PRIVACY ASPECTS OF THE MEDICALLY ASSISTED HUMAN REPRODUCTION

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ABSTRACT: *The analysis of privacy issues in the medically assisted human reproduction system includes both the rights of the person, as general private law right subject, respectively rights inseparably related to the very existence of the human being which circumscribe the general idea of "personality right" but also their rights as patient and also the rights deriving from the regulation of the statute of the human body, its elements and its products.*
Assisted reproduction technologies raise serious privacy issues within the field of the person's private life, so that the legal provisions relating to human beings comprise the human body, its organs and tissues, including those detached from it.
A person's right to have the freedom of disposition refers to physical freedom, to the right to dispose of the person's own body, including in its content also the right to donate organs and tissue for transplants or other medical and genetic engineering experiments.

KEY WORDS: *right to private life, status of the human body, physical freedom, organ and tissue donation, personality rights*
JEL CLASSIFICATION: *K3, K32, K36*

From the perspective of the quality of individual subject to civil laws, the human being holds a set of legal rights and obligations, which places the individual at the center of legal system.

The specialty literature shows that before reaching the development that it has acquired in modern society, the legal concept of *person* has gone through various stages that corresponded to the institutions and the successive needs of mankind. Undoubtedly, however, the social transformations that generated the legal notion of person in its current meaning include the history, morality, and the transformation of the civil and religious institutions of the Romanian people.

The analysis of privacy issues in the medically assisted human reproduction system includes both the rights of the person, as general private law but also the person's rights as a patient and not least the rights deriving from the stipulations concerning the statute of

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the human body, of its parts and its products, because the human being is an inimitable complex of elements and experiences which do not belong to the person, but represent the person itself.

The concern for regulation of the rights concerning the human person is found in the rules of the Civil Code that came into force on December 1, 1965, according to model of the French Civil Code of 1804 (which will be known in the future as the old Civil Code), then of the Decree no. 31/1954 regarding natural persons and legal entities and Decree no. 32/1954 for the implementation of the Family Code and other laws, so that the provisions of what shall be called the New Civil Code (Law no. 287/2009 regarding the Civil Code) develop the legislation in question in a manner adapted to the contemporary world, but undoubtedly improvable.

The continuous evolution of the Romanian society echoed also in the rules governing legal relations. Thus, for the period of its appearance, the old Civil Code had a transactional nature between the customary law and royal orders on the one hand, and the principles of Roman law on the other, but the moderate nature of this main regulation is the reason for which the rules established by it meet the existing needs for most citizens.

The classical legal literature was concerned, in a stricter manner, only by those elements regarding the person from the perspective of the name, residence and civil status documents, referring to the human individual only in terms of the role played in society, appreciating that "the science of law does not deal with persons under other aspects than those regulating the infinitely varied mutual relations that arise between these"[1].

Unlike patrimonial rights (concerning property) the persons' rights were called personal rights and they do not have a monetization, but this does not mean that the illegal violation of such a right could not give rise to money compensations to be paid to the person who suffered damages, in accordance with the general principles.

In current days, the science of law regards the man/woman as an individual of the human species in the entirety of his/her physical and mental characteristics[2], so that the legal provisions relating to human beings include the human body, its organs and tissues, including those detached from it.

In modern society the human person becomes its ultimate purpose. At the same time, a democratic society, pluralistic in its essence, needs an open and permanently evolving moral, justified by man's full freedom, generating full responsibility for their acts and transforms the moral action into a legal action, and what is legal is also assumed to be moral.

In the context of the above mentioned evolution in the regulatory framework, which is consistent with society as a whole, the civil law relations were modified by Law no. 287/2009 on the Civil Code (New Civil Code), not only to meet the current legal reality or to encode consecrated jurisprudential and doctrinal trends, but also to correlate the national legislation with the requirements of the European Law.

Given Romania's accession to the European Union, according to the Romanian Constitution and to the jurisprudence of the Court of Justice of the European Union ("CJEU"), European Law is part of domestic law and takes precedence over the latter (to

[1] Hamangiu, C., Rosetti-Bălănescu, I., Băicoianu, Al., *Romanian Civil Law Treatise, Volume I*, All Beck Publishing House, Bucharest, 2002, p.133;
[2] Ungureanu, O., Jugastru, C., *Civil Law. The Persons*, Editura Hamangiu, Bucharest, 2007, p.3;

the extent to which there is a conflict between the national and European standard). Moreover, European law is directly applicable to national relations, both under the Treaty of Functioning of the European Union ("TFEU") and according to ECJ jurisdiction.

Article 5 of the New Civil Code resumed the dispositions of Article 148 of the Constitution[3], stating that "*in matters governed by this Code, the rules of EU Law apply with priority, regardless of the quality or status of the parties*." The fact that this principle (of European standard priority) is provided in the New Civil Code, encourages the law subjects to rely on the Community rules in courts, when they consider that their rights have been violated, rights consecrated by the Community norm, which is in conflict with the national norm.

Article 4 of the New Civil Code is correlated with the Article 5 of the same Code, which sets, by Paragraph (2) the priority in applicability of human rights treaties to which Romania is part, as follows: "*If there are inconsistencies between the agreements and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall prevail, unless the Constitution or internal laws comprise more favorable provisions*."

