Posthumous Child. Post-Mortem Reproduction in the Brazilian Law

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Abstract. This article looked at the feasibility of carrying out post-mortem reproduction based on the provisions of the Brazilian legal system, as well as its bioethical implications. Because of the lack of specific regulation by law, we sought to analyze how the same problem is regulated in the Portuguese legal system, given the historical proximity between those legal orders, in an attempt to improve Brazilian Law. The methodology used consisted of a review of the legal literature in the research databases "Periódicos Capes", Directory of Open Access Journals, and the Open Access Scientific Repository in Portugal, using keywords and boolean operators. In addition, a document review was carried out in the case law repository of the Superior Court of Justice, using keywords and boolean operators. It emerged that the most controversial points on the subject concern the consent of the deceased spouse, the attribution of filiation, and inheritance rights. In the Brazilian case, the Superior Court of Justice, observing the infra-legal provisions on post-mortem reproduction, has decided that the consent required must be documented, in a testament or similar document, and that consent in a contract for the provision of medically assisted reproduction is not sufficient. The conclusion is that the issue still requires legislative improvements in the search for legal certainty and harmonization of legal and infra-legal provisions with the constitutional text of each country.

Keywords. Bioethics, comparative legislation, post-mortem reproduction, Brazil, Portugal.

1. Introduction

The evolution of science and technology has allowed previously unthinkable situations to become a reality. If the logic of life is to be born, grow, reproduce, and die, post-mortem procreation reverses the order of the last two stages. This became possible with the discovery of a substrate for cryopreserving gametes and embryos. In 1953, the use of Glycerol (C3H8O3), the first cryoprotectant discovered for freezing human reproductive material, proved to be effective through the successful performance of three intrauterine artificial inseminations with semen frozen for three months [1].

After the advances made with artificial insemination, in 1978 there was an even more important discovery in the field of medically assisted human reproduction: the successful performance of in vitro fertilization, which enabled the birth of the first child generated through this technique[2]. In this way, science and technology have had a major impact on human life, allowing direct interventions in issues that were previously only hypothetically considered[3].

However, while medically assisted reproduction makes it possible to carry out parental projects, it also raises several legal and bioethical questions regarding its potential and consequences. An example of this is the possibility of generating life from the reproductive material of a deceased person. For a better understanding, post-mortem procreation can be divided into two modalities. The first is carried out with the express consent and prior planning of those involved. The second is carried out without express consent using cryopreserved supernumerary gametes or pre-embryos or gamete recovery after death[4].

It is important to note that post-mortem reproduction can take place using three techniques: in vitro fertilization, artificial insemination, and embryo transfer. A distinction must also be made between homologous medically assisted reproduction and heterologous medically assisted reproduction. The former consists of using the couple's reproductive material, while heterologous reproduction is related to the donation of reproductive material by a third person[5].

Given the lack of specific legislation in Brazil and the

various bioethical and legal dilemmas it raises, it is necessary to understand its implications. With this in mind, this bibliographic study aims to analyze the possibility of carrying out homologous post-mortem reproduction and its consequences, comparing the legal treatment given in the Brazilian legal system and in the Portuguese legal system, which already has a statute on the subject, seeking to improve Brazilian legislation.

To this end, this article analyzes the treatment given by the Brazilian legal system to post-mortem reproduction, Portugal's normative discipline of this technique, and the dilemmas raised by the generation of a child after death. The approach will be limited to post-mortem reproduction carried out by the widow, since the man seeking post-mortem reproduction would imply surrogate pregnancy, with its own bioethical dilemmas.

2. Methodology

In order to carry out this qualitative exploratory research, a review of the legal literature in the repositories "Periódicos Capes", Directory of Open Access Journals, and the Open Access Scientific Repository in Portugal was carried out using keywords and boolean operators. In the first repository, the following keywords were used to define the document corpus: "reproduction", "post-mortem" and the boolean operator "and". The articles were filtered by the title of the journal, selecting those that contained the term bioethics, as this was the focus of the work. In the second, the same words and boolean operator were used. In the third, the document corpus was selected using the keywords "fertilization", "post-mortem" and the boolean operator "and".

In addition, a document review was also carried out in the case law repository of the Superior Court of Justice, using the following keywords and boolean operator: " post mortem", "and", "reproduction".

3. Post-mortem reproduction in Brazilian Law

In the Brazilian legal system, no statutes make exhaustive provisions for post-mortem reproduction. The issue is only partially regulated by Resolution No. 2,320/2022 of the Federal Council of Medicine (FCM), which authorizes post-mortem assisted reproduction, as long as there is specific authorization for the use of biological material granted during life[6]. As a result, controversies have arisen regarding the consent of the deceased, the possibility of recognizing the bond of filiation, and the inheritance consequences of carrying out post-mortem medically assisted reproduction.

