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THE "MARKET" OF HUMAN REPRODUCTIVE CELLS IN ROMANIA

Carmen Tamara UNGUREANU[1]

Abstract

In Romania, the donation of human reproductive cells (sperm and eggs) can only be done for altruistic and therapeutic purposes. Even so, a lawful market of reproductive cells functions, as part of medically assisted human reproduction techniques, in which Romanian citizens are involved. We will first analyze the legal status of the contracts regarding human reproductive cells (1), so that in the second part of the study we will show how the reproductive cell market works for persons of Romanian citizenship (2).

Keywords

Human reproductive cells (sperm, eggs); contract of reproductive cells, donation of reproductive cells; fertility tourism; medically assisted human reproduction.

Introduction

In Romania, cells of human origin, including human reproductive cells, cannot be the object of legal acts/contracts with the purpose of obtaining financial gain or other kind of benefit. According to article 66 of the Romanian Civil Code (Law no. 287/2009 regarding the Civil Code), with the marginal title "Prohibition of patrimonial acts", „Any acts whose object is to confer a patrimonial value to the human body, its elements or products are sanctioned with absolute nullity, except for the cases expressly stipulated by law.". According to the special legislation[2], the donation of human cells

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[2]Article 144 of Law no. 95/2006 on the health reform, TITLE VI Harvesting and transplantation of organs, tissues and cells of human origin for therapeutic purpose> CHAPTER II Donation and donor of organs, tissues and cells of human origin, republished in the Official Gazette of Romania, no. 652, 28.08.2015, as subsequently amended and supplemented.

can only be done for therapeutic purposes. Donating reproductive cells for the purpose of obtaining material gain or other benefits is a crime and is punishable by imprisonment or, in certain cases, by paying a fine[3].

However, a market of reproductive cells exists in Romania. This assertion can lead to the idea that such a market can only work by breaking the law, with consequences of a criminal nature. We will not analyze, however, the illicit side of the human reproductive cell market, which undoubtedly exists, but the market that legally functions under the conditions set by domestic and international trade laws in force. We will only focus on the human reproductive cells trade, in the context of their use in medically assisted human reproduction techniques, in which Romanian citizens are involved. To this end, we will first try to establish the legal status of the contracts regarding human reproductive cells in Romania (1), so that in the second part of the study we will show how the reproductive cell market works for persons of Romanian citizenship (2).

1. The legal regime of contracts having as object human reproductive cells[4]

Can human reproductive cells (sperm and eggs/ovules) be object of contracts? What kind of contracts? Are these contracts legally valid?

[3] According to article 156 of Law no. 95/2006 on the health reform, as subsequently amended and supplemented: "(1) The act of a person of donating organs, tissues or cells of human origin, for the purpose of obtaining financial gain or another kind of benefit, for himself/herself or for a third party is a crime and is punished by imprisonment from 3 months to 2 years or by a fine.".

(2) Forcing a person to donate organs, tissues or cells of human origin is a crime and is punished by imprisonment from 2 to 7 years and interdiction of certain rights.

(3) Publication or mediatization of announcements regarding the donation of organs, tissues or cells of human origin, for the purpose of obtaining financial gain or another kind of benefit, for himself/herself or for a third party is a crime and is punished by imprisonment from 6 months to 3 years or by a fine.". According to article 157 „(1) Organizing or carrying out the harvesting of organs, tissues or cells of human origin for transplant in order to obtain financial gain or another kind of benefit for the donor or organizer, is a crime and is punished by imprisonment from 2 to 7 years and the interdiction of certain rights. (2) The purchase of organs, tissues or cells of human origin for the purpose of resale is punished as provided in par. (1). (3) The attempt is punished.".

[4] A part of this article is included in a larger study presented at the National Conference with international participation "Legal Perspectives on the Internet", 3rd Edition, The Evolution of Law through Technology, October 26th, 2019, Iasi, Faculty of Law, "Alexandru Ioan Cuza" University of Iasi, with the title *Cyber-commodification of human being: an international commercial law perspective;* the study (in Romanian language) was published in theScientific Annals of "Alexandru Ioan Cuza" University of Iasi, Juridical Sciences Series, Supplement 2019.

In answering all of these questions and, finally, establishing the legal regime of the contract having as object sperm or eggs, we will start from the regulation of human reproductive cells.

