

Bioethics and Biolaw from a Religious Point of View¹

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ABSTRACT: Bioethics and biolaw from a religious point of view

This paper seeks to explore the role played by religion in bioethics and biolaw and, more specifically, to analyse the extent to which this religious factor influences the rejection of the figure of gestational surrogacy in our country. After analysing the evolution of science, law, ethics and bioethics in Spain, as well as the undeniable role that religion plays in scientific developments, this paper will examine the figure of gestational surrogacy from the Spanish religious point of view. As a result we see how, despite being a secular state, most of the arguments against gestational surrogacy put forward by non-religious actors correlate with the anti-surrogacy pronouncements of the Catholic Church.

KEYWORDS: Bioethics / Biolaw / Religious factor / Gestational surrogacy / Secular state / Aconfessional Laicism / Fundamental rights

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I. INTRODUCTION

Within the discipline of bioethics, topics such as euthanasia, the right of people to a dignified death, abortion, surrogacy, etc. have been examined, all of which make palpable the important link that unites the law with the development of the science of medicine.

Today, it is increasingly common to directly link the development of science with the parallel decline of religious convictions. Notwithstanding this, in the relationship between science and religion, we are in favour of the theory that there is no conflict between the two disciplines. This theory states that tension between these two disciplines is only to be expected. We understand that it is not reasonable to consider these two cultural forces in isolation and in total independence. On the contrary, we believe that it is essential that there should be dialogue between the two spheres and consequent integration².

Having said this, we are going to try to explain the role of religion in our current system, which will lead us to show that the guarantee of the principle of equality in matters of convictions supposes the absence of any different legal treatment of citizens in terms of their ideas, beliefs, convictions or religion. We will also relate this to the fundamental theme of surrogacy in bioethics and biolaw in order to analyse it from a religious perspective. Our fundamental objective will be to try to discover what role religion plays in bioethics and, more specifically, to what extent the religious factor influences the rejection of the figure of surrogacy in our country.

¹ This work has been carried out on the basis of the presentation with the same title that was attended by the author at the XXVI International Congress on Law and the Human Genome: Genetics, Biotechnology and Advanced Medicine, held in Bilbao on 6, 7 and 8 May 2019 at the University of the Basque Country UPV/EHU and which she attended as a speaker?.

² Vid., Aragón, D. L. F., "La interacción entre ciencia y religión: una actualización sobre el conflicto", *InterSedes* 37, 2017.

THE EVOLUTION OF SCIENCE, LAW, ETHICS AND BIOETHICS

It is evident that medicine has evolved a lot over the years. In this evolution, the new continuing science of traditional medical ethics has emerged from new and broader perspectives, namely, the discipline of bioethics, which aims to reflect on the decisions to be made about life and death.

It is also necessary to mention the important link between the law and this development of the science of medicine. It is absolutely essential that this link be taken into consideration by jurists. In this sense, these professionals must make an effort to try to see the law as something dynamic and as an entity that needs to evolve. In other words, it is essential that legal activity should be the driving force behind all the changes that have taken place in recent years³.

As mentioned above, it should also be remembered that the law is responsible, among other things, for placing a series of limits on what is or is not permitted in a society or, in other words, for regulating the conduct of people in society. This leads us to relate the concepts of law and bioethics and, in doing so, we may discover that, apart from certain concepts, theories and/or methods, there are a series of constitutional values and general principles, in most mature democracies which must be respected at all times⁴.

On the other hand, it has become necessary to adopt a global and interdisciplinary vision in relation to the questions posed by biotechnology. That is to say, at present in this field of biotechnology, there are ethical, legal, social and political aspects that must be contemplated for the main objective of giving answers to those problems that derive from scientific discoveries and biotechnological⁵ advances.

THE ROLE OF THE RELIGIOUS FACTOR IN SCIENTIFIC PROGRESS

The religious factor is implicit in our legislation and we can distinguish between different articles that refer to rights and principles that govern our society. These principles and rights must be taken into account at all times and bioethics cannot lose sight of them in any scenario⁶.

