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Discussions on the Content of the Right to Private and Family Life from the Perspective of Reproductive Rights

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Abstract: *Since the ancient times, the birth of a child has been a special event for the child's family and from a social viewpoint. It is simplistic to consider the reproduction as an event that belongs exclusively to the private life of the couple because it is considered that there has always been an interest on the part of society regarding the context in which its future members come into the world. The issue of the reproductive rights* ***is of particular relevance in this day and age****, especially in the context of the new reproductive technologies, which transform the issue from one that is already complex and sensitive, to one that urgently requires the clear establishment of some fundamental axes at the level of the principles of law; however, we must appreciate that the foundation of any legal protection is precisely the recognition by the legislator of these rights. Therefore,* ***the question from which we start*** *in our approach is whether we can recognize the per se existence of reproductive rights, and if so, what would be their basis and the reasons that could lead to the recognition of such rights.* ***The subsequent questions*** *that arise are the following: what are the limits of these rights, who are their holders and what is the type of legal protection that must be granted to them?*

Keywords: *surrogacy, reproductive rights, human rights, right to private and family life.*

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Introduction

During the last 20-30 years, different viewpoints have been formulated in the sociological literature (Huidu, 2022) regarding the opportunity for the society and, implicitly, the state to monitor the human reproduction more carefully. These ideas were also taken up by the sociology of law, later by other branches of law, as social cases (Huidu, 2022) created a financial pressure on society that can be avoided through responsible reproduction. This pressure comes from the fact that the abandonment of children by needy families or the lack of involvement of families in educating children creates members of the society who are not autonomous and who cannot add value to the society in which they live. Moreover, they become consumers of the society's resources and the situation perpetuates itself endemically and touches all the aspects of the state budget, from the budget for education to that of social insurance, medical insurance and pension insurance.

The specialists in the sociology of law argue that this way of looking at the human reproduction is a reflection of the postmodern society, marked by the individualism and the cooperation within the limits in which what is given is rewarded by the fact that the giver receives in turn a set of benefits from the interrelationship with the other members of the society. Against this background, the interests of some minority groups to have a series of rights recognized turn into real campaigns to increase the level of awareness of the needs of those groups at the social level, as well as to increase the social empathy in order for these groups to legitimize themselves to have access to resources.

The reproductive rights, we believe, must be seen precisely in this broader context. Traditionally, the right to have children was included (Alta Charo, 2002) in the field of the right to private and family life, but in recent years the idea according to which the human reproduction and its correlative right to reproduction could regard a separate right independent of the right to have a family has gained increasing interest. In the legal sociology there is already a debate (Luo et al., 2022) about the sociology of reproduction, as a branch separate from the sociology of the family, so it is possible for us not to be far from the moment when a new branch of law (the law of reproduction) will claim to be recognized as a branch different from the traditional branch of the family law.

The right to private life and family life from the perspective of the international human rights documents on the African continent

Along with rights such as the right to have a home, to association, to correspondence, to freedom of thought, conscience and expression, the right to have a family and to be protected against any interference in the private life is a form of recognition of the social respect which any individual enjoys. The right to private and family life is provided by the most important international instruments for the protection of human rights, as we will explain below.

Article 18 of the African Charter of Human and Peoples' Rights states that: „The family is the natural unit and the basis of the society. It will be protected by the state, which will take care of its physical and moral health. The state has the duty to assist the family which is the custodian of the morals and traditional values recognized by the community" (Organization of African Unity, 1981). The provisions of the Charter have been invoked by certain activists (Faber & Puschke 2001) for the reproductive rights of the LGBTQ community and interpreted to mean that the lack of any discrimination against women includes the right to have genetically related children of lesbian couples, just as the same provisions of the Charter have been invoked by members of the homosexual community (Hadiarty, 2023).

These provisions are supplemented by article 10 of the African Charter on the Rights and Welfare of the Child (Organization of African Unity, 1999). Thus, as we highlighted in the introduction of this chapter, we note that this international document expressly states that the state has a direct interest in how children are raised and educated, and when it is considered that their caretakers cannot responsibly exercise the activity of raising minors, and then the state (society) considers itself entitled to intervene. Considerations of this type fueled the debates regarding the rights of infertile people to have children through surrogacy, while many people (De Sousa Gonçalve, 2022) highlighted that the example offered by a homosexual family as a lifestyle will negatively impact the harmonious, psycho-social and sexual orientation development of the future child.

