

## EUROPEAN LAW

### THE MARGIN OF APPRECIATION RECOGNIZED FOR THE SIGNATORY STATES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE FIELD OF MEDICALLY ASSISTED HUMAN REPRODUCTION\*

Georgeta-Bianca SPÎRCHEZ\*\*

**Abstract:** *The following study focuses on a subject that is facing an obvious dynamic, correlated with the latest progress of medical sciences-that of medically assisted human reproduction. The option for analysing such a theme lies in the fact that it continues to generate issues not only of legal nature, but also ethical and moral ones, extremely delicate, having significant consequences in matters of family relationships. As there is no unitary approach at European level, we intend to examine, through this article, the general principles that emerge from the European Court of Human Rights case-law (as all Member States of the European Union are part of the European Convention of Human Rights). Thus, the international jurisdiction recognizes for the signatory States of the European Convention on Human Rights an appropriate margin of appreciation, which the European Court considers the States should enjoy in this sphere, but subject the decisions of the national authorities to a critical evaluation, in order to investigate the observance of the right balance between the competing interests. Drafting the work plan of the paper, we considered, in its first part, the elements of analysis that make up the margin of appreciation doctrine, having in mind, afterwards, their application in concrete cases brought before the ECHR, cases that are confined to the problem of assisted procreation.*

**Key words:** *Public Law, International Law, assisted human reproduction, margin of appreciation doctrine*

#### Introduction

Protocol No. 15 to the European Convention on Human Rights introduces a concept developed jurisprudentially by the European Court of Human Rights and

---

\* The article was prepared for the International Law Conference, "Current Issues within EU and EU Member States: Converging and Diverging Legal Trends", 3rd edition, organized by the Faculty of Law - Transilvania University of Braşov on the 29<sup>th</sup>-30<sup>th</sup> of November 2019. All links were last accessed on 4 November 2019.

\*\* Assistant Lecturer, Ph.D. - Transilvania University of Braşov, Faculty of Law (georgeta-bianca.spirchez@unitbv.ro).

which has become defining for the reasoning and interpretation of the European Court<sup>1</sup> - the margin of appreciation. In this regard we refer to the following text contained in Article 1 of the said Protocol, which is added to the existing Preamble of the European Convention on Human Rights: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

The rationale for the margin of appreciation doctrine is that, in principle, national authorities are the best one able to assess the necessity and adequacy of restrictions, respectively of limitations imposed to a fundamental right, in maintaining a balance between competing private/public interests<sup>2</sup>. Thus, this notion refers to the room of manoeuvre that the European Court grants to national authorities, which implies a certain autonomy recognized in relation to these in the application of the Convention<sup>3</sup>, their decision remaining subject to the control of the Court, which is competent to check that the margin of appreciation recognized to the national authorities does not exceed the limits imposed by a democratic society<sup>4</sup>.

Regarding the extent of this margin of appreciation left within the reach of the Member States, we note that this is not the same for all the causes subject to examination before the Court, but varies depending on the context, on the nature of the conventional right in question, on its importance to the person claiming it, on the nature of the disputed activities<sup>5</sup>. Therefore, we intend to analyse, through this study, the concrete applications of the margin of appreciation, namely in the field of medically assisted human reproduction.

In this regard, we find it relevant to indicate here, with an introductory title, a conclusion set by the Court<sup>6</sup>, regarding the factors that assess the extent of the margin of appreciation recognized to the states: "A number of factors must be taken into account when determining the breadth of the margin of appreciation to

---

<sup>1</sup> B. Selejan Guțan, *Recent normative developments in European human rights law*, Pandectele române no.11/2013, article consulted on [www.sintact.ro](http://www.sintact.ro) database

<sup>2</sup> M. Wells-Greco, *The status of children arising from inter-country surrogacy arrangements*, Eleven International Publishing, 2016, pp.340-341

<sup>3</sup> D. Spielmann, *Allowing the right margin: the European Court of Human Rights and the national margin of appreciation doctrine: waiver or subsidiarity of European review?*, published online by Cambridge University Press: 2017, p.382

<sup>4</sup> C. Bârsan, *The European Union and the European Convention on Human Rights: unity or duality in the European protection of human rights*, Revista română de drept european (comunitar) no.1/2003, article consulted on [www.sintact.ro](http://www.sintact.ro) database

<sup>5</sup> *Idem*

<sup>6</sup> ECHR, Case *Evans v. The United Kingdom*, nr.6339/05, April 10, 2007, par.77, available [Online] at: <https://hudoc.echr.coe.int>

be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted [...]. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider [...]. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights [...]"

### **1. General aspects regarding the legal problems raised by medically assisted human reproduction**

The advances of medical research and genetics have allowed human reproduction to be no longer, nowadays, entirely "a random event, based on the game of destiny", but allow us to manifest an increasing power of decision and control<sup>7</sup>. In this respect, from a legal point of view, it is noted<sup>8</sup> that the development in the Strasbourg Court case law of the principle of self-determination derived from the right to respect privacy "has ensured the contractualization of the person's right to dispose of him/herself and the right to become a parent".

