Chapter 8

Romania: The Patchwork of Statutory Provisions Concerning Assisted Reproduction



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Abstract

Romania has never had a comprehensive statute on medically assisted reproduction (MAR). Despite this deficiency, assisted reproduction technologies (ART) have taken hold within a statutory framework comprising general Civil Code provisions, cell and tissue transplant legislation, and several general statutes on patients' rights or public health programmes.

Although the transplant and patient's rights legislation can answer some of the technical questions regarding ART, the lack of an ART-specific statute implies that several legal questions either remain unanswered or are answered solely by legal doctrine based on general principles or norms employed in other areas of law.

By employing a black-letter law approach, this study attempts to draw a clearer picture of applicable Romanian law to ART situations and organise disparate relevant provisions in a semi-coherent framework and identify those insurmountable deficiencies that absolutely require a legislative intervention. The legal doctrine and relevant statutes referred here were the existing legal provisions as in December 2024.

Keywords: family, fertility, parent, child, assisted reproduction, filiation

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1. Introduction

Although Romania has never had a comprehensive statute on ART, the statutory landscape is not devoid of applicable provisions. A careful examination of Romanian legislation provides several statutes or lower-level ministerial regulations that are applicable to ART situations. First is the Civil Code,[1] with its chapter on medically assisted reproduction with a third-party donor, and other relevant provisions such as those concerning the inherent rights of the human being or filiation. Other major sources include the Law no. 95/2006 on healthcare reform, the Law no. 46/2003 on patient's rights and several ministerial orders or government decrees concerning transplants or public funding of *in vitro* fertilisation (IVF). Using patience and diligence, these scattered provisions can continue to be assembled in a semi-coherent framework for ART.

2. Policies Regarding Medical Help Through ART

The only explicit and current public policy that is relevant to ART is the one from 2023 concerning the justification for the expanded public funding of *in vitro* fertilisation procedures, from the previous 1,000 procedures per year to the current 10,000 procedures per year. This policy can be inferred from the June 2022 memorandum of the Ministry for Families, Youth and Equal Opportunities, justifying the Government Decree on enhanced funding for a social public health programme concerning IVF.[2]

This governmental policy is justified by two reasons: fighting Romania's demographic decline and helping alleviate the consequences of infertility as a disability.[3] The policy focuses on increasing the level of public funding for IVF with embryo transfer (ET) procedures for 10,000 couples or infertile single women. The recipients are eligible to receive public funding for up to 3 procedures per year, however, they must have a specialist M.D. recommendation for the procedure; the single woman or at least one member of the infertile couple must have public health insurance; the woman must be between 20 and 45 years old; and they must be Romanian citizens and be domiciled in Romania.[4]

Traces of a governmental policy about ART can also be observed in the 2012 memorandum of justification for the failed government-initiated law project on

1 Civil Code (Law no. 287/2009) first published in the Official Gazette (Monitorul Oficial) no. 511/24 July 2009, republished with new Art. numbers in the Official Gazette no. 505/15 July 2011.

2 Ministry for Families, Youth and Equal Opportunities, Memorandum of justification for Government Decree no. 1103/2022, pp. 1–9.

3 Ibid., pp. 1–2.

4 Ibid., pp. 3–4.

medically assisted reproduction with a third-party donor.[5] This policy memorandum justifies the necessity of ART on demographic grounds and is an answer to widespread infertility issues in society. Moreover, infertility treatments and supporting medically assisted reproduction are considered first, as an answer to demographic decline, and only thereafter, as an answer to a specific societal problem.[6]

Since 2011, the treatment of couples' infertility has been one of the objectives of the national health programme for organ, tissue and cell transplant.[7] IVF and embryo transfer were considered as the primary methods to achieve this objective, and thus, the national health subprogramme for IVF with ET was approved.

3. Constitutional Provisions

The Romanian Constitution has several provisions on human rights that are relevant to assisted reproduction matters. Additionally, international treaties on human rights, which Romania has ratified, prevail against domestic law provisions, thus having a quasi-constitutional power. When discussing the constitutionality of legal provisions, the Constitutional Court frequently refers both to the national Constitution and to the international treaties on human rights which Romania has ratified, particularly the European Convention on Human Rights, which was ratified in 1994.

One of the first relevant provisions of the Constitution is regarding non-discrimination, provided in Art. 4, para. 2, which prohibits discrimination based on race, nationality, ethnic origin, language, religion, sex, opinion, political membership, wealth or social origin by proclaiming that Romania is the common and indivisible fatherland of all its citizens, without discrimination based on the aforementioned criteria.

The 39-article Title II of the Constitution directly refers to fundamental rights, liberties and duties. Several of these are pertinent to assisted reproduction.

Art. 16, para. 1 proclaims that citizens are equal before the law and public authorities, without privileges or discrimination. Art. 20, para. 2 confers a superior power to international treaties on human rights compared with domestic statutes. Art. 22, para. 1 establishes and guarantees the right to life, physical and mental integrity.

Art. 26 establishes the right to intimate, family and private life. Para. 1 provides that public authorities respect and protect the intimate, family and private life. Para.

5 Memorandum of justification for the law project on medically assisted reproduction with a third-party donor, pp. 1–8.

6 Ibid., pp. 1–2.

7 Art. IV.5h of the Annex to the Government Decree no. 1388/2010.

2 mentions that the natural person has the right to decide upon everything regarding themselves, if they do not breach the rights and liberties of others, public order or good morals.

Art. 34 guarantees the right to protecting health. It establishes the right to health protection, compels the State to take measures for ensuring hygiene and public health, provides that organising medical care, social health insurance system for diseases, maternity and recovery, controlling the actions of medical professions and paramedical activities, as well as other means for protecting the physical and mental health of the person shall be done only according to the law.

Another constitutional provision relevant to ART is Art. 48, pertaining to the family. The most relevant is para. 3, which states that all children are equal before the law, either born during marriage or out of wedlock.

The Constitutional Court case law frequently refers to Art. 8 of the European Convention of Human Rights (ECHR), regarding the right to private and family life, however, it rarely had the opportunity to examine ART provisions owing to their scarcity in Romanian primary legislation.

One of the very few instances in which the Constitutional Court directly addressed ART legislation was the preliminary examination in 2005 of a 2003 law project, initiated long before the current Civil Code was adopted in 2009, regarding reproductive health and human medically assisted reproduction. This preliminary examination of the constitutionality of a law project is performed by request, before it comes into force. The Court observed that 21 out of the 34 articles of the law project had constitutionality issues[8] and the project was later abandoned by Parliament.[9]

In addition to the technical legal writing issues of the law project, the Constitutional Court observed that several core provisions of the law project were unconstitutional. The provisions regarding the compulsory preliminary surrogacy contracts between the surrogate mother and the intended parents, about relinquishing parental rights, were deemed to be unconstitutional because they breached the outer limits of a person's rights to decide about themselves and were contrary to good morals, insofar as they were allowing transactions regarding life, health and the unborn child.[10] The confidentiality requirements of the law project were deemed to breach the person's right to their own image.[11] Further, the court observed that decreasing the criminal penalties for genetic embryo alteration and embryo trade to a mere fine and decriminalising harvesting gametes without consent, gametes trafficking, violating the confidentiality of donations, abusive embryo production and insemination without consent or proper authorisations were all unconstitutional because they were trivialising the protection of fundamental constitutional values.[12]

8 Decision No. 418/2005 of the Romanian Constitutional Court.
9 Predescu, 2022, pp. 219–222.
10 Constitutional Court Decision No. 418/2005, para. 3b.
11 Ibid.
12 Ibid., para. 3d.

The court struck down all the provisions of the law project that would require a person to be part of a couple to access assisted reproduction and the delegation of statutory powers regarding assisted reproduction to the Minister of Health instead of enacting a more comprehensive law.[13]

4. Medical Regulation of ART

4.1. Regulations on Clinics Performing ART

The general health system statutes, such as Law no. 95/2006 on healthcare reform, do not render ART a State monopoly. More specific legislation, regarding the public health programmes on fertility, provide more precise criteria for the clinics receiving public funding for IVF.

The joint Work and Social Solidarity Minister's and Family, Youth and Equal Opportunities Minister's Order no. 2155/20917/2022, on the Regulations concerning the implementation of the social national programme of supporting couples and single persons for increasing childbirths, defines the conditions that must be fulfilled by any clinic aiming to be a partner in this publicly funded programme. The clinic must be authorised by the National Transplant Authority for cell transplants and as a reproductive cell bank for the processing, preservation, stockpiling and distribution of reproductive cells; it must declare that its prices for the publicly funded procedures will not exceed its own six-month average before entering the programme; both the clinic and the hired medical personnel must be insured for malpractice liability for the duration of the programme; it must be up to date with its contributions to the National Social Health Insurance Fund and the fund for medical leaves; it must prove that its medical personnel is fully authorised and they are legally hired; and the OB-GYN physicians must be accredited for infertility treatment and medically assisted reproduction.[14]

The 2022 norms on the national public health programmes, more precisely the subprogramme on *in vitro* fertilisation with embryo transfer, specify that only prior participating clinics with a 30% success rate from 2017-2021 or new clinics can join the programme.[15] The new clinics must fulfil the same criteria as the ones aforementioned for the social national programme.

13 Ibid., para. 5.

14 Art. 20 of Annex no. 1 to the joint Work and Social Solidarity Minister's and Family, Youth and Equal Opportunities Minister's Order No. 2155/20917/2022.

15 Annex no. 9, Section IX.3, Subsection F to the Health Minister's Order No. 964/2022.

4.2. Provisions on Medically Assisted Reproduction Technologies

ART technologies are regulated in detail primarily by Annex no. 30 of the Health Minister's Order no. 1241/2019, regarding the approval of official guides for gynaecology and obstetrics. It specifically mentions and thus allows the following assisted reproduction techniques: intra-uterine (artificial) insemination, IVF, ET, intracytoplasmic sperm injection (ICSI) and artificial insemination with sperm or oocytes from a third-party donor.[16]

The Civil Code prohibits, using general language, eugenics, organising the selection of human individuals and any 'infringement' against the human species.[17] Moreover, it prohibits any interventions on the genetic traits and altering human descendance, human cloning and creating embryos solely for research purposes.[18] Interventions on the genetic traits of a person or using medically assisted reproduction techniques for sex selection are allowed only for the purpose of avoiding or treating genetic afflictions.[19]

Medically assisted reproduction with a third-party donor is specifically mentioned by the Civil Code,[20] however, it is not regulated in detail, contrary to the requirements of Art. 447 of the Civil Code.[21] This seven-article section of the Civil Code deals only with the principles of who can be the parents, the requirements for parental consent to the MAR procedure, how filiation is established and confidentiality requirements.

