THE RIGHT TO BE BORN

Mircea Gelu Buta*, Iulia Alexandra Buta**

Abstract
The permission for a child with malformations to be born could be considered a mistake? This is a new challenge placed on the border between ethics and law, between the force of the science and the fundamental anthropological values. In order to understand the specificity of such a situation it is necessary to evoke an already notorious case, known as the "Perruche Judgment", which the French justice tried to clarify. The different comments on the "Perruche judgment" generated the repercussions of this jurisprudence. Even if a certain number of consequences deserve to be claimed relative, some of them risk being prejudicial.

So, the litigation of a born child with handicaps risks generating another one, namely the appreciation of the conditions of pregnancy interruption out of therapeutic reasons.

Key words: bioethics, handicap, birth.

Introduction
In November 2000, the French Upper Bench decided to financial recover Nicolas Perruche, a child born with serious mental and physical handicaps. His mother contacted rubella during pregnancy, and she sustained that if the doctors would have diagnosed the disease, she had made decision to have the pregnancy interrupted.

The allowance of a child to be born can or cannot be considered a mistake? This is a new challenge between ethics and law, between the force of science and fundamental anthropological values. To understand the specificity of this case, let's follow the facts as they happened.

The facts
The house doctor indicates the graduation of the anti – smallpox antibodies of a mother (Ms. Perruche) pregnant for the second time, because on the skin of her first born, she noticed the emergence of an eruption. The laboratory that performed the tests concluded that the mother is immune to the rubella, and the fetus is not endangered. Under these circumstances, the house doctor considered that the pregnancy may be carried out to the term.

On January 14th 1983, when the small Nicolas was born, he was carrier of some severe neurological disorders caused by congenital rubella. After six years from

* Medical doctor in Pediatrics, Emergency County Hospital Bistriţa, e-mail: butamircea@yahoo.com;
** Student, 4th year, Law School UBB Cluj-Napoca, e-mail: julie_bisou@yahoo.com.
the birth of the sick child, on June 15th 1989, Mr. and Mrs. Perruche suited the house doctor and the analysis laboratory.

On January 13th 1992, the Court House from Evry pronounces the analysis laboratory guilty, and this one did not appealed the court decision, and also pronounces the house doctor guilty, forcing them to pay jointly damages in amount of 500,000 Francs for the prejudice caused to the child, and the amount of 1,851,128 Francs to the Health Insurance Company that financed the care of the small Nicolas.

The house doctor appealed, sustaining that the laboratory is responsible for the error. On December 17th 1993, the Appeal Court in Paris pronounced, sustaining that the claimer made a mistake “in fulfilling his contractual obligation of means” because he knew the desire of his patient to interrupt the pregnancy in case she would had been diagnosed with rubella. The same Court House considered that “the child’ prejudice is not in causality relation to the committed facts”, that is, the handicap was not caused by a medical mistake, but by the rubella virus transmitted by the mother, and the 1,851,128 Francs must be paid back.

This decision was invalidated by the First Civil Chamber of the Upper Bar on March 26th 1996 arguing that “the mistakes generated by the medical part induced the mother the false impression that she is immunized against the rubella virus, and these mistakes generated the handicap on the child”.

The case was further transmitted to the Appeal Court in Orleans that on February 5th 1999, in its quality of re-judging Instance pronounces by refusing the allowance of the child because of the absence of the causal relationship between the medical errors committed and the child’s handicap. The court notes that “the only consequence connected to the practitioner’s mistake is the birth of the child”.

Finally, Mr. And Mrs. Perruche addressed again to the Upper Bar that in the plenum session from November 17th 2000 decided in favor of an allowance for the parents and child. “Since the mistakes made by the doctor and the laboratory in fulfilling their contracts signed with Mrs. Perruche, hindered her the right to interrupt the pregnancy in order to avoid the birth of an handicapped child, the latter may pretend damages to repair the prejudice resulted in the handicapped child, and caused by the errors mentioned above.”

The Court decision generated at that moment a huge controversy among the legal, medical and media environments.

**Discussions**

Retaining the events in chronological order, as they happened, we could be tempted to believe it is a classical medical situation, when an error hinders the diagnosing in due time of a disease, capable to generate invalidating sufferance. Maybe just because of that, the decisions of the justice were so contradictory and finally controversy.

The fact that a family tragedy transformed itself according to the decision of a Supreme instance, into a decision with normative and universal value, determines us to agree the anthropologist Cliford Geertz, who said that „the law is a cultural system; she tells us stories about the culture that lead to her creation, and on her turn, she models it. Stories about who we are, where we are coming and where are we going. The law’s language and concepts become part of our current speech and influence the way in which we perceive the reality. ”

The discussion generated by the decision of the Upper Bar is that in the old fashion society appeared the false idea that “the handicap is an intolerable prejudice”; brought to the human person, and that the birth of a child with malformations
constitutes an unjustified error. The ones looking from outside into the legal system, consider that the mission of the judge is to equitably share justice, if the idea of justice dominates him. But what could be just for a judge may be unjust for someone else. This explains the diversity of opinions and decisions.