This provision is also relevant in the context of the major European legislative changes that have occurred in recent years, the Lisbon Treaty of the European Union entered into force on December 1, 2009 (the "Treaty of Lisbon"). The Treaty of Lisbon adopted its own rules on human rights, namely the Charter of Fundamental Rights of the European Union ("EU Charter"). The Treaty on European Union ("TEU") establishes the entry into force of the EU Charter and the fact that it has the same legal force as treaties. Furthermore, it states that the principles of human rights protection in Europe are derived from the European Court of Human Rights ("ECHR"). Finally, it establishes the fact that the EU will accede to the European Convention on Human Rights.

On October 7, 1993, Romania joined the Council of Europe and ratified the European Convention on Human Rights ("ECHR" or "the Convention") on June 20, 1994, ensuring the Romanian State will observe the rights stipulated in the Convention and thus becoming subject to the jurisdiction and control of the European Court of Human Rights ("European Court"). According to Article 1 of the Convention, "*the High Contracting Parties shall guarantee to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*".

Although The Romanian Constitution, as republished in 2003 guarantees, in general terms, in its Article 1, Paragraph (3) "[...] *human dignity, rights and freedoms of the citizens, the free development of human personality* [...]", the legalization also in the New Civil Code of these rights arose in the legal landscape in order to ensure their effective guarantee and to provide a more rigorous and detailed regulatory mechanism for the matter, in agreement with the international standards. According to the European Court jurisprudence, "[...] *the purpose of the Convention is not to protect the theoretical and illusory rights, but practical and effective rights*" (Court decision of December 14, 2006 in *Case Lupaş and Others v. Romania*).

Considering the provisions of the New Civil Code relating to the priority of rights stipulated, among others, both by the European Convention on Human Rights and the

[3] *The Romanian Constitution* was republished in the Official Gazette no. 767 of October 31, 2003

Community Law, raise the question of how human rights are protected at the national level.

The answers to this question were given by the ECJ in the most recent case on the protection of human rights, namely Anton Vinklov against Bulgaria on June 7, 2012, in which the ECJ has declined jurisdiction in favor of the ECHR. In the present case, the ECJ was asked how the corresponding rights were protected, rights stipulated by both the EU Charter and the European Convention on Human Rights. The decision pronounced stated that the relevant national legislation was not a measure of implementing the European Union Law and did not present other reference to the right. Starting from this premise, the CJEU stated that, as long as a rule of Community law is not implemented, the violation of which would also lead to human rights violations, this cannot be considered by the CJEU. Thus, the ECJ concluded that, in the case in which the EU Law is not implemented through a domestic norm, the jurisdiction to judge the violations of the human rights on the part of Member States, does not belong to this court (per contrary, it belongs to the ECHR).

Thus, perhaps more than ever, the rules belonging to the judicial area must be consistent with the realities of socio-historical space and meet the current needs of the people in the complex existence which cannot ignore the scientific research whose main actor is the individual, including obviously the human body, its health and integrity.

Rights relating to private life, as outlined by the provisions of the New Civil Code[4], are inextricably linked to the very existence of rights of human beings and circumscribe the general idea of "*personality rights*".

Article 58 of the New Civil Code enumerates the following personality rights, "*the right to life, to health, to physical and mental integrity, to dignity, to their own image, to privacy, and other similar rights recognized by law*."

Going beyond the mere abstract legal notion – of holder of civil rights and obligations - the concept of man has evolved into a complex reality that combines the legal notion with the biology and mental, and the specific legal instruments are intended to ensure the proper legal protection.

It is shown in literature that the rights comprised under the name of "personality rights" are in fact subjective extra-patrimonial or non-patrimonial rights[5], "*which refer primarily to the protection of the physical and moral human being in its individuality and personality*"[6].

In similar phrasing, belonging to the French doctrine, they are rights inherent to the quality of the human person belonging to any individual by the very fact that this person is human. Therefore, they are called "innate rights."[7]

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[4] *Law no. 287/2009 on the Civil Code* was published in the Official Gazette no. 511 / July 24, 2009;

[5] Lupan, E., Sabău-Pop I., *Romanian Civil Law Treatise*, Vol I, General Part, CH Beck Publishing House, Bucharest, 2006, p.65, Reghini, I., Diaconescu, rev., *Introduction to Civil Law*, vol.1, Sfera Juridică Publishing House, Cluj-Napoca, 2004, p.111, Costin, M.N., Costin, M.C. , *Dictionary of Civil Law*, D-K, vol II, Lumina Lex Publishing House, Bucharest, p.222;

[6] Cosmovici, P.M., *Civil law. Introduction to Civil Law*, third edition, All Beck Publishing House, Bucharest, 1996, p.69;

[7] Colin, A., Capitant, H., J. de la Morandière, *Elementary Course of French Civil Law*, translated by V.G. Cădere, I. Miloaie, Vol. I, seventh edition, Central Printing, Bucharest, 1940, p.127;

In their endeavor to establish the concept of personality rights, theorists have started from the definition and delimitation of the subjective rights from the civil liberties[8]. It is shown that such an analysis led to the conclusion that, far from being incompatible with subjective rights, personality rights represent a particular application of these.

Indeed, subjective rights and personality rights can be viewed in a general-particular relationship. If we go further, we note that personality rights are subsumed to the subjective non-patrimonial rights category, as they protect values with no pecuniary articulation. Life, dignity, honor, image, privacy cannot be measured in money. It was stated, in a useful definition, that personality rights are "the extra-patrimonial prerogatives intimately associated to the person, expressing the human essence, which are intrinsic to this"[9].