Surrogacy as an ART technique is not regulated in Romanian law. The only cases where the concept is used are the regulations regarding the public funding of IVF with embryo transfer, which have specifically mentioned since 2011 that no public funding is provided for surrogacy, although these norms also deny public funding for any type of medically assisted reproduction with a third-party donor, which is a technique expressly allowed by both the Civil Code and medical regulations.[22]

Medically assisted reproduction is primarily performed using transplant regulations, as expressly provided by the Law no. 95/2006 on healthcare reform regarding

16 Irinescu, 2024, pp. 348–349.

17 Art. 62 of Civil Code: 'Nobody can threaten the human species. Any eugenic practice that tends to organise the selection of persons is forbidden'; Chelaru in Baias et al., 2021, pp. 78–79.

18 Art. 63, paras. 1 and 2 of Civil Code: 'Any medical interventions on genetic characteristics with the purpose of modifying a person's descendance, except those regarding the prevention and treatment of genetic ailments, are forbidden. Any intervention with the purpose of creating a human being who is genetically identical to another living or deceased human being is banned, as well as creating human embryos for research purposes'; Chelaru in Baias et al., 2021, pp. 79–80.

19 Art. 63, paras. 1 and 3 of Civil Code: 'Using human medically assisted reproduction techniques for choosing the sex of the future child is not allowed, except for the purpose of avoiding a hereditary disease related to the sex of the child'; Chelaru in Baias et al., 2021, pp. 79–80.

20 Arts. 441–447 of Civil Code.

21 Florian in Baias et al., 2021, p. 602.

22 Art. 2f of the Annex to the Health Minister's Order No. 765/2011.

IVF,[23] with no specific regulations for ART. Therefore, posthumous fertilisation can technically be construed to be legally possible if the deceased oocyte or sperm donor consented to cell harvesting before death, although this would bring forward questions about violating the rights to private life of the deceased donor. The use of harvested cells, tissues or organs from a live donor is not conditional on the donor's survival until the effective use of the donated biological material. The only legal situation where death renders consent ineffective is the medically assisted reproduction with a third-party donor, where the intended father's consent to the procedure becomes ineffective if the man dies before conception.[24] Despite this, medically assisted reproduction with a third-party donor can continue to proceed, practically as a new procedure, if the woman consents to becoming a single mother or opts for a different male partner for the purposes of this medical procedure. The previous husband cannot be the father in this situation, because his consent was rendered ineffective by death and he is not biologically related to the child, therefore, the mother can either be the single parent with a third-party donor or the father can be another man who had consented to the procedure before conception.

The official guide on infertility approved by Annex no. 30 of the Health Minister's Order no. 1241/2019, regarding the approval of official guides for gynaecology and obstetrics, specifically mentions the following assisted reproduction techniques: intra-uterine (artificial) insemination, IVF, ET, intracytoplasmic sperm injection (ICSI), artificial insemination with sperm or oocytes from a third-party donor. This guide is technical, addressing primarily health professionals, containing medical recommendations and best practices. It rarely defines the medical concepts it uses, and it cannot address most of the legal issues that may arise out of medically assisted reproduction situations. As it is a lower-level regulation, it should only more clearly define the used concepts and techniques from a technical perspective and leave the more controversial issues of parental eligibility, informed consent, liability, prohibited techniques, and parental filiation to a higher-level statute enacted by parliament.

The Health Minister's Order no. 1763/2007 on transplants is tangentially referencing access to ART procedures. This secondary legislation only mentions different-sex couples in a declared intimate relationship as having access to reproductive cell 'transplants' between partners.

23 Art. 142u of Law No. 95/2006: 'transplant – medical activity in which, for therapeutic purposes, an organ, tissue or cell harvested from another person, called the donor, is implanted in the body of a patient, called the recipient. The regulations in this statute are also applicable to in vitro fertilisation techniques'; Guțan, 2011, pp. 85–86.

24 Art. 442, para. 2 of Civil Code: 'Consent becomes ineffective in cases of death, filing a divorce petition or factual separation, prior to the moment of conception during human medically assisted reproduction. It can be revoked at any time, in writing, including before the physician tasked with ensuring assistance for reproduction with a third-party donor'; Florian in Baias et al., 2021, p. 596.

4.3. Financial Support for ART

Assisted reproductive procedures have been financed intermittently from public funds with special national health programmes since 2011[25] and they are not normally covered by the standard public health insurance.[26] All the existing financing programmes up to date have not distinguished between public and private fertility facilities.

The general Law on Healthcare Reform no. 95/2006 specifically exempts from funding by the national social health insurance fund: IVF,[27] high performance medical services[28] and medical care on demand.[29]

Publicly funded IVF with ET is subject to a national public health subprogramme since 2011,[30] with extended funding from 2022. It is restricted to infertile heterosexual couples defined as couples diagnosed, by a certified specialist M.D., with an affliction incompatible with natural reproduction or who could not reproduce after one-year of unprotected sexual relations, with no third-party donations allowed for sperm or oocytes, as well as specifically excluding surrogacy in one of the few specific mentions of this procedure in Romanian domestic law.[31] To receive public funding for IVF, initially both partners had to have public health insurance; the woman had to be between 24–40 years of age, with a body mass index (BMI) between 20–25 and with an ovarian reserve determined to be within the normal limits.[32]

Public funding since 2022 has been theoretically available for three procedures per year for each couple/single woman, depending on the limited funding availability. Funding was usually limited to 1,000 procedures per year in previous fiscal years, however, for 2022, Government Decree no. 1103/2022 stipulated funding for at least 2,500 procedures/year and a further 10,000 procedures/year from 2023, on a 'first come, first served' basis. Between 2017–2021, public funding was available only for IVF with ET, only for couples, with no financing whatsoever provided for gamete donations or surrogacy. The 2022 Government Decree has also extended the age range for public funding eligibility to 20–45 years for the women.[33]

The joint Work and Social Solidarity Minister's and Family, Youth and Equal Opportunities Minister's Order no. 2155/20917/2022, on the Regulations concerning the implementation of the social national programme of supporting couples and single persons for increasing childbirths, defines the conditions in which the State assists in paying for fertilisation treatments. The beneficiaries are both couples and

25 Brodeala, 2016, p. 64.
26 Art. 248, para. 2h of Law No. 95/2006.
27 Ibid.
28 Art. 248, para. 2b of Law No. 95/2006.
29 Art. 248, para. 2i of Law No. 95/2006.
30 Brodeala, 2016, p. 64.
31 Ibid., pp. 64–65, Florian and Floare, 2024, p. 473.
32 Florian and Floare, 2024, p. 473; Annex IX.3, Section C to Health Minister's Order No. 964/2022.
33 Art. 2, para. 3 of Government Decree No. 1103/2022.

single infertile women diagnosed by a fertility specialist for having an affliction that is incompatible with natural reproduction.[34] They can receive financial support of up to 15,000 lei, the equivalent of 3,000 Euro, of which 5,000 lei, approximately 1,000 Euro, is for the necessary medicines and 10,000 lei, approximately 2,000 Euro, for medical procedures. Each beneficiary can receive this special financial support up to three times a year for the duration of the programme. The cumulative conditions for receiving the financial support are: both members of the married or unmarried couple or the single woman have to be Romanian citizens domiciled in Romania; they all have to be insured in the Romanian public health insurance system; the fertility treatment and procedures must occur in a Romanian authorised medical unit which is a partner in the programme; and the age of the participating women must be between 20 and 45 years at the time of filing the request.[35]

The publicly funded fertility programme began in December 2022 with 2,500 beneficiaries for 2022, with a further 10,000 beneficiaries each year, from 2023.[36] The financial support is granted on a 'first come, first served' basis.[37] The funded procedures include the harvesting of oocytes from the beneficiary woman, the processing of sperm, artificial insemination, embryo cultivation for between 72 and 120 hours, embryo-transfer, the health monitoring of the case evolution and the necessary drug treatments.[38]

This social fertility programme explicitly excludes several fertility-related medical procedures from public funding: preliminary laboratory investigations, genetic diagnosis of the embryos, the cryopreservation of oocytes, sperm, or embryos; the surgical harvesting of sperm, general intra-venous anaesthesia for oocyte harvesting; intracellular sperm injection; and harvesting of donated oocytes.[39] In case the cost of the specific medical procedure is greater than the publicly funded allowance, the beneficiaries must bear the supplemental costs out-of-pocket.[40]

4.4. The Beneficiaries of ART

To define who can be a beneficiary of an ART procedure in Romanian law, one needs to examine three different and non-comprehensive regulations, which target the issue from different angles: the Civil Code chapter on medically assisted reproduction with a third-party donor, the Health Minister's Orders on transplants and the most recent Minister's Orders on the social programme for the public financing of IVF.

34 Art. 4 of Joint Order No. 2155/20917/2022.
35 Art. 5 of Joint Order No. 2155/20917/2022.
36 Art. 6 of Joint Order No. 2155/20917/2022.
37 Art. 7 of Joint Order No. 2155/20917/2022.
38 Art. 16 of Joint Order No. 2155/20917/2022.
39 Art. 26 of Joint Order No. 2155/20917/2022.
40 Art. 27 of Joint Order No. 2155/20917/2022.

The general provisions of Art. 441, para. 3 of the Civil Code specifically determine that both heterosexual couples and single women have access to medically assisted reproduction with a third-party donor.[41] As the law does not distinguish between a male or female third-party donor it can be broadly construed to include both types, as well as simultaneous donations of both sperm and oocytes for the same receiving couple or single woman.[42] This provision allows for the use of purely foreign genetic material, simultaneously from both male and female third-party donors, which would imply that the only legal parent who would have a biological connection to the child would be the mother giving birth.[43]

Art. 441, para. 3 of the Civil Code defines the parents, for the purposes of assisted reproductive procedures with third-party donations, as either a man and a woman or a single woman.[44] This provision is not restricted to married couples, however, implicitly refers to heterosexual couples, stipulating a man and a woman.[45] Despite the apparent broad nature of the provision, it excludes same-sex couples,[46] where both cannot participate in the procedure, although one of them could be involved as a single prospective mother or as a fictitious male partner to a woman.

Legal doctrine debates whether the legal concept of a single woman refers only to women that do not have a partner at all or if it also includes women whose partner has not consented to the medical procedure. Further, provisions in Art. 443, para. 2, which allow the husband to deny paternal filiation if he had not previously agreed to the medically assisted reproduction with a third-party donor,[47] tend to suggest that this procedure is also available for women who are not technically single, but whose partner does not wish to agree to such a procedure.[48] According to current regulations, even a married woman could consent to the procedure without her husband's joint agreement, a fact which would probably later be a well-founded reason for divorce owing to the lack of a joint decision about a serious matter that concerns the marriage.

