this country has regulated assisted reproduction techniques through Law 14/2006 and deals with filiation under this perspective and serves as a basis for countries, such as Ecuador, which do not present any legislative progress on the topic, since in the first place, filiation has not evolved in regulations such as the Civil Code or in the Code of Childhood and Adolescence, but even more serious is not having anything that regulates assisted reproduction techniques. By virtue of the aforementioned, a study of filiation in Ecuadorian legislation has been carried out, the right of will being fundamental in this subject, as well as the right of identity considered essential.

The objective of this study is focused on analyzing filiation and its challenges due to the evolution of assisted human reproduction techniques through legal orders, databases and grounded theory, with the purpose of an exhaustive investigation regarding the filiation system in this field. In addition, it has been proposed to explain the evolution that filiation has experienced in recent times; also, the determination of filiation when applying assisted reproduction techniques, with the description of situations that may occur in the different cases that arise; and, above all, to determine the lack of legal certainty regarding filiation and its participants due to the lack of updating of the legal regulations in Ecuador.

In this regard, the question arises: Is a new regulation of filiation in Ecuador considered necessary, especially with regard to assisted reproduction techniques? In this context, there is "the need for filiation in Ecuador to evolve according to the new areas in which it is presented and to be regulated in a way that guarantees the legal security of individuals".

What is sought through this academic contribution is to raise awareness that science and technology evolve in giant steps, but the law cannot lag behind, because it must guarantee the legal security of people and thus avoid the violation of rights, a situation that currently occurs with respect to the issue of filiation.

II. BACKGROUND OF FILIATION

In order to analyze filiation, it is necessary to go back to Roman Law. As far as primitive Rome is concerned, the filiation relationship was constituted under a scheme that had nothing to do with what was later understood. The prevailing system was that of agnation, which determined that the transmission was made from the male, with total omission of women, although it should be noted that the male descendants were not enough, since it should be emphasized that the main framework to constitute a bond is related to the domestic religion, which was characterized by the fact that each family worshiped its own gods, and this was so, since the dead ancestor became a protector god of the family group to which he belonged.¹

The paterfamilias can be cited as "the one who has the lordship in his domus house and is correctly designated by this name, even if he has no children"². Therefore, the aforementioned paterfamilias is the central part of the domus, around whom all the other members revolve. The power of the paterfamilias directs everything concerning the family institution. In this context, over his slaves he exercises the dominicapotestas, over his children and other descendants the patria potestas, over his wife the manus. Everything is done in accordance with his benefit.

Then in the Middle Age, the problem of inequality and discrimination of children began to be accentuated, since the principle of favor matrimonii, gained space and therefore the legal superiority of the children of couples procreated under marriage. But at the present time, the subject has been evolving along with the democratization of the nuclear family, the transformation of marriage, the search for filial unity, etc., has improved this aspect.

Under this context, in order to enter the subject of filiation it is necessary to refer to kinship as "the family relationship that exists between two persons"³. According to the Ecuadorian Civil Code, kinship can be either by consanguinity or affinity.⁴ Article 35 of the Civil Code establishes the consanguinity, stating that:

The degrees of consanguinity between two persons are counted by the number of generations. Thus, the grandson is in the second degree of consanguinity with the grandfather; and two first cousins, in the fourth degree of consanguinity with each other. When one of the two persons is an ascendant of the other, the consanguinity is in the straight line; and when the two persons come from a common ascendant, and one of them is not an ascendant of the other, the consanguinity is in the collateral or transversal line.

With respect to kinship by consanguinity, several effects are produced, some of which can be mentioned: parental authority, right of inheritance, right of maintenance; and as obligations the upbringing of children, education, identity, etc. In relation to affinity, article 23 ibidem states the following:

Affinity is the kinship that exists between a person who is "or has been" married and the blood relatives of his or her husband or wife, or between one of the parents of a child and the blood relatives of the other parent. The line and degree of affinity between two persons is determined by the respective line and degree of consanguinity; thus, between in-laws and sons-in-law there is a straight or direct line of affinity in the first degree, and between brothers-in-law, a collateral line of affinity in the second degree.

In the case of affinity, the effects that this entails refer to the fact that there is no right to alimony and it is worth clarifying that the spouses are not related or relatives of any kind; their obligations derive from the marriage contract.

Filiation is one of the relevant figures within civil and family law. At present and due to the evolution of science and technology, the legislations of the countries have seen the need to be updated within this context, that is to say, to advance and understand not only the biological filiation or better known as by nature, but

¹MIZRAHI, M., *Familia, matrimonio y divorcio*. Segunda Edición. Buenos Aires – Argentina. Astrea. Pág. 37.

²BRAVO GONZÁLEZ, A Y BIALOSTOSKI., *Compendio de Derecho Romano*. Editorial Pax -México. 1975. Pág. 37.

³MEZA BARROS, Ramón., *Manual de derecho de familia*. T. I, Santiago, Editorial jurídica de Chile, 1975. Pág. 12

⁴Preliminary Title of the Ecuadorian Civil Code, Official Gazette Supplement 46 of 24-Jun.-2005 Last amendment: 08-Jul.-2019 Status: Reformed. Article 27: In the cases in which the law provides that the relatives of a person shall be heard, the spouse of said person and his or her consanguineous relatives, up to the fourth degree, of either sex, of legal age, shall be understood to be included in this denomination. In the absence of a sufficient number of blood relatives, relatives up to the second degree shall be heard. Descendants and ascendants shall be preferred to collaterals, and among the latter, those of closest kinship.

also to approach the study of the filial part with respect to the techniques of assisted human reproduction, hereinafter referred to as HRRT, and all the procedures that derive from them.

In other words, there is a need to carry out a study of filiation in a comprehensive manner in order to avoid fragmentations that incur in the violation of the rights of persons who are immersed in this process. It is necessary to legislate it in an exhaustive manner to guarantee rights, not as it happens in Ecuador, where this issue is dealt with in a very brief way, and even more so when nothing has been said about HRT.