The characteristics of personality rights arise from their non-patrimonial essence[10]: personality rights are absolute rights, inalienable, imprescriptible from the point of view of acquisition[11], and have a strictly personal character, they cannot be exercised by anyone else, in principle, with the exception of the holder.

Until recently the Romanian law has not stipulated expressly the personality rights. But there were concerns to regulate, disparately, certain personality rights, such as the right to privacy, the right to own image, the right to life and integrity, more general rules, both in the civil and criminal law.

Decree 31/1954 on natural persons and legal entities[12] can be considered the document by which the legislation on personality rights emerged, but obviously this regulation was unable to cover very specific situations.

Often, however, the doctrine has shown the need for further regulation to consecrate the personality rights as absolute subjective rights, so that the simple violation of these to open the way for a reparation claim because "such an undertaking would be extremely difficult since it would be impossible to create a catalogue of all the rights, legitimate interests and rightful freedoms of the personality, and their list would never be current and should be continuously adapted to the evolving needs"[13].

Thus the analysis of non-patrimonial rights[14] dealt with non- patrimonial rights relating to the identification of natural persons (the right to a name - family name and first name, the right to a nickname, the right to domicile, the right to residence)[15]. The right to

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[8] Kayser, P., *Les droits de la personnalité. Aspects théoriques et pratique*s, „Revue trimestrielle de droit civil", vol. XXIX, 1971, p. 448–454; Mihai, Gh., Popescu G., *Introduction to the Theory of Personality Rights*, Romanian Academy Publishing House, Bucharest, 1992, pp.55–64;

[9] Jugastru C., *Reflections on the Concept and Development of the Personality Rights*, www.humanistica.ro/2007;

[10] Mureşan, M., Ciacli, P., *Civil law. General Part*, Cordial Lex Publishing House, Cluj-Napoca, 2000, p. 68; Mureşan, Boar, A., Diaconescu, Ş., *Civil Law. The Persons*, Cordial Lex Publishing House, Cluj-Napoca, 2000, pp. 36-37;

[11] Nicolae, M., *Statute of Limitations*, Rosetti Publishing House, Bucharest, 2006, p. 421;

[12] Published in the Official Gazette No. 8 of January 30, 1954, as amended;

[13] Ungureanu, O., *The Right to Honor and Dignity* in the Acta Universitatis "Lucian Blaga" series Jurisprudential, Supplement 2005, p.19;

[14] Cercel, S., Olteanu, E.G., *Considerations Regarding the Personality Rights*, in the Journal of Legal Studies of the University of Craiova no. 4/2009, pp.41-54;

[15] Cosma, D., *The right of Response through the Media*, in R.R.D. no. 10/1974, pp.3-9; Dobrinescu, I., *Legal Issues on the Surgical Grafts by Organ Transplant* in R.R.D. no. 12/1974, pp.14-19; Fekete, Gh., *Characteristics of the Non-Patrimonial Personal Rights and the Organ Transplants*, in Studia Universitatis Babes-Bolyai, Jurisprudential, Cluj-Napoca, 1976, pp.49-54; Chelaru, I., *Some Legal Aspects of Harvesting and*

life has been a subject of criminal law, the facts that constitute crimes against life being incriminated by the criminal law, but the rights related to the existence and integrity of natural persons were considered more after 2000[16].

Until the appearance of Law 287/2009 of the Civil Code the regulation of personality rights was contained in several laws such as the Constitution, Decree no. 31/1954, the Family Code[17], Law no. 95/2006 on healthcare reform[18], Title VI – Harvesting and transplantation of organs, tissues and cells of human origin for therapeutic purposes, Law 46/2003 regarding patient rights[19], and international sources of civil law, such as the Convention on the Rights of the Child, ratified by Romania by Law no. 18/1990[20], the International Agreement on civil and political human rights, ratified by Romania by Decree no. 212/1974[21] for the Protection of Human Rights and Fundamental Freedoms, the European Convention signed in Rome on November 4, 1950 and ratified by Romania by Law no. 30/1994, the European Convention on Human Rights and Biomedicine signed in Oviedo on April 4, 1997 and ratified by Romania by Law no. 17/2001.

Hence, *the respect for private life of the person and for dignity* are rights that were highlighted by the explicit inclusion in the new civil regulation, noting that in the matter of the harvesting of organs, tissues and cells, the New Civil Code does not bring anything new.

According to Article 71 of the New Civil Code, any person is entitled to one of the most important human freedoms: *private life*. No one shall be subject to any interference in his/her private, personal or family life, domicile, residence or correspondence, without his/her consent or without respecting the limits set out in the above mentioned article. It is also prohibited to use in any way, correspondence, manuscripts or other personal documents as well as information from the private life of a person without their consent or without respecting the limits set by the norm indicated. The article mentioned above, regarding privacy, is a transposition of Article 8 ECHR.

The content of Article 71 of the New Civil Code envisages, in a broad sense, an intimate, private "territory", regarding which every human being has exclusive rights and on which not only the New Civil Code but also the Constitution and the ECHR prohibit undue interference.

The notion of "*private life"* therefore includes the following: domicile, correspondence, own image, environment, daily life, marital life, health, friendships, leisure, the private aspect of professional work etc. The European Court established that privacy may suffer limitations in terms of protection in the case in which a person who puts in contact, willingly and fully aware, his/her personal, private life with the public one (e.g., celebrities or politicians), resulting a sensitive demarcation line between the freedom of expression on the one hand and the privacy on the other.