1.1. Regulation of human reproductive cells in Romania

At an international level, there is a convention of the Council of Europe dated back in 1997, namely the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Council of Europe), known as the Oviedo Convention, which stipulates in art. 21 that the human body and its components cannot give rise to financial gain. Romania ratified the convention in 2001 (Law no. 17/2001), and the legislation on the subject subsequently adopted is in full accordance with it. In case there are inconsistencies, according to art. 4 paragraph (2) of the Romanian Civil Code, the international treaties on human rights are applied with priority (unless the domestic law contains more favorable provisions).

In the European Union (hereinafter, the EU), the reproductive cells market is not regulated by an European act (regulation or directive). Each Member State has its own legislation (ESHRE, 2017), which ranges from the prohibition of egg donation (Germany, Norway), anonymous donation (France, Italy, Slovenia, Spain), or non-anonymous donation, as provided for in the United Kingdom, Finland or Sweden, where donor identification data are recorded in special registers, which can be transferred at a specific time in the future to children conceived using this procedure, to become aware of their genetic link.

In *Romania*, as an EU Member State, as we have already shown, any acts aimed at conferring a patrimonial value to the products of the human body are struck by absolute nullity; the reproductive cells can only be donated for therapeutic purposes; donation for the purpose of obtaining financial gain or other benefits is a crime. Therefore, at the legislative level, Romania falls into the category of states that allow the donation of cells (sperm and eggs) only for altruistic purposes, without any kind of compensation.

Natural persons having their habitual residence in an EU Member State (including Romanian citizens) may, however, travel freely under European law (Directive 2004/38/EC). They can choose to obtain / "purchase" or donate sperm and eggs and to undergo medically assisted human reproduction procedures in any of the states with more advantageous conditions, depending on the pursued goal, which facilitates medical tourism

towards states with a more permissive / friendly legislation (inside or outside of the EU).

European Commission documents show that in the EU, relating to medically assisted human reproduction with a donor, the principle of voluntary and unpaid donation of human cells applies[5].

1.2. Characterization of the contract having as object human reproductive cells. The (in) alienable character of the object of the contract

The unanimously accepted international denomination of the acts by which human reproductive cells are transferred is that of *donation*. However, the concept has different meanings in the legislation of different states. Mainly, in states that allow the donation of human reproductive cells, it is considered that donation can be done either for altruistic or commercial purposes. If the purpose is altruistic, then the donor does not seek to obtain anything in return, but his/her act is purely humanitarian, aiming at helping others. If the donation is commercial, then the donor usually pursues a consideration in money. Thus, the term of "donation" becomes inappropriate and incompatible with both the meaning of the term in the legal language and in the common language, which is giving something with no compensation.

In the EU, the donation of reproductive cells, if allowed, can only be done for altruistic purposes. However, the application of the principle of voluntary and unpaid donation proclaimed by the European Commission varies across the EU Member States. In many of these, the payment of financial or other compensation of cell donors (sperm and eggs) is used, which, depending on « the differences in purchasing power between Member States might also explain why a measure is considered a "compensation" in one country and an "incentive" in another », as shown in the Report of the European Commission (European Commision, 2016). The interpretation of the compensation received by the donors is also made according to the quality of the person making the decision regarding its value and form, namely private assisted human reproduction clinics / cell banks or is established by national legislation. « Only in a small number of

[5] Commission staff working document on the implementation of the principle of voluntary and unpaid donation for human tissues and cells, accompanying the document *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of Directives 2004/23/EC, 2006/17/EC and 2006/86/EC setting standards of quality and safety for human tissues and cells,* Brussels, 2016

Member States is the value of the compensation provided to […] cell donors connected to national economic indicators (e.g. monthly income, purchasing capacity). Giving lump sums to reproductive cell donors, as practiced in some countries, […] raises questions when the value is determined solely by tissue establishments or when the value is significantly high in relation to average national monthly income.» (European Commision, 2016). Therefore, at the EU level, the mere stating that the donation is made for altruistic purposes does not seem to be sufficient to fit it into the category of gratuitous acts.

In Romania, the concept of *donation* of human reproductive cells (which can be done only for altruistic purposes) is also used. It is questionable, though, whether the notion can be equated with the contract of donation or not. From the regulation of human cells donation in the special legislation (Law no. 95/2006 on the health reform), it transpires that this kind of donation follows the specific rules and characteristics set in the Romanian Civil Code for the *contract of donation*.