In the Spanish Constitution (hereinafter CE) we can find, in article 16, the principle and at the same time the right to "ideological and religious freedom". This principle guarantees, on the one hand, that public authorities have no jurisdiction over religious matters, and are prohibited from forcing someone to make statements regarding their religion or ideological beliefs. Our Constitution has entrusted the public authorities with a positive function, which takes the form, on the one hand, of removing obstacles and, on the other, of promoting freedom, specifically freedom of conscience⁷.

In addition we can find in our system another very important principle for the religious factor, which is the principle of "equality in matters of beliefs and convictions". Article 14 of the CE guarantees equality before the law, understood as both "in the law" and "of the law", but also welcomes its corresponding aspect of non-discrimination in the sense that this constitutional principle prohibits any discrimination for having certain religious beliefs or ideological convictions, as well as for not professing any⁸, in such a way that equality becomes an element that complements and deepens the rights of freedom.

³ Rodríguez, G. S., "El Derecho frente al desarrollo científico-tecnológico", *Revista de Ciencias Humanas y Sociales*, 34, 2001, pp. 140 ff.

⁴ Casado González, M., "¿Por qué bioética y derecho", *Acta bioethica*, 8 (2), 2002, p. 191.

⁵ Casado González, M., "Why bioethics and law?", *op. cit.*, 2002, p. 186.

⁶ Analizar el papel que tiene el Factor Religioso en nuestro sistema vigente se puede hacer de la mano de Contreras Mazarío, J. M., "La libertad de conciencia y convicción en el sistema constitucional español", *Revista cidob d'affers internacionals* 77, 2007, pp. 41-63.

⁷ Contreras Mazarío, J. M., "La libertad de conciencia y convicción en el sistema constitucional español", *op. cit.* 2007, pp. 41-63.

⁸ Sánchez, I. M., "Laicidad e igualdad religiosa: algunas cuestiones debdas", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 13, 2009, p. 183.

In conclusion, the guarantee of the principle of religious equality implies the absence of any different legal treatment of citizens on the basis of their ideas, beliefs, convictions or religion, as well as the equal enjoyment of the fundamental right to freedom of conscience and religious freedom⁹.

II. SURROGACY

1. INTRODUCTION AND CONCEPT

The exact terminology to be used to refer to these assumptions is not entirely clear.

On the one hand, a large group of authors have chosen to use "surrogacy". On the other hand, many others consider that it is not appropriate to use such a denomination because there are cases in which there is genetic contribution from the carrier mother¹⁰.

The term "rental of uterus" has also come to be used. But in the same way criticisms have been found due to the fact that not only the uterus is brought into the process¹¹.

In addition, a final denomination, given by the Special Commission for the Study of In Vitro Fertilization and Human Artificial Insemination, is presented, namely, "gestational surrogacy. This term is used quite frequently and it seems to have reached majority acceptance as the term considered the most appropriate to understand this reality¹².

There are also problems in reaching a common agreement on the most accurate definition of surrogacy. The majority of experts in the field believe that the most complete and illuminating definition is that it "*consists of a contract, gainful or altruistic, through which a woman consents to carry out gestation, through assisted reproduction techniques, also contributing her egg or not, with the commitment to deliver the baby to the principals or future parents, who can be a person or a couple, married or not, who in turn can contribute or not their gametes*"¹³.

2. LAW 14/2006, OF 26 MAY, ON ASSISTED HUMAN REPRODUCTION TECHNIQUES

Before regulating the field of assisted reproduction, the Spanish legislature decided to form a commission comprising biologists, gynaecologists, jurists, philosophers and moralists called the "Special Commission for the Study of In Vitro Fertilization and Human Artificial Insemination", which could advise the legislative body on the genetic, biological and ethical problems posed by assisted reproduction¹⁴.

First of all, we will deal with the negative aspects.