Moreover, this Civil Code provision does not compel the man and the woman who consent to this procedure to be an actual couple, consensual or otherwise.[49] They do not have to prove or even assert a relationship of any sort and their mutually agreed consent to the procedure could lead to them becoming the mother and father of a child without any other prior connection: emotional or social. This deficiency

41 Irinescu, 2024, p. 354.
42 Motica, 2021, p. 224; Florian in Baias et al., 2021, pp. 594–595.
43 Neamț, 2022, p. 642.
44 Irinescu, 2024, p. 354.
45 Motica, 2021, p. 224.
46 Neamț, 2022, p. 643.
47 Art. 443, para. 2 of Civil Code: 'The mother's husband can nonetheless challenge the child's paternity, according to the law, if he had not consented to the medically assisted reproduction with a third-party donor'.
48 Florian and Floare, 2024, pp. 474–475; Avram, 2022, pp. 310–311.
49 Neamț, 2022, p. 643; Art. 441, para. 3 of Civil Code: 'Parents, for the purposes of this section, can only be a man and a woman or a single woman'.

would allow for the legal circumvention of the rules on adoption,[50] by allowing the intended father's real spouse to later adopt the child, using the simplified procedure for adopting the other spouse's natural child, or even as a stand-in for the non-existent rules on surrogacy, by allowing the intended father to consent to medically-assisted reproduction with a third-party donor together with the surrogate mother, allowing them to use the oocytes donated by the father's spouse as the third-party donor, with a subsequent adoption.

Although the Civil Code does not use the term 'couple' for the man and the woman involved in the medically assisted reproductive procedure with a third-party donor, few scholars have discussed whether the only requirement for these prospective parents is that they are of different sex, or if it is prohibited for them to be relatives who could not marry each other.[51] The tentative answer to this question, based solely on the complications that may arise in relation to succession and other family relationships and which we consider as more of a *de lege ferenda* suggestion, is that the same prohibitions that apply to marriage between relatives should extend to the members of the reproductive couple.[52] The criminalisation of incest is not beneficial here, because it only narrowly prohibits sexual intercourse between ascendants and descendants or between brothers and sisters,[53] while leaving outside its legal scope the mere parenthood of the same child, involving two close relatives, with the help of a medical procedure that does not involve any types of sexual intercourse between the parents.

4.5. Informed Consent Regarding ART

The issue of consent regarding ART is dealt with briefly in the Civil Code and more thoroughly in the general law on patients' rights and the transplant regulations which are used occasionally as general norms for artificial insemination and IVF.

The Civil Code deals only with consent regarding medically assisted reproduction with a third-party donor, both through artificial insemination and IVF.[54] The statutory framework for parental consent comprises Art. 442 of the Civil Code, which stipulates the procedure for parental consent and the situations when this consent becomes ineffective. Legal doctrine has discussed at length[55] the various situations that may arise regarding consent in this type of medical procedure.

Art. 442, para. 1 of the Civil Code requires prior notarised consent from both parents for the medically assisted reproduction with a third-party donor. This consent must be given in a confidential manner, and the notary has a legal duty to explicitly inform both prospective parents about the consequences of their agreement

50 Neamț, 2022, p. 643.
51 Ibid., p. 648.
52 Ibid.
53 Art. 377 of Criminal Code.
54 Neamț, 2022, pp. 635, 638.
55 Ibid., pp. 649–658.

regarding filiation.[56] Prior written consent is relevant primarily for paternal filiation, while maternal filiation remains tributary to the fact of giving birth, with scant regard for the deficiencies or the lack of consent to the procedure from the mother.[57] The M.D. performing the procedure is responsible for checking the existence of the notarised prior consent from the single mother or both members of the couple.[58]

A legal scholar has recently noted that these general provisions on consent to medically assisted reproduction reveal no details about age or legal capacity requirements.[59] As this consent involves a legal act, extant legal provisions would exclude minors under fourteen years and people lacking legal capacity owing to guardianship.[60] Even if minors above fourteen years of age could exercise parental rights regarding the person of their child,[61] the paramount importance given by extant law to notarised parental consent as the beginning point of an assisted reproduction procedure would suggest that neither a regular fourteen-year-old with limited legal capacity, nor an emancipated or married minor with full legal capacity could legally consent to assisted reproduction owing to their reasoning abilities not being fully developed.[62] As this expressed consent and the underlying reasoning are purely personal, the minor's consent is not susceptible in this situation to be confirmed by their parent's or legal guardian's assent.[63]

The opinion in favour of the exclusion of fully capable minors from MAR is not widely shared,[64] particularly if this full capacity is reached as a consequence of marriage.

One of the legal issues raised by parental consent to medically assisted reproduction is who should be a parent in a procedure that is intrinsically more susceptible to State control and interference than natural reproduction. This question becomes more pressing when it involves parents that were previously stripped of parental authority as a civil penalty or were prohibited from exercising their parental rights as an accessory or complementary punishment to a criminal conviction.

De lege ferenda, a future detailed law on assisted reproduction should stipulate that people who were stripped of parental authority owing to their misconduct or were prohibited from exercising parental rights because of a criminal conviction should also be precluded from being part of an assisted reproduction procedure, at least for the duration of their civil or criminal sanctions.[65]

56 Irinescu, 2024, p. 356.
57 Neamț, 2022, p. 650.
58 Ibid.
59 Ibid.
60 Ibid.
61 Art. 490 of Civil Code: 'The underage parent who is 14 years of age has solely the parental rights and duties relating to the person of the child. The rights and duties regarding the child's assets belong to the child's legal guardian or to another person, according to the law'.
62 Neamț, 2022, pp. 650–652.
63 Ibid., p. 651.
64 Irinescu, 2024, p. 356.
65 Neamț, 2022, p. 652.

The parents' consent to assisted reproduction must be given, prior to conception, in a notarised form. The notary must explain to the potential parents the consequences of their consent regarding filiation. The future father must be made aware that, if fertilisation is made with third-party male genetic material, he would not be able to challenge the paternity, and that he can withdraw his consent up until the moment of conception. Moreover, the mother must be informed that maternal filiation is established by giving birth and cannot be challenged even if the genetic material comes from a third-party female donor. Legal doctrine mentions that even if the law does not specifically compel to include all this prior information in the parents' consent form itself, it should be included in a detailed manner.[66]

One of the particularities of consent to medically assisted reproduction with a third-party donor is that it is revocable, by either parent, until the moment of conception.[67] It could be revoked, in a dissimilar manner to its prior notarised written format, even verbally before the M.D. who assists the reproduction with a third-party donor.[68] The revoked consent can stop the procedure if it is revoked by the mother herself, however, it could also simply lead to reconfiguring the procedure as involving only a single woman, if the consent is withdrawn by the father, the male reproductive material does not belong to him and the woman decides to carry it out by herself, without a partner[69] or even with a different consenting male partner.

Art. 442, para. 2 of the Civil Code also stipulates that prior consent to medically assisted reproduction with a third-party donor is ineffective in case of death, filing for divorce or factual separation before conception.

Death of the mother implies the unavoidable end of the assisted reproduction procedure and the ineffectiveness of her prior consent. While the death of the consenting father before conception would not render medically assisted reproduction with a third-party donor technically impossible, the law renders his consent ineffective owing to both its very personal nature, particularly if it involves the use of the prospective father's biological material, and the difficulties that will arise for establishing paternal filiation when birth occurs sufficiently outside the legal timeframe for paternity presumptions.[70]

Filing for divorce is relevant for the ineffectiveness of prior consent to assisted reproduction only when it involves a married couple who had both consented to the procedure. If a married woman has consented to the procedure without involving her husband, filing for divorce by either spouse would not render the women's consent ineffective.[71] Recent legal doctrine opined,[72] more as a *de lege ferenda* suggestion, that in cases where both spouses had consented to the procedure before one of them

66 Ibid., pp. 652–653.
67 Irinescu, 2024, p. 356.
68 Neamț, 2022, pp. 654–655.
69 Ibid., pp. 655–656.
70 Neamț, 2022, pp. 656–657.
71 Ibid., p. 657.
72 Ibid.

filed for divorce, the mere filing of the divorce petition has the immediate effect of stopping the procedure only if the wife is the plaintiff; otherwise the husband's petition must be communicated to the respondent wife for it to have any legal effect. Filing for divorce from either spouse will not stop the assisted reproduction if the woman decides to carry it out by herself, as a single mother, without involving her husband as a potential father.[73]

The most controversial of all the three ineffectiveness-of-consent situations is the one concerning mere factual separation of the prospective parents. This situation involves both married and unmarried couples, without it being necessary to have a formal divorce petition. This factual separation involves both the material element of not living together and the intentional element of having no intention of continuing a relationship with the other.[74] Unlike the other situations, where consent is rendered ineffective, however, there is always a written document to that effect, due of its subjective nature, the exact moment of a couple's separation would be difficult to prove, particularly in relation to the exact moment of medically assisted conception. Thus, it is advisable for the separating partner to notify the other and the attending M.D. an explicit consent revocation, particularly because it is also technically possible, although unlikely, for a separated couple to continue to wish to jointly have a child through a medical procedure.[75] A single woman could continue to decide to carry on with the procedure, particularly if the used biological material is not from her former partner.

The Law on patients' rights No. 46/2003 deals with informed consent in any medical procedure, which includes, however, is not limited to any type of medically assisted reproduction.

A patient is defined by law as including healthy individuals who use health services.[76] This statute has a nine-article Chapter II regarding the patient's right to be informed and an eight-article Chapter III on the patient's consent to a medical intervention. Moreover, it has a three-article Chapter V about the patient's rights regarding reproduction.

The most relevant provisions of the Law No. 46/2003 regarding consent to ART involve the necessity of the patient's prior consent for any medical intervention and their right to stop it at any time by signing a written liability waiver.[77] Moreover, patient consent is mandatory for any harvesting, storage and usage of any biological products of their body,[78] as well as for their participation in medical research or clinical education.[79]

73 Ibid.
74 Neamț, 2022, pp. 657–658.
75 Ibid., p. 658.
76 Art. 1a) of Law No. 46/2003.
77 Art. 13 of Law No. 46/2003.
78 Art. 18 of Law No. 46/2003.
79 Art. 19 of Law No. 46/2003.

Regarding the information requirements for consent to ART, the law on patients' rights stipulates the patient's right to be informed regarding the available medical services and their usage,[80] the identity and professional status of the medical service providers,[81] their health, suggested medical interventions and their risks, extant alternatives to suggested medical procedures, diagnosis and prognosis,[82] the right to receive medical information in a respectful manner with minimal technical terms and in a language they understand[83] and the right to a second medical opinion.[84]

The general statute on patients' rights has a brief three-article section specifically on the rights of the patient concerning reproduction, although it is not targeted towards medically assisted reproduction. The woman's right to life takes precedence when the pregnancy represents a major and immediate risk for the life of the mother.[85] The patients also have the right to receive information, education and the required services, which are necessary for a normal sexual life and healthy reproduction, without discrimination.[86] Women have a guaranteed right to decide whether to have children, however, only without endangering their own life.[87] All patients have the right to select the safest methods for healthy reproduction[88] and to use efficient and risk-free methods for family planning.[89]

Lacking a specific statute on medically assisted reproduction, legal doctrine and medical practice frequently refer to the extant regulations on cell and tissue transplants as a proxy for any type of assisted reproduction which involves the transfer of reproductive cells from a donor, either third-party or the recipient's partner, to a recipient. Law no. 95/2006 on health reform has a section, Title VI, on the harvesting and transplant of human organs, tissues and cells for therapeutic purposes. Its requirements on consent applicable to ART include the requirements for consent from both the live donor and the recipient.