Much of the doctrine deals with the principles of filiation by citing the principles of equality of filiation and the best interest of the minor. Regarding the first one, it is considered especially in cases of children out of wedlock; and regarding the best interest of the minor, with the purpose of guaranteeing the rights of the children that are guaranteed in the Convention on the Rights of the Child⁵, as well as in the Constitution of the Republic of Ecuador in 2008⁶. But this aspect does not mitigate the deep legal vacuum regarding filiation.

III. RIGHT TO KNOW THE ORIGINS OF DIFFERENT TYPES OF FILIATION

In this regard, it is necessary to allude to the biological truth, since it constitutes the starting point to make reference to the legal bond of filiation, therefore, the ideal would be that the legal filiation coincides with the biological fact of procreation. Nowadays, this issue has obviously gained relevance due to the progress and above all the certainty of the biological tests. The transcendence of this issue is framed in the different types of filiation, among which the following can be mentioned: marital, non-marital, adoptive and those derived from assisted human reproduction techniques. It is therefore a current problem in the civil sphere, because according to Ecuadorian legislation, it has been scarce in relation to the advances of comparative law and the evolution of science and technology, there are contradictory sentences, there are no guarantees for those who are part of these legal processes, and it is time that the Civil Code of Ecuador effectively regulates the filial bond. Therefore, the biological truth constitutes a natural and legal fact. As a natural fact, the filiation always exists, this as a result of procreation, so all people have progenitors from whom they descend. On the other hand, in order for the filiation as a natural fact to acquire relevance, that is, to "exist" for the Law, it must be determined.

There are legal mechanisms to establish filiation, such as, for example: the presumption of paternity, the recognition of the child or through a court ruling). Once the filial bond is determined, the civil status of filiation is generated; that is, the legal situation or position that a person occupies within the family (status familiae) as a child (status filii)⁷.

The relationship of filiation is the one that measures between those who are legally considered parents and their child. The main problem lies in the identification of those who should be considered parents, then the dilemma and the question arise: What are the elements to be taken into consideration by the legal system to legally assign the condition of parent?

By virtue of the question, it is necessary to determine the child's need to know his or her origin. The biological relationship becomes fundamental since it must be adjusted in a fundamental way with the juridical filiation.

⁵Convention on the Rights of the Child November 20, 1989. Article 3 states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

⁶Constitution of the Republic of 2008. Montecristi - Ecuador. Article 44 states: "The State, society and the family shall promote as a priority the comprehensive development of children and adolescents, and shall ensure the full exercise of their rights; the principle of their best interest shall be observed and their rights shall prevail over those of other persons".

Children and adolescents will have the right to their integral development, understood as a process of growth, maturation and unfolding of their intellect, capacities, potential and aspirations, in a family, school, social and community environment of affection and security. This environment will allow for the satisfaction of their social, affective-emotional and cultural needs, with the support of national and local intersectoral policies.

⁷CATTANEO, G., *Filiazione Legittima*, Trattato di diritto Civile da G. Grosso e F. Santoro-Passarelli, vol. I, fasc. IV, Casa Editrice Dr. Francesco Vallardi, Milano, 1961, pp. 3 y ss.

It is for this reason that the Ecuadorian legislation must consider the elements that guarantee the legal security that establishes paternity and maternity.

There are new challenges in civil law with respect to filiation, especially because of the approaches, principles and criteria that do not always coincide in this area, but it is an inherent right of human beings to know their background, that is, the biological truth is an imminent issue for every human being. Filiation allows us to know our origin. For many years there has been an intense discussion regarding the right of the adoptee to know his or her biological origin. "This right is understood as an access to the knowledge of the true filiation by the mere fact of knowing. That is to say, without altering the adoptive filiation, nor the rights and duties that it carries with it, nor achieving the determination of the filiation by nature».⁸

The new regulatory framework of filiation is based on the principle of biological truth and considers that the benefit of legitimacy yields to the need to find out who are the real parents of the child. Related to this, there is the repeal of the principle of hierarchy of filiations and the elimination of differences in the effects of filiation: only a different regime of determination according to the matrimoniality or extramaritality of the generation relationship survives.⁹

IV. INTERNATIONAL TREATIES

Article 17 of the American Convention on Human Rights refers to the protection of the family, specifically number 5, which states: "The law shall recognize equal rights for children born out of wedlock and children born in wedlock".

Article 10.3 of the International Pact on Economic, Social and Cultural Rights states that States Parties recognize that: "Special measures of protection and assistance should be adopted for all children and adolescents, without any discrimination on the grounds of parentage or any other status".¹⁰

Resolution 41/85 of the United Nations General Assembly of December 3, 1986 on the social and legal principles relating to the protection and welfare of children¹¹ summarizes the principles that guide the Western and contemporary conception of adoption. Starting from the reaffirmation of the principle contained in the 1989 Convention on the Rights of the Child, which indicates that the minor, within the concrete possibilities of his particular situation, should grow up under the protection and care of his parents in an atmosphere of affection and spiritual and moral stability, it recalls that the institutions of foster care, guardianship and adoption of minors should be guided by the principle of the best interests of the child.¹²

In addition, the International Civil Law Treaties of Montevideo of 1889 and 1940 "regulate this issue based on the social and cultural reality of the time, determining an appropriate legislative policy, which implied a clear distinction between legitimate and illegitimate filiation".¹³

By virtue of the above, the regulation of filiation is fraught with difficulties, both from the moment of its creation as well as the consequences or effects that arise from it. From this perspective, it is the legal systems that must ensure legal certainty, especially in the area of the family, establishing fundamental bases that allow the protection of both parents and children, thus advancing and guaranteeing rights in the area of filiation.

⁸DE CASTRO, M. R. (2013). *La verdad biológica en la determinación de la filiación*. Madrid, Spain: Dykinson. Recuperado de <https://elibro.net/es/ereader/bibliotecaucm/57045?page=229>.

⁹DE LA CÁMARA ÁLVAREZ, M., *El nuevo régimen jurídico de la filiación*, en AA.VV., *La Reforma del Derecho de Familia*, Sevilla, 1982, p. 239.

¹⁰ Pacto Internacional de los Derechos Económicos, Sociales y Culturales. Adoptado y abierto a la firma, ratificación y adhesión por la Asamblea General en su resolución 2200 A (XXI), de 16 de diciembre de 1966.