It is clear that the practice of gestational surrogacy can cause significant detrimental consequences for those involved. Gestational surrogacy can also be seen as a "*commercial contract*" contrary to the medical deontology. The Code of Ethics explains in its new amendment that gestational surrogacy is considered to undermine the dignity and integrity of the woman, as well as of the child who will later be born¹⁵.

⁹ Contreras Mazarío, J. M., "La libertad de conciencia y convicción en el sistema constitucional español", *op. cit.* 2007, pp. 41-63.

¹⁰ Souto Galván, B., "Aproximación al estudio de la gestación de sustitución desde la perspectiva del bioderecho", *Foro: Revista de ciencias jurídicas y sociales*, n. 1, 2005, pp. 275- 292.

¹¹ Pérez Monge, M., *La filiación derivada de técnicas de reproducción asistida*, Centro de Estudios Registrales, Madrid, 2002, p. 331.

¹² Souto Galván, B., "Aproximación al estudio de la gestación de sustitución desde la perspectiva del bioderecho", *op. cit.* , 2005, p. 277.

¹³ Definition contained in the Sentence of the Provincial Court of Valencia (Sentence nº 826 Section 10ª 23/11/2011).

¹⁴ Souto Galván, B., "Aproximación al estudio de la gestación de sustitución desde la perspectiva del bioderecho", *op. cit.* , 2005, p. 279.

¹⁵ Reference can be made here to one of the many judgments that use the following argument as a legal basis to stand before this figure: a democratic society must "*respect the dignity and moral integrity of the pregnant woman, avoid the exploitation of the need in which young women may find themselves in a situation of poverty, or prevent the commodification of pregnancy and filiation*": Judgment 835/2013 of 6 February 2014.

Secondly, it is explained that the informed consent given in most cases is "mediated" by the economic need of the woman, so it can be said that the woman is not acting with complete freedom when making her decision. For this reason, many authors state that women in many cases are socially or economically influenced¹⁶.

Thirdly, another important aspect to consider is the protection of the best interests of the child. In the case of gestational surrogacy, most experts are of the opinion that this interest is not being taken into account because the child is born as a result of a commercial transaction and, in reality, the child needs the regularization of a legal framework that protects them, and provides them with legal security¹⁷.

In view of these negative aspects of gestational surrogacy, we must discuss how the aforementioned Special Commission began to point out that procreation should only be limited to "*relations of reciprocal love between two persons*", because the introduction of a third party would be going against the values and foundations of marriage. Afterwards, it also appreciated that this relationship that arises between mother and child is deformed by the phenomenon of surrogacy¹⁸.

Leaving behind the arguments against gestational surrogacy, let us focus on the arguments put forward by those authors who are in favour of and unconditionally support gestational surrogacy.

Firstly, this part of the argument states that this technique is directly related to the right to procreate. Moreover, they argue that human dignity is not the only fundamental value at stake here; so is the protection of marriage or the family, as well as the traditional role of procreation¹⁹. These authors introduce the notion of "reproductive freedom", which refers to the freedom to decide whether or not to procreate. A right that does not exist in the abstract, but which is intimately related to the right to sexuality and reproduction and which is currently proving to be very controversial²⁰.

On the other hand, the argument of "immorality" as an objection to gestational surrogacy is refuted when they explain that it is an old argument, which introduced "the principle of harm": it argues that conventional morality should not limit people's freedom to participate in consensual activities when they cannot harm others²¹.

It has also been decided to use the principles of equality and non-discrimination to argue in favour of the regulation and admission of this technique, since it is more and more common nowadays to find couples with multiple problems in attempting to procreate as well as the existence of same-sex couples²².

All this reasoning, and some others which, for reasons of space and time, we have not been able to mention, have been of great help to the legislature when it comes to regulating legislation in the area of gestational surrogacy. Both the Law on Assisted Reproduction and the report prepared by the aforementioned Commission reject gestational surrogacy and, as a consequence, declare null and void any contracts deriving from such a figure. There is talk of absolute nullity, due to the involvement of people in this act. Therefore, in the case of such a case, the pregnant woman shall be deemed to be the legal mother of the child born.