The live donor must be at least eighteen years old, with full legal capacity and unimpaired judgement.[90] Their consent must be informed, written, freely given and prior to harvesting. The information must be given by a physician, social worker or another medical professional and it must include the risks and physical, psychological, familial, professional and social consequences of harvesting. Consent is

80 Art. 4 of Law No. 46/2003.
81 Art. 5, para. 1 of Law no. 46/2003.
82 Art. 6 of Law No. 46/2003.
83 Art. 8 of Law No. 46/2003.
84 Art. 11 of Law No. 46/2003.
85 Art. 26 of Law No. 46/2003.
86 Art. 27 of Law No. 46/2003.
87 Art. 28, para. 1 of Law No. 46/2003.
88 Art. 28, para. 2 of Law No. 46/2003.
89 Art. 28, para. 3 of Law No. 46/2003.
90 Art. 68, para. 2 of Civil Code: 'The harvesting of human organs, tissues and cells from minors or living persons with impaired judgement due to a mental handicap, a serious mental disorder or another similar reason is banned, except for cases explicitly provided by law'; Chelaru in Baias et al., 2021, p. 87.

revocable, the donation and transplant may not be conducted under duress and it must be altruistic and not carry any material benefits.[91]

Further, the recipient must consent to the cell or tissue 'transplant' in written form, after being informed about the risks and benefits of the procedure.[92]

Human cell or tissue harvesting or transplant without the living donor's and the recipient's legal consent is a criminal act and carries a penalty between two and seven years in prison, while the attempt itself is a punishable crime.[93]

The Health Minister's Order No. 1242/2007 requires consent from the living donor of tissue or cells, after being informed about the clinical and laboratory tests to exclude any possible contamination, infectious disease or any other afflictions that present a risk for the recipient. The donor must also be informed in a clear and easily understandable manner about the donation process, the purpose of prelevation, consequences and risks, medical confidentiality, therapeutic purpose and potential benefits and personal data protection.[94] Another provision on transplants, the Health Minister's Order no. 1763/2007, has several provisions requiring the human tissue and cell banks to check for the donor's consent for harvesting as part of their due diligence.

4.6. Regulation of Donor's Status

The status of the donor in ART procedures in Romanian law can only be inferred from disparate provisions of the Civil Code and the regulations on transplants. These regulations allow for the donor to be any person who is at least 18 years old, with unimpaired judgement, no transmissible diseases or autosomal-recessive genes. There are no specific requirements on kinship between donor and recipient.

The Civil Code regulations on medically assisted reproduction with a third-party donor stipulate that this procedure does not lead to filiation between the offspring and the donor[95] and there is no liability of the donor.[96] Nobody can challenge the child's filiation for reasons that pertain to its medically assisted reproductive nature.[97] Moreover, the donor benefits from the blanket legal provisions on the confidential nature of the entire procedure, although the veil of secrecy can be pierced,

91 Art. 144 of Law No. 95/2006.
92 Art. 150 of Law No. 95/2006.
93 Art. 154 of Law No. 95/2006.
94 Art. 2 of Annex No. 1 to Health Minister's Order No. 1242/2007.
95 Art. 441, para. 1 of Civil Code: 'Human medically assisted reproduction with a third-party donor does not generate any parental relation between the child and the donor'; Florian in Baias et al., 2021, pp. 594–595.
96 Art. 441, para. 2 of Civil Code: 'In this case, any legal action for liability cannot be brought against the donor'; Florian in Baias et al., 2021, pp. 594–595.
97 Art. 443, para. 1 of Civil Code; Florian in Baias et al., 2021, pp. 596–599.

with prior court authorisation, to avoid serious damage to the health of the offspring or their descendants.[98]

There are other Civil Code provisions, referring to the respect owed to the human being and their inherent rights, which are particularly relevant to a donor involved in an ART procedure. For example, the personality rights, which are non-transferrable, include the donor's rights to life, health, physical and mental integrity, dignity, own image and private life.[99]

A donor's right to life, health or physical and mental integrity prevails over the interests of society or science.[100] Eugenic practice and the organised selection of people are prohibited,[101] as well as the interventions on the genetic characteristics of a donor, for the purpose of altering the descendants of a person, with the sole exception of those that are meant to prevent or cure genetic illnesses.[102]

Donors in ART procedures cannot be cloned[103] and the integrity of their body and mind cannot be affected, except in limited cases prescribed by law.[104] The examination of the genetic characteristics of an ART donor can also be performed if it involves a medical purpose, as prescribed by law.[105]

One of the most relevant Civil Code provisions, pertinent to the status of ART donors, is the general prohibition on ascribing a monetary value to the products of the human body, with any exception to this principle having to be expressly defined by law.[106] The Law on Healthcare Reform no. 95/2006 criminalises donating cells or tissues for material gain,[107] advertising for cell or tissue donation for material gain,[108]

98 Art. 445 of Civil Code: 'Any information regarding human medically assisted reproduction is confidential. Nevertheless, in cases in which the lack of information leads to a risk for serious damage to the health of a person thus conceived or of their descendants, the court can authorise the information to be transmitted, in a confidential manner, to the physician or the relevant authorities. Any of the descendants of the person thus conceived can use this right if the lack of information can seriously damage their health or the health of a close person'; Florian in Baias et al., 2021, p. 601.

99 Art. 58 of Civil Code: 'Any person has the right to life, health, physical and mental integrity, dignity, self-image, respect for private life and any other such rights recognised by law. These rights are non-transferrable'; Chelaru in Baias et al., 2021, pp. 73–76.

100 Art. 61 of Civil Code: 'Life, health and physical and mental integrity of any person are equally guaranteed and protected by the law. The interests and well-being of the human being must prevail over the sole interest of society or science'; Chelaru in Baias et al., 2021, pp. 77–78.

101 Art. 62 of Civil Code; Chelaru in Baias et al., 2021, pp. 78–79.

102 Art. 63, para. 1 of Civil Code; Chelaru in Baias et al., 2021, pp. 79–80.

103 Art. 63, para. 2 of Civil Code; Chelaru in Baias et al., 2021, p. 80.

104 Art. 64 of Civil Code: 'The human body is inviolable. Every person has the right to physical and mental integrity. The integrity of the human being can be affected only in cases and under the conditions explicitly and limitatively prescribed by law'; Chelaru in Baias et al., 2021, p. 82.

105 Art. 65, para. 1 of Civil Code: 'The examination of the genetic characteristics of a person can only be performed for medical or scientific research purposes, done according to the law'; Chelaru in Baias et al., 2021, p. 83.

106 Art. 66 of Civil Code: 'Any acts for the purpose of attributing a monetary value to the human body, its components or products, are void, with the exception of cases explicitly prescribed by law'; Chelaru in Baias et al., 2021, pp. 83–84.

107 Art. 156, para. 1 of Law No. 95/2006.

108 Art. 156, para. 3 of Law No. 95/2006.

organising or harvesting cells or tissues for transplant for material gain for either the donor or the person who organises the process.[109]

As there are no current statutory provisions that would allow for paying a donor for participating in an ART procedure, such payments would fall foul of both civil and criminal law.

Other general Civil Code provisions that are relevant to the ART donors require a prior written and explicit consent for harvesting human cells,[110] prohibiting harvesting of cells from a minor or a person with impaired judgement.[111] Any medical intervention, including the harvesting of reproductive cells from a donor, must be conducted only according to the limits prescribed by law.[112]

The most delicate area of donor's rights in Romanian law is that concerning the respect of their private life[113] and human dignity.[114] These rights appear to be heavily dependent on the confidentiality of the procedure, because any public exposure of the identity of the donor would infringe both on their right to an intimate life and their dignity or public reputation.

Regarding medically assisted reproductive procedures with a third-party donor, the Civil Code of 2009 includes a specific seven-article section in this regard (Arts. 441 to 447). These general provisions were supposed to be followed by a new special and detailed law on medically assisted reproductive procedures with a third-party donor, however, more than thirteen years have passed to no avail.[115]

All assisted reproductive procedures are considered confidential according to the general provisions of Art. 445, para. 1 of the Civil Code requirements which were construed to protect the identity of the parents or of the single parent, the child born out of these procedures or the third-party donor, as well as the notarised parental agreement to undergo the procedure, this confidentiality being considered

109 Art. 157, para. 1 of Law No. 95/2006.

110 Art. 68, para. 1 of Civil Code: 'The harvesting and transplant of human organs, tissues and cells from living donors are done exclusively in cases and conditions prescribed by law, with the written, free, prior and explicit agreement of the donors and only after they were previously informed about the risks of the intervention. In all cases, the donor can revoke their consent up until the moment of harvesting'; Chelaru in Baias et al., 2021, pp. 85–87.

111 Art. 68, para. 2 of Civil Code; Chelaru in Baias et al., 2021, pp. 85–87.

112 Art. 67 of Civil Code: 'No person can be subjected to experiments, tests, harvestings, treatments or any other interventions for therapeutic or scientifical purposes except in cases and conditions explicitly and limitatively prescribed by law'; Chelaru in Baias et al., 2021, p. 85.

113 Art. 71 of Civil Code: 'Every person is entitled to respect for their private life. Nobody can be subjected to interference in their intimate, personal or family life, nor in their domicile, residence or correspondence, without their consent or the respect of the limits provided by Art. 75. It is also forbidden to use in any way the correspondence, manuscripts or other personal documents as well as the information from a person's private life without their consent or the respect of the limits provided by Art. 75'; Chelaru in Baias et al., 2021, pp. 89–91.

114 Art. 72 of Civil Code: 'Every person has the right for their dignity to be respected. Any infringement to a person's honour or reputation is forbidden without their consent or the respect of the limits provided by Art. 75'; Chelaru in Baias et al., 2021, pp. 91–93.

115 Florian and Floare, 2024, p. 468; Avram, 2022, p. 309.

an integral part of the constitutional right to private life.[116] As it is also a medical procedure, the assisted reproduction is also covered by the right of the patient to the confidentiality of medical information, which is stipulated by Art. 21 of the Law no. 46/2003 on the rights of the patient.[117]

The only specified exceptions to the confidentiality requirements are made in Art. 445, para. 2 of the Civil Code, for the court-authorised transmission of information to a physician or to the competent authorities, to prevent serious health harms to the children born from these procedures or to their descendants.[118] Moreover, confidentiality can be curtailed on the request of the descendants of the child born out of this procedure, to avoid serious health harms to them or their close ones, according to Art. 445, para. 3 Civil Code. Legal doctrine has interpreted this provision as meaning that only the children or their descendants have legal standing to demand this type of information.[119]

All the details about ensuring the confidentiality pertaining to medically assisted reproduction should have been included, according to Art. 447 of the Civil Code, in a special statute on the matter of assisted reproductive procedures with third-party donors,[120] which is yet to be adopted for the thirteen years since the Civil Code came into force, on 1 October 2011.

