THE INTEREST OF THE CHILD IN NON-BIOLOGICAL FILIATIONS IN THE SPANISH LAW

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Abstract

In Spain, the 1981 legal system of filiation is based, with certain limits, on the principle of biological veracity: it tends to make a legal child who is biologically a child. Notwithstanding the above, the system opens the door to filiation without a biological basis when regulating adoption and assisted human reproduction techniques. On the other hand, the current doctrine of the Supreme Court on the validity of acknowledgements of consent also implies a departure from the principle of biological truth that finds legal backing in the recent Law 4/2023. The interest of the child is present, in the form of an inspiring principle, in the system of filiation based on the biological relationship. But when the system departs from biology, the criterion of the child's interest is affected: it ceases to have an homogeneous consideration and the intensity with which it is applied depends on the objective pursued with the different non-biological filiations, sometimes being overlooked. This places the child, in certain cases, in a situation of vulnerability. The paper analyses the specific treatment that the rules regulating each of these filiations (adoption, parentage derived from assisted human reproduction techniques and parentage determined by recognition of complacency) give to the interests of the child.

Keywords

Relationship of filiation. Interest of the child. Adoption. Parentage derived from assisted human reproduction techniques. Parentage determined by recognition of complacency. Vulnerability.

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I. THE EXCLUSION OF BIOLOGY IN LEGAL PARENT-CHILD RELATIONSHIPS AND ITS EFFECTS ON THE INTEREST OF THE CHILD

1. Introduction: biology and the legal relationship of filiation

The fact of procreation determines biological origin and creates a natural bond of affection and responsibility between the procreators and the procreated. The legislator gives legal dimension to this natural relationship by establishing the legal relationship of filiation. Filiation exists and produces legal effects from the natural fact of generation, but since the biological relationship that serves as its cause is not always evident, the law establishes means to externalise it, that is, to determine it legally. This determination is, therefore, the legal confirmation of the biological fact of procreation or the identity of the parents, and its effects are retroactilawve to the aforementioned moment of generation. However, although, as a general rule, biological filiation and legal filiation coincide, given that, in principle, the former is the basis of the latter, the identification is not complete: there may be cases in which there is no legal relationship between the procreator and the procreated; and, conversely, there may be such a legal relationship between those who have no biological relationship. This is because, firstly, the system for determining legal filiation allows it; and secondly, because the legislator –as with any legal institution– can configure filiation as it wishes within constitutional limits, and has chosen to extend it beyond natural relationships, giving rise to two types of filiation: filiation by nature and filiation by adoption –Article 108 of the Civil Code–.

2. Truthfulness as the guiding principle of the 1981 filiation system. Limits and legal relationships of filiation aside

Given that at the time of codification, the state of science was unable to guarantee certainty –especially in relation to paternity– the Civil Code (Cc) initially established a rigid and legalistic system for its determination, based on presumptions, and with a strong restriction on the investigation of biological truth, supported by the cultural and sociological trends of the time that called for the protection of the legitimate family[2] , which remained in place until the major reform of 1981.

In 1978, advances in science –which made it possible to determine a person's biological origin with a high degree of probability– and the new international and national social context led the constitutional legislator to include in Article 39 of the Constitution the legal obligation to enable the investigation of paternity. This meant that Law 11/1981 of 13 May left behind the nineteenth-century formalist system and, based on the principle of biological truth, tended to base the legal relationship of filiation on the biological relationship and to facilitate its investigation. In the Explanatory Memorandum to the Bill –which, although it disappeared in the approved law, sets out the principles that inspired it– the legislator explains that, in regulating the determination of the filiation link, the Law reflects the criterion of "making it possible to discover the biological truth so that the duty of parents to provide all kinds of assistance to their children can always be fulfilled" and declares "the admissibility of all types of evidence in matters of filiation, particularly biological evidence." It was Article 127 Cc, the content of which is now included in Article 767.2 of the Civil Procedure Law (LEC), that expressly admitted biological evidence.

The principle of truthfulness, however, does not enjoy absolute status in the regulation of filiation in the Civil Code. The 1981 legislature sought to combine it with other constitutional principles: that of legal certainty

[2] On the origin of restrictions – which were not present in common law – in the ideologues of the French Revolution, *see* DE LA CÁMARA ÁLVAREZ 1984, 13; PEÑA BERNALDO DE QUIRÓS 1984, 775; BARBER CÁRCAMO 2013, 22.

(Article 9 of the Spanish Constitution) and that of the best interests of the child (Article 39.2 of the Spanish Constitution). The Explanatory Memorandum itself explains that the Law also seeks "to prevent any interested party from bringing before the courts, without limitation, matters that so intimately affect individuals"; and this is mainly for the purpose of "giving stability to family relationships for the benefit of the child itself, especially when it already lives in peace in a certain family relationship [...] giving special importance to the possession of status, both to facilitate actions consistent with it and to hinder or prevent those that contradict it". This explains why limits are placed on the principle of truthfulness, for example, with the regulation of requirements for the effectiveness of recognition (Articles 123 et seq.); with the requirement of sufficient evidence to admit a claim of filiation (previously: Article 127 Cc, and now: Article 767 LEC); or with the limitation of standing and time limits for claiming or contesting paternity.

In relation to the claim, it is worth noting, for example, the limitation on claiming non-marital filiation that has not been experienced. Initially, Article 133 Cc (which legitimises the child throughout his or her life) denied any type of legitimacy to the parent. In 2005, the Constitutional Court declared this deprivation unconstitutional because it was not compatible with the mandate of Article 39.2 of the Spanish Constitution to enable the investigation of paternity or with the right to effective judicial protection (Article 24.1 of the Spanish Constitution)[3] and urged the legislator to regulate the legitimacy of parents, including, where appropriate, the relevant requirements to prevent the abusive use of this means of determining filiation. Law 26/2015 addressed this with the introduction of the current

[3] The court understood that in the weighing of constitutional values carried out by the legislator, one of them had been completely annulled, without this being in due proportion to the intended purpose of protecting the interests of the child and safeguarding legal certainty in the civil status of individuals. See Constitutional Court ruling of 27 October 2005 and, subsequently, Constitutional Court ruling of 16 February 2006.

paragraph 2 of Article 133 Cc, which legitimises parents, but –as the Constitutional Court itself suggested– in a limited way: only "within one year of becoming aware of the facts on which their claim is based", thus protecting the interests of the child and safeguarding legal certainty in civil status[4] .

As for the limits on challenging paternity, one example is the restricted standing to challenge marital filiation, which is limited to the child and the mother's husband –and their respective heirs under the terms of Articles 137 and 136 Cc–[5] . The husband has one year from the registration of filiation in the Civil Registry to bring an action; this period does not run while he is unaware of the birth or while, knowing of it, he is unaware of his lack of biological paternity –Article 136 Cc–. This latter *dies a quo,* based on knowledge of the lack of biological paternity, was introduced by Law 26/2015, following the declaration of unconstitutionality in 2005. The Constitutional Court, while considering the inclusion of a limitation period to be constitutional on the grounds that the free investigation of paternity

[4] As for the duration of the time limit, one year, the Constitutional Court has considered that it does not violate the right of access to jurisdiction because it does not make it impossible, nor can it be understood as an excessive restriction. It explains that "the time limit set serves a legitimate purpose, by preventing the abusive exercise of the action [...] and preserving the necessary proportionality between, on the one hand, the protection of the child's interests and the safeguarding of legal certainty in civil status and, on the other hand, the right of access to jurisdiction" (Constitutional Court ruling of 27 June 2022). The European Court of Human Rights (ECHR) had already pointed out –prior to Law 26/2015– that limitations on access to jurisdiction in filiation proceedings are compatible with Article 6 of the European Convention on Human Rights if they do not undermine the essence of the right, pursue a legitimate aim and there is a reasonable relationship of proportionality between the means and the end (ECHR judgment of 31 July 2014, Jüssi Osawe v. Estonia).

[5] The mother (regardless of her possible role as the child's representative) and the biological father are excluded from the possibility of bringing an isolated challenge (they could only challenge if they claim non-marital filiation –Article 134 Cc–).

must be compatible with other constitutional principles, such as the protection of 'the interests of the children', it considered the *ex silentio* exclusion of the husband who, despite knowing of the birth, is unaware that he is not the biological father to be contrary to the Constitution, as this is entirely "incompatible with the constitutional mandate to enable the investigation of paternity". The child also has a time limit on the exercise of the action to contest filiation if it is experienced: one year from registration; or, if the child was a minor or a person with a disability, from reaching the age of majority or the termination of the support measure; or –since 2015– from the moment they become aware of the lack of biological truth –Article 137 Cc–.

Apart from these limits on biological truth included in the regulation of the determination and contestation of filiation by nature, the legal system has opted to introduce, alongside filiation by nature, a different type of filiation, namely adoptive filiation, which is characterised precisely by the absence of a biological relationship, even prohibiting its establishment with respect to a descendant (Article 175.3.1 Cc). Thus, Article 108 Cc provides that "filial relationships may arise by nature or by adoption".

On the other hand, the fact that scientific advances have made human reproduction possible outside of sexual relations has made it necessary for the legislator to regulate these practices and establish rules for determining the filiation of persons conceived in this way. In establishing these rules, through Law 14/2006 (and previously, through Law 35/1988), it has opted to increasingly recognise the construction of legal filiation relationships outside of biology. Curiously, while scientific developments served as the basis for the establishment of the principle of biological truth in 1981, the same scientific progress prompted legislators to depart from this principle shortly thereafter.