¹⁶ Lamm, E., "Gestation by Substitution", *InDret*, (3), Barcelona, 2012, p. 6.

¹⁷ Rodríguez, J. F., "Gestation by substitution: closer to a common European legal status". *Rev. Private Law*, 27, 2014, p. 6.

¹⁸ See, in Souto Galván, B., "Aproximación al estudio de la gestación de sustitución desde la perspectiva del bioderecho", *op. cit.* 2005, pp. 279-281, how is it explained that the pregnant woman has to commit herself from the beginning to abandon the child after birth, but what happens to those ties that the child has with the pregnant mother that are considered to be very solid: it is an important question that many authors have asked; most agree that, in practice, the child will, after all, have been the object of a mere commercial transaction, that is, it will have been exchanged for money (in most cases).

¹⁹ Lamm, E., "Gestation by Substitution," *op. cit.* 2012, pp. 7-10.

²⁰ Rodríguez, L., "Derechos sexuales y reproductivos en el marco de los derechos humanos", *United Nations Population Fund Quito*, 2008, pp. 6 et seq.

²¹ Lamm, E., "Gestation by Substitution," *op. cit.* , 2012, p. 8.

²² Lamm, E., "Gestation by Substitution," *op. cit.* , 2012, p. 8.

SURROGACY FROM A RELIGIOUS PERSPECTIVE

The main doctrine of Buddhism is that any form of life is sacred. However, unlike Christianity, Buddhism does not have a central figure or hierarchy, which means that there are different points of view on practices related to human reproduction, among which we find surrogacy. In any case, most Buddhists are unfavourable to surrogacy. Although gestation for a family may seem like an act of compassion, the reality, from the Buddhist point of view, is that the woman is left in a position of servitude, since her body becomes a mere "tool" to be used by others.

As in Buddhism, the view of Judaism is heterogeneous. However, several rabbinical authorities reject it outright. In this case, the opposition is not due to issues related to marriage or filiation of the child, but to the mere fact that the surrogate mother receives money for "incubating" and giving birth to another couple's child. They consider it to essentially be a way of enslaving women.

Surrogacy is not allowed in Islam. However, it is permitted in those countries where polygamy is accepted, that is, the fact that a man has more than one wife. In these cases, the surrogate pregnant woman can be the second wife of the husband, as long as the husband's sperm is used or, otherwise, it would be a case of adultery.

With regard to the opinion of other Christian branches, it should be noted that the Protestant Church, for its part, does not recognize surrogacy, but it does accept in a generalized manner both in vitro fertilization and artificial insemination and that evangelicals consider that there should be no moral impediment to resorting to assisted reproduction, although there is a homogeneous opinion on surrogacy.

As expected, the Catholic Church opposes gestational surrogacy. The Church considers it the commercialisation of a woman's body and in some way encourages the trafficking of minors. The above-mentioned arguments against this technique agree for the most part with the doctrine of the Catholic Church that opposes this practice²³.

The Church takes very seriously the argument that there is no explicit right to procreate in the law. Notwithstanding this, and despite the fact that the term "sexual and reproductive rights" is of recent use, because previously there was only talk of their hypothetical existence²⁴, we can see how it has now been demonstrated that these reproductive rights contribute to improving people's quality of life²⁵.

III. PROBLEMS

At this point, the most important and interesting issue before us is: To what extent does the religious element influence the rejection of the figure of gestational surrogacy in Spain?

At present, Spain is governed by the principle of the secularism of the State, enshrined in our CE in Article 16.3, which states that: "*No religion shall have a state character*". This principle prohibits the Spanish State from becoming a protector of specific dogmas, beliefs or religious convictions. Thus public life cannot be conducted under one or more specific religious conceptions, or prescribe a faith, a creed, a belief or a conviction as unique²⁶.