The Health Minister's Order no. 1763/2007 on the technical requirements for human tissue and cells for transplants mentions, for transplants of reproductive cells, other than from the recipient's partner, the requirement to register information about the donor's age, health, medical history, medical risks for themselves or others, tests for transmissible diseases, which specifically include HIV, syphilis, Hepatitis B or C, Human T-cell Lymphotropic Virus, Chlamydia, supplemental tests depending on risk factors, which could include malaria, cytomegalovirus, *Trypanosoma cruzi*, genetic screening for autosomal-recessive genes.[121]

4.7. Cryopreservation of Embryos

The cryopreservation of gametes or embryos is legally allowed in Romania, although it is specifically excluded from public funding from the IVF with ET national public health programmes since 2017, even in the more generous recent fertility programme that has commenced in 2022. In Romania, there are no specific legal conditions for the cryopreservation of gametes or embryos. The only general conditions

116 Florian and Floare, 2024, pp. 470–471.
117 Ibid., p. 471.
118 Avram, 2022, p. 312.
119 Florian and Floare, 2024, p. 471.
120 Art. 447 of Civil Code: 'Medical assisted reproduction, its legal regime, ensuring the confidentiality of information pertaining to it, as well as the way in which information can be transmitted will be established by special statute'.
121 Annex III to the technical requirements in Health Minister's Order No. 1763/2007.

are the informed consent of the donor and a contract with the authorised medical institution that harvests and deposits the biological material.[122]

This lack of regulation led to serious legal issues when the 'ownership' of the frozen embryos was questioned in a case involving a criminal inquiry and asset seizure implicating a fertility clinic: whether they are mere material goods or living beings.[123] The case of *Knecht v. Romania*, No. 10048/10, 2 October 2012, reached the European Court of Human Rights,[124] establishing that the case involved the applicant's, that is the mother, right to private life, not her property rights.

A subsequent case, *Nedescu v. Romania*, No. 70035/10, 16 January 2018, was based on the breach of the right to private life by the Romanian authorities' incoherence and unpredictable administrative procedures for giving back frozen embryos to a parental couple, after they were seized during a criminal investigation concerning the fertility clinic where they had stored their frozen embryos.[125]

4.8. Provisions on the Protection of the Embryo

The 2009 Romanian Civil Code has a special section on the rights to life, health, and physical integrity of natural persons.[126] Art. 61 guarantees the 'inherent' rights of the human being by equally safeguarding the life, physical and psychological health of any human being. The wellbeing and the interests of any human being should take precedence over the sole interests of society.[127] Art. 62 of the Civil Code prohibits eugenics and any attempts to alter the human species, which is understood to refer to the altering of the human genome. Eugenics is legally defined as any practice which tends to organise the selection of persons while the scientific definition of the concept refers to the practical applications of hereditary biology in the genetic improvement of individuals.[128]

The Civil Code also prohibits any medical interventions on genetic characteristics with the purpose of modifying the person's descendance, with the sole exception of curative and preventative interventions for genetic diseases.[129] The legal prohibition extends to human cloning with the purpose of creating an identical human being and creating human embryos solely for research purposes.[130] Human medically assisted reproductive procedures are not allowed for the purpose of selecting the sex of the future child, unless it is to avoid a gender-related genetic disease.[131]

122 Tec, 2017, p. 246.
123 Ibid., pp. 236–239.
124 European Court of Human Rights, 2012.
125 European Court of Human Rights, 2023.
126 Diaconescu and Vasilescu, 2022, pp. 303–307.
127 Chelaru in Baias et al., 2021, pp. 77–78.
128 Ibid., pp. 78–79.
129 Art. 63, para. 1 of Civil Code.
130 Art. 63, para. 2 of Civil Code.
131 Art. 63, para. 3 of Civil Code; Chelaru in Baias et al., 2021, pp. 79–81

Additionally, the current Civil Code regulates the sanctity of the human body,[132] restricts the examination of genetic characteristics only for medical, research and judicial purposes[133] and forbids giving a monetary value to the human body or to its component parts.[134] Further, it states the broad principles for medical interventions on a person and for transplants from a living person.[135]

4.9. The Rights of the Child Born out of ART

Romanian law does not distinguish between the legal status of children born out of ART and those born out of natural conception. Art. 446 of the Civil Code explicitly states that fathers have the same rights and duties towards children born out of medically assisted reproduction with a third-party donor as towards a child born through natural conception,[136] while the Romanian Constitution itself provides, in Art. 48, para. 3, that all children born outside marriage are equal to the children born during marriage.

The only specific rights of a child born out of ART concern their prerogative to demand the piercing of the veil of confidentiality that surrounds it, with prior court authorisation, when it is necessary to prevent serious harm to the health of the child or their descendants caused by the lack of information.[137] This right also passes to the child's descendants, who can enquire in the same manner for information about the assisted reproduction to prevent harm to their health or their own descendants' health.[138]

The breadth of the confidentiality principle in relation to MAR with a third-party donor and the exceptions to this principle should have been regulated by the future specific statute on MAR with a third-party donor specifically required by Art. 447 of the Civil Code which has not yet been approved. Art. 445 only has the broad strokes of the required regulation, stating that all information regarding MAR is confidential and the sole exceptions are for health reasons.

The right to know their origin is a fundamental right of all children, either conceived naturally or through ART. This right is part of the more extensive right to private life, regulated by both Art. 8 of the ECHR and Art. 26 of the Romanian Constitution.[139] Some authors have suggested doing away with the absolute anonymity of third-party donations to implement this right of the child.[140] The children's right to establish their identity clashes with the ambiguous and broad principle of

132 Art. 64 of Civil Code; Chelaru in Baias et al., 2021, p. 82.
133 Art. 65 of Civil Code; Chelaru in Baias et al., 2021, p. 83.
134 Art. 66 of Civil Code; Chelaru in Baias et al., 2021, pp. 83–84.
135 Chelaru in Baias et al., 2021, pp. 82–87; Arts. 67–68 of Civil Code.
136 Irinescu, 2024, p. 353.
137 Art. 445, para. 2 of Civil Code; Irinescu, 2024, p. 353.
138 Art. 445, para. 3 of Civil Code; Irinescu, 2024, p. 353.
139 Florian and Floare, 2024, pp. 470–471.
140 Guțan, 2011, pp. 3–4.

confidentiality. Moreover, unrestrained confidentiality can endanger the children's right to health by only providing a cumbersome judicial procedure for obtaining vital information about the donor or the procedure itself.

As children born through ART may be the result of medically assisted reproduction with a third-party donor and a single female parent, they will unavoidably be discriminated against compared with children having two parents, because they could never establish paternal links to their genetic father owing to the legal prohibition in MAR with a third party donor and they also lack an intended father, while normally all other children have at least the potential to establish both maternal and paternal filiation. *De lege lata,* the only way in which the child of a single mother, born through MAR with a third-party donor, can have a father is through the subsequent adoption by the mother's husband, naturally with the birth mother's consent. The mother's consensual male partner can only legally become a non-adoptive father by consenting to the procedure before conception had occurred. Therefore, the legal restrictions of MAR with a third-party donor also imply that the children of a single mother who has used the procedure can never legally have a 'biological' father.

Romanian law establishes human rights only after birth. Legal capacity begins at birth, however, as a traditional exception, few legal rights are recognised for a child from conception if they are born alive,[141] which implies that they could be theoretically entitled to certain civil rights for 300 days before their birth. Embryos have no rights and legal status by themselves, however, they are recognised as an intrinsic part of their intended parents' rights to private and family life as defined by Art. 8 of the ECHR.[142]

The 1989 Convention on the Rights of the Child was ratified by Romania in 1990.[143] Most of its provisions are implemented in the Law no. 272/2004 on the protection and furthering of the rights of the child. Romanian law defines the child as a person who has not yet reached the age of 18 and who has not attained full legal capacity by other means.[144]

The Law no. 272/2004 on the rights of the child recognises the child's specific right to dignity,[145] compelling both the parents[146] and public authorities to respect their dignity,[147] particularly when taking disciplinary action regarding the child or dealing with disabled or abused children. The Civil Code general provisions that prohibit eugenics,[148] interventions on the human genome without a medical reason[149]

141 Art. 36 of Civil Code.
142 Tec, 2017, pp. 239–240.
143 Law No. 18/1990.
144 Art. 4a of Law No. 272/2004.
145 Art. 6g of Law No. 272/2004.
146 Art. 33, para. 2 and Art. 37b of Law No. 272/2004.
147 Art. 49, para. 5 and Art. 90, para. 2 of Law No. 272/2004.
148 Art. 62 of Civil Code; Chelaru in Baias et al., 2021, pp. 78–79.
149 Art. 63 of Civil Code; Chelaru in Baias et al., 2021, pp. 79–81.

and giving a monetary value to the human body and its parts[150] are also indirectly safeguarding the interests of the embryos.

Children have the right to establish and keep their identity.[151] Moreover, they have the right, if possible, to know their parents and to be raised, cared for and educated by them.[152] Children must be registered immediately after birth and have the right to receive a name and a citizenship.[153] The first name and family name of a child are selected by their parents[154] and the children have the right to keep their citizenship, name and family relations.[155] If a child is illegally missing any one of the elements of their identity, public authorities have a duty to take any necessary measures to re-establish the child's identity.[156]

Even children who are estranged from their parents and extended family have the right to have personal relationships and direct contacts with their family members, except in cases where a court decides that such contacts could endanger the child's physical, mental, intellectual or moral development.[157] This right does not extend to the biological donor-parent or their side of the family in cases of medically assisted reproduction with a third-party donor.