Transplantation of Human Organs, in R.R.D. no. 7/1981, pp.13-18; Deleanu, I., *Biology and Law*, Dacia Publishing House, Cluj-Napoca, 1983, pp. 80-140;

[16] The first issue of the Bioethics Journal appears in 2003;

[17] Law no. 4/1953, Republished in the Official Gazette no. 13 of April 18, 1956, supplemented and amended;

[18] Published in the Official Gazette, Part I, no. 372 of April 28, 2006, supplemented and amended;

[19] Published in the Official Gazette, Part I, no. 51 of January 29, 2003;

[20] Republished in the Official Gazette, Part I, of 14 of June 13, 2001;

[21] Published in the Official Gazette no. 146 of November 20, 1974;

In addition to general limits referred to by the article, there are special circumstances reflected in regulation that limit the absolute character of the right to privacy. In this regard, according to Article 27 paragraph 2 of the Constitution, the right to privacy may suffer restrictions if a) the execution of a warrant of arrest or a court decision, b) to eliminate a risk to life, physical integrity or property of a person or c) for the protection of national security or public order. Also, according to Article 8 paragraph (2) of the Convention the interference by a public authority with the right to privacy is permitted, if it is a necessary measure to take for national security, public safety or the economic well-being of the country, prevention of disorder or crime, the protection of health or morals, of the rights and freedoms of others.

The New Civil Code consecrates by Article 72, distinctly, the right to privacy (although only a part of it), the right to *dignity*.

In terms of content of the right, according to Article 72 paragraph (2) of the New Civil Code, "*it is forbidden to bring any prejudice to the honor and reputation of a person without his/her consent or without respecting the limits set out by Article 75*." The honor represents an innate quality of the human being, encompassing a whole range of feelings that may result from human interaction with other humans, from the human perception of the self (moral integrity, probity, fairness). Reputation, in turn, represents the public opinion about someone and results from the behavior of the person in society.

The regulation of the right to dignity in The New Civil Code can be considered a natural legislative consequence, occurred including as a result of the removal of the insult and slander offenses from the Criminal Code. The consecration of the right to dignity is an obvious component for sanctioning those who violate it, in the subsidiary of which occurs also the reparatory aspect of the image prejudice suffered.

As an epilogue of the regulation of privacy and, implicitly of the right to dignity, Article 74 of the New Civil Code lists as examples several situations where rights on the personal and private life are violated (e.g.: entering or remaining without a right in somebody else's domicile, interception without right of a private conversation, capture or use of the image or voice of a person in a private space, dissemination of news without the consent of the person concerned, dissemination or use of personal documents, including the information on domicile, residence, and telephone numbers of a person or family members without the consent of the person to whom they belong).

Obviously, some facts may meet and elements of offenses covered by the Criminal Code.

Article 76 of the New Civil Code regulates the absolute presumption of consent when the person to whom an information or material refers, makes himself/herself the information available to a natural person or legal entity about which he/she is aware that is working in the public information field, the written agreement of the person to which the information relates not being required.

Regarding the legal status of the human body[22], the Romanian civil law from the communist period (1948-1989) endorsed the ideology according to which "society offers

[22] Vasilescu, P., *Le statut juridique du corps humain*, the Romanian Report, the Henri Capitant Association, Journees internationales, 2009;

all citizens the best conditions to consolidate their health (...)"[23]. Beyond these populist statements, with a purely ideological character, the law dedicated only 8 out of the 189 articles of the Law no. 3/1978 referring to ensuring population health, to organ and tissue transplantation.

After December 1989, Romania has tried to recover the gaps in the legal field by changing its normative acts and by ratifying international treaties. Thus, presently, the status of the human body is stipulated in several constitutional provisions, in Law no. 95/2006 on healthcare reform (Articles 22 and 26), and in the international treaties to which Romania is a party.

In this regard, in 2001, Romania ratified[24] the Convention on Human Rights and Biomedicine and the Protocol on the Prohibition of Cloning Human Beings (Paris, January 12, 1998). Romania also signed the Protocol on Biomedical Research (Strasbourg, January 25, 2005). Nevertheless, Romania has not ratified the following agreements: the Protocol on Transplantation of Organs and Tissues (Strasbourg, January 24, 2002) and the Protocol on Genetic Testing for Medical Purposes (Strasbourg, November 27, 2008).

As legislation stands, in the Romanian legislation, the human body cannot be regarded as an asset and cannot be subject to a legal heritage. This conclusion applies as a general principle, even if it is not expressly provided for in the current legislation, but it can be inferred from paragraph e) and paragraph f) of Article 44, Law no. 95/2006 prohibiting the gaining of material benefits or other types of benefits in exchange of human organs or tissues.

According to the doctrine[25], the principles governing the protection of the human body are: any individual has the right to respect for his/her body, inviolability of the human body, the human body and its elements cannot be subject to legal heritage.

According to Article 22 of the Constitution, every person has the right to life and to physical and mental integrity and in accordance with paragraph (2) of Article 26 of the Constitution, entitled "Intimate, family and private life", "the natural person has the right to dispose of his/her own body, if by doing so the person does not violate the rights and freedoms of others, public order or good morals."

A person's right to have the freedom of disposition refers both to the physical freedom, to the right to dispose of his/her own body, but also to the psychological and moral implications[26]. This right includes the right to donate organs and tissue for transplants and other medical and genetic engineering experiments[27].

