European Journal of Law and Public Administration
ISSN: 2360-6754 | e-ISSN: 2559-7671
Covered in: Erih Plus; HeinOnline; CEEOL; RePEc; CrossRef; Google Scholar; KVK; WorldCat; ICI Journals Master List - Index Copernicus; EBSCO.

2024, Volume 11, Issue 2, pages: 280-290 | https://doi.org/10.18662/eljpa/11.2/249

Considerations on the Need to Legislate in the Field of Surrogacy

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Abstract: *Through scientific research, humanity transcends the boundaries of its biological condition and the genetic potential of the species, as the evolution of medical technologies makes possible certain modifications of the imperatives drawn by the limits of human evolution (Vlad, 2019). Human creativity is no longer limited to art, but also manifests itself in the scientific field, when scientists decide to no longer submit to species predeterminism, to oppose it, with all the ethical dilemmas that result from this, as well as all the legislative innovations involved. One field that has generated such transformations in recent years is medically assisted human reproduction, in all its forms, as there are numerous medical techniques for reproduction with the help of contemporary medicine, some of which are more controversial than others. Some of these techniques have already entered common medical practice, such as fertility and pregnancy maintenance treatments, while others await ethical validation to be implemented on a large scale. A third category is that of treatments that are still in the experimental stage, such as solo reproduction (Cutaş & Smajor) or cloning (Taylor, 2005).*

Keywords: *surrogacy, legislative process, medically assisted human reproduction.*

How to cite: Terec-Vlad, L. (2024). Considerations on the need to legislate in the field of surrogacy. *European Journal of Law and Public Administration, 11*(2), 280-290. https://doi.org/10.18662/eljpa/11.2/249

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Introduction

The medically assisted human reproduction is a set of medical techniques and technologies which can help an infertile couple achieve a viable pregnancy and the birth of a child (Morar & Dura, 2005). An infertile couple is considered to be a couple that cannot conceive naturally after a trial period of at least one year, regardless of the cause of infertility (male or female) (Buțureanu & Lupșan, 2001). The notion of "extreme reproductive techniques" includes the medically assisted human reproduction techniques which involve, in addition to in vitro fertilization, a series of interventions on the human embryo from the category of genetic engineering. The concept of "extreme reproductive techniques" occurred in the early 2000s, in the works of some researchers such as R. Schoysman (2003).

The surrogacy (also known as *surrogacy maternity* or *surrogacy*) is the practice of medically assisted human reproduction through which an infertile couple turns to another woman to carry the pregnancy, since the woman who is part of the infertile couple, for medical reasons, cannot carry the pregnancy herself (Teman, 2010). The surrogacy has two forms:

a. *The traditional surrogacy* – where the surrogate mother provides the egg and the fertilization occurs in vivo (in the woman's body), with the sperm of the man from the infertile couple (Bhatia et al., 2009);
b. *The gestational surrogacy* – where the fertilization occurs *in vitro* (outside the surrogate mother's body), and the embryo created *in vitro* is then transferred for implantation into the surrogate mother's uterus; in this case, the sperm and the egg can come from members of the infertile couple or they can come from sperm/egg donors (Brinsden, 2003).

The surrogacy has been classified by some authors (Huidu, 2019), from a legal viewpoint, in the category of "techniques related to medically assisted human reproduction", these techniques being a middle category between the actual reproductive techniques that involve medical assistance (fertility treatments, techniques for insemination of the egg *in vivo* with the man's sperm, in vitro fertilization followed by the embryo transfer into the uterus) and "the techniques derived from medically assisted human reproduction" (which imply, in broad terms, extreme reproductive techniques, whose character derived from RMA is given by the fact that these techniques can be used for both reproductive and non-reproductive medical purposes).

The related nature of the surrogacy with the actual techniques of medically assisted human reproduction is given by the fact that the surrogacy is more of a social practice (possible thanks to innovative medical technologies, such as the in vitro fertilization), than a medical technique *per*

se and through this social practice specificity it arouses interest from a legal standpoint.