The living consent of the deceased spouse is provided for in the aforementioned FCM resolution. However, this resolution does not have the status of a statute. Therefore, it cannot innovate in the legal system, assigning rights and duties. For this reason, its validity is questionable[7]. Since 1992, the resolutions of the FCM have required consent to be given while alive, as well as the collection of biological material to have taken place while alive[5].

In this regard, the Superior Court of Justice established, in the judgment of Special Appeal No. 1,918,421 / SP, that the consent present in a contract for the provision of services related to medically assisted reproduction is not enough. Specific consent in a will or similar document is required to carry out post-mortem assisted reproduction[8].

Regarding the filiation status of any child generated from the use of the aforementioned technique, the Civil Code adopts the presumption of filiation in Article 1,597, items III and IV[9]. In addition, Provision No. 63, of 2017, of the National Council of Justice, Article 17, §2, guarantees the child the right to registration, regardless of a court decision, with the exception that specific prior authorization from the deceased for the use of the preserved biological material, using a public certificate or notarized contract [10].

Although Article 1,597, item III, of the Civil Code exclusively mentions post-mortem fertilization carried out with biological material from the deceased husband, in compliance with Article 5, item I, of the Federal Constitution of 1988, the National Council of Justice drafted Enunciation no. 633, which establishes equal possibilities for the widower to use post-mortem insemination techniques, through surrogate pregnancy, on the condition that there is the express consent of the deceased wife [11].

Concerning the inheritance rights of the child generated through the aforementioned technique, the legal literature diverges on the possibility, since Article 1,798 of the Civil Code grants legitimacy to succeed only to those already conceived at the time of the opening of the succession[9]. According to Maria Helena Diniz[12], a posthumous child would not be entitled to succeed, since his conception occurred after the death of his biological father. He would therefore be excluded from legitimate succession. It is possible for a child born from post-mortem reproduction to be an heir by will, if there is an unequivocal will from the semen donor, present in the will, to pass on the inheritance to the child.

However, with the constitutionalization of Civil Law, the rules must be interpreted following the Federal Constitution of 1988[13]. Thus, in light of the principles of equality of filiation (Article 227, § 6), the best interests of the child (Article 227, caput), and family solidarity (Articles 229 and 230) [14], it is possible to infer the right of the child generated from post-mortem reproduction techniques to inheritance[15].

The disagreement over the posthumous child's right

to inherit may be settled by the National Congress, in the event of the approval of Bill No. 4,892, of 2012, with subsequent sanction by the President of the Republic, since, in its Article 59, it provides for the right to inherit of the posthumous child, generated by post-mortem fertilization or transfer of cryopreserved pre-embryos, if the pregnancy takes place within three years of the opening of the succession. On the other hand, this bill is attached to Bill No. 1,184/2003, which establishes a criminal penalty for anyone who uses biological material from a deceased person without consent having been given in a free and informed consent form or a testament.

4. Portuguese Law on post-mortem reproduction

The regulation of post-mortem reproduction at the international level does not follow uniform criteria. Some countries expressly prohibit it, others are largely flexible, and some allow it with restrictions.

In Portugal, posthumous fertilization is illegal, as determined by Article 22 of Act 32 of 2006. This also establishes that, in the event of the death of the spouse, his cryopreserved reproductive material must be destroyed. On the other hand, the transfer of cryopreserved embryos after the death of the husband is lawful if there is written consent[16].

Although the Act prohibits the generation of a posthumous child by post-mortem fertilization, there is a provision that, in the event of a transgression of the prohibitive rule, the bond of filiation with the deceased will be recognized, as provided for in Article 23 of Act 32 of 2006[17]. Furthermore, there are no penalties for those who violate its legal provisions. There is only punishment for the improper retrieval of gametes[18].

As in the Brazilian legal system, in Portugal, there is no deadline for the use of post-mortem biological material. As a result, there is uncertainty about the legally appropriate solution concerning succession problems, since there is recognition of filiation, but the concepture, under the provisions of the Portuguese Civil Code, would only have testamentary and/or contractual succession capacity, generating a differentiated regime for children resulting from post-mortem reproduction, in disagreement with the constitutional principle of equality between children[17].

Therefore, although there is a specific statute in Portugal that prohibits post-mortem reproduction, how this issue has been regulated generates legal uncertainty in inheritance law, since it is silent about this and the deadlines for carrying out the procedure, in addition to not providing any mechanism to discourage this practice.

