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A Jurisprudential Conclusion of New Criteria Regarding the Recognition of the Existence of Family Life and Relationships between Parents and Children Resulting from Surrogacy

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Abstract: *Article 8, paragraph 1 of the European Convention enshrines the right to respect for private life, the right to respect for family life, home and correspondence. As it is always seeking to provide solutions to new social realities, the ECHR created an evolutionary interpretation of the notion of private life that also included (in addition to the rights to the person's physical and mental identity, marital status, health and so on) aspects regarding the abortion, the homosexuality and the trans-sexuality, as well as those related to the impact of technical progress (the interception of telephone conversations, the access to databases and so forth). Also through the jurisprudence, the content of the right expanded, leading to the recognition of the right to one's own image and the right to a healthy environment.*

Keywords: *surrogacy, right to private life, right to family life, ECHR jurisprudence, human rights.*

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Introduction

If we refer to the "right of the person to establish and develop relations with his fellows" (European Court of Human Rights, 1992), we consider that the right to private life also guarantees the creation of bonds or relations of social empathy and help, such as the relations which are the basis of the bond between the infertile couple and the surrogate mother, whose purpose is and must be preeminently generous, to help the infertile couple in the reproductive process.

Secondly, emphasizing (in the light of the ECHR jurisprudence) the link between *the right to personal private life* and *the right to social private life* of the person" (Chappell v. United Kingdom, 1989), is "impossible to dissociate in modern society" as stated by Professor C. Bîrsan (2010, p. 603) we wonder if we can state the need for social acceptance of people who cannot procreate and the creation of a climate of social solidarity for their benefit, including the allocation of financial resources to support medically assisted human reproduction programs.

The right to social privacy relates to "the protection of those rights and freedoms that ensure the development of each individual's personality" (Margenaud, 1999, p. 6). In this context, the reproduction, as a crucial element in the personal development of any person, requires the creation of the appropriate regulatory framework precisely because the field of medically assisted reproduction, in general, and the surrogate motherhood, in particular, is sensitive, as "the same action by the state authorities may constitute an infringement of the right to private life of several holders" (Smith and Grady v. United Kingdom, 1999) (for example, the infertile heterosexual, the infertile persons, the persons who through surrogacy and the creation of embryos with gametes from donors wish to avoid the transmission of certain genetic diseases and so on).

Thirdly, if the sexual identity, the sexual orientation and the sex life are fundamental elements of the intimate sphere of the private life (Peck v. United Kingdom, 2003), the right of every person to freely decide on these matters must be recognized, while bearing in mind that among the most fervent activists in favor of the surrogacy are the representatives of the LGBTQ community. Regarding this detail, a series of controversies have arisen; their reasons (Organization of African Unity, 1999) are as follows: the fact that the recognition of the right to sexual orientation involves the implicit recognition of the right to establish a family through innovative medical technology. Their reasons *against* it are as follows: according to which (de Sousa, 2022) the sexual orientation is a matter of choice and the

impossibility of procreation should be an element assumed by the person who makes the choice of being part of a couple who are biologically unable to conceive a child.

Under these conditions, it is stated that no additional obligations should be imposed on the state because there is a big difference between "accepting the sexual orientation different from that of the majority and not discriminating on the basis of the sexual orientation" and "allocating resources to combat some shortcomings results, after all, from some personal choices" (Brodeală & Spiess, 2022). Also, the refusal to actively and consistently support the efforts of the members of the LGBTQ community to have genetically related children represents, in the view of the representatives of this community (Smith and Grady v. United Kingdom, 1999), an essential limitation of their social life from the perspective the socialization specific to parent status. The request of the members of the homosexual community is that the states observe the guidelines drawn by the Court which ruled that the guarantees that the states must provide to such persons must be "concrete and effective, not theoretical and illusory" (Bîrsan, 2010, p. 603).