The relationship between the American Convention on Human Rights and the UN conventions on reproductive rights as part of the right to private and family life

Article 11 of the American Convention on Human Rights states that: „No one shall be subjected to arbitrary or abusive interference with his private life, family life, his home, or his correspondence, or shall be subjected to

unlawful attacks upon his honor or reputation. Every person has the right to the protection of the law against such intrusions or attacks" (Inter-American Specialized Conference on Human Rights, 1969). We note that this convention includes in the sphere of rights related to the private life, according to the marginal note of article 11 (which is entitled „the right to private life") one's home, correspondence, honor, reputation and family, but makes no reference, i.e. it does not specifically individualize the right to reproduction.

The International Covenant on Civil and Political Rights provides in art. 17, that „no one shall be subjected neither to arbitrary or unlawful interference with his private, family, home or correspondence, nor to unlawful attacks upon his honor and reputation" (United Nations General Assembly, 1966), and in article 23 the fact that „the family is the natural and fundamental unit of society and it has the right to protection from society and the state. The right of men and women of marriageable age to marry and found a family is recognized. The States Parties to the present Covenant shall take appropriate measures to ensure the equality of rights and responsibilities of spouses with respect to marriage and its dissolution. In the event of dissolution, measures will be taken for the necessary protection of any children" (United Nations General Assembly, 1966).

Thus, on the one hand, it is understood (Brodeală & Spiess, 2022) that when the Covenant refers to the right of men and women to found families, it does not limit that right to marriage between a man and a woman; by correlating the provisions of the covenant with those regarding fighting any form of discrimination, it was interpreted that the right to found a family, as defended by the Pact, can also be extended to homosexual couples, as well as to those people who wish to form a single-parent family. Over time, this interpretation has been expanded (Luo, 2022) to include married people who used artificial reproductive techniques to create embryos in vitro, but after the divorce was pronounced. Considering that in homosexual couples the reproduction can only be achieved through the surrogate mother, and in lesbian couples only by calling on a sperm donor, implicitly the covenant is invoked (Brugger, 2012) to demand the liberalization of the aforementioned practices and also to support these couples through fertility programs financed from the health insurance budgets of the signatory states.

Also, the supporters (Bromfield & Smith, 2014) of the theory of the emergence of life from the moment of conception bring the covenant in support of the idea that states have a positive obligation to introduce specific procedures in the domestic legislation to ensure the taking over of custody of cryopreserved embryos by one of the couple members, in case of the dissolution of the parent couple. So, such arguments support the thesis

according to which (Storrow, 2018) these procedures should not be any different from those governing the conduct of an ordinary child custody proceeding.

The international convention on the protection of the rights of all migrant workers and their family members provides, in article 14, that „No migrant worker or member of his family shall be subjected to arbitrary or unlawful interference with his private life, his family, his correspondence or other communications or to unlawful attacks upon his honor and reputation. Every migrant worker and member of his family shall be entitled to the protection of the law against such interference or attack" (United Nations, 2018). The provisions of this article have been interpreted extensively by members of interest groups that support the medical tourism. Thus, it is considered that if a person does not have, in the state of origin, the legal possibility to resort to a certain medically assisted human reproduction treatment, but then the person immigrates to a different country state, where that procedure is allowed, then the person has the right to perform that procedure. The medical tourism involves traveling from the country of origin, town or region of residence to a locality, region or country where it is possible to perform a certain medical procedure in a particular case of assisted reproduction.

The medical tourism is perceived (Crozier, 2014) as a way to circumvent the legal provisions in the country of citizenship, which prohibit certain medical practices. A form of medical tourism involved situations where patients, because of the prolonged duration of medical procedures, temporarily move from their place of residence and resettle during the medical procedures in the place where these are to be carried out. During their stay in that locality, in order to ensure sources of income, they fall into the field of work, thus coming under the auspices of this Convention. As far as we are concerned, the interpretation seems to be difficult to support, considering the spirit of the Convention and the correlated interpretation of article 14 of the Convention and its regulatory object.