If the solution retained by the Plenum Session of the Upper Bar is generous, it becomes, in the same time, carrier of major dangers for the society. Isolated, the suggestion made by the Upper Bar, according to which the birth of an handicapped child constitutes a prejudice, may be qualified as “regrettable” but also “fundamentally severe” because it affect not only the fetus but also the new-born.

For a rightful appreciation of the whole affair, we need to carefully analyze the diversity of legal solutions emerged. The simple lecture of the legal decision is insufficient, because the solution must be analyzed within the actual legal context in which the medical practice develops.

Although the judges admitted the responsibility of the laboratory and of the doctor, in legal practice such a responsibility may only be established if three conditions are reunited. It is about admittance of the error of the person prosecuted, the damage incurred by the victim and the causal relationship between the mistake and prejudice. In this case, the first two conditions are acknowledged and the third one is still to argue.

The legal action was started simultaneously against the laboratory that performed the analysis and the doctor that asked for such an examination. They both made a mistake: the laboratory committed a mistake that brought along the elimination of the rubella diagnose, and the doctor did not offered, according to the experts of Mrs. Perruche, all necessary careful and correct care that she was entitled. More than that, the doctor did not fulfill his duty to inform and council the patient, so that she could have made a decision, fully knowing the situation, about the opportunity of an abortion. The prejudice brought to the child seems this way evident, and it might be interpreted as a mistake that could be damaged.

The discussion is still open concerning the causality relationship. In order to engage the responsibility of the laboratory and of the doctor, it had to be proven that those errors brought along the prejudice, precisely the child’s handicap. The Plenum Session of the Upper Bar admitted that if the abortion had occurred, the child wouldn’t have been born and wouldn’t have suffered the handicap, considered in this case the prejudice.

This reasoning may be contested because it is not possible to decide if the deeds of the doctor and of the laboratory caused the child’s handicap, because this is not due to medical errors. Even if the abnormalities had been detected by the laboratory, and the doctor had informed the mother, the handicap would have still been there. The reasoning could be totally different, just the doctor could have auctioned before the sickness in order to prevent such a pregnancy.

In this case, the handicap had originated in mother’s rubella. Because of this disease the child was born with malfunctions. No matter what is the manner to solve the problem, it is not possible to affirm that the medical mistakes generated the handicap. The allowance alone, on the base of damage and of punitive interests, without the evidence of a causal relationship, would permit the recognition of the child’s handicap.

It is obvious that the medical errors committed lead to the birth of the handicapped child, and not the handicap itself. If the laboratory and the doctor had correctly informed the mother, she would probably have had an abortion, and the
child wouldn’t have been born. In this situation, the appliance of the responsibility right cannot lead to the legal responsibility of the doctors, the solution being places within the ethical plan. But the final decision of the Court that suggests that the birth of a handicapped child is not a prejudice is difficult to accept in ethical plan. That is why the question is if the judges have the right to pronounce upon fundamental ethical problems. In case of a positive answer, one induces the idea of formation the magistrates for this kind of decisions.

It is true, that ethics, not being a science by itself, belongs to the whole world that is in equal measure to the judge, to the doctor and to the patient. We also know that the ethical reflection may not be certitude, reason for which the need for discussion and agreement between parties. In order not to influence the justice, it is necessary to form the magistrates in such a way as to have the capacity to pronounce, in full acquaintance of the cause, when they have to face legal problems that have ethical background, as the Perruche affair.

The simple suggestion of the fact the birth of an handicapped child may become a prejudice represent a dangerous message for the society, because the tradition leaves from the principle that the new-born, no matter if he is healthy or not, has the right to live, to be cared about to be accepted and respected by all the others.

The matter that still has to be clarified is represented by the allowance of the prejudice resulted from the handicap. In order to have the prejudice allowed it has to be demonstrated that the affection is of a particular incurable severity, the need for an abortion being fully justified.

Another problem that still needs to be discussed is if the handicap could be detected during the first 12 weeks of pregnancy, not taking the woman the right to have a therapeutically pregnancy interruption. Because the medical Courts refuse to make a list of these diseases and the couples ask for pregnancy interruptions in cases of minor malformations as the case of the hare-lip or the absence of the hand fingers, the jurisprudence should try to make the judges appreciate this situation fully aware.

The litigation of bearing a handicapped child risks generating another, precisely appreciation the conditions to interrupt the pregnancy out of therapeutically reasons. The advantage of introducing a legal control of the legal conditions to interrupt a pregnancy out of medical reasons may present a negative aspect. We should be afraid that this kind of jurisprudence stigmatizes the children born with severe handicaps or incurable diseases, and the parents will have the right to decide their birth.