The concept of family life from the perspective of the ECHR jurisprudence

As for the right to family life, the discussions are even wider. The family is, from the standpoint of the ECHR, an autonomous concept that experiences metamorphoses generated by the new legal, social and medical paradigm.

It is argued (Luo, 2022) that if the state did not liberalize and financially support the access to medically assisted human reproduction techniques when this is available from the viewpoint of the medical technology, the right to found a family would be completely devoid of content; therefore, the recognition of reproductive rights through innovative medically assisted human reproduction techniques is an implicit guarantee of the right to have a family.

The notion of family is not defined by the text of the European Convention on Human Rights, but the Court extended the notion to any child born within a family (Keegan v. United Kingdom, 1994), be it a classic family formed by two parents or a single parent. In other words, the ECHR expands the notion of family beyond formal relationships and legal commitments. Currently, family life is understood as a connection based on marriage and, also, as covering de facto relationships, resulting, for example, from a homosexual partnership, the relationships resulting from a stable extramarital partnership or from the relationship of a transsexual with the

partner's child, conceived by in vitro fertilization with donor sperm (X, Y, Z v. Great Britain, 1997).

De facto relationships as a form of family life

If we talk about the *de facto* relationships, the edifying case is the case of Schalk and Kopf v. Austria (Oliari and others v. Italy, 2015; Schalk and Kopf v. Austria, 2010; Smith and Grady v. United Kingdom, 1999), of two persons of a homosexual couple who requested to formalize their relationship through marriage, on the grounds that the Austrian law allowed the marriage only between persons of different sexes. The objection of unconstitutionality raised before the Austrian Constitutional Court by the two petitioners focused on the fact that the legal provisions contravened the right to private and family life, as protected by the European Convention on Human Rights, as they do not take into account the evolution of family relationships in today's society.

Therefore, they argued that the traditionalism of the Austrian Civil Code, although socially valid at the time of its adoption, in 1812, was based upon the then conceptions on marriage, as a socially accepted formula whose purpose was to bring forth and raise children. Currently, this view of the family no longer belongs to the essence of family relationships, which are seen as a partnership based on affection and mutual support, but not necessarily for reproductive purposes.

The ECHR decided that the provisions of the convention are not capable of obliging the states parties to legislate or recognize same-sex marriage. In this case, the ECHR formulates an *obiter dictum* considering that the relationships between persons of the same sex constitute a form of *family life* in the sense given by art.8. As a result, the cohabitation relationship between the applicants, as a same-sex couple, in a *de facto* stable partnership falls under the notion of family life, as do relationships between heterosexual persons in similar situations (Schalk and Kopf v. Austria, 2010).

Regarding the relations resulting from the extramarital stable partnership, we can recall the case of Oliari and others v. Italy (2015). Three homosexual couples were refused to formalize their relationship through marriage, as according to the Italian law, as marriage could only be concluded between a man and a woman. The European Court of Human Rights has emphasized that stable same-sex relationships fall within the scope of the concept of family life, even if national laws do not expressly recognize the right to marry. For these reasons, the Court considered that homosexual partners must be protected by national legislation, in order to ensure the fundamental interests of any stable couple, such as the mutual material support and the right to inheritance.

Special problems raised by the surrogacy in terms of family life

We therefore note that the surrogacy raises a number of special issues in terms of family life. Without attempting an exhaustive enumeration, we can list some of the most common: firstly, *the parental rights after the separation of the parents* – given that the surrogacy involves the creation of an embryo outside the human body, through *in vitro* fertilization, the question of the fate of the embryos thus created arises in the event that the parental couple decides to separate. The situation is only apparently similar to the issue of granting custody of children to one or the other of the parents in case of divorce, as long as the ECHR decided not to grant the status of a person to the embryo conceived in vitro (Evans v. Great Britain, 2007).

Therefore, the question arises as to what is the legal basis on the basis of which one of the members of the parental couple could request the entrustment of these embryos, to the detriment of the other partner. Even if human embryos are not considered persons, it still seems excessive for the decision to be made by reference to the legal provisions on the division of assets (Petralia, 2002). It cannot be ignored that, due to the potential of embryos to become persons, they must be treated with special respect, due to the dignity of the human species in general.

