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IF THEY CAN...WHY WE DON'T (Fertility rights and assisted reproduction on restricted groups)

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Abstract

The concept of family has undergone through powerful erosion in the recent decades. From traditional families consisting of two heterosexual parents and their biological children, it was transformed in formats such as child-parent families, families with homosexual parents and their legal children or other possible combinations. Undoubtedly, the debate over homosexual marriages brought to the attention their reproductive rights. Despite that some jurisdictions recognize the right of homosexual couples to adopt they do not recognized their right to undergo artificial reproduction techniques. This restriction operates in some jurisdictions, even to singles. Artificial reproduction techniques are a form of realization of reproductive rights. The restriction due to be part of these techniques may pose a potential limitation of the right to reproduce as a fundamental right. This article aims to analyze the right of homosexuals and singles to use artificial reproduction technologies by treating analyzing three important principles: 1) Reproductive right as a fundamental right. 2) Non discrimination principle. 3) The welfare of the child. As a conclusion will be analyzed on whether the restriction of the use of ART for homosexuals and singles, satisfies the reason for each it is required.

Keywords: reproductive rights, homosexuals, singles, non discrimination, welfare, artificial reproduction.

1. Introduction.

A family traditionally consisted of a man married to a woman, and their children. This idealized concept never was fully realized and has changed markedly in recent years as a result of high divorce, adoption, assisted reproduction, the gay-rights movement, the legalization of same-sex marriages. Traditional families has undergone in some shocking changes which are reflected even in national laws. More and more people can "choose" now the members of their families. This effort was firstly supported by gay and lesbians who were asking for legal recognition of same sex marriages and then the right of adoption. Some feminist who consider marriage as sexist support the diminution of the traditional family and the single person fertility rights.

A growing number of unmarried persons, heterosexual couples, and lesbian and gay couples are seeking for access in the fertilities program, but programs vary in their willingness to accept such patients. For some programs, it is never acceptable to treat unmarried persons, whether heterosexual or gay or lesbian.

Requests for treatments of such individuals or couples present questions about reproductive rights, the welfare of offspring, nondiscrimination against unmarried individuals, and gays and lesbians, and professional autonomy. There are three important values that need to be treated together:

- Reproductive rights of the lesbian, gay or unmarried person.
- Non discrimination (on sexual orientation, marital status), principle.
- The welfare of the offspring.

Homosexual may seek the application of the artificial reproduction technologies not because of infertility (as heterosexual partners) but because they can't reproduce with their partners or others of the same sex. The situation of the unmarried person is different. This persons ask for ART program because of infertility or because that they can't reproduce as the absence of a partner. The scope of this paper is to analyze the reproductive rights of homosexual, lesbian and single individuals based on the three values mentioned above.

2. Reproductive Rights of Homosexuals and Unmarried Persons.

Reproductive rights were seen as one of the most important functions of a marriage. Although a state might argue that procreation rights are tightly linked with marital status, it is also likely to find that a person's interest in reproduction exists independently of marriage. Some persons may be unwilling or unable to marry but they might strongly desire to be parents. A person interest in reproduction exist independently of marriage or his/her sexual orientation, this is why reproductive rights shall be firstly examined as an exclusive right of each individual.

The World Health Organization (WHO) defines reproductive rights as the; *“basic right of all couples to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence.”* (WHO; 2001)

Reproductive rights are the expression of procreation rights “the right of anyone to choose to have or not to have children”, seen as a positive right and the right “against coercive interference in decisions regarding procreation” as a negative right. (Hill, J. L., 1991)

The Supreme Court of USA in *Eisenstadt v. Baird*, stated that “if the right to privacy means anything, it means the right of the individual, married or single, to decide whether to bear or beget a child,” suggests that state limits on reproduction by unmarried persons, such as barring access to the most common ARTs, are likely to be struck down on due process or equal protection grounds. (*Eisenstadt*, 1972)

The reproductive right does also mean even the right to have access in artificial reproductive techniques. The approach of the European Court of Human Rights has been slower and more complicated. In the case of *Frette v France* where Mr. Frette complained for the refusal of the

adoption, the European Court of Human Rights did not find a violation of the Convention in this case and refused Mr. Frette the right to adopt, arguing that the child's best interests would be harmed if the adoption would be allowed because the child would be 'brought up by a homosexual and deprived of dual maternal and paternal role models. (Frette 2002)