¹¹Artículo 7.1.d: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." Article 8: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations in accordance with the law without unlawful interference".

¹²ALES URÍA ACEVEDO, María de las Mercedes. *El derecho a la identidad en la filiación*. Universidad de Sevilla. Valencia 2012. Pág. 84.

¹³FRESNEO DE AGUIRRE, C. (2016). El régimen internacional de la filiación y los derechos humanos: el diálogo de las fuentes. *Revista De Derecho*, (1), 155-187. <https://doi.org/10.22235/rd.v0i1.860>. Pág. 159

V. ASPECTS OF FILIATION BY NATURE AND BY ADOPTION UNDER SPANISH LAW

This category of filiation by nature is intimately linked to sexuality. This type of filiation was qualified as legitimate from the point of view that it comes from a marriage. Reference has also been made to the fact that it could be illegitimate due to aspects contrary to those mentioned above, i.e., marriage does not occur.

Legitimate or regular filiation has been distinguished by two subspecies: one is called *proprio sensu* or proper or normal legitimacy, and occurs if the initial phase of procreation - conception - and its end - birth - are chronologically located within the validity of the conjugal union. The other is the improper legitimacy and takes place when the child is conceived before the marriage was celebrated or is born immediately after its dissolution¹⁴.

Article 108 of the Spanish Civil Code¹⁵ refers to the types of filiation and makes a distinction between filiation by nature and by adoption. This paper explains that filiation by nature can be matrimonial and non-matrimonial. In the first case, as is obvious when there is marriage, "filiation is matrimonial when the father and mother are married to each other". On the other hand, "biological filiation or filiation by nature presupposes a biological link between the son or daughter and his or her parents. When this nexus can be accredited, paternity or maternity is legally determined". However, there is no precision with respect to adoptive filiation, that is to say, it leaves a legal vacuum when it comes to adoptive filiation "it is simply an adoptive filiation, period". At most it can be referred to as that in which the biological basis is completely absent with respect to the paternal and maternal line. But it is necessary to affirm that: "The act of constitution of the adoption is a solemn act that creates a bond of kinship by purely juridical disposition, making the adoptee a member of the adopter's family as if he were one naturally, unlike the simple adoptions of the past"¹⁶. It can be mentioned that adoption is specifically based on the best interest of the minor. The legal figure of adoption, based on the family, has been developed to solve the problem of children in distress. Adoption brings with it a positive consequence, since it allows the integration of the adopted child into the adopter's family.

As far as non-marital filiation is concerned, nothing is established in the Civil Code, although there is a contrary idea, that is to say, non-marital filiation is when the parents are not married. Then it can be mentioned that children born out of wedlock are those born of parents who at the time of conception or birth were not married to each other.

The core of the issue lies in the legal and juridical situation that the child will enjoy in relation to his or her legal parents and biological progenitors. "Traditionally, filiation has been divided into natural and adoptive, and it is worth asking whether filiation by AHRT is a third gender"¹⁷.

One of the main problems that has arisen in Spain with respect to filiation and that has left in doubt both filiation by nature and by adoption is related to the use of AHRT, since in many cases the parents are not the biological ones, constituting a latent problem at present, and the reason for this study and the challenges of filiation are a topic of relevant importance for the law. For this topic, it should be borne in mind that Spain has Law 14/2006, of May 26, 2006 on Assisted Reproduction Techniques¹⁸, which in its article 7 provides that:

Filiation of children born by means of assisted reproduction techniques. 1. The filiation of those born with the assisted reproduction techniques will be regulated by the Civil Laws, except for the specifications established in the following three articles. 2. In no case, the inscription in the Civil Registry will reflect data from which the character of the generation can be inferred. 3. When the woman is married, and not legally separated or, in fact, with another woman, the latter may state in accordance with the provisions of the Civil Registry Law that she consents to the determination in her favor of the filiation with respect to the child born of her spouse.

That is to say, once the child conceived by means of AHRT techniques is born, Law 14/2006 refers the matter in its article 7 to the regime established by the Civil Code in matters of filiation, establishing the

¹⁴PUIG PEÑA, F., *Tratado de Derecho Civil Español*. T. II vol. II. Editorial de la Revista de Derecho Privado 1971. Pág. 16

¹⁵ Código Civil Español. Real Decreto de 24 de julio de 1889.

¹⁶ ALBALADEJO, M., *Curso de Derecho Civil*, IV, 10^a ed., Edesofer, Madrid, 2006, p. 267.

¹⁷ ALES URÍA ACEVEDO, María de las Mercedes. *El derecho a la identidad en la filiación*. Cit., Pág. 153.

¹⁸ Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción asistida. España.

mentioned rules. In addition to the above and in accordance with the provisions of Article 8 of the Law, whether the required consent of the minor born as a result of such fertilization has been provided.

Clarifying paragraph 2 of the precept that it is considered an indubitable document for the purposes of paragraph 8 of Article 44 of Law 20/2011, of July 21, 2011, on the Civil Registry.¹⁹the document drawn up before the authorized center or service in which the consent to the fertilization with donor contribution given by an unmarried male prior to the use of the techniques is stated, safeguarding the principle of biological truth, given that the judicial claim of paternity is saved and in this sense, in those cases in which the disclosure of the identity of the donor is exceptionally appropriate, this will not imply the legal determination of the filiation.²⁰

In this same sense, article 120 number 5 of the Spanish Civil Code can be quoted: "Regarding the mother, when the maternal filiation is stated in the birth registration made within the term, in accordance with the provisions of the Civil Registry Law". Then it is clear that in the Spanish legislation the filiation is determined by the birth, therefore, the surrogacy or surrogate motherhood is null, arguing that, although the TRHA are accepted, acts that violate the dignity of the pregnant woman and the child are not allowed, nor can be made of maternity a kind of commercialism, since the filiation is an essential legal figure for the life of the human being for all the rights it entails.