In the (specialized) literature (Petralia, 2002) it was proposed that the issue of custody of embryos be regulated prior to their creation *in vitro*, by means of a contract concluded by the parent couple before the start of the *in vitro* fertilization procedure. In that contract, clauses could be inserted regarding the fate of the embryos in case of the separation of the couple members. However, in the absence of express legislation in this regard in Romania, as well as in the absence of an express agreement concluded between the members of the parenting couple, the legal reasoning of such a decision, in case of litigation, should appeal to the general principles of law (especially the human rights).

Secondly, the surrogate mother's refusal to cede custody of the child to the infertile couple after his or her birth - the appearance of the surrogate leads to the splitting of the parental roles, which traditionally were cumulated by one woman – the genetic role, the gestational role and the social role. When the genetic mother may be an ovule donor, the biological mother (carrying the pregnancy) a surrogate mother, and the social mother the woman in the infertile couple who engages the services of the surrogate mother, then the certainty of the mother (in its legal sense) is called into question. For this reason, the question arises as to which of the three roles will prevail if a conflict arises among the three potential persons who collaborate in the

reproduction process – the genetic mother, the biological mother (the woman who carries the pregnancy) and the social mother.

Thirdly, the reproductive tourism and the refusal of states to recognize the rights gained through medically assisted human reproduction techniques – the problem arises because of the regulatory differences among states, some allowing the surrogacy and others prohibiting it. The phenomenon of medical tourism occurred as a reaction to the legislative prohibitions in some states, as their citizens travelled to states with permissive legislation, to follow medical procedures there; in this context, it will be determined whether the legal parentage relationships born in a different state will or will not be recognized in the state of citizenship.

Two decisions (Labassee v. France, 2011; Mennesson v. France, 2011) from the practice of the European Court of Human Rights are particularly relevant in this regard, as they were likely to significantly restrict the states' margin of appreciation in terms of legislation in the field of surrogacy: Mennenson v. France (2011) and Labassee v. France (2011).

In both situations, the parental couples resorted to the in vitro fertilization procedure in the U.S., where it was legal, but upon returning to their country of citizenship, France, they were denied the recognition of parental rights with respect to the children born through IVF followed by the surrogacy. The Court stated that states must recognize and protect the rights legally acquired by their citizens in other states, in matters of private and family life, by correlation with the question of filiation.

Fourthly, the family relations between children and parents in homosexual couples, from the perspective of the ways of procreation of these couples – the procreation in homosexual couples is fundamentally linked to the technological evolution and the legislative acceptance of some practices with medical purposes, among which the donation of ovules and the surrogacy are essential to overcome biological barriers. Given that the surrogate motherhood for heterosexual married couples is relatively difficult to accept at a social level, the surrogate reproduction in homosexual couples presents even lower social adherence, and for this reason states tend not to positively legislate in this respect.

Tendencies to empower the right to reproduction over the right to private and family life

There has consistently been a reluctance to explicitly include the right to reproduction in the traditional content of the right to private and family life, as it can be seen from the lack of any express mentions in national instruments regulating the latter right. However, it cannot be

abstracted from the fact that without the recognition of a right to reproduction, the right to family life itself would largely lack content.

The European Court of Human Rights, in its desire to interpret the Convention flexibly, highlights that the right to privacy, the right to marriage and the right to have children are part of the right to private life. The fundamental importance of procreation in the life of the individual is today, thanks to the new reproductive technologies, exacerbated by the possibilities that these technologies bring to overcome the biological limitations. Being a parent is an important element of a fulfilling and satisfying life (Ryan, 1990).