Five years later, in the Evans case the ECHR had a different approach analyzing the implementation of artificial reproductive technologies in respect to the reproductive rights. For that sensitive ethical matter the court held its decision in 2007 declaring "that the concept of private life (art 8 of the ECHR) includes the right to the decision to become parent" as an expression of "individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world". (Evans 2007)

In its jurisprudence the ECHR stated that from the procreative rights derives the right to become a parent which is followed by the right to have access in the artificial reproductive technologies (Dickson 2007) (S.H 2011)

In all cases before the ECHR the court led the margin of appreciation to member states and national laws to decide which will be their approach in relation to reproductive and procreation rights of homosexuals. It is obvious that the approach of the US regarding homosexual's rights is much more liberal than that of the odd continent which is characterized for its rigid approach. This contrast is due to the different constitutional approaches between constitutions which are based more on the privacy rights and those which are based more on family and social rights.

Not all the authors consider procreation rights of homosexuals as part of human rights. Opponents of the homosexual reproduction find this kind of reproduction as unnatural as "human reproduction requires the union of a man and a woman, and child rearing requires a man and a woman for its most beneficial, effective, child-protective, and advantageous functioning". (Dau-Schmidt K.G & Brun. C 2006) The same charge can be levied against ART itself for infertile persons. After all, if nature has not equipped people to reproduce, then we should not interfere with nature by assisting them to do so. If we reject that argument for the infertile then we should reject it here as well. (Robertson J. 2005)

The concept of family but also the concept of individual rights has moved through liberalization.

In a very short time the society passed from the concept of traditional family to the small families, consisting on a parent and his/her child or to "de facto" families or only of two partners. (X, Y, and Z 1997), (Schalk & Kopf 2010)

The definition of family has changed and the society has to take in to consideration this fact. Procreative rights are no more rights that derive from the marital status as the main function of a marriage is not only the reproduction. Procreative rights are individual rights as such they can't be subject of any discrimination

3. The welfare of the offspring.

The desire to be a parent is not only reserve to heterosexuals. A great number of lesbians, gays and transsexuals are choosing the application of artificial reproductive technologies to become

parents. Skeptics experienced all this as a “threat” to the society as homosexual groups are often proclaimed as “antifamily”. (Bozzet 1987)

Who can be a parent?

No legislation prohibits no one to become a biological parent by the “natural” or sexual way (not even to the unmarried person), but when it comes to the “unnatural” way there legislations differ from one state to another. Homosexuals are prohibited from adopting and this prohibition would extend to their right of procreation through artificial reproductive techniques. This presumes that no gay partners can hire a surrogate mother and no lesbian couples can use donate sperm to conceive a baby. This prohibition to procreate through artificial reproduction in some legislation extends even to unmarried persons. It seems that by using this bans we are defining a good parenthood by the sexual orientation of the parent or by his/her marital status. As Sharon Rush observes;

“...good parenting depends on the person’s ability to care, listen and empathize....How good someone might be at relating to others including a child depends on the social and psychological influences that shaped that’s person personality. Clearly homosexuals are as capable and as likely as heterosexuals to have good effective skills”. (N. Richards, 2010)

Many opponents of the right to procreate and adopt of homosexuals and unmarried persons based their objections on the protection of the best interest of the child and its welfare. The main arguments against homosexual’s right of parenthood are based on the opinion that these children could not have a “normal upbringing”. (Dunstan GR. 1975) Others believe that children raised by homosexual parents will experience social isolation and sexual orientation problems. (Avison WR. 1997) (Cairney at al 2003)

This is part of the stigmatization of the society against homosexuals but the trend of the society is moving towards more acceptance and tolerance on homosexuals leads to the conclusion that stigmatization of children based on their parents’ sexual orientation will be completely eradicated.

Opponents think that priority should be given to secure optimal conditions for the future child and that children may be of great importance to society. To give the possibility to an unmarried women or man to rises a child is an expression of a wrong priority between the right to become a parent and the right of the child to have a mother and a father. (Ekelaar J. & Sarcevis P. 1993) But here it comes to our minds many examples of children whom because of divorce, abandonment of the parent or the death of one of them, they grow up only by the other one, while many other children are growing up by homosexual parents by their prior heterosexual marriages.