We note that all the conventions listed above resume what, in a previous form, had been proclaimed in the Universal Declaration of Human Rights, in article 12 (United Nations, 1966). By arbitrary interferences we mean those that do not have a justification, and the accepted justification is represented by the protected values: the good or the general interest, the public order and so on. Or, with regard to the medically assisted human reproduction, it was argued (Davies, 2017) that the prohibition of the surrogate motherhood or even its formal recognition, but without the assumption by countries of any positive obligation to ensure the easiest

exercise of this reproductive right, represents arbitrary state interference in the family life. Other authors (Ergas, 2013) pointed out the contradiction in terms of this argument: as long as the state is required to assume a positive obligation to grant access to the resources collected by the state from all the members of the society to people who wish to use the innovative techniques of assisted reproduction, this is not an interference of the state, but a call to action from the beneficiaries, addressed to the state.

Article 16 of the Declaration states that: „Men and women who came of age, without any limitation of race, nationality or religion, have the right to marry and found a family. They have equal rights in marriage, during marriage and at its dissolution" (United Nations, 1948). We note the limited area of discrimination criteria to which the text of the Declaration expressly relates: the race, the nationality and the religion. The sexual orientation, the choice of a certain lifestyle and the biological age are not part of these criteria.

Article 5 of the American Declaration of the Rights and Duties of Man practically takes over what is provided by the Universal Declaration of Human Rights: „Everyone has the right to the protection of the law against abusive attacks upon his honor, his reputation and his private and family life" (Ninth International Conference of American States, 1948). Then, article 6, states that: "Everyone has the right to found a family, the basic element of society, and to receive adequate protection" (Ninth International Conference of American States, 1948). The supporters (Gerber & O'Byrne, 2015) of the reproductive rights in the form of unlimited autonomy to decide about one's own reproduction, outside of any regulation by the state, emphasized that the phrase „any person" should not be interpreted in its restrictive sense, but in its extensive sense, since nothing in the text of the convention does indicate that it would remove from its protection the infertile people or the members of the LGBTQ community, or other categories of people who experience difficulties in the reproductive process.

The European Convention on Human Rights and its applicability within the non-traditional family

The most important international document which Romania is interested in is the European Convention on Human Rights (Council of Europe, 1950), which in article 8 provides: „Every person has the right to respect for his private and family life, his home and his correspondence". These provisions are supplemented with those of article 12, which states: „Starting with the age established by the law, men and women have the right to marry and found a family according to the national legislation that regulates the exercise of this right" (Council of Europe, 1950).

In the (specialized) literature on the human rights, an opinion has become embedded (Bîrsan, 2010) according to which the states have, with regard to the right to found a family, a negative obligation not to do anything that would hinder the exercise of the rights that involve the founding of this family: the right to marriage, the right to interpersonal relations, the right to have children, the right of parents to have relationships with their children, the freedom of parents to choose the best way to raise and educate their children. Starting from here, some authors (Luo et al., 2022) argued that it should be outside the state's concern how parents choose to bring their children into the world: through natural reproduction or medically assisted reproduction, with a surrogate mother or with gametes from donors, by using genetic engineering techniques or not.

The European Court of Human Rights has ruled repeatedly (ECHR, 1978) that any interference with the rights protected by this article of the Convention is admissible only to the extent that it proves to be necessary in a democratic society. From here onwards, the activists for the liberalization of the medically assisted reproduction, including the surrogate motherhood, believe (Hadiarty, 2023) that the limitations on the allocation of subsidies from state budgets for the financing of *in vitro* fertilization cycles with gametes from the donor and the surrogate mother are violations of the reproductive freedom of individuals.

Conclusions

With regard to the right to found a family, a negative obligation not to do anything that would hinder the exercise of the rights entailed in the fundament of this family, therefore the question arises whether it should be outside the state's concerns the manner in which parents choose to bring their children into the world: through natural reproduction or medically assisted reproduction, with a surrogate mother or with gametes from donors, by using genetic engineering techniques or not.

The content of the right to private and to family life is extremely complex and it involves, among other things, the right of the individual to establish and develop relationships with his peers, the integration of the individual's personal and social life, the sexual identity, the sexual orientation and the sexual life, the right to private social life and so on. The right to family life mainly means the right to have a family, a classical family, consisting of two parents or a single parent, based on relationships of affection and mutual support. Regarding the sexual minorities, the former European Commission of Human Rights established that their right to personal relations with their partner does not represent family life, but it is part of the private life.

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