Thus, bringing a child into the world in a framework where it is raised and educated by the members of a nuclear community among which there is affection and support specific to a family, represents "a family" in the sense of the Court's jurisprudence, regardless of the legal form of this family (Lazzaro v. Italy, 1997). However, the existing family is not equated with the mere intention to start a family, which for infertile people would be biologically impossible in the absence of innovative medical technologies.

In other words, the natural biological abilities are protected by the text of the Convention, while the biological abilities augmented by technology have not yet come within its scope of express protection. The Court ruled, however, that the coexistence among the related members of that family is not of the essence of family life, which for the issue of surrogate motherhood raises a series of particular discussions (Marckx v. Belgium, 1979).

Unlike the ECHR system, in the U.S. it is explicitly recognized (Griswold vs. Connecticut, 1965) that the right to reproduction is part of the right to family life. The U.S. Supreme Court wanted to eliminate any confusion between the right to reproduce and the right to found a family, showing that the two are not inextricably linked. Thus, it was held (Eisenstadt vs. Baird, 1972) that it is erroneous to superimpose the right to have children on top of a legally established two-parent family, because the reproduction is a deeply individual aspect that exceeds the couple. A person can decide to have children without being part of a couple, with a stable partner or by calling on a gamete donor, carrying the pregnancy herself or calling on another person, and that is precisely why the reproduction is not a couple's right, but an individual right.

In the American legal doctrine, however, there is a controversy related to whether the Supreme Court's jurisprudence can be extended to the reproduction by means of medical technology. Also, it is argued (Roberts, 2002) that extending the right to reproduction to encompass innovative reproductive techniques is not appropriate, given that the collaborative

reproduction (involving gamete donors or surrogate mothers) is not limited to the infertile person and her interests, but it can also impact the interests of third parties, i.e. the parents or the surrogate mother.

Furthermore, it is considered (Lawrence, 2002) that there is no reason to remove these practices from the sphere of protection of the right to have a family, because the individual autonomy extends to all the aspects of life, therefore including the reproductive matters, and the non-recognition of the right to resort to medically assisted reproduction in order to acquire the status of parent represents an unjustified limitation of this autonomy.

A person does not become the holder of reproductive rights just by being fertile, just as the person does not lose these rights if he becomes infertile due to sexual orientation choices. It is inaccurate to put the equal sign between the right and the possibility of exercising the right, or, practically speaking, the infertile are not deprived of the right itself, but only of the possibility of exercising it; thus, just as people with minor reproductive disorders use hormonal drug treatments to achieve pregnancy, so too do people with serious reproductive dysfunctions turn to the medical possibilities specific to their condition.

There is no difference between one and the other, which would justify the recognition of reproductive rights only in favor of some. Given the fact that the evolution of medical technology has made this possible, at the moment infertile people can exercise this right, even if until now we can say that it was only a more theoretical right than a concrete right.

Private life, individual autonomy and reproductive autonomy

If a human right to reproduction were to be recognized, as part of the right to have a family, but with its own content, then the question arises as to what the limits of its exercise would be. Starting from this, the notion of reproductive autonomy occurred (Garrison, 2000) which, in essence, would be the right to make any decision in reproductive matters, not only to have children or not, when these children would be born and their number, as well as the partner with whom they will be conceived, but also the method of conception *(in vivo* or *in vitro*), their genetic structure (hence the call for genetic engineering techniques), the traits that are transmitted to the offspring (hence germ-line engineering), the eradication of some family diseases with genetic determinism (so, again, genetic engineering), the decision of the family structure (so the selection of the sex of the embryos, of the children that will be born), the manner of bringing children into the world (by birth by the social mother or by a surrogate mother), and so on.

However, in order to have successful access to the new reproductive practices, which the contemporary medicine makes available to infertile people, the beneficiaries of these techniques and practices should be correctly and fully informed about what they entail as well as on the best way to implement the particular procedures in the life of the person concerned. Many of these techniques are invasive, that is some are in the stage of initial implementation, so there are also risks associated with their use (for example, for Romania and in the case of surrogate motherhood, there is no clear legal framework to regulate the issue of possible litigation between the surrogate mother and the parent couple for the custody of the child thus resulting from the collaborative reproduction of the three persons).