Some authors pretend that giving birth to a child using artificial reproduction methods by homosexual partners leads to the “non-identity” problem by causing an unavoidably flawed existence that can be avoidable by not having them at all. In this case Derek Parfit explains that the ‘non- identity problem’ basically states that the child in question cannot be harmed because they would not even exist if the ‘no IVF for homosexual’ law was adopted,¹ (others do not accept at all the non identity principle as there an unborn child is not eligible “...the arguments based on welfare of a potential child sounds feasible but they are based on protecting the rights of an unborn child and a child who is probably non- existent thus those are weak claims and merely discriminatory attacks on homosexuals”. (Soo C. 2013)

1.Standford Encyclopedia of Philosophy 2009

Peterson describes the welfare of the child as “the material and psychosocial well-being of a person and often encompasses stability, love, warmth, caring and compassionate relationships”. (Peterson 2005) Families perform better if any of their members assumes defined roles which in fact are recurrent behavior patterns. It is indispensable the role of both father and mother in achieving the welfare of the child as they play different roles and cannot replace each other. Fathers are important in a child’s life as they are not only providers but disciplinarians, models, companion and teachers. Mothers on the other hand, are nurturing, understanding and supportive. (Greenfield DA. 2007) However not all families have well-defined roles as the single-parent families in which an only parent assumes both the roles of a mother and a father. In this situation it sounds better if we talk about “parents” that if we use the concept of “mother and father”.

4. The equity of access in ART legislation. The Albania Case

In Albania as also in some other countries (Greece, Italy, France, Germany) the access to the artificial reproductive technologies is denied to certain groups as to homosexuals and transsexuals. The arguments that justify this lack of access are mostly based on the welfare of the child and in promoting the traditional family.

The welfare of the child mostly has been associated with the presence of both parents (a female and a male) which has always been seen as an important circumstance to their healthy psychosocial development. With the high rate of divorces and also by the increasing of the number of children born out of wedlock, the welfare of the child should not necessary be seen as related to the presence of both heterosexual parents.

Even though the purpose of the artificial reproductive technologies is to make possible the procreation, legislations associate this right with the marital status of heterosexual couples or to heterosexual couples who are in a stable relationship, which means that they have to be “qualified” in order to meet the legislation criteria.

Only a few legislations in Europe recognize the procreation rights of homosexuals or single persons by using the artificial reproductive technologies. Sweden has recognized the right of lesbians and single persons to procreate but not the right of gays to undergo through surrogacy techniques². Spanish legislation makes a similar prevision but with the difference that Spanish law knows as the beneficiary of the artificial reproductive technologies only women, independently of their marital status or sexual orientation.”³

Netherland has a different approach. It ensures the parentage of the lesbian partner only by an adoption procedure, but they can’t access to the ART⁴. According to Portuguese legislation only heterosexual couples can have access to ART⁵. German, France and Italy are seen as rigid legislations which lead the right of procreation only with heterosexual couples.

² Swedish Act (2006:351) on Genetic Integrity, chapters 6 and 7

³ Spanish law n. 14/2006 article 6/1

⁴Netherland Artificial Insemination Donor Information Act, 25 April 2002

⁵ Portugal law nr 32/2006, art 6/1

The Albanian legislation provides the possibility for a married couple or an individual to undertake the artificial reproduction techniques based on the infertility and the heterosexual criteria.⁶ Art 32 of the Albanian law, “On the reproductive health” legitimates the right of individuals and couples to undergo the artificial reproduction techniques:

Article 32

The techniques of reproduction are applied:

- a) when an individual has reached the age to marry;
- b) when the spouses have failed in attempts to have a child for a period of two years up to the moment when the transfer of the embryo and insemination is performed;
- c) in the presence of a licensed specialist doctor;
- ç) only after the written consent has been received for each cycle by the interested individuals.