**Consequences**

The comments around the Perruche affair generated repercussions about:

a) Civil liability of ultra-sound specialized doctors. „The ultra – sound became impossible to be practiced under the conditions in which they have to realize the pathological state of the patients ” (Israel Nisand), „in order to avoid the liability that doctor precaution could incur in order to plead in favor of the abortion every time when there is a doubt about child’s health, the decision Perruche leaves only one solution to the patients: to be morally responsible for the death, in order not to be responsible for life ”. (A. Pellisei)

b) Every time when the jurisprudence leads to doctor liability, we have to take the argument of relativity into account.

c) The responsibility of a practicing doctor may not be
contested unless it is based on a mistake related to him (malpraxis).

d) The “Perruche” jurisprudence may generate a legal action of the handicapped child against his/her mother, that out of different reasons did not had a pregnancy interruption. The reason is disputable because it is hard to admit that a child could appreciate if his/her mother did exercised or not the legally recognized freedom to have an abortion or not.4

e) There is a risk that the doctors systematically indicate abortions when they suspect a malformation. The argument seems still fragile, as the obligation of the doctor is only to inform the mother, the decision of an abortion belongs exclusively to her.

f) The problem of the malpraxis insurances is far from being a utopia and makes the terms of this debate even more complex. Every time when the responsibility of the doctors increases, the insurance companies may not increase the policy value. For the time being, this risk is hidden because, although the majority of the doctors pay their policies do not have any benefit. One thing is clear: the malpraxis insurances do not take over the costs for the handicaps, but the society does because in matters of insurances there applies the joint principle.

Final discussions

The technological modernism induces the mistaken belief according to which the doctors have the power to control not only life and death, but also the biological quality of the embryos, having this way the obligation to guarantee the parents a perfect child.

The fundamental problem consists in the fact that under certain conditions, the society accepts the suppression of the embryos carrying severe and untreatable disorders. The measure must be doubled by the ones born with different handicaps that have to be helped by the society. We still do not believe that the victim’s dignity could be restored by material advantages.

On the other hand, the interdiction of the abortions has dramatically implications for the contemporary medical practice. Among other, it leads to a condemnation of the pre-natal screening and implicitly of the abortion, practices that became the nucleus of the medicine but also of the social understanding of a responsible parent quality. Today, the society asks the biological evaluation of the unborn children and their abortion in case that they are found to be malformed. This a behavior considered responsible (?) both towards society, that does not have to support he costs for the caring of a handicapped child and the child in cause, bearing the idea that he/she won’t suffer because of this kind of burden5.

Today’s doctors are responsible for providing the information necessary to the parents so that these can action in full awareness about the wish to have or not the child. This sense of the parent quality, of course a perversion of the traditional sense, encourages the parents not to confront the challenge of loving and caring a handicapped child. These may be assured that they will have children as perfect as their cars. Still the fact that a child may be born with a malformation does not constitute a reason to kill a child; even he/she is still unborn.

The tradition has no sympathy for arguments that affirm that such a child will be harmed by the fact that he is permitted to live with a malformation. As the perspective is eternal life and not just a temporary sufferance, the child is given a great good together with the life, because
of the possibilities of experiencing the Holy Sacrum of the Church, no matter what associated harms appear.

At the end, we wish to bring forward the key question put by George Will: „Do we really wish a world in which there are children with Down syndrome, a world in which every person is 2 m height and practices sport? Are we that blind, that attracted by physical accomplishments in an over-saturated sport world, that we cannot see anymore the personal beauty and value radiating from the handicapped persons, persons that courageously fought with their condition, moral if not physical, and became winners? Our only reaction towards these living icons is the wish to abort them? More and more questioning we must admit we do. ”

This atmosphere imposes a special burden on the shoulders of the Servants of the Orthodox Church that preach about the sacred spirit of the human life and condemn the final solution of an unwanted life by means of abortion. Out of the experience of our orthodox priests there results that the decision to abort is taken before consulting the priest, since she knows that he will principally give a recommendation against the abortion. Our priests say: „It is easier to obtain the forgiveness than the permission “.

It is also important to underline the fact that the real Christianity means personal freedom, freedom in spirit that force to a responsibility of every decision to interrupt a pregnancy, first of all towards the mother. The same as the child she is bearing in her womb, the child is a person with its own rights and must work to its salvation by caring the burden before God in total dependency of His glory and forgiveness. Men can hardly imagine the loneliness and sadness the women suffer when they must make the decision to have an abortion. Every woman is mother since conception of the child, and not after child’s birth. That is why, when she puts end to the life she carries in her womb, a part of her is dying too, and sufferance is long and deep.

Bibliography


Notes

[1]. It is about the Gregg Syndrome, a complex of genetically severe abnormalities that groups neurological disorders, deafness, eye-lesions, hearth malformations, motor deficit, that impose the permanent assistance from a third.
[2]. It is about the decision of a laic institution.
[3]. It is still suggested by the decision in the case Perruche, wherefrom the explanation of the virulent reactions when announcing this decision.
[4]. There exists a whiteness of Cioran in the volume Caiete III, Ed. Humanitas, Bucharest, 1997, pg.90: „Something terrible that my mother told me one day – I would have aborted you if I knew “. 
For example, the Court Houses in some jurisdictions sustained that only parents may be entitled to receive the costs incurred by rising of a child with congenital malformations, costs that they could have avoided if they had received enough information that would have permitted them to abort the unborn child, but they allow the child to receive costs generated by its sufferance. There are situations in which the Court Houses were forced to give solutions in processes in which the children suited their parents for the simple reason that they did not abort them.

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