5. Bioethical dilemmas

The debate on the implications of allowing or prohibiting post-mortem reproduction is wide-ranging and raises many questions, even in countries where there is specific legislation on the subject. This is due to the difficulty of establishing a consensus, because of the ethical dilemmas present in such a procedure, especially when there is no unequivocal manifestation from the deceased member of the couple.

It is pointed out that the use of medically assisted reproduction techniques should only be used as a means to overcome the limitation imposed by infertility since it should be a subsidiary method. However, the new family arrangements recognized by Brazilian law have given homosexual couples and single people access to assisted human reproduction. As a result, this has become an option for forming new family structures. In this way, assisted reproduction techniques have also come to serve structural infertility[[7].

There are also concerns about the inheritance rights of posthumous children[19]. However, the failure of the Legislative Branch to adapt the legal system to new situations arising from advances in technology and medicine does not prevent the enjoyment of the right to inheritance when it is possible to make a systematic interpretation in the light of constitutional principles and there is provision for an action to claim assets, as provided for in art. 1,824 of the Brazilian Civil Code[20].

Another issue that arises is the possibility of a woman wishing to become pregnant by her deceased husband out of an interest in the inheritance since the child would be entitled to the deceased's assets and, being initially incapable, the mother would administer them. However, it is worth noting that good faith must be presumed, and, in most cases, the woman's interest is to carry out the parental project she had previously conceived. Her main motive is the sentimental bond she had with the deceased, which gave rise to a life project [20].

The main controversy lies in the posthumous child's deprivation of a two-parent family structure. However, the absence of biparentality is not a factor that harms the child's well-being, since the 1988 Federal Constitution expressly recognizes the plurality of family forms, including the single-parent family (Article 226, §4). The hierarchization of family structures, privileging the one composed of both parents, neglects the fact that what should be understood as relevant is the care, protection, and affection granted to the child[21]. The posthumous child does not have the presence of one of the parents, but benefits from contact with the family of the deceased, especially the grandparents, and knowledge of their genetic origin. At the same time, the conception of the child becomes another inspiration for overcoming grief [22].

Finally, other arguments against conceiving a

posthumous child involve the possibility of the surviving spouse being pressured by the deceased's family to carry out his last wish[23]; and the fact that, in many cases, post-mortem reproduction situations are related to one of the couple's members suffering from cancer. Thus, due to the long and exhausting treatment, the surviving spouse would not be in the psychological and emotional conditions to become pregnant and care for a child[14].

Concerning the circumstance mentioned above, the establishment of an initial period after the death of one of the couple's members in which post-mortem reproduction would be prohibited seems to be the best solution so that the surviving spouse can reflect on whether it is in her best interest to give birth to a child posthumously since the responsibilities regarding the child will fall to her. In addition, the requirement for psychological support before the child's conception may also be beneficial in overcoming grief and ensuring that the unborn child, when it comes into the world, finds suitable conditions to develop.

Therefore, although there are bioethical controversies, the main challenges of post-mortem reproduction can be solved with legislation that adapts to the problem and considers the need to ensure conditions for the healthy continuity of the parental project, as a reflection of private autonomy and the duty of responsible parenthood.

6. Conclusions

The law faces challenges in the face of advances in science, creating limiting situations in which a child can be conceived after the death of a parent. As a result, not only do some bioethical dilemmas arise, but also legal problems stemming from backward legislation. In Brazilian law, there is no statute regulating post-mortem reproduction, but sub-statutory normative acts regulate the practice. Under these regulations, post-mortem reproduction is only permitted in Brazil if there is a document attesting to the deceased member of the couple's uncontested wish to have a child in such a situation. The need for express consent was reinforced by a recent decision of the Superior Court of Justice, which ruled that such a manifestation of will must be conveyed in a testament or similar document.

From the point of view of inheritance, there are dilemmas regarding the absence of a deadline for the use of biological material, a common occurrence in both the Brazilian and Portuguese legal systems. In addition, both legal systems coincide in the fact that, although they attribute filiation status to the child generated, there is a regulatory limbo about succession, which allows for legal uncertainty and interpretations that violate equality between children, a principle laid down in the legal systems of both countries.

Finally, it should be noted that Portugal's experience shows that it is not enough to pass a statute on post-mortem reproduction; the legal system needs to be updated to encompass situations generated by the birth of a posthumous child, to ensure legal certainty and, the maximum extent possible, the realization of the parental project without prejudice to the rights of others involved.

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