Accordingly, art. 985 of the Romanian Civil Code reads: "The donation is the contract whereby, with the intention of gratifying, a party, called the donor, irrevocably disposes of a *good* [s.n.-CTU] in favor of the other party, called the donee.". For the validity of the contract, certain substantive conditions pertaining to the capacity of the parties, the consent, the *object*, the cause and the form of the contract must be fulfilled. These conditions are stipulated in the special legislation as well and would lead to the conclusion that the donation of cells could be a contract, *if* the object of the contract is a *good*. All conditions are met, except one, concerning the object of the contract, which is questionable. Can human reproductive cells be considered *goods/commodities*?

Art. 535 of the Romanian Civil Code reads: "Things [...] that a person holds a patrimonial right over are goods". The patrimonial right is the one that has an economic content, evaluable in money. Hence, in the legal sense, goods are the things that acquire economic value through appropriation, that is, insofar as they are the object of a right of ownership or other real right (Stoica, 2005, p. 23). Human reproductive cells are things; in order to be *goods*, they should be the object of the right of ownership (Reghini & Diaconescu, 2013) whose holder is the natural person who "produces" them.

In the common law legal literature (Halewood, (2008, p. 134),there is a theory of ownership over one's own body (Rostill, 2013, pp. 14-18) (Goold, Skene, Herring, Greasley, 2013, pp. 1-2), so-called *self-ownership* or *self-proprietary*. *Self-ownership* has a double meaning: on the one hand, it is the right to prevent anyone who may have an interest, including the state, from

acquiring rights over one's own body, which interferes with the person's freedom and autonomy, with his/her "self-government", undermining the sacred character of the human body; on the other hand, *self-ownership* means the ability of the person, as an owner, to dispose of his own body, as a good/a commodity.

In the continental law system, certain French authors (Zenati-Castaing&Revet, 2006, p. 239) consider that the person has a right of ownership over his own body, which is not transferable for cause of death and imperfectly disposable, and human things are appropriable and can therefore be regarded as goods.

According to certain Romanian authors (Ungureanu & Munteanu, 2015), when detached from the body, human body component elements, such as organs, tissues, cells, or its products (blood, breast milk, sperm), acquire the character of things; however, they continue to keep the "mark of their humanity", which is why they do not become *goods* (Ungureanu & Munteanu, 2015, p. 25). Other authors (Vasilescu, 2013, p. 263) consider the donation of human cells as part of medical procedures, which "are not legal acts, but neither non-legal, nor quasi-contracts, nor simple legal facts. They can be considered as a special category of willful manifestations, which produce legal effects exclusively due to their compliance with the provisions set in a special legislation and in respect of human dignity. These operations resemble some legal acts, appearing to be legal facts by structure, but producing legal effects only in the power of law. "

Thus, various theories can be built up in the attempt of characterizing the "products" of the human body as goods or not, of interpreting the donation of human cells as a contract or not, all as to "adjust" the reality, like a desire to make it fit in a Procrustean bed[6], to the concepts that have become unusable in the context of the evolution determined by technology. These concepts were created to regulate relatively stable social relations, in an environment characterized by a slow evolution, which no longer corresponds to the current situation (Fenwick, Kaal, Vermeulen, 2017, p. 590). Nowadays, flexibility and openness to new approaches are needed. The alternative seems to be the acceptance of the new situations and adaptation, considering that the "products" of the human body represent a *sui generis* category, which requires its own regulation. Moreover, it was stated (Tarby, 2015, p. 84) that a third legal category was

[6] Procrustes (in Greek, Προκρούστης –Prokroustis) was a bandit in Greek mythology, who used to attack and torture people by stretching them or cutting off their limbs and head, so as to force them to fit the size of an iron bed.

born, situated between persons and goods, for which the law has not yet found a suitable term to designate it.

Therefore, according to the current regulation in Romania, human reproductive cells are not goods, because the natural person is not their owner (Vasilescu, 2013, p. 463). The law, however, "gives [to the individual] the opportunity to alienate them with a gratuitous title; this means that the "products" of the human body are not completely nondisposable/inalienable" (Ungureanu & Munteanu, 2015, pp. 27-28). It seems that this is how a paradox is born: human cells are not goods, but the natural person who "produces" them may alienate them (only for free), which means that they are on the market and they are object of a donation contract; but they are not on the ordinary market, they can be disposed of only under specific rules.