Finally, the current doctrine of the Supreme Court on the validity of recognitions of complacency represents another departure from the principle of biological truth. The legal system, in regulating recognition,

assumes that the person who recognises is the biological father of the recognised child. However, insofar as the recogniser is not required to prove this circumstance, it is possible that this is not the case. Although the DGRN (General Directorate of Registries and Notaries) has been considering, based on the principle of biological truth, that this recognition of convenience is null and void and, therefore, denies registration, the Supreme Court, in its ruling of 15 July 2016, has established the doctrine that recognition is not null and void because it is of convenience and indicates that registration cannot be denied.

3. The interests of the child: the guiding principle of 1981 in relation to non-biological filiation

As can be derived from the above, the interests of the child are present in the filiation system of the 1981 Civil Code, based on biological relationship, in the form of an inspiring principle. While the initial regulation of filiation focused on the interests of the parents, following the Constitution, the 1981 legislature focused on the protection of the child. The Constitution mandates the "comprehensive protection of children" (Article 39.2 C.E.), of children in general, regardless of their age; and, in addition, it proclaims the duty of parents to "provide all kinds of assistance to their children [...] during their minority and in other cases where legally applicable". On this basis, a system has been designed that seeks to benefit the child: i) As stated above, paternity investigations are permitted, fundamentally, so that parents can fulfil their natural and constitutional duty to protect their children, and the limits on such investigations are intended to favour the child (as demonstrated by the rules on standing to claim (Articles. 131 et seq.) and to challenge (Articles 136 et seq.). ii) Furthermore, Title V –of Book I– is scattered with rules inspired by the principle of the child's best interests, which, on this basis: ii') limit the legal determination of filiation or the effectiveness of the determination, for example, Article 125 Cc (which expressly refers to the best interests of the child –in this case– of the minor

child as justification for restrictions on recognition in cases of incest), Articles 123 and 124 Cc (which empower the child or his or her representative to prevent recognition in his or her interest) or Article 111 Cc (which, in order not to harm the child, partially excludes the effectiveness of the determined filiation when certain circumstances concur[6]); ii") and which regulate the effects arising from the filiation relationship, for example, Article 108 Cc (which establishes equal effects for the benefit of all children), Article 110 Cc (which imposes an obligation on parents to care for and support their children even if they do not have parental authority), Article 109 Cc (which, in the absence of agreement between the parents on the order of surnames, establishes the criterion of the interest of the minor child by reference to Article 49 of the Civil Registration law –LRC–), etc.

When the system departs from biology, the criterion of the child's interest, although it does not change in terms of the effects of filiation, because these are the same for all filiation (Article 108 Cc), is nevertheless affected in the area of determination, ceasing to be considered uniformly: the intensity with which it is applied ranges from nothing to everything, passing through intermediate stages, depending on the purpose pursued by the filiation in question. As explained above, these filiations are adoptive filiation, filiation derived from human reproduction techniques with a donor, and filiation determined by means of recognition of complacency. In these cases, the biological relationship, which as a general rule forms the basis of the legal relationship, is replaced by will: in the absence of a biological relationship, the legal bond of filiation is created on the basis of the will of one or both of the parties involved, depending on the case. These types of filiation, which we could describe as special, do not serve the same purpose; they have not been designed to fulfil the same objective, and this conditions their regulation and the different treatment they give to the interests of the child,

[6] On the protective function of the rule, beyond its punitive nature, *see,* for example, DE LA CÁMARA ÁLVAREZ 1984, 84 et seq.

especially when the child is a minor. Thus, while adoption is configured as a mechanism for the protection of minors –although it also has the secondary effect of allowing access to parenthood– filiation derived from assisted human reproduction techniques is only a means of accessing parenthood, and the recognition of complacency satisfies the wishes of all concerned –and not only of those who wish to become parents– that there should be a legal relationship of filiation between two people. Thus, the interest protected in the regulation of each type of filiation is different: while the rules on adoptive filiation focus on the best interests of the child, which prevail over any other interest, those regulating filiation derived from assisted reproduction techniques focus on the interests of those who wish to become parents and on defending their autonomy of will, disregarding any consideration of the interests of the child; and the recognition regime serves the interests of all those involved: the father, of course, because he is the one who recognises, but also the child, and even –as will be seen– the mother.

II. THE INTEREST OF THE CHILD IN ADOPTIVE PARENTAGE

1. Nature of adoption

The Convention on the Rights of the Child recognises the family "as the fundamental group of society and the natural environment for the growth and well-being of all its members, and in particular of children" and, consequently, declares that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment...". Its articles establish that when there are difficulties and parents cannot fulfil their duty to raise their children, the State must ensure their protection and care, and provide that one of the mechanisms by which

this obligation will be met is through adoption (Article 20), which must be in the best interests of the child (Article 21)[7] .

In accordance with this conventional framework, adoption in our Civil Code is an instrument for the definitive integration into a family of minors in need of protection through the establishment of a parent-child relationship (Articles 175 et seq. of the Civil Code). The institution has a dual nature: it is a mechanism for the protection of minors and it is also a type of parent-child relationship. When a minor is in need of protection because their natural family cannot care for them, the law responds by providing them with another family and, to this end, establishes a filiation bond. This bond does not originate in nature, but is created artificially, yet it produces the same effects as natural filiation (Article 108 Cc) and allows the minor to grow up within a family. It should be noted that filiation is the starting point and destination of a journey in which the driving force is the protective function. The starting point is natural filiation, specifically, the irregular inability of the natural parents (due to impossibility or the will of those who hold it) to care for the child. And the end point is adoptive filiation, which is configured as an alternative to the former to protect the minor.

What seems obvious today has not always been so. The current form of adoption is not inherent to it, but rather its configuration has varied over time, adapting to the social reality of each moment. It could be said that adoption acts as a mirror of the society of each era. Initially, when it was introduced into the Civil Code of 1889, it was an institution designed to serve the interests of the adopters. Its regulation sought to preserve or defend the interests of the legitimate family against the adopted child, and the law did not refer to it as filiation. This initial regulation gradually changed

[7] *See* the Instrument of Ratification by Spain in the Official State Gazette of 31 December 1990.

with various amendments to the Code in 1958, 1979 and 1981[8] . The process culminated in 1987: the current adoption regime has its origin, specifically, in Law 21/1987 of 11 November, which built its regulation on two principles: i) the configuration of adoption "as an instrument of family integration"; ii) and the preference of the interests of the adoptee, which must prevail over any other legitimate interest. On this basis, the effects of adoptive filiation were fully equated with natural filiation, with the full integration of the adoptee into the adopter's family and the consequent acquisition of a *status familiae*; and, on the other hand, the contractual model of constitution was abandoned, giving way to a system based on guarantees. Subsequent reforms (in 1996, 2005, 2007 and 2015) have gradually chiselled away at this regime, which, although it remains in place, is increasingly fraught with cracks.

2. Principles of family integration and the best interests of the child as the basis of the legal regime of adoptive filiation

With adoptive filiation established as a mechanism for the protection of minors, all its regulations revolve around the aforementioned principles of family integration and the best interests of the child. Some examples of this are set out below:

First: With regard to the requirements for accessing this filiation, the Civil Code takes precautions and is quite demanding about the conditions that the adopter must meet:

i) It is not enough for the person to have reached the age of majority; they must be over twenty-five years of age (if there are two adoptive parents, at least one of them must be over twenty-five) –Article 175 Cc–. The aim is

[8] For more information on adoption in the initial version of the Civil Code and in these laws, see, for example, PÉREZ ÁLVAREZ 1989, 13 et seq. and HUALDE SÁNCHEZ 1993, 126 et seq.

not to determine an age at which a person can freely exercise their autonomy of will, but rather to respond to the need to protect a vulnerable minor: for this reason, the optimal conditions are sought to guarantee, as far as possible, the success of the measure. In this sense, at the age of twenty-five, a person is more likely to have a more stable personal, family, work, economic and social situation, which facilitates the successful development of the adoption and allows the objective of satisfying the interests of the minor to be met, than at the age of eighteen[9] .

ii) Furthermore, it requires that there be a minimum age difference of sixteen years and a maximum of forty-five years between the adopter and the adoptee (Article 175 Cc). The aim is to match the age differences in adoption with the age differences between biological parents and children, i.e. to apply, in the interests of the child, the principle of *adoptio imitatur naturam*.

The minimum age difference requirement applies in all cases, without exception. It has always been present in the Civil Code, although the age has fluctuated over time. The current difference of sixteen years comes from Law 26/2015, which raised the previous difference of fourteen years –set in 1987– by two years, probably to bring it into line with the provisions of the European Convention on Adoption, even though this difference is only preferential in nature (Article 9.1). The General Council of the Judiciary described the increase as appropriate "as it seeks to ensure that the age

[9] Although there are some critical voices regarding the establishment of a minimum age that does not coincide with the age of majority (LETE DEL RÍO 1991-1, 77 and 78), this more demanding condition for adopters is generally accepted without much discussion (*see*, for example, CORTADA CORTIJO 1999, 155 and PÉREZ ÁLVAREZ 2016, 919).

differences between parents and children in the adoptive family are similar to those in the biological family"[10] .