On the other side the Albanian law does know only two forms of ART; the artificial insemination and in vitro artificial procreation. The criteria to fit in both those techniques are linked with the marital status and the infertility problems of the couples. This makes it practically impossible to homosexuals to undergo in these techniques.⁷

Although the procreation rights are considered as individual rights sanctioned by the Albanian Constitution and the “Universal Declaration on Human Rights” the health reproductive law make a discriminatory ruling based on sexual orientation of the individual.⁸

In fact, this is not an unexpected ban since the Albanian legislation does not recognize homosexual marriages or homosexuals partnerships. Even the adoption is realized only by single individuals or heterosexual married couples and there is no possibility for gay couples to adopt. Given the above is understandable such an arrangement of access on artificial reproduction techniques

The procreation rights are an expression of autonomy which has been defined as the “freedom from external constraint and the presence of critical mental capacities such as understanding, intending and voluntary decision making capacity” in simple terms it means the right of every individual to exercise his own rights. Limitations of the rights and freedoms “are only made by law and in the public interest for the protection of the rights of others”⁹. In medical service provision, however, exceptions to the autonomy principle are acceptable when “an individual’s choices endanger the public health, potentially harm another party, or involve a scarce resource for which a patient cannot pay”. In this case it will have to be determined if there is any public interest which may lead in discrimination based on sexual orientation. As we mentioned above there are no statistics to prove that children raised by homosexual families or by homosexual parents suffer an unequal treatment of those raised by heterosexual parents.

⁶ Law nr 8876, date 04.04.2002 “On the reproductive health” of the Republic of Albania; art 32,33

⁷ Law nr 8876, date 04.04.2002 “On the reproductive health” of the Republic of Albania; art 32,33,34

⁸ The Universal Declaration of Human Rights, art 16

⁹ The Constitution of the Republic of Albania, art 17

5. Conclusions

Gay efforts to be legalized and to legitimate their rights seem to be one of the hot topics of the last decade. Those who are skeptics on homosexual reproduction rights argue that these issues are risking and damaging the morale and the normal functioning of the society. According to them their (gay) efforts to achieve reproductive rights are harmful to society and should not be recognized. The other flip of the coin is that reproduction rights are recognized by international acts as an inviolable individual right. Consequently cases of restriction of that right must be expressed in law and justified by the protection of public interest. Is morality a part of society who oppose gay rights a sufficient reason to limit their rights? Can human rights be limited based on the tradition and on the moral of the society? Who has the right to choose? Procreation is an individual right or it is subject to social control?

As Capron suggest in his paper “prior to looking narrowly at legal regulation, we begin by asking what interest various participants might have in procreation and then examine how law does or should protect or restrict those interests”

The arguments based on the moral of the society are not sufficient to realize the limitations on the reproduction rights as well as in parenting rights.

Justifications that the growth of children by homosexual parents does not affect positively the child's life is also an excuse which is not based on studies and does not justify why children can be provided with good growth from heterosexual parents when these do not meet their duties rather than by committed gay parents.

Legal restrictions may not always fully and effectively limit the negative effects they have requested to avoid. Sometimes it can create a boomerang effect. Lesbians, gays and singles despite their sexual orientation wish to have and to raise children. Legal impossibility may push them towards other forms in order to fulfill their desire to become parents and to exercise all the parental rights. Therefore they can contract simulated marriages which would later lead to the growing number of divorces since the only scope of this marriage would be the possibility of “natural” or artificial reproduction.

In other legislations, where the right to undergo through artificial reproduction techniques is known to single woman but not to homosexuals create access and opportunity only for lesbians, as long as their sexual orientation is not a criteria to meet, and exclude from the access only gay partners

Finding new forms in order to realize the procreation rights and the right to become a parent does not “save” the society from the negative effect that claim to have the legalization of homosexual rights to procreate but would bring other negative consequences as simulated marriages and increasing the number of divorces.

The tendency to draft and interpret laws narrowly creates restricted conditions for the reproductive right of a certain group of individuals and limits the possibility of further development of these straights. The European Parlieament in the Resolution 8/2 1994 recommended to Member States to recognize homosexual couples’ rights and to avoid any restrictions that don’t allow homosexual couples to get married, to adopt and to raise their children.

Reproductive rights are individual rights to which the state must proclaim and create conditions for their further development, so the reproductive rights of homosexuals or single individuals should advance, because the ethical risks of gay reproduction do not seem very serious, the important benefits that would result indicate that this is an area of research that merits attention and priority and also because pregnancy and reproduction are normally seen as part of the private and family rights and not as part of the public intervention.

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