The surrogacy as a social phenomenon that must be legislated in Romania

The issue of surrogacy is topical in Romania, reaching the public's attention mainly through the possibility that the gestational surrogacy gives people of homosexual orientation to have children, meaning that a series of intense opposition reactions have been noted at a social level - we relate here to the rally in support of maintaining the traditional family, as the only family formula accepted by the law, held in the city of Oradea in 2016 (Ionescu & Magradean, 2016).

Even though reactions at the macro-social level only occurred in 2016, the issue of surrogacy was not foreign to the Romanian legislator. Since 2011, the surrogacy had been provided as a reason for excluding infertile couples from subsidies offered by the health insurance budget for in vitro fertilization procedures. The condition imposed by the National Public Health Program no. 765/2011 (Ministry of Health, 2011) was that the embryos come from the infertile couple (not from donors) and that the pregnancy is not carried by a surrogate mother. In other words, the surrogacy was accepted by the legislator, it was not outlawed, but it was not actively supported by the Romanian state either. This approach has been maintained in all National Public Health Programs to date.

Starting from this, the question arises, of course, as to why the surrogacy was excluded from the list of practices subsidized by the health insurance budget, which leads us to think about the idea of the state's positive duty to ensure the protection of the human rights (from the perspective of the right to reproduction), including in terms of surrogacy. Currently, in Romania there is a legislative vacuum in the matter of surrogacy, the few applicable legal provisions being disparate and not likely to outline a coherent and unitary framework.

However, the surrogacy is a continuously developing practice in Romania. Unfortunately, there have also been signs of the diversion of the purpose of surrogacy towards illicit activities, which involve the exploitation of the reproductive capacity, Romania often being a transit country or a country of recruitment for human trafficking networks (which exploit, in an illicit manner, the demand for surrogacy existing at international level) (DIICOT, 2012)

Against the background of the legislative vacuum at the level of organic laws, we focus on the constitutional law, which provides, in article

20, that the civil rights and freedoms are applied and interpreted in Romania, by reference to the international agreements and treaties to which our country is a party, so that, in paragraph 2 of article 20, it is provided that "if there are inconsistencies between the agreements and the treaties regarding the fundamental human rights, to which Romania is a party and the internal laws, the international regulations prevail, except in the case where the Constitution or internal laws contain more favorable provisions" (article 20, article 20 paragraph 2 of the Romanian Constitution).

Therefore, an analysis from the perspective of international human rights law appears to be necessary, which would clarify the status of the surrogacy among the human rights - more precisely of what we today call the reproductive rights. In order to gain practical utility, we believe that the analysis must take into account both the international treaties and conventions to which Romania is a party, therefore which are applicable in our country, as well as the jurisprudence of international courts whose jurisdiction is recognized by our country.

The importance of legislating the surrogacy in the current context

The issue of the reproductive rights is of particular relevance today, especially in the context of the new reproductive technologies, which transform the problem from an already complex and sensitive one, into one that urgently requires the clear establishment of fundamental axes at the level of legal principles; however, we must state that the foundation of any legal protection is precisely the recognition of such rights by the legislator. Therefore, the reasoning from which we start in our approach is whether we can recognize the existence *per se* of reproductive rights, and if so, what would be their basis and the reasons that could lead to the recognition of such rights (Collins, 1994). The subsequent dilemmas that arise are the following: what are the limits of these rights, who are their holders and what type of legal protection should be granted to them?

Legislation in the field of medically assisted human reproduction is taking shape among the states of the world, even if some are still reluctant to issue laws in a constantly changing and controversial field, because the issue is not only complex, but also extremely sensitive from an ethical point of view. Reproductive rights cannot be protected if it is not recognized that they exist. Therefore, the question arises whether reproductive rights are autonomous or fall within the scope of other rights, already recognized by law. Depending on the answer to this question, it is also possible to determine what the limits of reproductive rights are, who the persons to whom these rights should be recognized are and how they should be regulated.

From a theoretical standpoint, we believe that the most optimal approach is to start from an analysis of the phrases *the right to private and family life*, as in the recent years a series of innovative legal theories have emerged which promote the reproductive rights, and the key aspects of the arguments brought by the supporters of these theories help to characterize the reproductive rights and their foundation in the human rights system.