The alienable nature of the reproductive cells transpires more clearly if one follows the "path" they take after being harvested. Whether the donor receives a compensation or payment or donates without receiving anything in return, the one who uses the reproductive cells sells them for profit. Due to the specific nature of artificial fertilization procedures, they can only take place in a specialized clinic. The clinics charge prices displayed online on their websites for the reproductive cells used for *in vitro* fertilization. For example, at Columna Medical Center in Bucharest, the eggs are imported from Ovobank Spain, they come from anonymous donors and they have prices from 2276 € (for 3 eggs), 4061 € (for 6 eggs) to 4656 € (for 8 eggs) (Columna Medical Center, 2020). People using human reproduction techniques pay for donated reproductive cells (by other anonymous or non-anonymous persons). Although the "buyer" does not enter into a contract of sale having as object sperm or eggs, but into a contract for medical services in which the payment for the reproductive cells used in *in vitro* fertilization is included, the onerous nature of the contract rests. In addition, it is obvious that the clinics import cells of human origin, which means *purchasing*, for the purpose of *resale* them to their clients/patients (in the *in vitro* procedures). The Romanian National Transplant Agency does not seem to observe the provisions of the article 157 (2) of Law no. 95/2006 on the health reform, when approves the imports. The Law no. 95/2006 provides imprisonment for the purchase of human reproductive cells in scope of resale.

The denial of the alienable nature of human reproductive cells only secures profit for different professionals involved in assisted human reproduction procedures and contributes to the exploitation of donors. Under these circumstances, perhaps we should not analyze whether donation is a contract or not, but rather admit that human reproductive cells

are commercialized and that the so-called "donation" is, in fact, a contract of sale in disguise.

2. The market of reproductive cells for Romanian citizens

The persons of Romanian citizenship involved in the "donation" of reproductive cells (eggs or sperm) are subject to different legal norms, depending on their contractual position, of "donee" [interested in the "purchase" of reproductive cells (2.1.)] or that of "donor" [who "donates" reproductive cells (2.2.)] and depending on the place of the donation.

2.1. The "purchase" of reproductive cells in Romania

Infertile heterosexual couples or infertile single women, who want to "purchase" reproductive cells for an *in vitro* fertilization procedure, can follow two paths: a local one, without travelling abroad (a) and another one which involves the so-called fertility tourism (b).

(a) The local "path"

Locally, the infertile couple/ single woman choose the services of an *in vitro* fertilization (hereinafter, IVF) clinic in Romania, which they enter into a contract with (for medical services). The reproduction cells could be offered by a kind and altruistic donor, who is subject to the legal provisions in Romania and who does not receive or should not receive a payment for the "products" offered *or* by importing them from a cells bank located abroad. The clinic is the one which imports the reproductive cells.

When the reproductive cells come from a donor who donates to the IVF clinic for the donee, as a rule, no foreign elements are involved and the national law is applied, that is, the provisions of the Romanian Civil Code and of the special legislation. A donation contract is concluded between two natural persons, within the IVF clinic, by its active involvement, in compliance with the provisions specially elaborated for the case of cells of human origin. The donor and the recipient/donee conclude an authentic document stating that the donation is for humanitarian purposes, is altruistic and does not constitute the object of any legal acts and facts aiming at

gaining money or other kind of benefit[7], according to the form template approved by order of the Minister of Health[8].

Should one or more of the participants have the citizenship of a state other than Romania, inside or outside of the EU, a private international law issue would arise regarding the applicable law. For example, if the egg donor is a citizen of the Republic of Moldavia and donates in Romania to a "recipient"/donee of Romanian citizenship, what law will govern the donation of cells: Moldavian law or Romanian law?

The conflict of laws is settled by applying the Romanian private international law, precisely the provisions of art. 2577 of the Romanian Civil Code, according to which the existence and content of the inherent human rights/personality rights are subject to the national law of the natural person which they belong to. The right to donate reproductive cells is a right inherent to the human being, which is part of the right to dispose of oneself. According to art. 60 of the Romanian Civil Code, "The natural person has the right to dispose of himself/herself, if he does not violate the rights and freedoms of others, public order or good morals.". Therefore, the law which the donor of Moldavian citizenship must comply with as to the rules and the procedure to be followed is her national law, that is, the Moldavian law. Nevertheless, the Romanian provisions on medically assisted human reproduction are mandatory and apply as *overriding mandatory rules* [in the meaning of art. 2566 para. (1) of the Romanian Civil Code] governing any situation falling within their scope, irrespective of the law otherwise applicable to the contract. Therefore, the Romanian law will govern the contract.

The same reasoning works regardless of the foreign element present in a human reproductive cell donation contract. On the Romanian territory, the Romanian law applies as an *overriding mandatory regulation*. The private international law mechanism of establishing the applicable law is triggered, however, only in case of disagreements between the contracting parties or of a dispute. Otherwise, the local law is applied, without questioning the applicable law.