In principle, any forced treatment must be excluded because medical care is granted only based on free and informed written consent, in accordance with Article 144 of Law no. 95/2006. The same law prohibits the harvesting of organs and tissues from a living

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[23] Preamble to the law number 3/1978 on health, published in the Official Gazette of Romania no. 54 of July 10, 1978, repealed by Law no. 95/2006 on healthcare reform

[24] By Law no. 17/2001, published in the Official Gazette, Part I, no. 103 of 28 February 2001

[25] Ungureanu, O., Jugastru, C., *Civil law. The Persons*, Hamangiu Publishing House, Bucharest, 2007, pp. 20-35

[26] Cioclei, V., *Romanian Constitution. Review on Articles* by Muraru, I., Tănăsescu, ES (coordinator) C. H. Beck Publishing House, Bucharest, 2008, p.255;

[27] Constantinescu, M., Iorgovan A., Muraru, I., Tănăsescu, E.S., *Romanian Constitution Revised - Comments and Explanations*, ALL Beck Publishing House, Bucharest, 2004, p.50;

donor, lacking the ability to exercise his/her rights. By the time of harvesting, the potential donor may withdraw consent at any time.

As a rule, the child cannot be subject to a harvesting of organs or tissues, but, exceptionally, the law authorizes the collection of stem cells for therapeutic purposes only. For harvesting of organs and tissues, in the case in which the donor is a minor over the age of 14, Article 145 of Law no. 95/2006 requires the consent of the minor and also that of the minor's legal representative (parent or guardian). In any case, the harvesting or transplantation of organs or tissues performed without the consent of the donor is a crime punishable by imprisonment from 3 to 5 years, in accordance with Article 157 of the Law. Articles 141 and 149 of Law no. 95/2006 require that any harvesting (or transplant) of organs or tissues to be performed for therapeutic purposes and as provided by the law.

From this point of view, the Romanian law on transplantation complies with the content and intent of Article 19 of the Convention on Human Rights and Biomedicine.

The medical advancements should not ignore the human rights and together they must ensure respect for human dignity.

The international documents on bioethics were based on expressing the concern regarding medical actions that may endanger human dignity through the improper use of biology and medicine.

Regarding reproduction, it is widely agreed that the prohibition of human cloning must be unequivocal but the practice of medically assisted reproduction, the genetic testing or the harvesting of organs presently increases the concern that they should not distort the medical act and should not harm, in any form the human being.

Undoubtedly, all therapeutic steps and all the norms trying to regulate these procedures are centered on human dignity, which shall prevail in relation to the benefit of science and society's interest.

Although closely related, the notion of respect for the human being and the notion of dignity are not the same, as dignity is an attribute of the individual and respect outlines the ethical concept that translates precisely this human dignity.

The science of law is called upon to express the human dignity exactly as a complex of prerogatives inherent to the human being.

The proclamation and observance of the rights of European citizens includes norms concerning the right to life and respect of privacy, the main legal acts of the European Union (EU) in this field being:

a.)The European Convention on Human Rights and Fundamental Freedoms of November 4, 1950

b.)The Revised European Social Charter of May 3, 1996;

c.)The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Applications of Biology and Medicine: Convention on Human Rights and Biomedicine of April 4, 1997 – "Oviedo Convention";

d.)The EU Charter of Fundamental Rights of December 7, 2000;

e.)The European Charter of Patients' Rights of November 15, 2002

1. The European Convention on Human Rights and Fundamental Freedoms of November 4, 1950 expressly provides:

- Article 2 - The right to life:

1. The right to life of any person shall be protected by law. No one shall be deprived of life intentionally except in the execution of death sentences pronounced by a court when the crime is punishable with this sentence by law.

2. Death is not regarded as inflicted in contravention of this article when it results from the absolutely necessary use of force:

a. in defense of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. to suppress violent disorder or insurrection in a legal manner.

Therefore the right to life of every person is protected by law, thus death cannot be imposed deliberately on anyone except by death sentence pronounced by a court, where the law provides for a death penalty.

- Article 8 - The right to private and family life

1. Any person has the right to a private and family life, the protection of home and private correspondence.

2. The interference of a public authority in the exercise of this right is not permitted except if stipulated by law and constitutes, in a democratic society, a necessary measure to protect national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health, morals, rights and freedoms of others.

2. The Revised European Social Charter of May 3, 1996, Part II, Articles 11-13, 23 regulates the right to health protection, the right to social security, the right to social and medical assistance and the right of elderly persons to social protection.

3. The Oviedo Convention of April 4, 1997 emphasized the need for international cooperation so that humanity, as a whole, to benefit from the contribution of biology and medicine, recognizing the importance of public debate on the applications of biology and medicine, with the inherent consequence of taking those measures which ensure the human dignity and the fundamental human freedoms.

4. The EU Charter of Fundamental Rights of December 7, 2000, although elaborated as a primarily political document, was proclaimed by the European Commission, European Parliament and Council during the European Council meeting in Nice and acquired value as a treaty with the entry into force of the Lisbon Treaty in late 2009, the fundamental rights and freedoms having the legal value of any treaty. This document assumes that the European institutions and Member States are legally obliged to observe these rights when implementing the EU law.

The benefit of these rights entails responsibilities to others and to the human community and future generations, with the consequent strengthening of the protection of fundamental rights in the light of changes in society, social progress and scientific and technological development.

Consequently, the European Union acknowledges:

- Article 1 - Human Dignity

Human dignity is inviolable. It must be respected and protected.

- Article 2 – The right to life

(1) Any person has the right to life.