Today it is common for many authors to call bioethics "**secular bioethics**", a term with which they intend that bioethics be considered independent of any religious doctrine and rebalance the influence that the Church has had in this area for many years²⁷.

²³ Souto Galván, B., "Aproximación al estudio de la gestación de sustitución desde la perspectiva del bioderecho", *op. cit.* 2005, pp. 279 ff.

²⁴ Igareda González, N., "El hipotético derecho a la reproducción", *Cuadernos Electrónicos de Filosofía del Derecho* n. 23, 2011, pp. 252-271.

²⁵ Rodríguez, L., "Derechos sexuales y reproductivos en el marco de los derechos humanos", *op. cit.* 2008, pp. 6 et seq.

²⁶ Carazo Liébana, M. J., "El derecho a la libertad religiosa como derecho fundamental", *Revista de Filosofía, Derecho y Política*, n^o 14, 2011, pp. 46 ff.

²⁷ López Baroni, M. J., "Las bioéticas laicas", *Argumentos de Razón Técnica*, n^o 16, 2013, pp. 121-161.

On the other hand, although Spain declares itself, as has already been stated, as a non-denominational or secular State, little by little, in the normative development of bioethics, an attempt has been made to move more and more towards secularism²⁸.

Notwithstanding this, there is an objective fact which is that, although Spain is a secular state, as has already been mentioned above, most of the reasons put forward against gestational surrogacy coincide with the arguments of rejection given by the Catholic Church.

Having examined all the above, we find in our country something quite curious from the point of view of Church-State relations, since "there is very advanced legislation in matters referring to bioethics that does not correspond to the constitutional framework and the obligations contracted internationally with the Vatican"²⁹.

IV. FINAL CONCLUSIONS OF THE ANALYSIS

- We can say that religion has always occupied a predominant place in the sphere of citizens, in addition to being able to influence different areas of life for a long time. However, we must not forget that we currently live in a non-denominational state in which the principle of secularity prevails. These two realities lead us to the current situation in our country where there is an evident ambivalence of bioethical legislation with a strong laicist bias, on the one hand, and a normative framework in a broader sense in which the weight of the Catholic Church continues to be predominant, on the other hand, which gives rise to the paradox of so-called **non-denominational laicism**.

- Being in favour of the latter, we prefer to conclude that the rejection of gestational surrogacy, instead of being derived from religious and/or archaic arguments, can be influenced by the important role played by our Fundamental Rights in our legal system and in the field of bioethics. As we have studied, gestational surrogacy could endanger the right to physical and moral integrity, as well as the right to dignity, not only of the pregnant mother, but also of the child she is carrying. That is why, in our opinion, it would be more appropriate to say that this rejection may have resulted from **respect for fundamental rights**, which must be respected as a matter of **urgency**.

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²⁸ Recently, regulations have been developed in this area, such as the counter-reform of the Assisted Reproduction Law (2006), which allowed pre-embryo research; the Biomedical Research Law of 2007, which legitimized stem cell research; and the Sexual Health Law of 2010, which allowed abortion with deadlines; the Law of Dignified Death of the Andalusian Autonomous Community, governed by the PSOE, of 2010, which was to serve as a point of reference for a hypothetical state law close to active euthanasia; the norms on gender equality implemented by the PSOE in those years at state and autonomous level, which indirectly affect issues of family, reproduction, autonomy of women, etc. the approval of same-sex marriage, with its reflection, among other things, in artificial reproduction; the rights of transsexuals, etc: López Baroni, M. J., "Las bioéticas laicas", *op. cit.*, 2013, p. 128.

²⁹ Vid. López Baroni, M. J., "Las bioéticas laicas", *op. cit.* 2013, p. 129, which continues: "Hence, in the legal system of our country, stem cell research, pre-embryos, therapeutic cloning, abortion with deadlines, marriage of persons of the same sex, a very advanced law on issues of euthanasia, etc. coexist with the 1979 Vatican agreement that 'education given in public schools will be respectful of the values of ethics cristiana'".

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