If no donor can be found or the interested parties are not willing to follow the procedure described above, the IVF clinic in Romania could provide the solution of using reproductive cells from a cells bank. Only one

7 Art. 144 (1), lit. f) from Law no. 95/2006 on the health reform.

8 Order no. 1.170/2014 on the approval of the template forms for the application of the provisions of Title VI of Law no. 95/2006 on health reform, published in Official Gazette of Romania, no. 765, 22.10.2014, annex 1.

clinic in Romania states on its website that it has a sperm and egg bank. Other IVF clinics inform on their websites that they use *imported* genetic material (Columnia Medical Center, 2017), (Fertilia, 2018).

When IVF procedures use imported human cells, a contract is concluded between *professionals* (a business contract), that is, between an IVF clinic in Romania and a bank of reproductive cells outside Romania, approved/authorized by the Romanian National Transplant Agency. According to art. 142 lit. e) and f) of Law no. 95/2006 on the health reform, an approved bank is a bank of cells of human origin, which could be described as a healthcare unit that carries out activities of processing, preservation, storage or distribution of human cells, located outside the territory of Romania. "For third countries, the bank must comply with the quality and safety standards imposed by Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells and to provide supporting documents in this regard. For the Member States of the European Union, the bank must be accredited by the competent authority of that country.". Import is always made on the basis of an approval issued by the Romanian National Transplant Agency (Art. 148, point (9) from Law no. 95/2006 on health reform).

In a B2B (business-to-business) contract, which could be characterized as an *international sale contract of tangible goods* or, under certain conditions, as an international distribution contract, the applicable law is the law chosen by the parties according to the principle of party autonomy.

Regardless of the applicable law to the contract or the law of the importing state and regardless of the fact the donor has been paid/compensated or not, the one who uses them, through the IVF clinic, pays for them. The transfer takes place between professionals, the cells bank and the IVF clinic, which aim at making profit. For instance, certain clinics in Bucharest practice *in vitro* fertilization especially with cells imported from Spain, Belgium, Germany and Denmark. Their price is 2200 € for 3 eggs and 1000 € for sperm (Life.ro, 2018), (Columna Medical Center, 2020).

Cryos International, a Danish sperm bank, which exports sperm to certain IVF clinics in Romania, supplies sperm like any other product in over 100 states worldwide. In 2011, certain Danish courts ruled that sperm should be considered a *good/a commodity*, to which VAT should be applied (European Commision, Directorate-general for health and food safety, 2017). The *international electronic adhesion contract* proposed by Cryos for the delivery of sperm is available on the supplier's website and contains contractual clauses specific to the international trade of goods, more

precisely to the international *sale* of tangible goods. The contract uses different clauses on price, which varies depending on the delivery method (Medimall. Fertility Centre Greece, 2017a). ["Goods are shipped DAP (Delivered At Place) according to Incoterms 2010. This means door-to-door excluding any local customs formalities like customs clearance, import permits, duty and tax. Shipping and insurance is included." (Cyros, 2019)], on the method of payment, on reservation of title ("Delivered goods remain the property of Cryos until Cryos has received full payment from the customer of the total price of the goods as well as delivery, transport and packaging.") (Cyros, 2019), on the rights and obligations of the contracting parties, on the limitation and exoneration of liability, on the applicable law and competent court for settling any disputes (giving competence to Danish courts and Danish law, regardless of the fact that international choice of law rules may give rise to another choice of law) *et al.* (Cyros, 2019) .

Therefore, paradoxically, although the *sale* and *resale* of reproductive cells in Romania are crimes, the *purchase* of reproductive cells is not prohibited by law. The tolerant attitude of the Romanian authorities can be explained, either as an opportunity to open up to the evolution of the world market for reproductive cells, or as a denial of the phenomenon, or perhaps as a way to *outsource* (Fenton-Glynn, 2016, pp. 59-75) ethical, religious, legal or other issues, in the sense that, everything outside the Romanian territory does not concern Romania and its legislation.

(b) Transnational fertility tourism

As a way of avoiding the complex procedure of "purchasing" reproductive cells in Romania, either by making use of an altruistic donor, or by importing reproductive cells from abroad through an IVF clinic, those interested in obtaining sperm or eggs can choose the transnational *reproductive tourism*, which is also called transnational *fertility tourism*. Allowing fertility tourism is a pragmatic solution to the diversity of European (Van Beers, 2014, p. 117) legal, moral and religious traditions practiced, also, by states outside of the EU, refractory to admitting the radical changes that take place, mainly due to technology.