Romanian law promotes raising the children in their natural family, with their parents, as a priority, except when this is not in the best interests of the child.[158]

The child's right to health is considered as one of the pillars in defining their best interests.[159] Health concerns are one of the reasons that could trigger an investigation by child protection services.[160] Children have the explicit right to reach the best health level they can achieve[161] and to receive free healthcare paid for by the National Health Insurance Fund.[162] Further, they must be protected against work exploitation or any other activities that endanger their health.[163] Endangering the physical or mental health of a child can be considered as abuse or neglect.[164]

One of the core principles of child protection is providing equal opportunities and non-discrimination.[165] All children have the same rights, without regard to their, their parents' or their legal guardians' race, skin colour, language, religion, political

150 Art. 68 of Civil Code; Chelaru in Baias et al., 2021, pp. 85–87.
151 Art. 9, para. 1 of Law No. 272/2004.
152 Art. 9, para. 2 of Law No. 272/2004.
153 Ibid.
154 Art. 9, para. 3 of Law No. 272/2004.
155 Art. 9, para. 4 of Law No. 272/2004.
156 Art. 9, para. 5 of Law No. 272/2004.
157 Art. 17, para. 3 of Law No. 272/2004.
158 Art. 5, para. 2, Art. 6c and d, Art. 35 para. 1, Art. 36 para. 1, Art. 38 of Law No. 272/2004.
159 Art. 2, para. 6a of Law No. 272/2004.
160 Art. 41, para. 1 of Law No. 272/2004.
161 Art. 46, para. 1 of Law No. 272/2004.
162 Art. 46, para. 2 of Law No. 272/2004.
163 Art. 91, para. 1 of Law No. 272/2004.
164 Art. 94 of Law No. 272/2004.
165 Art. 6b of Law No. 272/2004.

or any other type of opinion, nationality, ethnicity, social origin, material status, disability, birth or achieved status, or developmental difficulties.[166]

The protection of the private and family life of the child is recognised against both their parents, authorities or other parties.[167]

Lesbian and gay couples continue to have no formal recognition in Romanian law, despite the recent 2023 ECHR decision in the case of *Buhuceanu and others v. Romania*, no. 20081/19, 23 May 2023,[168] where the lack of even a legally defined registered partnership for same-sex couples was deemed to be a violation of their Art. 8 right to private and family life. *De facto* same-sex couples are not prohibited by Romanian law, therefore, a child can actually be raised by a same-sex couple if any of them has parental rights. Current family law would usually simply disregard the presence of the same-sex partner of the biological or adoptive parent of the child, although the child could later acquire a visitation schedule and a personal relationship with a non-related person who happens to be his biological parent's current or former same-sex partner, in a similar manner to any other person towards whom the child had become factually attached.[169]

Contrary to the precarious status of same-sex couples raising children in Romania, single mothers have better defined rights at least since 1954, when the prior Family Code came into force. Either parent can exercise parental rights, and the child's residence can be established at either one of them. The preferred option of the Civil Code is the joint exercise of parental authority,[170] which includes the major decision-making powers,[171] while the law on the rights of the child defines the criteria for establishing the residence of the child, when there is no joint parental agreement, as being the best interests of the child, the parent's residential situation and the distance to the child's school, the parent's personal history and capacity to respect and support the other's parental rights.[172] Single parents of either gender have well-defined social protection rights, their situation being expressly recognised as a family for the purposes of social protection law.

The right of the child to know their origin is recognised by Romanian legal doctrine as being primarily an effect of Art. 8 of the European Convention on Human Rights[173] and of Arts. 7 and 8 of the 1989 Convention on the Rights of the Child.[174] This fundamental right frequently clashes with the confidentiality provisions specific both to ART and medical procedures in general.[175]

166 Art. 7 of Law No. 272/2004.
167 Art. 27, para. 2, Art. 37b of Law No. 272/2004.
168 Applications No. 20081/19 and 20 others, 23 May 2023.
169 Art. 17, para. 1 of Law No. 272/2004.
170 Art. 483, para. 1 of Civil Code; Irimia in Baias et al., 2021, pp. 642–646.
171 Art. 36, para. 3 of Law No. 272/2004.
172 Art. 21, para. 1 of Law No. 272/2004.
173 Florian and Floare, 2024, pp. 470–471.
174 Irinescu, 2024, p. 352.
175 Ibid.

The confidentiality principle of third-party donations by itself would preclude the child from knowing the identity of the donor, male or female, who contributed biological material to their conception, and it would also prevent the child from knowing that they are a product of medically assisted reproduction.[176] The Civil Code's explicit exceptions to confidentiality are circumscribed solely to health reasons for the direct offspring and their descendants.[177]

Several authors have argued that the confidentiality of the ART procedure is not equivalent to complete anonymity and that the best middle ground approach would be to allow the child, at a certain legally predefined age, such as 14, 16 or 18 years, to receive certain information about their origin, even without specific health reasons, such as the age, physical characteristics or medical history of their biological parents, without actually revealing the identity of the third-party donor.[178] Nonetheless, a complete cancellation of the confidentiality principle would imperil the availability of third-party donations; therefore, we can presume that not all information about the donor's identity can be freely available.

4.10. Sanctions for Malpractice regarding ART

Medical malpractice in general is regulated by Title XVI of the Law no. 95/2006 on healthcare reform. Malpractice is legally defined as a professional error in the exercise of a medical act, which has caused damage to the patient, involving the civil liability of medical personnel or the provider of medical services or products.[179] Medical personnel are liable for negligence, recklessness or insufficient medical knowledge in the exercise of their profession, including any preventative, diagnostic or curative procedures[180] such as ART. They are also liable for damages caused by breaches of confidentiality, informed consent or the obligation to provide medical care[181] or if they exceed the limits of their medical competence in any cases that are not emergencies involving the unavailability of competent personnel.[182] The primary civil sanction for malpractice is the payment of material or moral damages, however, these do not preclude criminal liability if the deed is also a criminal act,[183] or liability for professional misconduct either with the employer or professional organisations.

Civil liability for ART malpractice is shared between all those involved in the medical act, proportionately with everyone's degree of guilt.[184] Medical personnel is exempt from civil liability if the damages to the ART patient are the result of

176 Art. 445, para. 1 of Civil Code; Irinescu, 2024, pp. 352–353.
177 Art. 445, para. 2 and 3 of Civil Code; Irinescu, 2024, p. 353.
178 Nicolescu, 2021, pp. 693–694; Nicolescu, 2023, p. 466; Florian, 2018, pp. 128–129.
179 Art. 653, para. 1b of Law No. 95/2006.
180 Art. 653, para. 2 of Law No. 95/2006.
181 Art. 653, para. 3 of Law No. 95/2006.
182 Art. 653, para. 4 of Law No. 95/2006.
183 Art. 653, para. 5 of Law No. 95/2006.
184 Art. 654, para. 1 of Law No. 95/2006.

in-hospital infections, generally accepted adverse effects, complications and risks of investigative or treatment methods, hidden defects of medical goods, equipment, medical devices, technologies or of the medical substances that were used.[185] Civil liability for ART malpractice passes to the private or public health facility when damages are the consequence of in-hospital acquired infections, known defects of medical devices which were not repaired, or using medical devices, medicines or materials which were expired or out of warranty.[186]

5. Family Law Regulations

5.1. Filiation and ART

Family law rules about filiation have specific provisions relating to ART only regarding medically assisted reproduction with a third-party donor. In all other situations, general rules on natural filiation completely apply.

The specific rule on filiation from medically assisted reproduction with a third-party donor is that paternity is established based on the husband's or male partner's consent to the procedure,[187] without the possibility of challenging it for biological reasons.[188] The paternity can be challenged if the pregnancy was not the result of the medical procedure[189] or if the father's consent was ineffective.[190]

Initially, the paternity would continue to be registered in the birth registry according to the common rules for children born or conceived during marriage, however, it can be afterwards struck out by court decision if the alleged father, the mother's actual or former spouse who is not biologically related to the child, successfully challenges it owing to his lack of prior consent or his ineffective consent for MAR with a third-party donor. According to Art. 442, para. 2 of the Civil Code, consent becomes ineffective owing to death, filing for divorce, factual separation or

185 Art. 654, para. 2 of Law No. 95/2006.

186 Art. 655, para. 1 of Law No. 95/2006.

187 Art. 444 of Civil Code: 'The person who, after having consented to medically assisted reproduction with a third-party donor, does not acknowledge the child thus born out of wedlock is liable towards the mother and the child. In this case, the paternity of the child is established by judicial decision, according to Arts 411 and 423'; Florian in Baias et al., 2021, pp. 599–601.

188 Art. 443, para. 1 of Civil Code: 'Nobody can challenge a child's filiation for reasons pertaining to medically assisted reproduction and neither the child thus born can challenge their own filiation'; Florian in Baias et al., 2021, pp. 596–599.

189 Art. 443, para. 3 of Civil Code: 'In cases in which the child was not conceived this way, the provisions regarding challenges to paternity remain applicable'; Irinescu, 2024, p. 357.

190 Art. 443, para. 2 of Civil Code: 'Nevertheless, the mother's husband can challenge the child's paternity according to the law, if he had not consented to the medically assisted reproduction with the help of a third-party donor'; Irinescu, 2024, p. 357.

consent revocation before artificial conception. For consensual partners, acknowledgement of paternity after birth or a judicial decision for establishing paternity is required even in MAR cases, however, an acknowledgement which has no basis in either biological filiation or prior consent to MAR can be challenged in court, at any time, by any interested party.[191]

In all other ART situations, where no third-party donor was involved, paternity is presumed in favour of the mother's husband either at the time of birth or during the legal timeframe for conception,[192] between 300 and 180 days before birth.[193] If the mother was not married either at birth or during the timeframe for conception, paternity can be established either by voluntary acknowledgement from the father or by court decision.[194] Moreover, the latter provisions apply if the husband or former husband had successfully challenged paternity by proving that it was impossible for him to be the biological father.[195]

Maternity in all ART situations is the result of giving birth,[196] with no legal regard given to genetic maternal filiation. Genetic maternal filiation is examined only as a proxy for proving who gave birth to the child, particularly if there is no medical registration of birth.[197] Maternal filiation, which is affirmed both by a birth certificate and the child's status by habit and repute, cannot be legally challenged, unless a court had previously found that a child substitution had occurred or that the woman registered as a mother was not the one who gave birth.[198] If the birth registration and the status by habit and repute do not concur, any interested party, including the child, can challenge the registered maternal filiation.[199]

191 Art. 420, para. 1 of Civil Code: 'The acknowledgement which is not truthful can be challenged at any time by any interested party'.

192 Art. 414, para. 1 of Civil Code: 'The child born or conceived during marriage has the mother's husband as a father'; Florian in Baias et al., 2021, pp. 556–559.

193 Art. 412, para. 1 of Civil Code: 'The time interval between the three hundredth and the one hundred eightieth day before the child's birth is legal timeframe for conception. It is calculated day by day'; Florian in Baias et al., 2021, p. 555.

194 Art. 408, para. 3 of Civil Code: 'The filiation towards the father outside marriage is established by acknowledgement or by judicial decision'; Florian in Baias et al., 2021, pp. 550–551.

195 Art. 414, para. 2 of Civil Code: 'Paternity can be challenged if it is impossible that the mother's husband is the child's father'; Florian in Baias et al., 2021, pp. 556–559.

196 Art. 408, para. 1 of Civil Code: 'Maternal filiation results from the fact of birth; it can also be established by acknowledgement or judicial decision'; Florian in Baias et al., 2021, pp. 550–551.

197 Art. 14, para. 2 of Law No. 119/1996.

198 Art. 411, para. 3 of Civil Code: 'Nonetheless, if a judicial decision establishes that a child substitution had taken place or that another woman has been registered as the child's mother than the one who has given birth, the true filiation can be proved by any means'; Florian in Baias et al., 2021, pp. 554–555.

199 Art. 411, para. 1 and 2 of Civil Code: 'No person can claim another maternal filiation than the one resulting from their birth registration and the status by habit and repute which corresponds to it. Nobody can challenge the maternal filiation of the person who has a status by habit and repute concurring with their birth registration'; Florian in Baias et al., 2021, pp. 554–555.