VI. STUDY OF FILIATION IN ECUADOR

In Ecuador, the Constitution of the Republic of 2008, in its article 69 number 6 regarding filiation establishes: "In order to protect the rights of family members: daughters and sons shall have the same rights without considering filiation or adoption background"; and in its numeral 7 provides: "No declaration on the quality of filiation shall be required at the moment of birth registration, and no identity document shall make reference to it". This is all that the Constitution mentions about filiation. Regarding the family in its article 44 states:

The State, society and the family shall promote as a priority the integral development of children and adolescents, and shall ensure the full exercise of their rights; the principle of their best interest shall be observed and their rights shall prevail over those of other persons. Children and adolescents shall have the right to their integral development, understood as a process of growth, maturation and unfolding of their intellect, capacities, potential and aspirations, in a family, school, social and community environment of affection and security. This environment will allow for the satisfaction of their social, affective-emotional and cultural needs, with the support of national and local intersectoral policies.

Likewise, Article 67 of the Constitution provides: "The family in its various forms is recognized. The State shall protect it as the fundamental nucleus of society and shall guarantee conditions that fully favor the achievement of its purposes. These shall be constituted by legal or de facto ties and shall be based on the equality of rights and opportunities of its members". Among other articles that mention the rights of the persons who make up the family are the following.

In this sense, much of this is topic is about family, about rights, but very little about guaranteeing filiation, as it will be determined, there is a deep legal gap especially in the Ecuadorian Civil Code, as well as in the Code of Childhood and Adolescence²¹, because the legislator has not bothered to make the legal norm evolve according to the new models of family and diversity of types of filiation that arise at the present time. That is to say, Ecuador does not offer guarantees in the civil sphere and, to mention it, in filiation, which is the subject under study. Civil law has been forgotten by those who are in charge of legislating.

¹⁹ Ley 20/2011, de 21 de julio de Registro Civil. Publicado en: «BOE» núm. 175, de 22/07/2011.

²⁰FERNÁNDEZ, R. D. L. (2020). La filiación en las parejas homoparentales. Barcelona, J.M. BOSCH EDITOR. Recuperado de <https://elibro.net/es/ereader/bibliotecaclm/130493?page=458>.

²¹ Código de la Niñez y Adolescencia Ecuador. Registro Oficial No. 737, de 3 de 3nero 2003. Normativa: VigenteÚltimaReforma: Suplemento del RegistroOficial 481, 6-V-2019

It is in this way that the current Civil Code in its Preliminary Title, Article 24 states that filiation is determined, and the corresponding paternity and maternity²², institutes the ways to establish filiation, but there is no specific definition of it, the same happens in the Code of Childhood and Adolescence that within its Title II, Fundamental Principles in its Article 6 on equality and non-discrimination states:

All children and adolescents are equal before the law and shall not be discriminated against because of their birth, nationality, age, sex, ethnicity, color, social origin, language, religion, affiliation, political opinion, economic status, sexual orientation, health status, disability or cultural diversity or any other condition of their parents, representatives or relatives.

Regarding the norms of identification of minors, the article 36 in the third apart establishes that:

If the identity or domicile of both parents is unknown, the child or adolescent will be registered by judicial or administrative order, with two names and two surnames in common use in the country. The name by which he/she has been known will be respected and his/her opinion will be taken into account whenever possible. The registration may be requested by the person in charge of the protection program in charge of the child or by the Board for the Protection of Rights. Once the registration has been made, the Cantonal Head of the Civil Registry will inform the Defender of the People of the corresponding jurisdiction, in order to initiate the extrajudicial steps to clarify the filiation of the child and subsequent voluntary recognition or to initiate the action to have it judicially declared.

But the only thing that this Code of Childhood and Adolescence refers to is the unity of filiation, stating: "All children are equal before the law, the family and society. Any indication that establishes differences of filiation is forbidden, as well as requiring statements indicating their modality". Therefore, the question arises: where is it specified about the natural or adoptive filiation; what happens with the children who come to the world through assisted reproduction techniques; how does the jurisdictional part act before this imminent legal void?

Then we realize that Ecuador has a challenge of great magnitude regarding the subject in question, because within the filiation there are constitutional aspects that cannot be left aside as the paternal and maternal co-responsibility, as well as the diversity of family types; and, from the civil point of view from the moment of the birth of the human being there are inherent rights such as having a name and surname, inheritance rights, the right to alimony, etc.

Previously, Spain was mentioned, but it can be noted that, although there are shortcomings in the legislation, it is much more advanced and in a better position to guarantee rights and, above all, the legal security of parents and children. Apart from having its Civil Code, Spain has a Law on Assisted Reproduction Techniques, which allows them to act according to the reality of the law, a situation that does not happen in this country. Neither the Civil Code nor the Code of Childhood and Adolescence in Ecuador define filiation or protect anything regarding the forms in which it can occur, given this circumstance, the following definitions have allowed us to establish its importance: "legal bond that is established between two persons, qualified by law as "father" or "mother", at one end and as "son" or "daughter", at the other. Consequently, the so-called paternal and maternal filiation takes place".²³

Another definition that can be mentioned is: "Set of legal norms relative to the establishment - also called determination or establishment"²⁴, of the paternal-maternal filial relations between the three possible areas currently known: a) procreation by nature, b) generation by artificial fertilization methods and c) adoptive filiation²⁵. As explained by Carbajo Gonzalez:

²² a) By the fact of having been conceived within the true or putative marriage of his or her parents, or within a legally recognized stable and monogamous union; b) By having been voluntarily recognized by the father or mother, or by both, if there is no marriage between them; and, c) By having been judicially declared the child of a specific father or mother.