Regarding the approach to the comparative law and the *de lege ferenda* aspects, we point out that Romania has not yet developed a law dedicated to the surrogacy; therefore the legislative models of other states can be important sources of inspiration for the Romanian legislator. However, when developing a law on surrogacy, the Romanian legislative specificity must be taken into account and any new regulations must be harmonized with the national legal system.

A first stage in the development of a normative act is to identify the object of legislation and the limits of the legislation, by reporting to this object. As a common feature in the legislative process, the legislators from countries that have already enacted special laws in the field of surrogacy have focused on aspects that are of general, principled importance and which we believe can represent as many axes of legislation for the Romanian legislator. We relate here to issues such as: the prohibition of the commercial surrogacy in comparison with the surrogacy for altruistic reasons, the acceptance or the non-acceptance of the traditional surrogacy compared to the gestational surrogacy, the tolerance of the medical tourism, compared to the possibility recognized only for the citizens of the respective country to resort to this practice of medically assisted human reproduction and so on.

It should also be noted that the legislative solutions in the countries that already operate with special legislation in the field of surrogacy are not always the same; often the options of legislators in various countries are even contradictory. In federal countries, such as the USA or Australia, we can notice various solutions and options within the borders of the same country, from state to state. We will find such solutions on issues such as issuing birth certificates for children born through surrogacy, the imposition or the non-imposition of a minimum age to conclude surrogacy contracts, the implementation of the condition that the surrogate mother has at least one child of her own and so forth.

One other issue that needs to be discussed is the question of the appropriateness of regulating the surrogacy, as well as the limits of this regulation, given that the decision to have a child and the way to become a parent has traditionally been considered a matter of the couple's intimacy, that is not an area of life in which the legal interference is justified. However,

the technological evolution today makes the collaborative reproduction possible, with the reproductive process no longer involving only the parental couple, but also other people essential for the success of the reproductive act (medical team, gamete donors, surrogate mother, etc.).

When we discuss the limits of the law's interference in the private life of individuals, we naturally also discuss the nature of the norms through which the law establishes mandatory rules and the types of sanctions applicable in case of violation of legal obligations or prohibitions. In order to distinguish the nature of the norms through which the legislation will be enacted (imperative or dispositive), as well as the type of sanctions applicable (nullity, damages, unenforceability or even criminal sanctions), it is necessary to first establish the nature of the rights whose protection is intended to be granted by means of legal texts and the seriousness of the violations. In other words, before legislating, it is necessary to conduct an analysis from the perspective of the human rights and the most efficient legal mechanisms to ensure not only their compliance (i.e. the absence of violations), but also their effectiveness/efficiency (in other words, the effective possibility of exercise).

The legislative experience of approximately 100 countries that have legislated in the field of surrogacy will help to outline a macro-level picture of how various countries have responded, from a legislative viewpoint, to the issues indicated above, which will highlight the differences in legislative policy and the various legislative models adopted by countries for the recognition, protection and exercise of reproductive rights through the surrogacy.

The regulation of the surrogacy in Romania must be done by capitalizing on legislative models from other countries, which are legally compatible with the Romanian legal system and with the legislative tradition of the national legal system. From the very beginning, we would like to note that the premise from which we start is that the national law is unclear (it contains disparate provisions, as a result of the interpretation of which it is difficult to draw clear-cut conclusions regarding which reproductive rights are recognized and which are not recognized, as well as for which categories of persons), incomplete (which makes the few legislative references that currently exist difficult to apply in practice) and uncorrelated with the current regulation of substantive and procedural rights in the Romanian legal system.

The fundamental rights involved in the practice of surrogacy

The right to resort to medical technology to conceive a child derives from the right to have a family, and due to its derivative nature, it is a relative right, not an absolute one. What is also of interest, in order to issue a pragmatic legislation, is the classification of this right as positive (which

would mean that the state must take active measures to ensure it's exercise) or negative (which would only imply an abstention by the state from any violation of such a right).