The status by habit or repute is the factual expression of the underlying filiation and kinship that exists between the child and their family or relatives.[200] It constitutes the reciprocal behaviour of the parent and the child by treating them as their own, the public acknowledgement from the family itself of the child as being part of it, from society and authorities or the child carrying the name of the person who claims to be their parent.[201]

The person giving away the gametes to another person in a medical procedure can be the parent of a child conceived through assisted reproductive procedures if there is a reproductive cell transfer between partners, which can be construed as IVF. Third-party gamete donations, either male or female, do not give rise to legal parenthood because maternal filiation depends solely on giving birth to the child, similar to 'natural' motherhood,[202] while the 'fatherhood' of the third-party donor, the 'genetic' father, is specifically excluded by Art. 441, para. 1 of the Civil Code, which states in broad terms that medically assisted reproduction with a third-party donor does not give rise to any filiation between the child and the donor.

There are no special presumptions of parenthood for the assisted reproductive procedures, the mother is the person giving birth and the father is presumed to be either the mother's husband at the time of birth[203] or the former husband at the time of conception, identical to natural conception, or the mother's cohabiting partner at the time of conception, the latter presumption being applied only during paternity trials. For children born out of wedlock, either through natural conception or ART, fatherhood is established either by voluntary acknowledgement or by judicial decision for establishing paternity.[204] In the latter case, during the trial, proven cohabitation during the timeframe when conception was possible is considered sufficient proof of paternity,[205] unless the respondent man proves that it is impossible for him to be the father.[206]

The true source of paternal filiation in case of medically assisted reproduction with a third-party donor is the consent given by the mother's husband or consensual

200 Art. 410, para. 1 of Civil Code: 'The status by habit and repute is the factual situation which indicates filiation and kinship relations between the child and the family to which they allegedly belong. It consists mainly in any of the following circumstances: a person treats the child as their own, taking care of their upbringing and education, and the child behaves towards this person as if they were their parent; the child is acknowledged by the family, society and, when the case may be, by public authorities as belonging to the person who is alleged to be their parent; the child carries the name of the person who is alleged to be their parent'; Florian in Baias et al., 2021, pp. 552–553.

201 Art. 410, para. 2 of Civil Code: 'The status by habit and repute must be continuous, peaceful, public and unequivocal'; Florian in Baias et al., 2021, pp. 553–554.

202 Florian and Floare, 2024, p. 475.

203 Ibid.

204 Art. 424 of Civil Code: 'If the father out of wedlock does not acknowledge the child, paternity can be established by judicial decision'.

205 Art. 426, para. 1 of Civil Code: 'Paternity is presumed if it is proven that the alleged father has lived together with the child's mother during the legal timeframe for conception'.

206 Art. 426, para. 2 of Civil Code: 'The presumption is inapplicable if the alleged father proves it is impossible for him to have conceived the child'.

partner to undergo the procedure. Paternal filiation can be contested only for lack of prior consent from the father or if the pregnancy did not arise from the medically assisted procedure.[207]

A consensual partner who gave his consent to this procedure is liable to recognise paternal filiation after birth,[208] if there is no intervening marriage between the parents. Although the Civil Code section on MAR with a third-party donor does not elaborate what this 'liability' indicates, legal doctrine recognises that it should mean establishing fatherhood by judicial decision,[209] as well as requiring the father to pay half of the mother's expenses during pregnancy and immediately after childbirth, including the mother's maintenance expenses.[210] If MAR is involved, establishing paternity by judicial decision implies proving the alleged father's prior and effective consent to the procedure, not biological conception.

5.2. The Right to Decide on the Fate of an Embryo

The fate of frozen human embryos and the right to decide on it have been examined by Romanian legal doctrine,[211] without reaching a satisfactory conclusion. The questions are difficult to answer particularly when examining the legal status of frozen embryos between the moment of conception and the date of their transfer into the mother's body. Issues may arise not only among the intended parents, who may later divorce, separate, or one of them could become legally or mentally incapacitated, but also between the parents and institutions that have physical custody of the frozen embryos, which may be either private fertility clinics who are contractual partners or State institutions who happened to seize those embryos during criminal or administrative investigations.[212]

Owing to the lack of a proper statute which may answer the questions about legal status of embryos in assisted reproduction, the only sources of inspiration are two landmark European Court of Human Rights' rulings concerning Romania and the fate of human embryos,[213] as well as the general principles of law, professional customs or the legal provisions for similar situations used through analogy.[214] Romanian private law can use not only the statutes enacted by Parliament, but also the general principles of law, analogy with similar regulations and customs.

The most significant legal issue concerning frozen embryos is whether they should be treated as mere assets or as human beings. The ECtHR has mostly sidestepped

207 Florian and Floare, 2024, pp. 476–477; Motica, 2021, p. 228.
208 Florian and Floare, 2024, pp. 478–480.
209 Ibid., pp. 479–480; Avram, 2022, p. 311; Nicolescu, 2023, pp. 470–471; Irinescu, 2024, p. 358.
210 Florian and Floare, 2024, p. 480; Avram, p. 311.
211 Tec, 2017, pp. 234–248.
212 Ibid., pp. 235, 240.
213 *Knecht v. Romania*, No. 10048/10, 2 October 2012, *Nedescu v. Romania*, No. 70035/10, 16 January 2018.
214 Art. 1 of Civil Code; Baias et al., 2021, pp. 1–3.

the issue and treated the authorities' ineptitude regarding the fate of seized frozen embryos belonging to the plaintiffs as violations of their rights to private and family life, under the aegis of Art. 8 of the European Convention on Human Rights, and not as violations of their property rights protected by Art. 1 of the First Additional Protocol to the Convention.[215] The European Court has stopped short of recognising full personhood for frozen embryos, treating them only as a constitutive part of the genetic patrimony and biological identity of the person who has contributed to their creation.[216] Strong arguments have been brought to the fore for recognising embryos as distinct beings from their parents, although such a conclusion would unavoidably make abortions a crime, the preservation of frozen embryos a violation of human dignity and disputes between parents over the fate of embryos as similar to child custody litigations.[217]

The courts have not recognised the personhood of embryos and any litigation in their regard would be solved according to the intended parents' rights to private life and the provisions of the extant contracts between the parents and the fertility establishments.[218] ECHR case law leads to the conclusion that, in cases of divorce and separation, the fate of the embryos would be decided according to the parents' agreed decision or, in cases of disagreement, either parent's decision to not become a parent should take precedence, based on their right to personal autonomy, which would lead to the destruction or donation for research purposes of the embryos.[219]

Contractual issues bring a host of intractable problems regarding the fate of frozen human embryos. Unused embryos during the contractual timeframe, unpaid storage fees, the death of both intended parents are all scenarios that will lead to the destruction or even the possible unauthorised trafficking of the embryos. In the absence of a statutory provision allowing for the 'adoption' of abandoned embryos by infertile couples, their destruction is the only legal means which respects the parents' rights to personal autonomy.[220] Legal scholars have severely criticised the parental focus of extant legislation and case law, arguing for some recognition of the unused embryo's right to life or some form of protection, similar to the one for a vulnerable human being.[221]

The *de lege ferenda* suggestions[222] for a future statute dealing with the fate of frozen human embryos include the necessity for it to regulate the execution, performance and cessation of contracts between the intended parents and the medical establishment, the parties' contractual duties; the options in cases of divorce, separation and death of one of the parents and the timeframe for exercising the option,

215 Tec, 2017, pp. 238–239.
216 Ibid.
217 Ibid., pp. 239–240.
218 Ibid., p. 240.
219 Ibid., p. 244.
220 Ibid., p. 245.
221 Ibid.
222 Ibid., p. 247.

which may include the use by only one of the spouses, post-mortem use, donation to another couple, consent revocation; the fate of abandoned embryos and parental liability for embryo abandonment; liability for the destruction or disappearance of frozen embryos, liability for implantation errors; the particular effects of frozen embryo use on filiation and inheritance.

5.3. Surrogacy Arrangements and Romanian Law

Surrogacy is not expressly forbidden, however, it is neither specifically allowed nor regulated in Romania.[223] The provisions that the mother is the one giving birth, irrespective of genetic relationship, even in medically assisted reproductive procedures,[224] and that the parental authority cannot be voluntarily transferred to another person make surrogacy legally difficult.[225]

Art. 408 para. 1 of the Civil Code makes no distinctions in stating that motherhood is always derived from the fact of birth, thus, making no special provisions for medically assisted pregnancies, artificial insemination, or IVF.[226] The source of the biological material is not relevant and genetic testing for motherhood is employed only as a proxy for determining who gave birth to a certain child in cases of late birth registration when there is no medical certificate of birth.[227]

Parental authority is usually exercised by both biological parents, and they can agree between themselves how to divide it in practice. However, a mere parental agreement cannot voluntarily relinquish parental authority or transfer it to a third party. Only through court-approved adoption can parental authority be permanently transferred from the biological parents to the adoptive parents.[228] All other court decisions regarding the exercise of parental rights, including the most drastic ones concerning the removal of the exercise of parental rights, are essentially temporary in nature and can later be reversed when the parents' situation improves. Thus, there are no defined legal means to contractually transfer parental authority from the birth mother to another woman, even if the latter is the genetic parent of the child.

Both types of surrogacies, gestational and traditional,[229] are equally impeded by the legal provisions on birth motherhood and the impossibility of voluntarily relinquishing or transferring parental authority.

One of the only legal ways to circumvent the underlying scepticism of Romanian legislation regarding surrogacy is by using a simplified adoption procedure, where the biological father first voluntarily recognises paternity and then his wife adopts the child, with the consent of the surrogate mother, who was legally registered

223 Hageanu, 2023, p. 222.
224 Florian and Floare, 2024, p. 469; Nicolescu, 2023, p. 474; Irinescu, 2024, p. 361.
225 Dobozi, 2013, pp. 64–65.
226 Nicolescu, 2023, p. 474.
227 Art. 14, para. 2 of Law No. 119/1996.
228 Nicolescu, 2023, pp. 478–479; Irinescu, 2024, p. 365.
229 Predescu, 2020, p. 477; Nicolescu, 2023, p. 472.

as the child's biological mother. This option implies that the male gametes come from the father, with a compulsory DNA test to verify paternity, and that the surrogate mother agrees to adoption after giving birth, without any financial reward.[230] Compulsory DNA testing is required under Art. 7, para. 4 of the Law No. 273/2004 on adoption procedure only when the declared father's wife wants to adopt the child in a simplified procedure, with the birth mother's consent, and paternity had been previously established by extrajudicial acknowledgement or by a non-contested judicial procedure where the father merely acknowledged paternity or agreed with the mother's petition for establishing paternity.

Altruistic surrogacy is not explicitly prohibited, although it is heavily impeded by the current legal framework, while commercial surrogacy falls foul of multiple legal bans on trading the products of the human body, trading biological products or even human trafficking.