²³CORNU, G., *Droit civil. La famille*. Editeur: L.G.D.J Collection: *Précis Domat*. Sous-collection: Privé. 9^e édition. Parution: 10/2006. Pág. 285

²⁴MENDEZ COSTA, M.J., *La filiación*. Rubinzal Culzoni Editores. Santa Fe. Argentina. Pág. 136

²⁵MIZRAHI, Mauricio Luis, *Identidad filiatoria y pruebas biológicas*. Editorial Astrea. Buenos Aires. Pág. 6

Filiation is the relationship or bond that unites a person with his or her parents. It evidences a blood, carnal, biological bond. One is a child by birth of parents, which is a purely natural circumstance, to which no human being is alien. In the eyes of the law, however, filiation consists of more than a purely biological relationship. The filiation is essentially a relationship of a juridical nature between two persons, parent and child; that is, it is a birth relationship elevated to juridical status. In order for the filiation to produce legal effects, it must be known by law, it must be legally established, because, if this does not occur, the blood relationship is, in principle, irrelevant.²⁶

With all the above mentioned, it can be stated that the progress of reproductive medicine means that Ecuadorian society and its legislation cannot turn its back on a palpable reality, which because it is not regulated, leaves indifferent the consequences that can be generated with respect to the acts that the subjects may have. Therefore, Ecuadorian law cannot close its eyes to a fact that has become an existing reality, since the techniques of assisted human reproduction and all that derives from them such as artificial insemination, in vitro fertilization, surrogate motherhood, post mortem fertilization, etc., lead to the legal figure of filiation, which makes it necessary to have a regulation that guarantees the rights of the persons involved.

VII. RIGHT TO THE IDENTITY OF THE CHILD

One of the issues that affect everything related to filiation is the right to personal identity²⁷, since this characteristic, if it can be called that, makes human beings unique and allows to distinguish them from others. Article 66 of the Constitution of the Republic of Ecuador recognizes and guarantees in its number 28: "The right to personal and collective identity, which includes having a name and surname, duly registered and freely chosen; and to preserve, develop and strengthen the material and immaterial characteristics of identity, such as nationality, family origin, spiritual, cultural, religious, linguistic, political and social manifestations". Personal identity, in short, "is everything that makes each one of us who we are and not someone else"²⁸. Human beings have the right to know their biological antecedents, it is here where the problem of filiation starts, when paternity contestation is presented²⁹, because nowadays personal identity is based on the filiation part, but also on the genetic part. The fact of having a genetic and filiation identity is a right for everyone.

In this sense, it is necessary to distinguish between genetic identity and filial identity. In the case of genetic identity, it refers to knowing its origin, its biological progenitors; in the case of filial identity, it is more involved in the legal sphere, thus creating a legal link between two people.

"The question of whether a person, particularly a child, has a right to know his or her biological and genetic origins is one of the most important legal challenges of the last two decades. It is now accepted that all children whose parentage is divided between biological, or genetic, and social, have a vital interest in identifying all elements of their ancestry".³⁰

Nowadays, there are many cases in which the genetic part does not coincide with the filial part. For example, the Civil Code of Ecuador establishes a presumption in its article 62: "From the date of birth the time

²⁶CARBAJO GONZALEZ, *Manual de Derecho de Familia*, Edisofer, Madrid, 2007, p. 297.

²⁷ Ley Orgánica de Gestión de Identidad Y Datos Civiles. Ecuador Suplemento del Registro Oficial No. 353, 23 de octubre 2018 Normativa: Vigente Última Reforma: Suplemento del Registro Oficial 353, 23-X-2018. Art. 1. Objeto. The purpose of this Law is to guarantee the right to identity of persons and to regulate the management and registration of facts and acts related to the civil status of persons and their identification.

Art. 39 ibidem. - The case of the married woman or in legally constituted de facto union, whose spouse or cohabitant is not the father of the minor to be registered. The married mother or in legally constituted de facto union, will be able to authorize to her spouse or cohabitant who is not the father of the minor, the adoption of her son or daughter in case the identity or whereabouts of the biological father is unknown, indicating this particularity and leaving safe the right of recognition; or, previous consent of the biological father of the future adoptee in case his identity and location are known, who will lose the filiation, by said authorization.

²⁸FERNÁNDEZ SESSAREGO, Carlos., *Derecho a la identidad personal*. Primera edición. Argentina. Editorial Astrea.1992. Pág. 34.

²⁹ Art. 250.- The challenge to the acknowledgment of paternity may be exercised by: 1. The child.2. Any person who may have an interest in it. The recognizer may challenge the act of recognition by way of nullity to demonstrate that at the time of granting it, the concurrence of the indispensable requirements for its validity was not verified. The absence of consanguineous bond with the recognized one does not constitute proof for the impugnation of recognition in which the biological truth is not disputed.

³⁰BESSON, S., «Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights», *International Journal of Law, Policy and the Family*, 21 (2007), pp. 137-159, pp. 138-139.

of conception is inferred, according to the following rule: It is presumed by law that the conception has preceded the birth not less than one hundred and eighty full days, and not more than three hundred, counted backwards, from midnight at the beginning of the day of birth". For a long time the filiation situation has been made through the application of this article, which at present is unnecessary, since to know exactly if there is a genetic relationship between persons, the only thing that is required is the application of the biological test better known as DNA, in this sense one of the great debates that arise at present is to determine if the judge is empowered to order the performance of the biological test, in the case of our legislation the Code of Childhood and Adolescence in its article numbered 9 second paragraph establishes: "When the filiation has not been established or the kinship in the case of the other blood relatives, the Judge will order in the order of qualification of the claim, the comparative examination of the patterns of bands or sequences of deoxyribonucleic acid (DNA), without detriment of the provisional fixation of alimony". As a complement to this article, it is also worth mentioning article number 10 which provides for the obligation of the alleged parent:

The Judge shall fix the child support in favor of the child or adolescent to a person whose filiation or kinship in the case of other blood relatives has not been legally established, according to the following rules:

a) In the event of refusal by the defendant to submit to the scientific DNA tests ordered by the Judge, the filiation or kinship relationship in the case of other blood relatives with the alimentary will be presumed de facto, and in the same order the provisional pension will be fixed, which will be enforceable from the filing of the lawsuit.

b) If the result of the DNA test is positive, the Judge will declare the filiation and the corresponding paternity or maternity and will order the registration of the respective Resolution in the Civil Registry; or the relationship of kinship in the case of the other blood relatives. In the same order it will fix the definitive alimony, which will be enforceable from the date of filing of the claim.

c) If the defendant bases his or her refusal to perform the DNA test on the circumstance that he or she lacks the resources to pay for it, the Judge shall order the Ministry of Public Health, through a Genetic Research Unit, to perform the DNA test free of charge.

Proof of the lack of resources of the alleged father, mother or blood relative obliged to pay the costs of the DNA test, as well as the procedural costs and the costs of the social study, shall be admitted when the study of the technical office proves this and in accordance with the evidence to be acted in the respective hearing.