The maximum difference was first introduced by Law 26/2015. The *Senate's Special Committee for the Study of National Adoption and Related Issues* included among its recommendations the need to introduce this requirement, "in accordance with nature"[11] . The legislator accepted the proposal, with the approval of both the General Council of the Judiciary and the Attorney General's Office, which showed their willingness in this regard in their Reports on the 2014 Draft Bill[12] , in that –as the former indicated– this seeks to ensure that the age difference in adoption is similar to that of biological families[13] . In this case, the Code does allow for exceptions: if there are two adopters, it is sufficient for one of them not to exceed the maximum difference; in the special cases of Article 176.2 Cc, i.e. when no prior proposal from the public entity is required; and when a group of siblings is adopted. The legislator has sought to be flexible in order to adapt to reality (it is not uncommon for one of the parents, especially the male, to exceed this threshold) and because the benefits that adoption can bring to the adoptee in some specific cases outweigh the disadvantages arising from the advanced age of the adopters.

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[10] *Report of the General Council of the Judiciary on the Draft Bill on Child Protection*, p. 78.

[11] Recommendation No. 60 of *the Report of the Special Commission for the Study of the Problems of National Adoption and Other Related Issues* (BOCG, Senate, IX Legislature, Series I, 17 November 2010, No. 545), p. 53 states: "Set a maximum age limit between adopters and adoptees, in accordance with biological nature, establishing this maximum age difference in the Civil Code."

[12] The *Report of the General Council of the Judiciary on the Draft Bill on Child Protection* described the new requirement as "appropriate" (p. 78), and the *Report of the Fiscal Council on the Draft Bill on Child Protection* considered it "reasonable" (p. 69).

[13] See *Report of the General Council of the Judiciary on the Draft Bill on Child Protection,* p. 78.

iii) Apart from these age requirements, the adopter may not be subject to any grounds for prohibition: specifically, they may not have been deprived or suspended from exercising parental authority or custody and protection rights, they may not have been removed from a previous guardianship, curatorship or custody, they may not have been convicted of a crime that would suggest that they will not perform their role well, etc. (Article 175.1 Cc –which refers to Articles. 216 and 217 Cc– and Article 176.3.3 Cc). In other words, the law excludes anyone who it considers will not properly serve the ultimate purpose of adoption, which is to protect minors in need of a stable family.

According to the European Court of Human Rights (ECHR), the limits set out above do not constitute discrimination against those who are excluded. The Court had the opportunity to rule on this issue in 2010, in a case brought by a woman against the Swiss State who was denied adoption on the grounds of age (ECHR *judgment* of 10 June 2010 –*Affaire Schwizgebel v. Suisse*–). It considered that the refusal pursued the legitimate aim of protecting the welfare and rights of the child and did not contravene the principle of proportionality. It therefore ruled that the justification appeared objective and reasonable and that the difference in treatment was not discriminatory, so that there was no violation of Articles 8 and 14 of the ECHR. Furthermore, the ECHR has stated that the provisions of Article 8 on the right to respect for family life do not guarantee the right to adopt (ECHR judgment of 24 January 2017 –*Affaire Paradiso et Campanelli v.* Italy–); the right to adopt is not recognised as a human right in any international text[14] .

[14] Although international texts recognise the right to found a family, understood as the freedom to do so without restrictions, they do not recognise adoption as a human right: Universal Declaration of Human Rights –Article 16–, Convention for the Protection of Human Rights and Fundamental Freedoms –Article 12–, International Covenant on Civil and Political Rights –Article 23.2–.

Second: The Civil Code prohibits adoption outside of a family environment: according to Article 175.4 Cc an adoptive parent may be a single person or two people, but they must necessarily be spouses or form a couple (adoption by more than one person is not possible unless it is carried out 'jointly or successively by both spouses or by a couple united by a relationship of affection analogous to that of spouses'); two friends, two acquaintances, etc. cannot adopt. The aim is to ensure that the adoptee is integrated into a family structure, whether based on marriage or a civil partnership, for their own benefit.

Third: The Civil Code subjects adoption to strict controls. Since 1987, it has clearly opted for a system of constitution by means of public authority, specifically judicial authority: adoption is constituted by a court decision (Article 176.1 Cc). It also grants an important role to the public authority, which carries out intensive checks prior to the initiation of proceedings. The *iter* followed, as a general rule, is as follows:

First, the public authority determines whether or not the applicant is suitable to adopt. The capacity to adopt is determined, as explained above, by compliance with objective legal requirements that are not subject to assessment, but compliance with these requirements does not automatically qualify a person for adoption. It is simply a necessary prerequisite. It is also necessary to assess whether that person meets the appropriate suitability conditions for adoption[15] . Article 176.3 Cc defines suitability as "the appropriate capacity, aptitude and motivation to exercise parental responsibility, attending to the needs of the minors to be adopted, and to assume the peculiarities, consequences and responsibilities that adoption entails". The same provision outlines the criteria for assessment: "The declaration of suitability by the public body shall require a psychosocial

[15] This assessment is provided for in international standards: Article 10 of the European Convention on the Adoption of Children and Article 15 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

assessment of the personal, family, relational and social situation of the adopters, as well as their ability to establish stable and secure bonds, their educational skills and their aptitude to care for a minor according to their unique circumstances". Following the declaration of suitability, the public body assigns a minor to the applicant, who may become a guardian for the purposes of adoption (Article 176 bis Cc), and proceeds to submit the adoption proposal to the judge (Article 176.2 Cc), thus initiating the legal adoption procedure.

Once the proceedings have begun –regulated in Chapter III of Title II of the Voluntary Jurisdiction Law (LJV)– the judge gathers the relevant information and, where appropriate, complies with the hearing procedure, carries out any proceedings it deems appropriate and, finally, if it deems it appropriate, issues a constitutive decision[16] . The judge's decision is not limited to approving the administrative action or verifying compliance with the legal requirements for adoption. Obviously, if the judge finds any non-compliance, he or she cannot approve the adoption. However, compliance with the legal requirements and administrative and procedural conditions does not bind it to constitute the adoption, but rather it must assess the appropriateness of the adoption and is free to agree or disagree to constitute the adoption. This assessment must be made, in accordance with Article 176.1 Cc, "always taking into account the interests of the adoptee".

3. Fissures in the legal regime of adoption

The adoption system based on the principles of family integration and the best interests of the child is not pure; it is contaminated and has fissures through which other adult interests seep in. Some of these cracks date back to 1987, while others are the result of subsequent reforms (1996, 2005, 2007,

[16] See: GARCIMARTÍN MONTERO 2017, 351 et seq.

2015), in which the legislator has chiselled away at the initial system and moved away from the principles that inspired it. Some of these cracks are set out below by way of example.

i) To begin with, the Civil Code does not strictly limit adoption to minors who are not emancipated, but in some cases allows the adoption of emancipated minors or those of legal age. This is certainly an exceptional possibility, which is activated when certain prior cohabitation requirements are met (which have been relaxed with the 2015 reform): specifically, "when, immediately prior to emancipation, there has been a situation of foster care with the future adopters or stable cohabitation with them for at least one year" –Article 175.2 Cc–. The intention of the exception is understandable: to provide an opportunity for filiation in cases where, even though there was foster care or cohabitation (for example, because the adoptee was the spouse's child), the adoption was not formalised during the minor's minority for whatever reason. But this (apart from being a loophole through which other adoptions of less clear justification can slip through –especially after the requirements have been lowered–) means that adoption, in addition to its primary purpose of protecting children in need, also serves other objectives: since the emancipated or adult child does not need protection, the ultimate objective here is filiation itself, that is, to fulfil the desire to establish a filiation. That desire certainly responds to different motivations than in the case of the use of reproductive techniques, but, leaving aside the motivations, the ultimate goal is the same in both cases: to fulfil the desire to establish a filiation relationship. It should be noted that adoption in this specific case is stripped of its dual nature. In the absence of its protective nature, the legislator dispenses with prior administrative control as unnecessary: it is not necessary for the public entity to declare the prospective adopters suitable or to submit an adoption proposal to the judge (Article 176.2 Cc, Article 35.1 LJV and section 2 of the LOPJM Explanatory Memorandum); and relaxes the requirements for adopters: it exempts them from the maximum age difference of forty-five years (Article 175.1 Cc).

ii) The Civil Code, as stated above, prohibits joint or successive adoption by persons who are not married or in a civil partnership (Article 175.4 Cc) in order to prevent the adoptee from lacking a family structure, but then, contradictorily, allows a person to adopt a minor who has a legally determined parent with whom the adopter has no marital or partner relationship, without the adoption extinguishing the legal ties between the adoptee and their parent. Specifically, Article 178.2 Cc provides that "legal ties with the parent's family shall remain in force" [...] "b) when only one of the parents has been legally determined, provided that such effect has been requested by the adopter, the adoptee over the age of twelve and the parent whose tie is to remain in force". It is obvious that, since paragraph a) regulates the continuation of ties when the adoptee is the child of the spouse or partner, this section refers to cases where there is no such relationship between the adopter and the legally determined parent. The result is that the adopted minor will have two parents who do not live together, who have no relationship –perhaps not even a friendship– and who may even barely know each other, which distances adoption from the principle of family integration. Perhaps for this reason, the General Council of the Judiciary expressed its reservations about the introduction of this possibility in the reports on the draft bills prior to the 1987 Act[17] .

iii) On the other hand, since 2015, the legislator has relaxed the aforementioned rule on dual adoption with the addition of a new paragraph in Article 175 Cc. After establishing in paragraph 4 that adoption by more than one person can only be carried out by a married couple or a couple, the following paragraph provides that in some cases the breakdown of the marriage or partnership during the adoption process is not an impediment

[17] Regarding the reluctance of the General Council of the Judiciary (which considered that it created an artificial situation that lent itself to problems in terms of the exercise of powers and duties), *see* PÉREZ ÁLVAREZ 1989, 215 et seq. *See* other criticisms in: TORRES LANA 1993, 195 and 196, and BARBER CÁRCAMO 2017, 728 and 729.

to adoption, i.e. it allows joint adoption by persons who are not married or in a civil partnership. Specifically, paragraph 5 establishes that "in the event that the adoptee is in permanent foster care or guardianship for the purposes of adoption by two spouses or a couple united by a relationship of affection similar to that of spouses, the legal separation or divorce or breakdown of the relationship between them, duly recorded prior to the adoption proposal, shall not prevent the joint adoption from going ahead, provided that it can be proven that the adoptee has been living with both spouses or with the couple in a relationship similar to that of a married couple for at least two years prior to the adoption proposal".