(2) No one shall be condemned to the death penalty, or executed.

- Article 3 - The right to integrity of the person

(1) Any person has the right to physical and mental integrity.

(2) In the fields of medicine and biology must be observed in particular:

(a) the free and informed consent of the person concerned, in accordance with procedures prescribed by law;

(b) the prohibition of eugenic practices, in particular of those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of profit;

(d) the prohibition of the reproductive cloning of human beings.

Author B. Mathieu showed that the European regulatory legal framework covers both principles that represent fundamental rights sustainable in time (e.g. the principle of dignity) but also principles which include ethical thinking adapted to scientific and technical progress[28].

5. The European Charter of Patients' Rights of November 15, 2002 defines the rights that are effective in the current European health care system and aims to adopt any changes will be required in relation to the evolution and development of scientific and technological knowledge.

In the matter of the protection of the right to life, at the American regional level there are two complementary systems which coexist: one regarding the states belonging to the American Convention on Human Rights and the other referring to the OAS member states that have not yet ratified or joined the Convention.

The right to life is proclaimed in Article 1 of the American Declaration of Rights and Duties of Man, but this article does not specify the time at which this right is recognized, or the terms of the death penalty.

The right to life is also guaranteed by Article 4 of the American Convention on Human Rights, whose paragraph 1 stipulates:

"Any person has the right to life. This right is protected by law, generally from the moment of conception. No one shall be arbitrarily deprived of his life."

This recognition of the right to life from the moment of conception has generated lengthy controversies about the admissibility of a domestic law that would recognize the legitimacy of abortion under certain circumstances. Thus, recognizing the right to life "in general", after conception, could be diminished or enhanced by law. The Inter-American Commission of Human Rights stated that certain laws of the United States relating to abortion do not violate any provisions of the Declaration.

The American Charter of Human and Peoples' Rights, as well as the European or the U.S. Convention, has its origins in the Universal Declaration. Other sources are the declarations, conventions and other instruments adopted by the Organization of African Unity, or by the Non-Aligned Movement. However, it should be noted that those who elaborated the African Charter were inspired also by the European Convention and the American Convention. The African Charter articles were worded in a simpler, vaguer, less detailed manner as compared to the European or the American Convention. This wording was used intentionally.

[28] Mathieu, B., *Principes éthiques în Code européene de la santé sous la direction de A. Laude et D.Tabuteau,* De Santé Publishing House, 2009, p.78;

Regarding the right to life, it is established in Article 4 of the Charter as follows: "The human being is inviolable. Any human being has the right to life and to physical and moral integrity of the person. No one shall be arbitrarily deprived of this right."

We have to note the importance of using the term "arbitrarily". It signifies the fact that a person may be deprived of his right to life, provided that this is done according to the law. Thus, the death penalty, which is still widespread on the African continent, is in accordance with the African Charter. As one can notice, there is a variety of definitions and situations falling under the scope of the right to life.

Although the Universal Declaration of Human Rights is the reference point for all other subsequent documents, as one can notice, there are significant differences between the various international instruments guaranteeing human rights in terms of establishing the right to life.

Despite its undeniable value, the right to life remains ambiguous in terms of the area it protects, the elements enjoying its protection being likely to raise more questions: May a person have freedom of disposal regarding the right to life? Where does the right to life start and where does it end? In addition to the right to life is a right to die? Although the right to life is defined by international texts, its content remains uncertain because life itself has not yet been defined.

The right to life has a dual nature which is reflected in extinction of the entire society as social form when the right to life is violated, whereas failure to observe any other fundamental right protected by the Convention has as a result a reduced quality of life.

What is the content of the right to life? The duty of the state to guarantee this right is stated clearly in the majority of international instruments: the state must enact legislation to protect life and all violations to it must be punished by law. If the State's obligation to protect the right to life by means of legislative action seems quite clear, the same cannot be stated about the prevention of violations to the right to life. It is obvious that the state cannot provide effective security to every citizen, a good deal of protection against the dangers being left to the vigilance of individuals.

The right to life embraces two basic forms, a personal interest of the human being and the interest of society, which is in general extremely powerful, and in analyzing these, there will be needed also several jurisprudential examples:

1. *The personal right to life.* The personal interest is the one that is indispensably linked to the person concerned, which is protected between the two primary moments of human life - the moment of that person's emergence, and respectively the moment of the person's death.

The personal right to life arises when the human being emerges as a person. It should be noted that this moment should not be confused with the birth of the person, because the moment is somewhere anterior to this point, which is the time at which the fetus could survive independently of the mother who carries it. According to the conditions of viability, the fetus is able to live alone, to survive independently of the person carrying it, so that it is no longer a part of a person's body, but a human being who enjoys protection.

We have to note that according to the court decision Roe vs. Wade, repeated shortly after in the court decision Doe vs. Bolton, the Supreme Court of the United States settled the matter by stating that no right is more important than the right of control over the own person. This decision also revealed that this right is not absolute, the court finding that

during the first two trimesters of pregnancy the mother is free to have an abortion, but under certain circumstances.

Therefore, the personal right to life comes into being from the emergence of the person, so after conception, but previous to birth, and this moment is represented by the beginning of the third quarter of pregnancy according to the condition of viability.

It can be seen that between the moment of procreation and the moment of the person emergence there is no personal right to life, but a detached right to life, the latter benefiting from the protection of society. The personal right to life emerges also in the third trimester of pregnancy, a right which enjoys the protection of the legislature and the judiciary institutions, even more as at this point brain activity occurs in the fetus, which reinforces the need for scientific protection.