It is forbidden to perform DNA tests on the unborn child, however, it may be performed on deceased persons, when necessary to establish the parent-child relationship.

The means of determining filiation have acquired renewed importance since the introduction of tests of biological inheritance. Scientific advances in the area of genetic research have brought with them a growing certainty at the moment of determining biological paternity. This evidentiary issue involves considerations of fundamental rights, such as the right to privacy and physical integrity.³¹

This is what is found in the Code of Childhood and Adolescence regarding the application of DNA tests, which although it is true that they serve to establish the biological truth, as well as the fixing of alimony. As it has been demonstrated through the mentioned articles, the biological tests allow us to verify the filiation, by means of the legal mechanisms, attributing the juridical status of the relation father - child. Therefore, a relationship arises from two points of view: legal and biological, which entails rights and obligations.

In the context of the right of filiation, the right to personal identity is in line with the right of every person to be able to know the origin of his own life, his genetic heritage, the fact of belonging to an individualized family and above all to have a family. For this search for biological truth, the law incorporates an open system of actions to determine parentage. Therefore, the right to claim filiation is imprescriptible and cannot be waived.

³¹ALES URÍA ACEVEDO, María de las Mercedes. *El derecho a la identidad en la filiación*. Citado.

The right to identity from any field constitutes one of the reasons that explain the search for paternity and maternity, as well as to guarantee the legal security regarding the inquiry for the knowledge of the circumstances and elements of one's own generation, even when the Law does not allow establishing a kinship bond. The fact of knowing the parents of the person establishes a component that is directly related to constitute us as individual beings, that is to say, with our identity that allows us to be unique in the world. Under this same perspective, the protection of the right to identity has its basis in the dignity of the human being: because absolutely all men, in our quality of persons, are worthy, since what is claimed is the respect to their identity for being an essential part of our existence, it is under this scope the fact of the search of the biological filiation both paternal and maternal. For the human being, the knowledge of his own biological identity is essential.

Therefore, the right to identity: "It is doctrinally defined as a very personal right, which every human being enjoys to be oneself, in its complex and multiple diversity of aspects, thus reaching its own identity".³²

VIII. THE WILL OF FILIATION AS A FUNDAMENTAL ROLE

In the Spanish doctrine, Martínez Calcerrada lists the following principles, general to the Law itself, and present in the phenomenon of artificial reproduction: principle of legal voluntarism; of legally protected interest; of no harm to third parties and of public order. The principle of legal voluntarism refers to the fact that AHRT has arisen due to the demand of many couples for a solution to the sterility problems that afflict them. In other words, the emergence of TRHA has given scientific, and subsequently legal, channel to what was requested by a set of wills of the members of the community. Likewise, both individual and legislative will have a marked incidence on the whole filiation regime that will develop from assisted conception onwards.³³

Within the determination of filiation, the autonomy of the will plays a preponderant role, since there are many paradoxical situations, among them are those in which the person who has recognized the child is not the biological father. In the case of adoption, it is an obligation that those who are in this circumstance have access to know their biological truth.

From another point of view it can be mentioned the fact that the person refuses to know his biological origin, in the case of this legislation the question arises: what to do in this circumstance? Well, the will has a preponderant role in this matter, the bond of filiation constitutes a relationship in which not only a person but his descendants are immersed, in the case of not wanting to know his biological identity, the identity not only of this person but of all those who have kinship would be violated. "What the law values and what is essential for the validity of any acknowledgment is the declaration of paternity. That is, the will of the recognizer to proclaim and assume the paternity and, with it, all the legal effects *ex lege* of the paternal-filial relationship, but not the veracity of the filiation, which is presumed".³⁴

IX. FILIATION AND ASSISTED REPRODUCTIVE TECHNIQUES

In Europe, with respect to AHRT, two legislative currents can be mentioned. The first involves countries such as Germany, Italy, Sweden, Switzerland, Norway and Austria, and the second involves Spain and the United Kingdom. In the case of the former, they allow the application of these procedures by placing as a fundamental requirement the respect for human dignity and the interest of the minor to have a two-parent family composed, as far as possible, by his mother and father by nature. "The tendency is to recognize the child's right to a non-dissociated maternity and to his own identity, in such a way that, if in some cases sperm

³²MOLINA, EDUARDO Y VIGGIOLA, LIDIA., *Protección constitucional del derecho a la identidad del hijo extramatrimonial*, paper presented at the International Congress on Rights and Guarantees in the 21st Century, Asociación de Abogados de Buenos Aires, 1992, p. 2.

³³MARTÍNEZ CALCERRADA, L., *La Nueva Inseminación Artificial*, Central de Artes Gráficas, Madrid, 1989.

³⁴As stated by ALBALADEJO, "the acknowledgment does not contain a declaration of belief in paternity, but a declaration of paternity (. . .) and when it is made it is presumed that it responds to reality (. . .). It is not to prove paternity and, by virtue of the fact that it is proven, to declare to assume it; it is only to affirm oneself father. Which certainly allows it not to be true". (Curso de Derecho Civil, vol. IV, Edisofer, Barcelona, 2007, pp. 222-223).

donation is admitted, the child is always recognized as having the right to know the identity of his biological father. The fundamental concern is to avoid recourse to excessive artificial procedures and the attempt to make biological ties coincide with social ties." ³⁵ In the case of the legislations of Spain and the United Kingdom their model is based on suppressing legal problems capable of making the application of these procedures impossible, without giving the child, with the exception of the United Kingdom, the possibility of knowing the identity of its parents and, therefore, with a guarantee of anonymity for the donor of genetic material.

Within filiation, the real problem arises when AHRT is practiced, in the sense that for various circumstances the parents decided to opt for these methods, especially in cases where genetic material that does not belong to the couple has been used, but was obtained from a donor bank, in this case the legislation must be clear, it cannot give way to the biological truth because of the circumstances that precede the fact, because those who donate genetic material do so altruistically and especially for the protection of the identity of the donor. In these cases what prevails is the consent and the will of the people who decide to undergo this type of procedures, having clear what are the legal effects that accompany these processes, in most countries of the world these problems are presented, but in Ecuador the situation becomes critical because of the new challenges that establishes the filiation, through the biological truth, the use of assisted human reproduction techniques, and its lack of regulation on this fact, etc.