This provision, which has been met with some scepticism[18], distances the Civil Code from the European Convention on the Adoption of Children, which states in Article 4.2 that "the competent authority shall attach particular importance to the adoption providing the child with a stable and harmonious home" and constitutes a breach of the principle of guaranteeing a stable structure, so it can only be interpreted in the light of the principle of the best interests of the child. To begin with, it should be noted that the provision states that the breach of the conditions set out "shall not prevent joint adoption from being promoted". In other words, there is no obligation on the public authority to submit the proposal to the judge, nor is there a right on the part of the adopters to do so. It is simply permitted. An exception to the general rule is established which, although not mentioned in the provision, will only be applicable if it is in the best interests of the child. It is not enough that the adoption by the former spouses or former partners is not detrimental to the child; it must also be the best option (or the least detrimental) compared to possible adoption by other members of a stable family unit or even, as an intermediate solution, compared to possible adoption by only one of the former spouses or former partners (in

[18] *See* LÓPEZ AZCONA 2016, 58; LÓPEZ MAZA 2016, 653; CALLEJO RODRÍGUEZ 2017, 8.

this case, with a possible right of access for the other[19] , as a close relative –Article 160.2 Cc–). Therefore, before making the proposal, the public body must assess the above. Legal doctrine has pointed out that the Administration should even reassess the suitability of adoption applicants, given that the circumstances that justified the previous administrative declaration of suitability have changed[20] . Specifically, Article 176.2.3 Cc, also introduced in 2015, establishes that "the declaration of suitability by the public entity shall require a psychosocial assessment of the family situation [...] of the adopters, as well as their ability to establish stable and secure bonds". In any case, it will ultimately be the judge who, if there is a proposal for adoption, will decide "taking into account the interests of the adoptee" –Article 176.1 Cc–. Despite this, it would be useful for Article 175.5 Cc to include an explicit reference to the best interests of the child, excluding other interests in the presentation of the proposal, especially those of the adopters, whose shadow looms over the provision. It would suffice to add at the end that the dissolution of the marriage or partnership shall not be an impediment to the adoption proposal "if this is in the best interests of the adoptee". Otherwise, the silence of the rule could be exploited for interpretations that separate adoption from its ultimate purpose.

iv) The principle of family integration is also weakened by the way in which adoption by members of de facto unions is regulated. Until 2015, this possibility was included in the Third Additional Provision of Law 21/1987, but Law 26/2015 transferred its regulation to the articles of the Civil Code, specifically to Article 175.4 Cc. Initially, the Draft Bill of 2015 proposed to attribute this power to "unmarried couples registered in the corresponding registry". The Attorney General's Office, in its report, suggested that this expression be replaced by "unmarried couple permanently united by a

[19] This potential right of access is referred to by MARTÍNEZ DE AGUIRRE ALDAZ 2017, 337.

[20] *See* MARTÍNEZ DE AGUIRRE ALDAZ 2017, 334.

relationship of affection analogous to that of a married couple registered in the corresponding registry", considering that, due to the very nature of adoption, it should be a couple united on a "permanent" basis[21] . The General Council of the Judiciary also recommended in its report that, in view of the nature of adoption, it should be specified that the couple should be "permanently" united[22] . This "permanent" nature, moreover, had been required by the law itself since 1987 in the aforementioned Third Additional Provision. The legislator, however, departed from the previous regulation and the suggestions in the reports and not only failed to include an express reference to the permanent nature of the couple, but also eliminated the registration requirement, referring only to a "couple united by a relationship of affection analogous to that of a married couple", going beyond the provisions of Article 7 of the European Convention on the Adoption of Children (which requires registration or at least the "stable" status of the union[23]).

If, in accordance with the principle of family integration, the basis for limiting adoption by more than one person to married couples and partners is –as already indicated– the integration of the adoptee into a family structure, it would seem logical for the legal system to require stability and seek guarantees or indications of the likelihood of the survival of that family structure. Such guarantees, while not ensuring permanence as such, insofar as this is impossible, would at least allow for a glimpse of a tendency towards stability. In the case of marriages and couples formally constituted (registration or public deed), the indication would be found in the declaration of intent of those who unite. In the case of couples who are

[21] *Report of the Fiscal Council on the Draft Bill on Child Protection*, p. 70.

[22] *Report of the General Council of the Judiciary on the Draft Bill on Child Protection*, pp. 79 and 80.

[23] The Convention, in the aforementioned provision, requires that the couple be registered in order to adopt. It allows, however, for States to extend this possibility to other couples provided that the relationship is "stable".

united without formalities, the guarantee should come from past stability: it would be the permanence of the couple in the past which, replacing the declaration of intent to remain together, would guarantee their tendency to continue in the future. However, the legislator:

a) Waives the requirement of permanence of the couple. Permanence that is doubtfully implicit in the nature of that emotional relationship, firstly because there is no agreement on the characteristics that define it: that is, whether it is the sexual dimension of the emotional relationship linked to cohabitation that differentiates it from other emotional relationships and, therefore, is that its defining element, or whether other characteristics should be included, referring, for example, to duration; and, secondly, because if the latter option is chosen, since the reform introduced by Law 15/2005, the minimum guaranteed duration of marriage is, in the best case scenario, three months. That is precisely why the guarantee of a certain tendency towards stability in marriage would come, as I have already indicated, from the expression of will or commitment of the contracting parties, as is the case in formal civil partnerships. The existence of a union for three months does not seem sufficient to replace the declaration of will to remain together as an indication of future stability.

b) It also refrains from establishing formal or substantive requirements linked to stability: it does not require a declaration of intent to remain stable, through registration in a registry or formalisation in a public deed, as a basis for adoption; nor does it require sufficient and reliable evidence of the couple's ability to predict future stability.

The result is a crack in the principle of family integration in adoption, which, at best, can be alleviated –where appropriate– by an interpretation of the law by the enforcer based on good intentions (as is so often the case). It would have been preferable to have a regulation that did not leave the application of this principle to the discretion of the interpreter, but rather clearly required the requirement of permanence or stability and also

specified how it should be assessed and quantified in the interests of legal certainty and the interests of the adoptee.

v) While in 1987 legislators sought to introduce controls on adoption because they considered it "necessary if adoption is to fulfil its true social purpose of protecting minors deprived of a family life" (as explained in the Preamble to Law 21/1987), subsequent reforms have weakened the system of safeguards. For example, the relaxation of the requirements for adopting an emancipated adult or minor by Law 26/2015, mentioned above, is a step backwards in that it provides a relatively easy route (one year of cohabitation is sufficient –Article 175.2 Cc– instead of the four years previously required) to circumvent administrative control (as indicated: neither a declaration of suitability nor a proposal from the Administration to the judge is required, and the requirements for adopters are relaxed –Article 176.2 Cc, Article 35.1 LJV, section 2 of the Explanatory Memorandum of the LOPJM and Article 175.1 Cc). And, continuing with the examples, the amendment of Article 176.2.2.3ª Cc and the introduction of Article 176 bis Cc by the same law of 2015 also allow the control of the Administration to be circumvented. In view of both provisions, when there is pre-adoptive guardianship, the administrative proposal must be submitted as soon as possible, within a period not exceeding three months, unless the public entity considers it necessary, in which case it may be extended to one year; and after that year has elapsed, the Administration's proposal will not be necessary, but the guardians may initiate the adoption procedure[24] . This exception to the adoption proposal has become a kind of –in the words of BARBER CÁRCAMO– "effective and direct weapon against the inactivity of the public entity"[25]. This is worrying in that it distorts the very meaning of administrative control through the proposal. If the inactivity of the public

[24] This is the interpretative proposal of the doctrine to resolve the antinomy between the two provisions (*see*, for example, MARTÍNEZ DE AGUIRRE ALDAZ 2017, 339).