Transnational fertility tourism is a component of medical tourism, which involves traveling abroad to access *in vitro* fertilization techniques and services or other medically assisted human reproduction procedures (Jade Martin, 2015). Even though this type of tourism can be combined with vacation experiences, the main part is focused on fertility services, whose choice is based on affordable costs, high quality, varied offer or even the

relaxing and pleasant environment in which these services are provided (Jade Martin, 2015).

The infertile heterosexual couples or the infertile single women of Romanian citizenship have at their choice a vast array of possibilities, regarding the states available for reproductive tourism with a friendly applicable legislation, the requirements they must fulfill in order to have access to fertility services, the variety of services offered.

Many IVF clinics located outside Romania, which have found a promising market in Romania, have websites available in Romanian, targeting Romanian speaking interested persons. For example, Medimall (Medimall. Fertility Centre Greece 2017b) and Genesis Athens (Genesis Athens Clinic, 2013) based in Athens, Greece, the latter having a branch in Bucharest (Genesis Athens Clinic, 2013), Mitosis (Mitos, 2020) based in Piraeus, Greece, Wunschkind Klinik Dr. Brunbauer (Wunschking Klinik Dr. Brunbauer, 2020) having its seat in Austria, Prague Fertility Center (PFC. Prague Fertility Centre, 2020). in the Czech Republic, Cryos from Denmark (Cyros, 2019), Dünya clinic based in Cyprus (Dumia. Clinic FIV, 2019), to name just a few. All of these clinics based in EU Member States apply the European principle of voluntary and unpaid donation.

From the neighboring states, that are not EU members, Ukraine is a favorite destination for Romanian heterosexual married couples (Gryshchenko & Pravdyuk, 2016)[9] when it comes to "purchasing" reproductive cells from a fast accessible and permissive legislation, especially when combined with surrogacy. For example, BioTexCom offers IVF services on its website, including in Romanian (BioTexCom Center for human reproduction, 2020).

Although it has many advantages, mainly related to the simplification of legal procedures, but also to the quality and variety of the offered services, transnational fertility tourism may pose the disadvantage of the uncertainty regarding the applicable law. Romanian citizens who choose IVF clinics from abroad are subject to the national law of the place where the services are provided. Permissive legislation is one of the main reasons why they travel, but not knowing it requires hiring professionals, lawyers, to advise them.

[9] In Ukraine only the heterosexual married couples have access to surrogacy..

2.2. The "donation" of reproductive cells by persons of Romanian citizenship

If a natural person having its habitual residence in Romania provides eggs or sperm in Romania, according to the local regulations, he / she cannot receive payment or other compensation, financial or not. The sale of reproductive cells is prohibited by law and considered a crime. However, if the reproductive cells are provided through a clinic situated outside of Romania, the "donor" will be subject to the local law. Following the reasoning of establishing the applicable law on the occasion of the donation of human reproductive cells in Romania by a person of foreign citizenship (presented by using an example of a Moldavian citizenship donor), if any dispute arises, then the applicable law should be determined according to the rules of private international law in the state where the clinic is based. Such regulations and solutions that would be reached in hypothetical situations cannot be discussed here, but we consider that the right to donate human reproductive cells is an inherent right of human being in most national legislations. Also, this particular area which raises many controversial issues can be regarded as being regulated by *overriding mandatory rules*. However, the competent authority will establish the applicable law, on a case-by-case basis.

As we have already mentioned, in EU Member States, the principle of voluntary and unpaid human cell donation applies. However, donors are compensated. For example, in Greece, although the egg donor donates for altruistic purposes, according to the Greek law she receives a compensation, which cannot exceed 1200 €. A donor of Romanian citizenship will therefore receive compensation. The compensation is not always made in money. For example (Crete fertility Centre, 2018), in exchange for eggs, an infertility treatment that the donor needs and which otherwise would not be financially available, may be offered. As the Romanian criminal law has no extraterritorial effect and the payment for reproductive cells in money or in another type of compensation is lawful in the state in which the donation takes place, the donor of Romanian citizenship receives it legally and validly.

Another way of compensation/payment is providing tourism services to foreign remote destinations, which otherwise would not be possible for young egg donors. For example, the *TravelingDonors (*Traveling Donators, 2016) platform offers to donors from all over the world, regardless of nationality or residence, the opportunity to travel to countries such as Malaysia, Cyprus, Thailand, Ukraine, Georgia, Australia, USA, India or Sri Lanka. The website mentions that donors are not paid for their eggs, because the sale of human cells is banned internationally, but they are

compensated for the discomfort and time consumed by offering them trips abroad.