The Court clearly stated the principle that the fetus has a right to life, but secondary to the woman's right to abortion. However, there is a recommendation of the Council of Europe to recognize the right to life of the fetus from the moment of conception (European recommendation no. 874 from October 3–4, 1979).[29]

2. *The detached right to life.* This right represents basically the right of society to have members, to protect their lives, for it to evolve and thus survive. The moment from which this right is protected is that of conception because the embryo cannot be regarded as a "thing" but as a "potential person".[30]

There are times when the state may be forced to take action when it comes to the protection of communities in a particular area or locality threatened by an impending disaster, known by authorities. A reasonable protection of individuals against terrorist attacks is an obligation that was assumed in all seriousness by many countries after the attacks of September 11, 2001.

The strength of the detached interest increases from the time of the emergence of human embryo, being very low in the beginning because the probability of survival is very low, but it maintains gradually until birth, at which time the potentiality of life is safe.

The two interests, the personal and the detached right constitute the right to life which creates both for individuals and for society multiple mutual obligations for this supreme right to enjoy true protection. These two interests, although they are both parts of an absolute, intangible right, can be subject to either voluntary or non-voluntary violations, according to the degree to which the person whom the right to life has been recognized agrees or not with the violation of the right to life.

Following the above analysis, a natural question arises: what are the boundaries of the right to life? The boundaries of the right to life represent actually the boundaries of life itself. This problem can be seen from a philosophical, ethical, religious and legal point of view. Here we will refer to both the beginning of life and the way life is perceived by the jurisprudence of the specific institutions and to its end.

We must not ignore the results of the biomedical revolution that are important steps for all mankind. These boundaries, borders that limit the right to life are found in three categories: those imposed by the initial moment of the human being emergence, those

[29] Vlădoiu, N.M., *The Constitutional Protection of Life, Physical and Mental Integrity,* Hamangiu Publishing House, Bucharest, 2007, p.14;
[30] ECHR, the case of Evans v. the United Kingdom, court decision of 07.03.2006;

imposed by the final moment of life and those imposed by the evolution of biomedicine and science.

An important issue regarding the right to life is determining the moment of its recognition for the human being. Most of the texts in the field do not indicate precisely this point, claiming that the right is recognized to "the person". Doctrine and jurisprudence have stated it, in the sense that this right includes birth. Only the Inter-American Convention on Human Rights expressly states that the right to life is recognized from the moment of conception.[31]

The first boundary of life relates therefore to the beginning moment and for the theme addressed by us, this moment is relevant. Here we are faced with the absence of a unanimous opinion, reason for which the answers to the questions that arise in our minds about this matter should be sought in the processes involving genetic manipulation, experimentation on human embryos or artificial fertilization.[32]

The Member States of the Council of Europe and the European Community through the Oviedo Convention of April 4, 1997 (Romania ratified the Convention for the Protection of Human Rights and Human Dignity in Biology and Medicine by Law no. 17 of February 22, 2001) imposed the obligation to protect the human being, Article 18 of the Convention stipulating that "when research on embryos in vitro is allowed by law, it shall ensure adequate protection of the embryo" but does not define the concept of "life", as it fails to determine the moment at which an embryo may considered to have the right to life.

Therefore, in this matter, disrupted by medical progress, the European jurisprudence is extremely cautious, as the Oviedo Convention, which avoids defining the term "person", by making reference to the legislation of the Member States.

At EU level, the Commission established a working group for science and new technologies ethics, which, through a research framework adopted in 1998 noted that in the legislation of the Member States of the EU there are two main views regarding the moral status of the human embryo and on the legal protection it should be granted. In the first view, it is considered that the embryo is not a human being and should be granted only limited protection. In a second view, it is considered that the embryo has the moral status of a human being and as such, it should benefit from adequate protection.[33]

In this context, we find a clarifying example in the cause of Evans v. the United Kingdom (2006). The plaintiff Natalie Evans and her partner J. started a fertilization treatment at the Bath Assisted Conception Clinic. During a consultation at the clinic, Miss Evans was diagnosed with a pre-cancerous condition of her ovaries and was given the opportunity of in vitro fertilization before the surgical removal of the ovaries. During the consultation, Miss Evans and her partner were informed that each of them would have to sign a form to consent to treatment and that, in accordance with the Human Fertilization and Embryology Law from 1990 it was possible for each to withdraw the consent given at any time before the embryos were implanted into the uterus of the plaintiff. Ms. Evans asked if there were other means to fertilize the ovules, as a means of protection in the case

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[31] Vlădoiu, N.M., *The Constitutional Protection of Life, Physical and Mental Integrity*, Hamangiu Publishing House, Bucharest, 2007, p.115;

[32] Scripcaru, Gh., *Introduction to Biology Law*, Lumina Lex Publishing House, Bucharest, 2003, p.17

[33] Bârsan, C., *the European Convention on Human Rights. Review on Articles. Vol. I. Rights and Freedoms*, All Beck Publishing House, Bucharest, p.164;

that J. would withdraw his consent, but the latter assured her that this would not happen. The treatment resulted in six embryos which were stored and, on November 26, Miss Evans underwent surgery for excision of the ovaries. In May 2002, the relationship between the two ended and J. informed the clinic that he no longer agreed to let Miss Evans use the embryos.