[25] BARBER CÁRCAMO 2017, 693.

entity stems from doubts about the appropriateness of submitting the adoption proposal, it does not seem very appropriate to give guardians direct access to the adoption procedure: a system of guarantees is established, but if this system, in the exercise of control, does not give access to adoption, the interested parties are allowed to bypass it and go directly to the judge. If the inactivity of the Administration is simply due to a lack of resources to meet the deadlines, once again, the prior administrative control and guarantees that have been opted for are being dispensed with for the sole reason that they are not feasible in practice: the legal system establishes obligations that the Administration must fulfil in order to offer guarantees to citizens and, at the same time, offers a solution to citizens in case it fails to fulfil them. Furthermore, until 2015, the judge had to hear the public body when the adoptee had been in foster care for more than a year (Article 177.3.4 Cc), which gave the Administration the option of at least expressing its opinion. However, Law 26/2015 eliminated this duty to hear the Administration, which again reduces its possibilities of intervening[26] .

III. THE INTEREST OF THE CHILD IN PARENTAGE DERIVED FROM ASSISTED HUMAN REPRODUCTION TECHNIQUES

1. Introduction: legal framework

Scientific and technological advances allow the use of alternative human reproduction techniques to natural reproduction, i.e., outside of sexual relations, which give rise to new situations to which the law has responded,

[26] In view of all this, the Administration should be aware that its inactivity is tantamount to consent. In this regard, DÍEZ GARCÍA, H. points out that inactivity must be regarded as acquiescence to adoption (DÍEZ GARCÍA 2013, 1809).

first with Law 35/1988 of 22 November, and then with Law 14/2006 of 26 May (LTRHA), currently in force.

When the law was first enacted, these techniques had already been in use for some time: homologous or heterologous artificial insemination had been practised for many years –the first sperm bank was established in 1978– and some 2,000 children had already been born; the first *in vitro* fertilisation had taken place in 1984. The 1988 Act took these practices on board, listing them in a closed list, with regard to a woman together with her husband or another man, or alone, with her own or donated material; it established that their purpose was "medical intervention in cases of human infertility, to facilitate procreation when other therapies have been ruled out as inappropriate or ineffective", although it admitted that they could "also be used in the prevention and treatment of diseases of genetic or hereditary origin" of the subject created; it regulated them from an administrative and health point of view; and it provided for how filiation was to be determined with regard to those born through them. In 2003, Law 45/2003 limited to three the number of oocytes that could be fertilised and the number of pre-embryos that could be transferred, and authorised the use for research purposes of pre-embryos that had been cryopreserved prior to its entry into force, albeit under very restrictive conditions. This possibility was not available for pre-embryos generated after the Act came into force, which could only be used for reproductive purposes.

Law 14/2006, currently in force, follows a more open approach by listing the techniques that, according to the state of science and clinical practice, can be performed today. It also avoids regulatory rigidity by empowering the relevant health authority to authorise the practice of new experimental techniques which, once clinically proven, can be included by the Government, by royal decree, in the list of authorised techniques. In addition, the law allows the use of techniques for therapeutic purposes for third parties, removes limits on the number of fertilised oocytes and broadly allows research and experimentation with pre-embryos. As for the rules on determining parentage, the 2006 legislation did not depart from the basic

content of the initial 1988 regulation. It was later, through the reform brought about by Law 3/2007, that a substantial change was introduced by enabling the possible determination of parentage in favour of the spouse of the user of the techniques.

Finally, it should be mentioned that both laws, the derogated one and the current one, have always prohibited cloning and surrogacy.

2. Goal of the use of techniques as a guiding principle

In view of the current regulation, it can be said that the purpose of the use of assisted human reproduction techniques is the creation of a person: i) to satisfy the desire to be a parent of two people who cannot do so naturally, due to pathological or structural infertility, or who do not want to use this method because they exclude sexual relations between themselves; (ii) to satisfy the desire of a single woman to become a mother; (iii) to satisfy the desire of those who want to be parents of a healthy child without hereditary diseases; (iv) or, finally, to attempt to cure a third party.

The use of one's own gametes to achieve these ends does not change the basis of the legal relationship of filiation, which remains biological. The same is not true when donor material is used. In such cases, as we shall see shortly (section III. 3), it is necessary to construct a legal relationship outside of that one. Therefore, even when it is known with certainty (except for errors in handling, obviously) who the biological parent is[27], the law establishes the legal relationship of filiation with respect to the person who is known not to be the parent but wants such a relationship (the man – husband or not– or the woman who does not give birth); and deprives of

[27] MARTÍNEZ DE AGUIRRE ALDAZ observes that the mystery of filiation does not exist from the outset, but rather that biological transparency is the rule in these techniques (MARTÍNEZ DE AGUIRRE ALDAZ 2021, 375).

such a relationship the person who is known to be the biological parent but does not want that relationship (the donors). Thus, in these cases, will replaces biology as the basis for the filiation relationship.

As in the case of adoptive filiation, the legislator again departs from the principle of biological truth. However, while in the case of adoption this is done with the aim of protecting a child in need, who is provided with parents, in this case, as we can see, it is done with the opposite aim of providing a child to adults who wish to be parents. This conditions, as we shall see (section III. 4), all its regulation, which, far from revolving around the minor who needs parents, as is the case in the rules on adoption, has as its centre of gravity the adult who wants children or a specific child. In this way, it also departs from the principle of the child's best interests which, as explained above, governs the Civil Code's system of filiation based on biology.

As can be seen, the aim pursued through the use of the techniques described above determines both the fact that the legislator establishes a legal relationship without a biological basis and the meaning of the specific regulation of that relationship. It can therefore be said that the satisfaction of the desire to become a parent or to have a child with certain characteristics is the guiding principle of the law.

3. Construction of a legal relationship of filiation by nature

The legal relationship resulting from the application of these techniques, despite the fact that, as we are seeing, in most cases it lacks biological basis, is paradoxically classified as filiation by "nature". This is because, as BARBER CÁRCAMO points out, the legislator has refrained from establishing a third type of filiation – alongside filiation by nature and adoption – or from discriminating according to the type of assisted reproduction used, and has limited itself to considering the general regime of the Civil Code relating to filiation by nature to be applicable, to which it

adds some special rules, which are integrated into the same[28] –Article 7.1 LTRHA–.

This means, in relation to maternity, that, by application of the general rules (Articles. 120.5 Cc and Articles. 44, 46 and 47 LRC), according to which childbirth determines maternal filiation, the mother will be the woman who gives birth. In other words, in the case of two women, the genetic mother and the surrogate mother, the legal status of mother is attributed to the latter. This is the case even when surrogacy is agreed upon, which is prohibited by law (Article 10.1 and 2 LTRHA). Since 2007, however, it has been possible to determine a second motherhood in favour of another woman –the wife– regardless of whether she gave birth or not, whether or not she is the genetic mother, who will also have the status of filiation by "nature". It is sufficient for her to express her wish to do so before the registrar[29] . Although initially such a declaration had to be made before the birth, following the reform introduced by Law 19/2015, it can now be made at any time.

As far as the father is concerned, if the woman is married, by application of the presumption of Article 116 Cc, the husband will be the father, regardless of whether his genetic material or that of a donor was used in the assisted reproduction, and whether or not he consented – as is mandatory – to the use of the techniques by his wife. The consent required by Article 6.3 LTRHA has no effect other than to prevent a subsequent challenge to his paternity by himself or his wife (Article 8.1 LTRHA). If the woman is not married, paternity may be legally determined with respect to any man, applying –in accordance with the provisions of Article 7.1 LTRHA– the

[28] *See* BARBER CÁRCAMO 2010, 28.

[29] Note that this is not consent given for the practice of the techniques, as is required to attribute the relationship of filiation in the other cases covered by the Law, but rather consent to "the determination of filiation in their favour" –Article 7.3 LTRHA–.

general rules of determination which, in this case, are contained in Article 120 Cc. If no declaration is made on the official Civil Registry form at the time of registration (Article 120.1 Cc) or subsequent formal acknowledgement (Article 120.2 Cc), the determination is facilitated by means of a government file (Article 120.3 Cc and Article 44.7 LRC) to the person who did not provide their genetic material, with a special rule contained in Article 8.2 LTRHA, which provides that "the document issued by the authorised centre or service reflecting the consent to fertilisation with donor contribution" by the male shall be *ope legis* an unquestionable document. It is not that the document containing the consent of the male who contributed his gametes is excluded from consideration as an unquestionable document under Article 44.7 LRC ("unquestionable document from the father [...] in which he expressly acknowledges paternity"), on the contrary, there is no doubt that it is, as is any informal acknowledgement. If the provision only refers to the document of the man who did not provide gametes, it is because, in reality, what he is acknowledging in such a document is not his paternity, as required by Article 44.7 LRC, but precisely his non-paternity.

Article 9 LTRHA allows for *post-mortem* fertilisation. It provides that the husband may give his consent (in the document referred to in Article 6.3, in a public deed, in a will or in a document containing prior instructions) for his reproductive material to be used in the 12 months following his death to fertilise his wife. It establishes that 'such offspring shall have the legal effects derived from marital filiation'. Any man who is not married to the woman undergoing the techniques may also consent to the above. In such a case, the consent shall serve as grounds for initiating the proceedings under Article 44.7 LRC.

Finally, it should be noted that the law expressly excludes the possibility of legally determining filiation with respect to the biological parents. Article 5.5 LTRHA decrees the anonymity of the donor, whose identity may only be revealed in specific extraordinary circumstances. Article 8.3 LTRHA

establishes that this exceptional disclosure "does not imply in any case the legal determination of filiation".