In a definition of medically assisted human reproduction, outlined in our research literature<sup>9</sup>, under the inspiration of the French Public Health Code, it was shown that we will understand "those clinical and biological practices that allow in vitro conception, embryo transfer and artificial insemination, as well as any other techniques that make procreation possible outside the natural process".

As the doctrine concludes<sup>10</sup>, these artificial procreation practices generate a series of legal problems such as the gestation for another, substitution maternity, embryo fate, embryonic reduction, being a sensitive area, with heated debates that invoke ethical and moral considerations, possibly causing an increased social resistance in certain traditionalist states. This is, therefore, a representative area for exemplifying the doctrine of the margin of appreciation, because the principle is that where there is no consensus within the Member States of the Convention, as the progressive social trends are not uniformly embraced, the margin of appreciation will be wider, as opposed to the matters in which the developed policy is perceived as a common one, or a European one, which will undoubtedly imply an effect of narrowing the margin of appreciation<sup>11</sup>.

---

<sup>7</sup> A. Huidu, *Medically assisted human reproduction - the ethics of incrimination vs. biological ethics - comparative law study*, Iași: Lumen, 2017, p.21

<sup>8</sup> A.R. Motica, L. M. Tec, *Family by Contract*, Revista de dreptul familiei no.1-2/2019, p.357

<sup>9</sup> E. Florian, *Family Law. 4<sup>th</sup> edition*, Bucharest: C.H. Beck, 2011, p.232

<sup>10</sup> L. Irinescu, *The child, a gift or a right?* Revista de dreptul familiei no.1-2/2019, p.212

<sup>11</sup> M. Wells-Greco, *op. cit.*, p.341

All the above concerns the scope of the European Court of Human Rights' analysis, even though the right of reproduction has not been explicitly included in the human rights mentioned in the international documents<sup>12</sup>, since the recognition of the right to privacy also includes the recognition that the person is free in terms of deciding how to set up a family<sup>13</sup>. The same legal framework is also supported in the case of reproduction that occurs outside marriage, as the protection granted by Article 8 of the European Convention on Human Rights does not differentiate between the legitimate family and the natural family, therefore "what prevails is not the criterion of legality, but the criterion of effectiveness, the family life not being limited exclusively to the formal relations and the legal commitments"<sup>14</sup>.

To support this point of view, we will cite from the case law of the Court<sup>15</sup>, the passage rendered referring to the case law of this court of human rights developed for shaping the notion of private life within the meaning shown by us as well: "The Court reiterates that the notion of "private life" within the meaning of Article 8 is a broad concept which includes, among other things, the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B), the right to "personal development" (see *Bensaid v. the United Kingdom*, no. [44599/98](#), § 47, ECHR 2001-I), or alternatively the right to self-determination (see *Pretty v. the United Kingdom*, no. [2346/02](#), § 61, ECHR 2002-III). Factors such as sexual identity, orientation and life also fall within the personal sphere protected by Article 8 (see, for example, *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45, and *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, § 36, *Reports of Judgments and Decisions* 1997-I), as does the right to respect for the decisions to become or not to become a parent (see *Evans*, cited above, § 71; *A, B and C v. Ireland* [GC], no. [25579/05](#), § 212, ECHR 2010; and *R.R. v. Poland*, no. [27617/04](#), § 181, ECHR 2011 (extracts)). Under Article 8 of the Convention, the Court has also acknowledged a right to respect for the decision to become genetic parents (see *Dickson v. the United Kingdom* [GC], no. [44362/04](#), § 66, ECHR 2007-V, with the references cited therein) and concluded that Article 8 applies to heterologous insemination techniques for *in vitro* fertilisation (see *S.H. and Others v. Austria* [GC], no. [57813/00](#), § 82, ECHR 2011)".

In this context of analysis it is useful to note that the formation of a family with the help of modern medical techniques is not exclusively a matter of personal self-determination, but most often interferes with the interests of the society or conflicts with other competing rights<sup>16</sup>, the mission of the contracting states being,

---

<sup>12</sup> A. Huidu, *op. cit.*, p.66

<sup>13</sup> *Ibidem*, pp.70-71

<sup>14</sup> *Ibidem*, p.68

<sup>15</sup> ECHR, *Case Costa and Pavan v. Italy*, nr.54270/10, 28 August 2012, final at 11 February 2013, par.55, 56 available [Online] la adresa: <https://hudoc.echr.coe.int>

<sup>16</sup> A. Huidu, *op. cit.*, p.66

finally, that of maintaining a fair balance within the margin of appreciation exercised, determining according to objective criteria which of the interests will prevail.

Thus, the use of the principle of proportionality has proved to be an objective criterion, being closely linked to the principle of effective protection, imposing a limit against the temptation to use excessively the margin of appreciation, being the parameter that offers legal certainty. The practical indications offered in the specialized studies are relevant to the proportionality test<sup>17</sup>: „In order to assess the proportionality of an interference with a right, it is appropriate to examine its impact on that right, the grounds, the consequences for the applicant and the context. As regards the grounds for the interference, the importance of the local circumstances and the difficulty of objectively assessing the respective weight of conflicting aims play a major role. It is for the State to justify the interference. The grounds must be relevant and sufficient, the need for a restriction must be established convincingly, any exceptions must be construed strictly and the interference must meet a pressing social need”.