A negative right can be freely exercised by any person, just like a positive right, but unlike the latter, it does not need the cooperation or assistance of the state in order to be effective. For example, in the case of a positive right, if the state does not provide the financial assistance, the right cannot be exercised. As a negative right, the legislation on the organization of medical activity would only target aspects regarding the safety of medical procedures, not their opportunity or the associated ethical dilemmas. The legislative vacuum is not an optimal solution today, given the activity of numerous networks of trafficking in persons and human tissues or cells, which pray on reproductive exploitation.

If the right to reproduction is a positive right and will be viewed as such within legislative policy, then the state will not only have to recognize the legal effects of medically assisted reproduction, but will also have to create laws that ensure the protection of individuals (such as, for example, recognizing the citizenship of a child born from surrogacy in a foreign state). Romania has refused to finance in vitro fertilization with sperm or gametes from donors or through surrogacy (article 45 paragraph 1 of Law no. 95/2006 on the health reform), so from the interpretation of this legislative attitude (also see G.D. no. 1388/2010 on the approval of national health programs for 2011 and 2012, chapter IV) we can conclude that the Romanian legislator sees reproductive rights as negative rights.

The right to state funding for a successful birth through in vitro fertilization is recognized only for couples in which the parents are genetically related to the child that will be born (by providing the gametes), and the woman who gives birth to the child is the one who will raise it and has also provided the egg (see Government Decree no. 124/2013, Government Decree no. 206/2015, Government Decree no. 155/2017 and Government Decree no. 140/2018, that promote the legislative concept that the genetic mother, the biological mother and the social mother must be one and the same person, this vision being tributary to the traditional conception of parenthood). At an international level, the concept that the right to medically assisted human reproduction is a negative right seems to be the general attitude, with no obligation on the state to finance medical procedures, so that "the exercise of procreational rights may be significantly restricted by the economic and social context" (Falasco, 2005, 275). The question arises whether there are several groups of infertile people and what are the differences between them, respectively whether there should be

differentiations at the level of legal treatment, depending on the cause for which a person cannot conceive. Thus, if the person is in a heterosexual relationship, which, from a biological point of view, creates the premises for successful reproduction, but certain diseases prevent them from reproducing, then medical help, possibly with state funding, is related to the person's right not only to family life, but also to health. If, on the other hand, the person cannot reproduce because they have chosen a lifestyle that prevents them (relationships with people of the same sex, did not want to reproduce and have exceeded the age of natural biological reproduction), it is possible that the same type of protection of the right to have children is no longer justified, because no right to health is violated if they are denied funding.

It is important to understand specifically what right is being defended by that legislation: the right to reproduction or the right to health. If what is defended at the legislative level is the right to reproduction, then a positive obligation of the state to financially support the medically assisted reproduction of people who cannot reproduce due to their lifestyle cannot be supported, because there is no positive obligation of the state to provide them with medical assistance, not being the case of an actual illness. Therefore, from the perspective of this category of people, the right to medically assisted reproduction is a negative right, based on which the state only has to ensure that they will not be stopped from freely exercising this right.

Conclusions

Human rights protection must be done without discrimination, so the question arises whether by recognizing a positive right to reproduction for heterosexual couples, but not for elderly people and same-sex couples, somehow implies discrimination against the latter. The problem becomes even more difficult to solve when the fair distribution of resources is raised. In a society where there are not enough funds to cover the needs of people already cared for in the social work system or to provide the necessary medication free of charge for chronic diseases, it seems unfair to grant a positive right to reproduction to people whose inability to conceive is due to a personal lifestyle choice that is incompatible with reproduction.

Excessively traditionalist legislation will affect social balance, as reproductive minority groups assert their position and needs in the public space. Excessively innovative legislation is likely to create social conflicts, if the society for which it is legislated is not prepared to accept the new social and reproductive realities that have necessitated that legislation. Any legislation must be preceded by detailed sociological studies on the social acceptability of innovative reproductive technologies, as well as on the

willingness of society to finance the exercise of such rights from public state funds. This need to legislate is felt not only in the matter of surrogacy, but of reproductive rights in general, regardless of the technology used.

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