Surrogacy is heavily impeded in all cases; however, medical infertility or gestational impediments occasionally bring an unspoken sympathy from the courts in attempting to overcome the legal hurdles to recognition of its effects. There were a few published court cases where the effects of surrogacy have been recognised[231] with a circumvented legal reasoning, usually with the paternal filiation being initially voluntarily recognised by the genetic parent and maternal filiation being recognised afterwards, by special request, as an effect of the 'possession of civil status or status by habit and repute', and genetic filiation, frequently also referring the provisions of Art. 8 of the European Convention of Human Rights in regard to the right to private and family life.[232]

The best known and most discussed domestic case involving surrogacy involves the 2013 decision rendered by the Court of Appeals in Timișoara, sitting on an appeal on points of law (*recurs*) and reversing the lower courts' decisions by recognising the effects on maternal filiation of an altruistic gestational surrogacy, where the woman giving birth was the sister of the intended mother, the latter providing the genetic material but lacking an uterus to carry the pregnancy to term.[233] While the effects on paternal filiation were recognised even by the lower county court owing to the extant genetic link between the father providing the biological material and the child, the recognition of maternal filiation went against the clear national rule that the mother is the one giving birth, with maternal genetic links being relevant only insofar as they serve as proof of birth. The court's decision heavily referenced Art. 8 and the right to private and family life from the European Convention on Human Rights. This type of judge-made law is unusual in a statute-based justice system such

230 Nicolescu, 2023, pp. 478–479.
231 Ibid., pp. 482–485; Brodeala, 2016, pp. 70–73.
232 Irinescu, 2019, pp. 213–214; Hageanu, 2023, pp. 221–222.
233 Decision No. 1196/26.09.2013, detailed by Nicolescu, 2023, pp. 482–485; Motica, 2021, pp. 229–230; Avram, 2022, p. 274; Irinescu, 2024, pp. 362–363.

as the Romanian system, and it cannot sustainably cancel the explicit statutory rules on maternal filiation being *de lege lata* inextricably tied to birth.

5.4. Issues Regarding Cross-border Surrogacy for Romanian Parents

Filiation in Romanian private international law, regulated by Book VII, Chapter 2, Section 2 of the Civil Code, is subject to either the law that governs the general effects of the parents' marriage, for children born or conceived during marriage,[234] or to the national law of the child at the time of birth, for children born out of wedlock.[235] There are no special provisions in Romanian private international law for surrogacy because there are scant references to this procedure in the entire domestic legislation.

In cases concerning surrogacy performed abroad or with a foreign element, Romanian courts would probably apply either the national law of the woman giving birth, which would be the surrogate mother, if she is single, or possibly the law that governs the general effects of her marriage. If these foreign laws allowed for surrogacy and the voluntary transfer of parental authority from the birth mother to the intended parents owing to their previously concluded agreement, there is a risk that international public order grounds could lead to the refusal to recognise the lawful consequences of these procedures in Romania. However, ECtHR case law in surrogacy situations, based on Art. 8, including *Menneson and Labassee v. France*, No. 65941/11, 26 June 2014, and *Paradiso and Campanelli v. Italy*, No. 25358/12, 24 January 2017, would compel the courts to affirm the child's right to private and family life by recognising parental filiation when there is a factual basis for the child being treated as the intended parents' offspring.[236]

In Romanian domestic law, a genetic link is required only for paternal filiation (fatherhood) out of wedlock, while maternal filiation (motherhood) is intrinsically dependent on giving birth. Paternal filiation (fatherhood) is legally presumed for the current husband at the time of birth or the former husband at the time of conception, which is presumed to be between 300 and 180 days prior to giving birth. An apparent maternal filiation, even if it is based on a birth certificate, coherent with habit and repute, could continue to be challenged if the listed mother is not the woman having given birth. On a domestic birth certificate, the woman having given birth is automatically listed as the mother of the child, while her current or former husband, or the person who voluntarily recognises the child, is listed as the father.

234 Art. 2.603 of Civil Code: 'The filiation of the child born in wedlock is established according to the law which, at the time of their birth, governs the general effects of their parents' marriage. If, before the child's birth, the parents' marriage had ceased or had been dissolved, the law which had governed the effects of marriage at the time of its cessation or dissolution is applicable. The law thus established is also applicable to the challenges to the child's paternity as well as to the acquisition of a family name by the child'; Macovei and Dominte in Baias et al., 2021, pp. 3042–3043.

235 Macovei, 2017, pp. 343–345; Popescu and Oprea, 2023, pp. 463–480.

236 Nicolescu, 2023, pp. 475–478.

The civil status of a person is subject to their national law according to Art. 2.572, para. 1 of the Civil Code.[237] Foreign birth certificates are registered in Romania if they concern any person born abroad.

6. The History of Failed Attempts to Legislate on Medically Assisted Reproduction

Slightly prior to the most recent Civil Code of Romania, one of the first contemporary attempts to adopt a comprehensive statute concerning medically assisted reproduction was from 2009 (PL-x No. 690/2009[238]). This 26-article project affirmed a right to reproduction as a right of couples and individuals to 'freely and responsibly decide the number, frequency and time when they wish to have children', as well as their right to have access to information, education, and the means to reach such a decision. The medically assisted human reproduction was reserved only for married couples or consensual partners who could prove at least a two-year cohabitation. Moreover, they would have had to be both alive, inseminating a woman with her dead husband's sperm being expressly forbidden, and fulfil the general health and biological age criteria for procreation.

This project had a list of allowed human medically assisted reproduction techniques, such as artificial insemination, IVF, ET, and a list of prohibited techniques, such as *post-mortem* artificial insemination, *post-mortem* embryo transfer, interventions when infertility is owing to old age, fertility interventions for couples who cannot prove a stable cohabitation. The 2009 project regulated both endogenous fertilisation and reproduction with a third-party donor.

Filiation was established, according to this project, by the simple declaration of parents at the time of birth, the child having the same rights as a naturally conceived child.

This 2009 project was rejected by the lower Chamber of Deputies in 2010;[239] the Health Committee's rejection report[240] stating that the project had serious technical drafting deficiencies, and it had serious gaps in its rules about a sensitive topic, gaps that could lead to constitutionality issues.

There were at least two attempts to regulate this area in greater detail since the Civil Code came into force on 1 October 2011, however, both law projects were

237 Popescu and Oprea, 2023, p. 195.
238 The 2009 project, in its Senate-approved version, is available (in Romanian) at Romanian Parliament, 2009.
239 Predescu, 2022, p. 222.
240 Health Committee, 2010.

rejected, even if they were initiated by the government or as a cross-party private members' bill.

The first project to be promoted, after the new Civil Code came into force,[241] originated from the government, in 2012.[242] This project was considerably short, comprising 12 articles,[243] and it stated that the human medically assisted reproduction with a third-party donor is organised and controlled by the Health Ministry, and it is supervised and coordinated by the National Transplant Agency. The purpose of the procedure is either to be a remedy for pathological infertility or to prevent the passing of a serious affliction to the offspring.

The crucial question of who is eligible to participate in this type of medical procedure had remained unanswered because the medical criteria for both physical and mental health were supposed to be adopted later by a Health Minister's Order. The cases of infertility that allowed someone to participate in this type of procedure were exemplified as including immunological incompatibility between parents, unknown causes, or the impossibility of contact between two reproductive cells. Medically assisted reproduction with a third-party donor covers both artificial insemination with biological material from said donor or the IVF with reproductive material from a third-party donor. The parents who aimed to participate in such a procedure had to demand it from an authorised medical facility, undergo counselling from medical professionals regarding the chances of success, the risks, adoption possibilities and to be checked for their motives. The project subjected a woman's access to medically assisted reproduction with a third-party donor to the written consent from both her and her husband.

The medical criteria for selecting the third-party donor, regarding the quality and quantity of reproductive material, as well as the physical and mental health of the donor that could influence the offspring, were also delegated by the law project to a subsequent Health Minister's Order. Confidentiality of the procedure was mentioned specifically only in relation to the health personnel involved in this procedure.

This project was finally rejected by the lower house of parliament in 2016 because the draft was considered poorly written from a technical perspective, the rejection report of the parliamentary commission drawing from the objections of the Legislative Council. This project was considered as being too ambiguous, confusing, and as not really offering practical solutions to a delicate and important societal issue.[244]

A subsequent project, the more comprehensive cross-party private members' bill PL-x No. 462/2013,[245] comprised 19 articles.[246] It had similar provisions regarding the role of the Health Ministry and of the National Transplant Agency as the

241 Predescu, 2022, p. 222.
242 PL-x no. 63/2012.
243 Romanian Parliament, 2012.
244 Chamber of Deputies' Judiciary and Health Committees, 2016.
245 Romanian Parliament, 2013.
246 Predescu, 2022, p. 222

previous project. The project was generously stating fundamental principles such as the parents' right to access to medically assisted human reproductive techniques, right to an informed consent, respecting the best interests of the child, safeguarding human dignity, body autonomy, preserving the human species, individuality, and diversity.[247]

The allowed reproductive techniques were artificial insemination, IVF and ET. It specifically prohibited the simultaneous transfer of embryos from different donors. The project had a wider list of prohibited activities in the field of medically assisted human reproduction: altering the human genome and species cross-breeding, selecting the sex of the future child except for reasons related to a sex-related genetic disease, creating human embryos only for research purposes, human cloning, using embryos previously used in research for reproduction, selecting the donor by using eugenic criteria, harvesting reproductive material from a deceased person and intentionally using reproductive material from donors closely related to the beneficiary.

A novelty in this subsequent project, compared with the previous one, was an age restriction for oocyte harvesting by limiting the woman's age to between 18 and 45 years. The law project also stipulated that embryo-transfers and artificial insemination were allowed only for women between 18 and 50 years of age. There was also a novel ten-year time limit for embryo and gametes storage, after which the parents had to express an option about what to do with the stored biological products.

This 2013 project was also structurally incomplete, the statute requiring further details about the enforcement of the law that would have been provided by future governmental decrees drafted by the Health Ministry.

Thus, it was finally rejected by the lower house of parliament in 2022, with a similar reasoning to the previous project, for being not only too ambiguous, lacking enforcement sanctions, being elliptically written and for not offering practical solutions to a delicate social problem, but also for lacking specific financing resources for the stipulated expenses.[248]

7. Conclusion

In Romania, the regulation of human reproductive procedures tends to be extremely scant and general. Although the Civil Code attempted to go further by regulating medically assisted reproduction with a third-party donor, alongside prohibiting eugenics and genetic manipulation without a therapeutic purpose, the special legislation that aimed to implement these generous principles continues to be missing. There remain detailed provisions on transplants, including reproductive

247 Irinescu, 2014, pp. 16–18.
248 Chamber of Deputies' Judiciary and Health Committees, 2021.

cell transplants for IVF, and firm regulations on patient confidentiality and informed consent for any medical procedure, however, these lack a specific focus on reproductive issues. The public financing for reproductive procedures is limited and the regulations that surround it tend to be restrictive and with a traditionalist approach to reproductive health.

Additionally, the haphazard nature of ART regulations affects the rights of the children born out of these medical procedures. Their right to establish their identity clashes with the ambiguous and broad principle of confidentiality. The legal restrictions of MAR with a third-party donor also imply that the children of a single mother who has used the procedure can never legally have a 'biological' father. Unrestrained confidentiality can also endanger the children's right to health by only providing a cumbersome judicial procedure for obtaining vital information about the donor or the procedure itself.

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