There are a variety of cases such as people who have been adopted, as well as those who have been conceived through AHRT with donation of genetic material. Even in various questions of filiation by nature in which the children, as a result of the relationship between their parents, do not know the identity of those who have begotten them. In all the situations mentioned above it can be seen that they lack a common denominator in real life: the relationship between an adopted child and its adopters is not identical to that of a child conceived through heterologous AHRT with the non-genetic father or mother, nor that of a non-marital child with the father who has not acknowledged it or the mother who took refuge in anonymous birth at the time of giving birth. In all these cases, the child's right to know his or her origin may conflict with the rights of other persons to the preservation of their privacy and private family life.

The emergence of the AHRT has represented for the Law the need to reformulate certain rules in the field of relationships between individuals. These new requirements give rise to principles that respond to the data of the reality to be regulated and that inform the laws on the subject.

However, there is a lack of legislation regarding the events that may occur in relation to AHRT ³⁶, It is indeed a core problem within the civil sphere, due to the legal gap that exists, since it is necessary to emphasize that these procedures continue to shake the world and especially family law, especially from the perspective of filiation. There are two legislative options: to create a new regime to accommodate these new cases or to adapt the existing one to the current needs. In any case, the rule of law with its requirements of respect for human rights and the dignity of the person demands that the result of equal treatment of children engendered in one way or another.³⁷ In addition, it can be seen that in recent times and with the progress of science and technology, especially in genetics, it is clear that the result of a biological test has the

³⁵DE CASTRO, M. R. (2013). *La verdad biológica en la determinación de la filiación*. Madrid, Spain: Dykinson. Citado. Recuperado de <https://elibro.net/es/ereader/bibliotecaclm/57045?page=246>.

³⁶ALES URÍA ACEVEDO, María de las Mercedes. In her book *El derecho a la identidad y la filiación* (The right to identity in filiation) she mentions: "AHRT in which third parties are involved is characterized by the fungibility of the contribution of these third parties and because this cooperation is exhausted in a single act. Thus, donated sperm and ova are fungible, since those who will receive them can carry out their treatment with one sample or another. This is not so in the case of a commissioned pregnancy in which the commissioning couple chooses a particular woman to gestate an embryo. The identity and particularities of the carrier woman are known to the medical team and to the intended parents, and it is to her, and not to another, that they wish to have recourse. For this reason, the collaboration of this woman is not limited to a single act of gamete donation, but she is actively involved in the planning of the conception, pregnancy and delivery. Finally, the issues relating to the anonymity of the sperm donor, to his possible paternity and to the knowledge of the children of the data referring to their biological parent seem to be better framed in the treatment of the right to identity and its relationship with filiation. The inquiry of paternity with its consequent determination of the paternal-filial bond has been conceived as a means to achieve certain ends such as the integral protection of the child and the assumption of responsibilities by those who conducted themselves in a suitable manner to achieve a conception".

³⁷RIVERO HERNÁNDEZ, F., *Las acciones de filiación y las técnicas de reproducción asistida*, pp. 282-285.

characteristic of infallibility, becoming every day a necessary instrument to accompany the right to guarantee the identity of minors, and obviously displacing the presumptions or traditional tests that still exist in the legislation without any sense, because in short, these tests have helped to prove in an assertive way the filial link with absolute certainty.

But one of the main problems that arise within the AHRT with respect to filiation is the diversification between maternity and paternity from the biological and legal point of view.

As explained in previous lines, filiation through AHRT is complicated in proving the biological truth, because on the one hand there is the desire to assume the role of parents from the social and legal point of view, but this fact is completely different from the biological and genetic part, in which there is a separation by those who were donors of genetic material to help as a palliative to couples who for various reasons have not been able to have biological children. So, there is gamete donation, but it must be clear and present that donors do not intervene in the process of gestation of the child.

Through these techniques of assisted human reproduction, genetic material may appear that belongs either to the woman who will give birth to the child, to the man who is her partner, or even the genetic material may not belong to any of them, coming from a donor or donors, depending on whether sperm or eggs are used that do not belong to the woman who will give birth to the child. Even more: it is possible that the woman who gives birth has no link whatsoever with the child, nor any interest in having her relationship determined with respect to her. Leaving aside this last case, which is the one related to gestation by substitution and which will be studied in the following sections, it is worth asking how the relationship of the child born through assisted reproduction techniques should be determined, taking into account the different possibilities that can occur³⁸.

The emergence of AHRT represents for the Law the need, as well as the obligation to legislate rules between individuals to mitigate this problem that arises, the way these procedures have convulsed the progress of science, invades the Law, as it forces us to redefine paternity, maternity, parents, because now the children do not always come from a sexual relationship but from a AHRT.

Under this parameter, "filiation by assisted reproduction is based on the principle that the legal father or mother is not the genetic father or mother. Paternity and maternity, in this case, are based on a social relationship, not a biological one. Therefore, this lack of consanguinity does not give rise to the action of impugnation". In Spain, Law No. 14/2006 establishes in its article 8.1: "Neither the woman progenitor nor the husband, when they have given their formal, prior and express consent to a certain fertilization with the contribution of a donor or donors, may challenge the matrimonial filiation of the child born as a result of such fertilization".³⁹

With respect to the action of claim, it is pointed out that, if it were accepted that the donor could claim his or her paternity or maternity or that the child resulting from the donation could claim the paternity or maternity of the donor, it would allow the interference of a third party in a family relationship, where the legal father and/or mother has behaved as such, even though biologically he or she is not. Who has continuously and uninterruptedly publicly accredited his or her condition of father or mother, must be maintained and protected in this situation. The possession of notorious civil status of son or daughter must be considered as a legitimizing reason to prevent the claim action.⁴⁰

As has been indicated throughout this study, the limitations that exist regarding children born from assisted human reproduction techniques are completely valid, the child must know that he/she was conceived under these methods, but the concern that arises has to do with what is the appropriate and opportune moment to provide this information.