Apart from information, the family planning education again plays an important role in the reproductive process. The infertile person must consider the time factor and the cost factor. Concerning the time factor, the successive operations of finding a sperm or ovule donor, a surrogate mother, negotiating the contract with her, supervising the pregnancy throughout its duration, carrying out the legal procedures that are required after the birth of the child, all these take a rather long period of time.

In addition, the financial aspect is not to be neglected. Each cycle of *in vitro* fertilization with donor sperm and surrogate mother is estimated to cost a total of approximately $200,000 (Overall, 1990) (including here the costs of obtaining the sperm, thawing and treating it for fertilization, the fertility treatment for induction of the superovulation, followed by ovule retrieval, the *in vitro* fertilization itself, the embryo *screening* to detect genetic diseases and choose the most viable embryos for implantation, the implantation itself, followed by pregnancy costs, until birth).

The reproductive health education and information to the general public is done through coherent and organized programs, and the financial resources of the state are divided between these two processes and the financing of medical procedures. For this reason, there are authors who fight reproductive autonomy (Washenfelder, 2003), considering that this autonomy stops where infertile people would impose burdens on the state, therefore on the society. It is argued (Washenfelder, 2003) that there can be no such autonomy, at least at an absolute level, as long as the state is the main pawn that finances such medical operations and provides the public/citizen with access to technology and information. Therefore, the reproductive autonomy does not properly reflect the autonomy of the individual, as long as such autonomy is dependent on state resources.

Moreover, the phrase "reproductive autonomy" is not very accurate; its meaning is unclear and it can be used with various meanings in various

contexts depending on the nuance, as it can suggest a certain right or another, an unfortunate aspect if this notion should be based on a social policy targeting the infertile. Therefore, there is a danger that the notion of "reproductive autonomy" will be exploited by various interest groups at the social level according to their own agenda, as a theoretical justification for controversial or high-risk medical practices, or only in the stage of experiment.

In a narrow sense, it is considered that the reproductive autonomy involves "the right of the person to be protected against any arbitrary interference by the state in deciding whether and when to bring a child into the world, ultimately encompassing the right of the person to decide whether he wants to be parent or not" (Falasco, 2005, p. 277). The focus is, as we can see, on the decision to be a parent or not, a detail entailing that the reproductive autonomy is seen as having its positive limit in the right to have children and the negative limit in the right not to have children. There is a plethora of possibilities and intermediate decisions between these two limits generated by the possibilities that the new reproductive technologies bring.

Obviously, the two limits are in opposition, so the question what will happen when some static limits, which establish the boundaries of a right, will turn into dynamic limits and come into conflict arises. Which of the two will prevail, if within a couple who created embryos in vitro with a view to their implantation with the help of a surrogate mother, one of the members of the couple no longer wants the embryos to be implanted, and the other insists on doing the exact opposite? In other words, the question is whether the reproductive autonomy is a set of rights and, if so, whether there is a certain hierarchy among these rights?

Conclusions

Traditionally, the right not to procreate was recognized at the time of the recognition of the right to abortion (Asch, 1995), and this is a constitutionally recognized right by the vast majority of states, explicitly and unequivocally, as it is the right to found a family, so to have children. However, we propose not to be guided in our endeavor to determine the scope of the reproductive autonomy by the discussions in the matter of the right to abortion, because they involve a series of particular aspects that are not related to the reproduction through *in vitro* fertilization with a surrogate mother.

The abortion is recognized on the basis of the mother's right to self-determination over her own body, but when embryos are created outside the human body, this argument, which has cut the abortion controversy, no longer applies. The discussion cannot be conducted on the grounds of an embryo's right to life versus a right not to have children, as part of the

reproductive autonomy, as long as the European Court of Human Rights does not recognize an inherent right to life of the embryo created *in vitro*.

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