In states where "donation" is commercial, donors receive a payment in cash. If, for example, a Romanian citizen donor travels to Ukraine to donate eggs, she will validly receive a cash payment for them, according to local law. Romania cannot control such practices, nor prevent them in any way.

Conclusions

The market for human reproductive cells in the context of the progressive commodification of the human body is a reality that cannot be ignored. Many legal theoreticians and practitioners put up resistance against this evolution determined by the development of technology in all its forms, which, among other things, seeks and finds solutions for the perpetuation of the human species, endangered by the increase of infertility. This attitude of rejection, justified by fundamental human rights concepts can lead to counter-intuitive results. Technology is beneficial to humanity, but there is the other side of the coin, as well. Positive approach is the desirable way to go.

Prohibitive laws against human cells trading cannot lead to its disappearance, but to the development of an "underground" market, without protective rules for any of the parties involved, with the only rule of making profit. Therefore, a regulation is needed in Romania and at the EU level. Denying a reality is not a solution. An attitude of tolerance is needed based not on the legitimacy of the reproductive cell market, but on its inevitability (Van Beers, 2014, p. 107).

References

BioTexCom Center for human reproduction. (2020). Prestarea serviciilor de către clinica BioTexCom in cadrul tratamentelor Fiv cu terț donator. Retrieved from: https://www.mamasurogat.net/wp-content/uploads/2019/09/eco_donation_romain_sep.pdf

Columna Medical Center. (2020). Tarife Fiv. Retrieved from: https://cmed.ro/tarife-fiv/

Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine,* (ETS no. 164), Oviedo, 1997, in force from 1999. Retrieved from: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164

Crete fertility Centre. (2018). Egg donation. Retrieved from: https://www.fertilitycrete.gr/fertility-treatments/egg-donation?gclid=EAIaIQobChMI1eD7j97S5AIVwtmyCh0gowKmEAAYAiAAEgLxl_D_BwE

Cyros. (2019). Terms of Agreement. Retrieved from: https://dk.cryosinternational.com/legal-information/terms-of-agreement

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States published in Official Journalof the EU, L 158, 30.4.2004; 77.

Dumia. Clinic FIV. (2019). Donarea de ovule. Retrieved from: from https://www.dunyaivf.com/ro/donarea-de from https://www.dunyaivf.com/ro/donarea-de-ovule/-ovule/

ESHRE (European Society of Human Reproduction and Embryology). (2017). *Regulation and legislation in assisted reproduction*, 2017. Retrieved from: https://www.eshre.eu/Press-Room/Resources

European Commision, Directorate-general for health and food safety. (2017). Meeting between DG SANTE (Unit B4), the Federation of Danish Enterprise and Cryos International. 26 October 2017, Draft Summary Minutes. Retrieved from: https://ec.europa.eu/health/sites/health/files/blood_tissues_organs/docs/ev_20171026_sr_en.pdf

European Commision. (2016). Commission staff working document on the implementation of the principle of voluntary and unpaid donation for human tissues and cells, accompanying the document *Report from the*

Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of Directives 2004/23/EC, 2006/17/EC and 2006/86/EC setting standards of quality and safety for human tissues and cells, Brussels, 2016.Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0128

Article 144 of Law no. 95/2006 on the health reform, TITLE VI Harvesting and transplantation of organs, tissues and cells of human origin for therapeutic purpose: CHAPTER II Donation and donor of organs, tissues and cells of human origin, republished in the Official Gazette of Romania, no. 652, 28.08.2015, as subsequently amended and supplemented.https://www.anm.ro/_/LEGI%20ORDONANTE/LEGE%20%20%20Nr%2095_2006%20republicata,%20TITLUL%20XVIII%20versiunea%20actualizata%20_1%20martie%202018.pdf

Fenwick, M.D., Kaal W.A, Vermeulen, P.M.E. (2017c). Regulation Tomorrow: What Happens When Technology Is Faster than the Law? in *American University Business Law Review*, 6 (3): 561-594. retrieved November 25, 2019 from https://digitalcommons.wcl.american.edu/aublr/vol6/iss3/1/

Fenton-Glynn, C. (2016). Outsourcing ethical dilemmas: regulating international surrogacy arrangements, in *Medical Law Review*, 24 (1): 59-75.