4. Regulation outside the interests of the child

As anticipated, the guiding principle of the regulation on the generation and determination of filiation is the satisfaction of the desire to become a parent or to have a child with certain characteristics. This means that the interests of the minor or the child in general are disregarded, only taken into account in exceptional cases, and that legislative efforts are directed in the aforementioned direction. When the legislator first addressed the issue, it explained that "the law must remove any limits that undermine the desire to procreate –referring to women– and to form the type of family that they freely and responsibly choose" –Explanatory Memorandum of the 1988 Law–.

It could be said that the occasions on which the law refers to the interests of the child are limited to two, both of which relate to healthcare: i) The first is contained in Article 3 LTRHA: it states that 'Assisted reproduction techniques shall only be performed when [...] they do not pose a serious risk to the physical or mental health of [...] the potential offspring'. However, this is a programmatic principle that is not reflected in the rest of the article: for example, as will be explained later, women are allowed to choose to undergo the techniques at an advanced age that involves a risk to the health of the child –Article 6.2 LTRHA– and there is no requirement that the woman does not suffer from genetic, hereditary or infectious diseases that are transmissible to her offspring. Perhaps the only provision that complies with the general rule of Article 3.1 LTRHA is that relating to the limit on the number of pre-embryos transferred in each reproductive cycle (Article 3.2): although the 1988 Law initially left the number open, to be determined by the doctor on the basis of a final criterion ("the most appropriate to reasonably ensure pregnancy") –Article 4 Law 35/1988–, the 2003 Law introduced a limit of three pre-embryos "in order to reduce the number of

multiple births and thus avoid the risks that this type of pregnancy can pose to both the mother and the children" –Explanatory Memorandum–; a limit that –surely with the same purpose, taking into account the risk to the children– has been maintained in the current Law of 2006. ii) The second instance in which the law takes the child into consideration is in the third paragraph of Article 5.5 LTRHA, which introduces the following exception to donor anonymity: "Only in exceptional circumstances involving a certain danger to the life or health of the child [...] may the identity of the donors be revealed, provided that such disclosure is indispensable to avoid the danger."

Beyond the above, the legislator does not take precautions for the benefit of the child resulting from the techniques, given that, as has been pointed out, such benefit is not the objective of the law and, furthermore, such measures could be a limitation that would undermine the aforementioned desire to procreate and to form a family in the manner freely chosen, a limitation which, in the words of the legislator, the law 'must eliminate'. Therefore, no special requirements are imposed on those in whose favour filiation will be determined, any control by an external authority, such as adoptive filiation or even the recognition, is omitted, and rules of dubious benefit to the child are introduced, such as the deprivation of knowledge of their biological origins.

i) First, the law refuses to ensure the family integration of the child born. It allows access to reproductive techniques to 'any woman', either alone or with another person, who may or may not be her spouse, without it being necessary in the latter case for the man in respect of whom paternity will be determined – whether or not he provides the gametes – to be in a stable relationship with her or to have any kind of relationship, not even friendship: he may be a third party unrelated to the woman's life (Articles 6 to 8 LTRHA). It thus differs from other laws in our immediate environment that protect the family life of the child. For example, in France, the *Code de la santé publique*, in Article L2141-2 (amended by LOI n°2021-1017 du 2 août 2021), denies the use of these techniques to those who are not married or

cohabiting: it establishes that the only recipients of these techniques are a woman or a married couple or cohabiting couple, expressly excluding insemination or embryo transfer when a petition for divorce or separation is filed or when the cohabitation ceases; in Switzerland, the *Federal Law on Medically Assisted Reproduction* –18 December 1998– after establishing in the first paragraph of Article 3 that medically assisted reproduction is subject to the welfare of the child, stipulates in the following paragraph that it is reserved for couples; also in Italy, the *Legge 19 febbraio 2004, n. 40*, in Article 5, limits access to the techniques to couples: "couples of adults of different sexes, married or cohabiting"; and in Austria, the *Fortpflanzungsmedizingesetz* limits the techniques to marriage and registered partnerships or cohabitation –§ 2–.

ii) No requirements are established with regard to those in whose favour filiation will be legally determined, beyond the woman being over 18 years of age and, anachronistically, having full legal capacity.

ii') Leaving aside the issue of full capacity to act (which conflicted with the provisions of Additional Provision 5, which establishes that persons with disabilities cannot be discriminated against in access to and use of assisted human reproduction techniques, and which, following Law 8/2021, must be interpreted in accordance with the new capacity system), and focusing on age, the law merely requires women to be of legal age. In this regard, it should be noted that: 1) Article 7.3 LTRHA says nothing about the age of the man –husband or not– or the wife who will be the legal parents, so it does not exclude the possibility of a third party who is a minor and not a donor becoming a legal parent, without any control, such as, for example, those provided for in Article 121 Cc. 2) With regard to the minimum age of the woman, no qualifying age is established as in Article 175.1 Cc, which, as already stated, requires 25 years of age to become adoptive parents. 3) It does not establish a maximum age for either parent. Article 6.2 LTRHA only establishes that the information to be provided to the woman before she gives her consent must include information on the risks to her and her offspring that may arise from motherhood "at a clinically

inappropriate age", without prohibiting her from giving her consent. The assumption of risks to both herself and her child is therefore left to her discretion. Other countries, however, introduce limits, not only to avoid such risks, but also to ensure that the child will have parents whose age, similar to that provided by nature, will allow them to raise the child normally, as demonstrated by the fact that the limits are introduced for both parents, and not only for the woman: in Switzerland, the aforementioned *Lois fédérale sur procréation médicalement assistée* (Federal Law on Medically Assisted Reproduction) establishes that the techniques shall only be applied to couples who, "in view of their age [...], appear capable of raising the child to adulthood" –Article 3.2.b)–; in France, the aforementioned Article L2141-2 of *the Code de la santé publique* establishes that the age requirements for benefiting from medically assisted reproduction are set by Decree of the Council of State, taking into account "the medical risks of reproduction linked to age and the interests of the child to be born"; specifically, Decree No. 2021-1243 of 28 September 2021 has set the maximum age at 45 for the woman who is to give birth and 60 for the other member of the couple; and in Italy, the aforementioned *Legge n.40 of 2004* requires spouses or cohabiting partners to be "of potentially fertile age" (Article 5). The Civil Code in Spain pursues the same aim when it requires –with some exceptions– that, in order for a person to become an adoptive parent, there must be a maximum age difference of 45 years with the child –Article 175.1 Cc–.

ii") Law 14/2006 does not introduce any prohibitions on the use of techniques in any case, as is the case in the regulation of adoption (Article 175.1 Cc –which refers to Articles 216 and 217 Cc– and Article 176.3.3 Cc), so that those who, for example, have been deprived of parental authority over other previous children, or who have been convicted of crimes that suggest they will not perform their role well –e.g. crimes related to paedophilia– may become parents through these techniques. Furthermore, it does not require that the woman and, where applicable, the

other future parent be suitable for raising the child[30] , as is the case with adoption (it should be noted that Article 176.3 Cc regulates the declaration of suitability of future adoptive parents, understood as the adequate capacity, aptitude and motivation to exercise parental responsibility). They are not even required to be in good health[31] or to be free of communicable diseases. Both of these requirements are imposed on the donor: good mental and physical health and freedom from "genetic, hereditary or infectious diseases transmissible to offspring"; but this is not for the benefit of the child to be born, but to guarantee that the prospective parents' desire to have a healthy child is fulfilled. It should be noted that, if it were for the benefit of the child, such health requirements would be imposed on all those involved in the biological procreation of the child: the woman, the husband or male whose biological material is to be used, and the donor; but it is only imposed on the latter, who will never be the legal father. Once again, it seems that the focus is on the wishes of those who will become parents: the law gives them the freedom to choose to procreate a child with their genetic material when they are carriers of a disease, just as it allows them to do the opposite, i.e. to use these techniques, selecting pre-embryos to avoid the transmission of a disease (Article 12 LTRHA). In the same vein, it should be remembered that Article 6.2 LTRHA also allows older women to undergo the techniques even if it causes health problems for the child.

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[30] The aforementioned lack of a minimum requirement of suitability or favourable conditions for raising a child has been criticised by legal scholars. *See,* for example, JARUFE CONTRERAS 2013, 16 2 et seq., and the long list of authors cited therein. Also, as the aforementioned author points out, this goes against the proposal made by the Council of Europe's Committee of Experts on Bioethics –now the Bioethics Committee (DH-BIO)– when reproductive techniques first emerged (Rule No. 3 of Principle 1 of the 1981 proposal).

[31] The 1988 Law did require that, at least, the woman be in "good mental and physical health" –Article 2.1 b)–, but the current law dispenses with this requirement.