³⁸ROSA FERNÁNDEZ, R. D. L. (2020). La filiación en las parejas homoparentales. Barcelona, J.M. BOSCH EDITOR. Recuperado de <https://elibro.net/es/ereader/bibliotecaclm/130493?page=455>.

³⁹ Ley 14/2006, de 26 de mayo Técnicas de Reproducción Asistida. España. Citada.

⁴⁰CORTES GENERALES, «Informe de la Comisión Especial de Estudio de la fecundación in vitro y la inseminación artificial humanas», aprobado por el Pleno del Congreso de los Diputados en su Sesión de 10 de abril de 1986, Madrid, p. 46.

The main legal aspect that is modified through the aforementioned changes in reproductive techniques is that no mention can be made of "born being" or even "nasciturus", when trying to legally explain the institute of filiation, as it has been done until a few years ago.⁴¹

"The scheme of certain AHRT in which filiation is determined in favor of the man or woman who, without contributing their gametes, consent to the use of a donation and legally and irrevocably assume the paternity or maternity of the child born as a result. In this field, there are two institutions that break with the principle of veracity; the unimpugnability of filiation and the anonymity of the donor".

The current position of the Ecuadorian legal system should be in line to immediately favor an evolution in terms of filiation that allows a legal provision of Assisted Human Reproduction Techniques, given the imminent advance of reproductive medicine, the legislation is in the obligation and duty to be updated in order to avoid doubts and ethical problems, since to mitigate this situation it is important to have the response provided by the legal system.

X. JURISPRUDENCE ON FILIATION

This section contains excerpts from Rulings related to filiation in two countries, Spain and Colombia.

10.1 Spain

10.1.1 Ruling 1

Ruling 116/1999, of June 17, 1999. Appeal of unconstitutionality 376/1989. Filed by Members of the Popular Parliamentary Group against Law 35/1988, of November 22, 1988, on Assisted Reproduction Techniques, in its entirety and, subsidiarily, against different sections of the same. Private vote.⁴²

Ruling 273/2005, of October 27, 2005. Question of unconstitutionality 1678/1998. Raised by the First Section of the Provincial Court of Ciudad Real in relation to the first paragraph of article 133 of the Civil Code, drafted by Law 11/1981, of May 13. Alleged violation of equality in the law and violation of the right to effective judicial protection (access to justice): standing to claim non-marital filiation, when there is no possession of status, by the person who claims to be the biological parent. Unconstitutionality of state precept. Individual opinions.⁴³

10.1.2 Ruling2

The State Attorney General and the State Attorney have intervened in the proceedings. The Judge Mr. Jorge Rodríguez-Zapata Pérez was the Rapporteur, who expressed the opinion of the Court. Ruling 138/2005, of May 26, 2005 on the question of unconstitutionality 929/1996. Raised by the 17th Court of First Instance of Madrid in relation to the first paragraph of article 136 of the Civil Code. Infringement of the right to effective judicial protection: time limit for the exercise of the action to challenge matrimonial filiation when the husband is unaware that he is not the biological parent of the child registered as a child in the Civil Registry.

Second Courtroom. Ruling 58/2008, of April 28, 2008. Constitutional remedy 2306-2005. Filed by Mrs. Alicia Mercedes Fuentes Ambhul against the decisions of a Court of First Instance of ACoruña in a voluntary jurisdiction proceeding for the adoption of her minor son. Infringement of the right to effective judicial protection: adoption proceedings where it is not resolved whether the intervention of the biological mother is limited to being heard or whether, on the contrary, her consent is necessary.⁴⁴

⁴¹ROSA FERNÁNDEZ, R. D. L. (2020). La filiación en las parejas homoparentales. Citado. Recuperado de <https://elibro.net/es/ereader/bibliotecaucalm/130493?page=450>.

⁴²«BOE» núm. 162, de 8 de julio de 1999, páginas 67 a 80 (14 págs.). T.C. Suplemento del Tribunal Constitucional

⁴³«BOE» núm. 285, de 29 de noviembre de 2005, páginas 93 a 104 (12 págs.). T.C. Suplemento del Tribunal Constitucional

⁴⁴«BOE» núm. 135, de 4 de junio de 2008, páginas 9 a 14 (6 págs.). T.C. Suplemento del Tribunal Constitucional

For its part, the Constitutional Court of Colombia has pointed out the relationship of the right to identity with the free development of personality:(1) "The right to identity, insofar as it determines the being as an individuality, carries a meaning of Human Dignity and to that extent is a right to Liberty; such recognition allows the possibility of developing his life, of obtaining his realization, that is to say, the free development of his personality". (2) "The right of the minor to a name and to the knowledge of his filiation is fundamental not only because of the aforementioned constitutional mandate but also because his human dignity is at stake, since it implies the possibility of being identified and differentiated from other individuals and the exercise of other rights, such as those related to his food, upbringing, education and establishment".

XI. CONCLUSIONS

The relationship of filiation is a legal figure closely linked to Civil and Family Law, since the Civil Code is the legal framework within which the links between parents and their children are developed. The biological situation may appear separately from the legal component. The Law accepts these possible combinations within the legal framework that is the filiation relationship.

In many cases and given the evolution of science and technology, especially in the field of genetics, the legal concepts of father and mother do not always coincide with that of parent: the parents of a child may be persons not biologically related to him or her.

The discrepancy or affinity, resulting from the legal and biological factors with respect to the filiation responds to a diversity of circumstances among them many games of interests and principles that determine the establishment of the paternity and maternity ties, according to one or another factor. The truth is that filiation involves the rights of the child and of the parents, as well as social interests that in many occasions appear confronted. Therefore, with respect to this institution of rights, there are a series of conflicts that still play an important role and do not allow it to evolve, among which the following can be mentioned: the biological truth, the advancement of women's rights, the right to identity, the legal security of those involved in the methods of assisted human reproduction with respect to the preservation of the anonymity of the gamete donors.

In short, it is an issue that must be solved and legislators must take action and conduct a thorough analysis of the lack of evolution of civil law regarding filiation and the imminent legal gap with respect to assisted reproduction techniques, in order to mitigate this problem that affects society and especially the law.

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