Fertilia. (2018). Protocol financiar proceduri. Reproducere umana asistată. Retrieved from: https://www.fertilia.ro/protocol-financiar-proceduri-reproducere-umana-asistata/

Genesis Athens Clinic. (2013).Fertilizarea in vitro. Retrieved from: http://www.genesisathens.gr/ro/

Goold, I., Skene, L, Herring, J., Greasley, K. (2013). The human body as property? Possession, control and commodification, in *Journal of Medical Ethics*, 40 (1): 1-2. Retrieved from: https://jme.bmj.com/content/40/1/1

Greek Mythology (2003). Athens, Greece: Savalas; 173.

Gryshchenko, M. & Pravdyuk, A. (2016). *Gestational Surrogacy in Ukraine,* in Scott Sills, E., (ed), *Handbook of Gestational Surrogacy*, London: Cambridge University Press.

Halewood, P. (2008). On Commodification and Self-Ownership, in *Yale Journal of Law & the Humanities*, 20 (2): 131-162.

Law no. 17/2001, published in Official Gazette of Romania, no. 103, 28.02.2001.

Law no. 287/2009 regarding the Civil Code, published in Official Gazette of Romania, no. 511, 24.07.2009, as subsequently amended and supplemented.

Law no. 95/2006 on the health reform, republished in Official Gazette of Romania, no. 652, 28.08.2015, as subsequently amended and supplemented.

Life.ro. (2018). Nu poţi să faci copii? Ba poţi, cu costuri rezonabile în România. Retrieved from: https://life.ro/nu-poti-sa-faci-copii-ba-poti-simplu-rapid-si-cu-costuri-rezonabile-in-romania/

Martin, L. (2015). *Reproductive Tourism in the United States. Creating Family in the Mother Country*, New York: Routledge.

Medimall. Fertility Centre Greece (2017a). Preț urile noastre. Retrieved from: https://www.medimall.gr/wp-content/uploads/2017/10/IVF-Pricelist-RO.pdf

Medimall. Fertility Centre Greece (2017b).Banca noastra de ovocite. Retrieved from:

Mitos. (2020). De ce să alegeți Grecia pentru tratament de FIV. Retrieved from: https://www.mitosis.gr/ro/de-ce-sa-alegeti-grecia-pentru-tratament-de-fiv/

PFC. Prague Fertility Centre (2020). Programele cu ovocite donate. Retrieved from. https://www.pragueivf.com/ro/donation-programmes

Reghini, I., Diaconescu, S. (2013). *Bunurile [Goods]*, in I., Reghini. S., Diaconescu. P., Vasilescu.*Introducere în dreptul civil [Introduction in civil law]*, Bucharest: Hamangiu: 381-422.

Rostill, L.D. (2013). The ownership that wasn't meant to be: Yearworth and property rights in human tissue, in *Journal of Medical Ethics*, 40 (1): 14-18. Retrieved from: http://dx.doi.org/10.1136/medethics-2013-101449

Stoica, V. (2005). Actualitatea ocupaţiunii - mod originar de dobândire a dreptului de proprietate privată [The actuality of the occupancy - original way of acquiring the right of private property], *Dreptul* [The Law], 9: 21-58.

Tarby, A. (2015). *La bioéthique*, Paris: L'Harmattan.

Traveling Donators. (2016). Traveling Donors is reaching out to many more destinations. Retrieved from: https://www.travelingdonors.com/destinations/

Ungureanu, O & Munteanu, C. (2015). *Drept civil. Persoanele, în reglementarea noului Cod civil* [*Civil Law. Persons in the new Civil Code*], Bucharest: Hamangiu.

Van Beers, B. C. (2014). Is Europe giving in to baby markets? Reproductive tourism in Europe and the gradual erosion of existing legal limits to reproductive markets, in *Medical Law Review*, 23 (1): 103-134.

Vasilescu, P. (2013). *Actul civil* [*The civil act*], p. 463. In I., Reghini, S., Diaconescu. P., Vasilescu.*Introducere în dreptul civil [Introduction in civil law]*, Bucharest: Hamangiu.

Wunschking Klinik Dr. Brunbauer (2020). Donarea de ou. Retrieved from: https://www.wunschkind.at/ro/cai-de-urmat-spre-copilul-dorit/donarea-de-ou/

Zenati-Castaing, F. & Revet, Th.(2006). *Manuel de droit des personnes,*Paris: Presses Universitaires de France, *apud.* Chelaru, E. (2012). *Persoana fizică [Natural person],* p/ 64*,* in Baias, F. A., Chelaru, E., Constantinovici, R., Macovei, I. (eds), *Noul Cod civil. Comentariu pe articole* [*The new Civil Code.Commentary]*, Bucharest: C.H. Beck.