Spanish law also differs on this point from other European regulations that do establish requirements in the interest of the unborn child. For example, in Switzerland, the *Federal Law on Medically Assisted Reproduction* only allows the use of techniques for couples who, "due to their personal circumstances, appear capable of raising the child" (Article 3.2 b). And in France, the law requires an assessment of the health and motivation of the couple or woman in the interests of the child: the *Code de la santé publique* requires applicants to have a preliminary interview with a medical team, including a psychiatrist and a psychologist, who must "verify their motivation" and "carry out a medical assessment"; and stipulates that medical assistance for procreation may not be provided by the doctor if the conditions laid down by law are not met or when the "doctor, after consultation with the multidisciplinary clinical-biological team, considers that the single woman or the applicant couple needs an additional period of reflection in the interests of the foetus" –Articles L2141-2 and L2141-10–.

iii) Thirdly, there is no external control of any kind, such as adoptive parentage or even recognition. It should be remembered that adoption is constituted by a court decision and that, prior to the initiation of proceedings, there is intense administrative control (*see* section II. 2), all in accordance with the principle of the best interests of the child. And, as will be seen, even when a minor is recognised as a child without the consent of their representative, judicial approval is required with a hearing by the Public Prosecutor's Office –Article 124 Cc– with 'the interests of the recognised child' being the criterion that the judge must take into account in order to grant authorisation –Article 26 of the LJV–. However, none of this applies in the field of assisted human reproduction techniques, where the law merely establishes controls in relation to the centres that may practise these techniques, which require authorisation from the competent health authority –Article 4 and Chapter V LTRHA–, and in relation to the application of special practices, which will require authorisation from the competent health authority (pre-implantation diagnosis for purposes other than those legally provided for –Article 12.2 LTRHA–, therapeutic

intervention on the pre-embryo –Article 13 LTRHA– and experimentation with surplus pre-embryos –Article 15–), excluding any control by the authorities over the appropriateness of applying the techniques and the consequent determination of filiation in favour of those who so wish. The will is sufficient for both things[32].

iv) According to Article 5.5 LTRHA, donation is anonymous and the confidentiality of donors' identity data must be guaranteed by gamete banks, donor registries and medical centres. Children born through these techniques can obtain general information about donors, but do not have access to their identity. Only in exceptional circumstances involving a certain danger to the life or health of the child, or when required by criminal procedural law, may the identity of the donors be revealed, provided that this is essential to avert the danger or to achieve the proposed legal purpose. This anonymity impregnates the entire law: i) the legislator reiterates it throughout the articles, for example, in Article 3.6 –when regulating medical records–, in Article 6.5 –in relation to the medical team that applies the techniques–, in Article 11.6 –when referring to the use of cryopreserved pre-embryos by centres–, in Article 18.2 and 3 –when regulating the operating conditions of centres and teams–; ii) and classifies non-compliance as a serious offence –Article 26.2 b) 5th– imposing not only the ordinary financial penalty –as for any other offence in the same category–,

[32] There has been no shortage of proposals in doctrine regarding the introduction of external control. *See*, for example, PÉREZ MONGE 2002, 92 and 93. The author proposes the creation of an administrative body dependent on the Civil Registry or a Regional Ministry –composed of a judge, a doctor other than the one who will apply the reproductive technique, a social worker, a psychologist and a notary– to study the qualities and circumstances of the applicants in order to determine whether the practice of the technique is advisable from the point of view of the protection or interest of the child to be born, and before which the consents required by law are given.

but also the possible revocation of the authorisation granted to the centre or service to practise reproduction techniques –Article 27.1–.

This anonymity of the donor, as provided for by law, prevents the child from knowing the identity of his or her biological parent, which has been criticised for not serving the child's interests, as it is considered to frustrate the innate human tendency to know one's true identity and may be detrimental to the child due to the possible ignorance of a predisposition to certain diseases[33] . Furthermore, this legislative option is difficult to reconcile with the constitutional mandate that "the law shall enable the investigation of paternity" (Article 39.2 CE). However, in the well-known STC 116/1999 of 11 June, the Constitutional Court denied that Article 5.5 LTRHA is contrary to the Constitution. Paradoxically, only three months later, the Supreme Court, in the also well-known STS 773/1999, of 21 September, considered the anonymity of motherhood to be contrary to the Constitution and declared the supervening unconstitutionality of Article 47 LRC, which allowed it[34] . And while the LTRHA prohibits the disclosure of the identity of the biological parent of a child conceived using these medical techniques, the Civil Code requires such disclosure in the case of an adopted child (Article 180 Cc). It seems that these contradictions are due to the different interests protected: i) in the case of parentage derived from techniques, anonymity serves the interests of users, medical centres and donors; this was expressed by the Constitutional Court itself in the aforementioned ruling when it stated that "the limits and precautions established in this area by the legislator are not without rational basis, clearly responding to the need to legitimise the obtaining of gametes and pre-embryos [...] essential for the implementation of these techniques [...] thus contributing to promoting access to these techniques of artificial human

[33] *See* extensively: PÉREZ MONGE 2002, 197 et seq.

[34] On these rulings, see, for example, DURÁN RIVACOBA 2010, 3 et seq.; RIVERO HERNÁNDEZ 2004, 105 et seq.; ORDÁS ALONSO 2016, 1 et seq.

reproduction". ii) And in the case of adoption, the prohibition of anonymity for the biological mother and the obligation to reveal her identity when the child is adopted by other parents is in line with the objective of satisfying the interests of the child. This interest is defended to the extreme, i.e. to the point of completely denying the biological mother's right to privacy, rather than seeking a balance between the two interests. This has been criticised by the European Court of Human Rights, which advocates reconciliation, balance and proportionality between all the interests at stake –ruling ECHR of 13 February 2003 (ECHR/2033/8)–.

Europe is currently immersed in a trend towards the elimination of donor anonymity. In recent years, two of the closest countries, Portugal and France, have joined the list of European countries that prohibit anonymity (Austria, Switzerland, Norway, the Netherlands, the United Kingdom, Finland, etc.): in Portugal, Constitutional Court Ruling 225/2018 of 24 April 2018 declared anonymity unconstitutional; and in France, Article L2143-2 of *the Code de la santé publique* prohibits anonymity since the reform introduced by loi n° 2021-1017 du 2 août 2021. This is in line with Recommendation 2156 (2019) of the Parliamentary Assembly of the Council of Europe, which advocates the renunciation of anonymity in member states. In Spain, however, despite the fact that the Bioethics Committee has also recently (2020) come out in favour of abolishing anonymity[35], there appears to be no intention to promote legislative reform in this regard.

[35] *See* the *Report of the Spanish Bioethics Committee on the right of children born through assisted human reproduction techniques to know their biological origins* –15 January 2020–. The report acknowledges that the removal of anonymity would reduce the significant number of foreign couples who regularly come to Spain to undergo reproductive techniques, but considers that it cannot be argued "that such a business based on reproductive tourism should be maintained at all costs, to the detriment of the rights of the most vulnerable party, the child born through assisted human reproduction techniques".

5. Use of the best interests of the child for convenience

It is striking that, despite the fact that the regulation of the application of these techniques and the determination of the filiation of those born through them does not take into account the interests of the child, this interest is subsequently used as a criterion for resolving problems arising from non-compliance with the law, and is also used to defend one solution and its opposite, which suggests that the criterion could be used to suit the arguments of those involved[36] .

As is well known, Article 10 LTRHA considers null and void any contract agreeing to gestation by a woman who renounces maternal filiation in favour of the contracting party or a third party, and stipulates that the filiation of the child born through this surrogate gestation is determined by birth. Faced with the refusal to register the birth of children born abroad as a result of surrogacy in the Consular Civil Registry, the DGRN ordered the registration, arguing that the contrary violates Article 3 of the Convention on the Rights of the Child, given that the best interests of the children "require that they remain in the care of the persons who have given their consent to be parents, as this constitutes the environment that ensures the child 'the protection and care necessary for his or her well-being'" –RDGRN of 18 February 2009–. This resolution was challenged in court, and following the decision of the Court of First Instance to annul the registration, the DRGN issued the Instruction of 5 October 2010, which establishes guidelines for the Registries regarding the registration in question, in order to guarantee the protection of the child. When the case reached the Supreme Court, the latter, apart from observing that, according to the argument used in the DGRN's resolution, the Spanish legislator, by

[36] On the best interests of the child as a legitimate argument for any decision, *see*, for example, FARNÓS AMORÓS 2015, 38 et seq.; VERDERA SERVER 2016, 25 and 26.

not recognising the relationship of filiation with respect to the intentional or commissioning parents, it would have violated the best interests of the child, and that the application of this principle could not be used to contradict what was expressly provided for in the rules, it considers that the interests of the child cannot lie in the commodification that results from filiation being determined in favour of the person who places the order, thereby undermining the dignity of the child, who becomes an object of trade (Supreme Court ruling of 6 February 2014[37]). This argument is maintained in the recent ruling of 31 March 2022, which denies that it is beneficial for the child to be treated as an object rather than as a person. The Supreme Court considers that their protection must be achieved on the basis of the provisions of the law, i.e. by bringing an action to claim paternity (if the genetic material of the commissioning parent has been used) –Article 10.3 LTRHA– and/or foster care or, where appropriate, adoption.

IV. THE INTEREST OF THE CHILD IN THE PARENTAGE DETERMINED BY RECOGNITION OF COMPLACENCY

1. Introduction

The recognition regulated in Article 120.2 Cc is a means of determining non-marital filiation. It consists of a declaration of knowledge and/or will by which a person recognises themselves as a parent and/or assumes legal paternity of another. In order to be valid, this declaration must be made in the legally established manner: either before the registrar of the Civil Registry (Article 44.7 LRC) or in a will or other public document.

[37] On the ruling, *see*, for example, DE TORRES PEREA 2014; PÉREZ MONGE 2019, 535 et seq.