On February 27, 2005, the European Court of Human Rights was notified by the plaintiff following the failure of her civil actions in the domestic courts. The plaintiff requested, pursuant to Article 39 of the Rules of Court on interim measures for the UK to take the necessary measures to prevent the destruction of the embryos by the clinic until the Court decision would be pronounced. As a result, the embryos were not destroyed.

In the decision on the alleged violation of Article 2 of the Convention, the Grand Court found that embryos had no right to life in the sense of Article 2 and that there was therefore no violation of this text. The Court made reference to the argument concerning the right to life of embryos, which is at the discretion of the Member States.

In the silence of the European Convention, the Commission and the Court have always proved a special prudence, reason for which the issue of the beginning of the right to life remains unresolved. We believe that the solution pronounced by the Court in the Evans case was at least unfair, depriving Miss Evans of any chance to have biological children and, implicitly, of disposing of her body elements. Also we find this decision intriguing, as it represents a paradox: a woman who underwent surgery for the excision of her ovaries, leaving her only with the hope of in vitro fertilization is taken this last chance to have children by an individual who withdraw his consent so that embryos were destroyed, but when a woman wants to have an abortion, the opposition of the child's father is ignored.

A very recent case that captured the attention both domestically and internationally is the Sabyc case[34]. The plaintiff was subject to artificial insemination at the Sabyc clinic in 2008, the process which resulted in 19 embryos, out of which 3 were used, resulting in a boy. The other 16 cryopreserved embryos were entrusted for storage, according to a protocol, to the Sabyc clinic, until the woman's body was able to carry again. After learning, in July 2009, about the investigation the Directorate for Investigating Organized Crime and Terrorism (DIOC) on the Sabyc clinic, the woman requested the institution on August 25, 2009 to provide information on where and in what condition were the 16 cryopreserved embryos and on the practical ways to bring them back to her possession. DIOC replied that the genetic material confiscated from the clinic was under the administrative jurisdiction of the clinical genetics lab at the Forensic Institute for monitoring and conservation and that this institution was to be contacted by the specialized doctor performing the embryo transfer to be put in contact with representatives of the keeper.

The plaintiff sought a specialized embryologist, but because of the media pressure, no one was willing to perform the embryo transfer. In the end, the plaintiff found two specialists willing to perform the procedure at a clinic in Sibiu, but requiring consent of the National Transplant Agency (NTA), she did not receive a reply. After numerous delays, NTA informed that they were not able to give consent to the transfer of embryos,

[34] http://www.bzi.ro/recuperarea-unor-embrioni-confiscati-din-clinica-sabyc

due to the fact that the National Forensic Institute Minovici Mina was not a cell and tissue bank accredited by the NTA.

Prosecutors informed on February 10, that the motivation of the NTA representative was not enforceable against the criminal prosecution institution, reason for which, the plaintiff had to collect the genetic material by February 25. On February 18, 2010 the plaintiff requested the European Court of Human Rights to order the Romanian state to allow the transfer of 16 embryos. The ECHR chairman analyzing the case, decided to indicate the Romanian Government that it is in the interest of the parties that embryos should not be destroyed after February 25, for the entire duration of the trial.

It remains to be seen how this trial will end and to what extent the Court will change its view regarding the right to life of the embryos.

Given the medical research and several dangers, we believe that it is necessary that the human embryo should benefit from legal protection, as the human embryo cannot be considered a "thing" as it is a person by destination or, to be more precise, a potential person. The human embryo has to be protected as long as this does not conflict with the fundamental rights of the mother, at which point these rights will become a priority.

Assisted procreation technologies raise serious privacy issues within the scope of the person's private life. Therefore, participants in these technologies must respect the laws and regulations, and the medical and scientific body should comply with ethical and professional standards set by the World Medical Association and other community organizations involved.

The World Medical Association was founded in 1947, currently consisting of 97 national professional associations around the world and, since its inception, has been concerned with establishing and implementing ethical standards for doctors.

On October 14, 2006 as part of the 174th session of the General Assembly in Pilanesberg (South Africa), the World Medical Association showed that medically assisted procreation includes a wide range of techniques to help couples who cannot procreate without medical assistance, requiring a careful medical attention.

As with other medical procedures, doctors have an ethical obligation to limit their practice to areas that they have competence in and respect the rights of patients, including the patient's valid consent.

The informed consent of the participants in medically assisted human reproduction maneuvers guarantees the human dignity as a whole but also regarding its body elements or products as a valid element in this specialized medical action.

Medical confidentiality is the answer to protecting individual privacy, protection that members of a society expect from the legislature and, in some cases, claim from a judge. This is why the law tries to define the contents of medical confidentiality, considering "what is morally desirable, socially effective and scientifically possible"[35]. As a result, medical confidentiality is at the boundary between ethics and law.

It should be noted that medical confidentiality - as intrusion into the privacy of the patient – cannot be broken, even if there is consent from the interested party and even if the information is already known to third parties.

[35] Turcu, I., *Healthcare Law, The Common Front of the Doctor and the Lawyer,* Wolters Kluwer Publishing House, Bucharest, 2010, p. 91

In the context of the spectacular progress of medical science, it is becoming a necessity to provide a legal status of the human embryo, a status that would allow effective protection, but on this issue there is no unitary point of view.

The right person is claimed to be understood as a right to dispose of the self as physical freedom, embodied in the right to dispose of the own body, which brings together in its content also the right to donate organs and tissue for transplantation or other medical experiences and genetic engineering.