The law assumes that the person who recognises is the biological father of the recognised child. However, insofar as the recogniser is not required to prove this circumstance, it is possible that this is not the case and that we are dealing with a recognition of convenience. The DGRN has considered, based on the principle of biological truthfulness, that this recognition of convenience is null and void. Therefore, it refuses registration "when there is significant and conclusive evidence in the proceedings from which it can be inferred that such recognition does not correspond to reality"[38] . However, in its ruling of 15 July 2016, the Supreme Court (Plenary Session of the First Chamber) established the doctrine that recognition is not null and void because it is complacent and indicated that registration cannot be denied, even if the Registrar has conclusive evidence of the lack of biological veracity[39] . The DGRN does not seem to agree with this[40] , but the reality is that if a recognition of convenience reaches the Supreme Court, it will deny its nullity. In this way, recognitions not intentionally based on biological truth are legitimised by case law.

Law 4/2023, of 28 February (law for the real and effective equality of trans people and for the guarantee of the rights of LGTBI individuals) does not modify the wording of this no. 2 of Article 120 Cc, but it seems to give legal backing to the recognition of complacency by introducing in Article 120 Cc the mention of the 'non-pregnant parent' in the terms explained in the Explanatory Memorandum (woman other than the mother).

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[38] *See*, for example, RDGRN of 5 June 2006, RDGRN of 29 October 2012, DRGN of 4 September 2015.

[39] On the ruling, see: BARBER CÁRCAMO 2016, 1941 et seq.; MARTÍNEZ DE AGUIRRE ALDAZ 2016, 347 et seq.; MUÑOZ DE DIOS SÁEZ 2017.

[40] *See*, for example, RDGRN of 22 July 2016, RDGRN of 15 October 2019, RDSJFP of 10 February 2021, RDSJFP of 22 February 2021 (DGSJFP (Directorate-General for Legal Certainty and Public Faith) is the new name of the DGRN).

These recognitions, which have no biological basis, satisfy the desire of those who aspire to become the parent of a specific person[41] , but also the desire of that person –or their representatives– to become, or to have them become, legally their child, as this is beneficial to them. The interests of both parties are taken into account and protected by the regulation of recognition in the Civil Code: the interests of the father, of course, because he is the one who recognises, but also those of the child.

2. Mixed system of control of the child's interests: *inter privatos* and authority

With regard specifically to the interests of the child, a control system is established that could be described as mixed because it combines *inter privatos* and authority control. In principle, the power to control, either by themselves or through their representative, whether the legal relationship of filiation resulting from the recognition is beneficial or in their interest is left to the interested party. However, if the recognised child is a minor, the door is opened to possible alternative control by authority, specifically judicial control. Judicial control is also present, this time on a mandatory basis, in cases of incest between the parents of the recognised minor.

i) Control of the child's interests or convenience:

Since recognition is based on free will and since the resulting legal relationship affects two parties –parent and child– the law requires that both parties be in favour for it to take effect. This does not affect the unilateral nature of recognition: it is a manifestation of will which, when it meets the

[41] GALLO VÉLEZ analyses the motivation that may lie behind such a desire. He observes that there may be noble motives, such as pleasing the mother or benefiting her child, with whom the recogniser may have developed a relationship of affection similar to that of a father; or illicit motives, either of a pecuniary nature or of another kind, such as evading the rules governing adoption (GALLO VÉLEZ 2017, 90 et seq.).

requirements of capacity (Article 121 Cc) and form (Article 120 Cc), is valid and therefore binding and irrevocable for the person issuing it, but which, as long as it does not have the consent of Articles 123 or 124 Cc, will not take effect, i.e. it will not determine filiation. In view of this, it can be said that the consent of the other party or their representative acts as a right of veto[42] . This right of veto has no other purpose than to serve the interests and wishes of the person being recognised.

If the recognised person is of legal age, consent is given by them, either expressly or tacitly, and must always be given –Article 123.1 Cc–. When the recognised person is of legal age and has a disability, they shall give their consent with the support they may require, in accordance with the provisions of the court decision or public deed establishing the support measures. This support may be of any kind, within the wide range of possibilities offered by the new system: it may consist of advice or assistance in reasoning and understanding or, going further, and given that the legal system itself excludes it from being a highly personal act, it may be an approval or assent as a complement to capacity or even representative support, in which case judicial authorisation will be required to give the consent –Article 287 Cc–. In any case, whoever supports the adult must always act "in accordance with their will, wishes and preferences" –Article 249.2 Cc–.

For the recognition of a minor child to be effective, it must have the consent of their legal representative or judicial approval (Article 124 Cc). The rule does not give priority to either option, so judicial approval is not necessarily subsidiary to the consent of the representative, but may be applied alternatively: the recogniser is free to choose one or the other. The representative's consent must be express and shall be given –or should be given– in the interests of the minor child. As for the judge, who must hear

[42] This right of veto has already been referred to by BARBER CÁRCAMO 2021, 186.

the Public Prosecutor and the other legally recognised parent prior to approval, their decision must also be guided by this criterion of the best interests of the child. This is expressly recognised in Article 26 LJV.

The Code excludes this requirement of effectiveness when the recognition is made within the period established for registering the birth or when, if the recognised child is a minor, it is made in a will –Article 124.2 Cc– that is, when there is a greater likelihood that it corresponds to the biological truth or, at least, it is less likely that the recogniser is acting in a self-serving manner or guided solely by their own interests. This suggests that the aim is to give the recognised person the possibility of avoiding a filiation that is not in accordance with biology, saving them from subsequent legal challenges, or even freeing them from self-serving recognitions. However, it cannot be ignored that nothing prevents the motivation of the recognised person or their representative from responding to other criteria: they may give their consent when the recogniser is not the biological father or, conversely, deny it when he is[43] , all for pure convenience or simply because they wish it to be so. Therefore, it can be said that this right of veto, which does not have to be justified, is left to the free will of its holder.

Despite excluding the consent of the representative or judicial approval in the aforementioned cases, the law does not entirely renounce possible control: it allows the mother to suspend the registration of paternity carried

[43] The relevance of the veto as a means of denying paternity when there is a biological basis, purely in the interests of the child, has lost force with the extension of the right to bring an action to claim non-marital filiation to parents without legal status (Article 133 Cc). Whereas previously, in the absence of such standing, refusal to give consent was a significant obstacle to the legal determination of filiation, it now only prevents a determination based on the will of the alleged parent, who has the option of taking legal action to claim paternity by bringing the corresponding action –within the time limit, obviously–.

out in this way during the year following the birth. This suspension can only be lifted by the father with judicial approval –Article 124.2 Cc–.

ii) Control in cases of incest:

In the exceptional case that the parents of a minor are siblings or direct blood relatives, the law requires prior judicial authorisation for the filiation to be legally determined with respect to both. It should be noted that this control of incest is reserved for cases in which the child is a minor. When the child is of legal age, the assessment of incest is subsumed under the generic *inter privatos* control that the law attributes to the recognised parent. The "prior" nature applies to the legal determination and not to the title of determination, so authorisation is not necessary for recognition, but rather for the validly made recognition to have the effect of determining filiation. The judge shall grant authorisation –after hearing the Public Prosecutor's Office– "when it is in the best interests of the minor" –Article 125 Cc and Article 26.2 LJV–. The legislator places this criterion above any other, including that of biological truth. If authorisation is granted, the recognised child may, upon reaching the age of majority, invalidate the determination if they did not consent to it, which means that the judge's decision issued during the child's minority does not override the will of the adult child, but only serves to protect the minor.

The basis of the rule lies in social morality convictions typical of our culture, which reject sexual relations between siblings or between parents and children or grandparents and grandchildren. Its aim is to prevent the negative consequences that the legal determination of filiation with respect to both parents may have for the minor child. Although the Code initially prohibited it, since 1981 it has allowed it, but under control and with the possibility of invalidation. The doctrine close to the 1981 Law accepted the

rule as reasonable, but today, voices are beginning to emerge that question its appropriateness following recent family law reforms[44] .

3. Requirement of effectiveness regardless of the child's interests

Apart from the requirements of effectiveness set out in the previous section, Article 126 of the Civil Code introduces another requirement for cases where the recognised child has died, but, unlike the provisions of Articles 123 to 125 Cc, it is doubtful that the objective of this requirement is to protect the interests of the child, but rather to penalise the parent who recognises the child late and to protect the interests of the descendants of the recognised person.

Specifically, the provision states that '[T]he recognition of the deceased shall only take effect if his descendants or their legal representatives consent to it'. In other words, it allows for the legal determination of the filiation of the deceased child by means of recognition, but not in all cases and without conditions, only when there are descendants who consent to it. Consent is a requirement for effectiveness: it allows valid recognition to take effect and, consequently, to legally determine filiation. The limitation through this requirement has a dual purpose: i) On the one hand, by excluding the effectiveness of recognition when there are no descendants, it attempts to avoid belated recognitions by those who have disowned the child while he or she was alive. It should be remembered that, in the absence of descendants, the parents or ascendants will be legitimate heirs (Article 807 Cc) and that, if there is no will, they will be called to the inheritance (Article 935 Cc). ii) On the other hand, by requiring consent, the aim is to protect the descendants. It should not be forgotten that the determination of filiation not only operates between father/mother and child, but also, as

[44] *See*, for example, NANCLARES VALLE 2016, 684.

QUICIOS MOLINA observes, creates a *status familiae* that affects the descendants[45] : for example, it may involve a change of surname or a claim for maintenance from the new ascendant (Articles 143 and 144 Cc). The aim is therefore to prevent these relationships from being created unilaterally. As can be seen, the interests of the child are irrelevant to the purpose of the rule.

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[45] QUICIOS MOLINA 1997, 325 and 326.

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