In the following sections, we aim, without exhausting the whole issue, at highlighting, by reference to concrete cases that have been before the European Court of Human Rights, the practical way of examination carried out by this international case law regarding the overcoming or not of the margin of appreciation available to the signatory states of the ECHR in the field of artificial procreation.

## **2. The margin of appreciation of states in the hypothesis of surrogacy maternity**

In the case of the lineage established following the use of modern techniques - the option of the surrogate mothers, the legal debates start from legitimate questions, of the type mentioned in the specialized literature<sup>18</sup>: "does the fact of birth take precedence, even if it has no cover in biological truth, or vice versa, and inevitably, is the subject open to "contractualization" in the form of the convention having as object "gestation for another" and "substitution maternity"?".

In trying to find answers, we find it appropriate to refer to two cases that we consider emblematic for the subject analysed. Thus, in *Mennesson v. France*<sup>19</sup>, Mennesson spouses, after having several unsuccessful attempts of in vitro fertilization with their own gametes, concluded in California an agreement of gestation for another, after which they resorted to in vitro fertilization with the

---

<sup>17</sup> D. Spielmann, *op. cit.*, pp.409-410

<sup>18</sup> E. Florian, *Lineage: between the obsession of biological truth and legal mystification*, Revista română de drept privat nr.3/2018, pp. 123-124.

<sup>19</sup> ECHR, Case *Mennesson c. Franței*, nr. 65192/11, June 26, 2014, final on September 26, 2014, available [Online] at: <https://hudoc.echr.coe.int>

gametes of Mr. Mennesson and an ovule from a donor, for the purpose of implanting the fertilized embryos in another woman's womb. The caring mother became pregnant with the twins, and through a decision of the California Supreme Court, jointly referred by the two spouses, the caring mother and her husband, it was decided that any child brought to the world by her within the next four months will have Mr. Mennesson as a "genetic father" and Mrs. Mennesson as a "legal mother". That decision also indicated the particulars that must be included in the birth certificate of the twins, clearly specifying that Mennesson spouses must be registered as father and mother. Following the birth of the twins, Mr. Mennesson addressed the French Consulate in Los Angeles for the transcription of birth certificates in the French civil status records and the registration of children on his passport, in order to be able to return with them to France, but his request was rejected by the consular authorities, the motivation being that the decision obtained thus abroad is incompatible with the public order of French international law. After the domestic remedies were exhausted, the two spouses complained to the European Court of Human Rights that, to the detriment of the best interests of their children, they were not able to obtain in France the recognition of the legally established lineage abroad.

Analysing the request with which it was invested, the European Court of Human Rights referred to the national margin of appreciation regarding the recognition or not of the connection of lineage between the children conceived legally by gestation for another abroad and the parents of intention, but emphasized that the margin of appreciation mentioned should be reduced to ensure a fair balance between the interests of the State and those of the persons directly concerned by the measures taken by the State. For twin children born under such conditions, the Court found that they are in a situation of legal uncertainty that could create negative consequences on defining their own identity, by the refusal of the French authorities to transcribe their birth certificates issued in another country, in their national civil status registers. At the same time, given the existence of a biological connection with the father, the Court stressed the importance of a biological relationship as part of a person's identity, stating that it is contrary to the interests of a child to deprive him/her of such a legal connection. In this case, the Court's conclusion was that there was no breach of Article 8 of the Convention regarding the right of the two spouses to have their family life respected, but on the other hand, regarding the two twins, there was a breach of the conventional provisions regarding the respect of their private life.

In a similar case<sup>20</sup>, the Labassee spouses, the claimant parents before ECHR, also resorted to gestation for another in the United States of America, using the genetic material of Mr. Labassee. In this case as well, the ruling in the United States

---

<sup>20</sup> ECHR, Case *Labassee c. Franței*, nr. 65941/11, June 26, 2014, final on September 26, 2014, available [Online] at: <https://hudoc.echr.coe.int>

acknowledged that the Labassee spouses are the parents of the child born in this way, but, nevertheless, the French authorities refused to transcribe the birth certificates in the French civil status registers, considering that such of transcription would have meant that a gestation for another convention would cause effects, in fact being absolutely null for public order causes, under the French Civil Code. The Court admitted France's margin of appreciation to discourage its own citizens from resorting to a method of procreation prohibited on its territory, but in its considerations ruled that this conduct of the French State impinges on the best interests of the child, the observance of which must prevail in making any decision regarding them, all the more so as one of the parents of intention is the biological parent of the child. Therefore, the conclusion was that the respondent State exceeded the permitted limits of its margin of appreciation, causing an infringement of the child's right to respect for his/her private life.

### **3. The problem of the father's consent to keeping and implanting the fertilized ovules**

This issue was debated at the European Court when examining the case *Evans v. The United Kingdom*<sup>21</sup>, which refers to two antagonistic rights - to have children, respectively not to have children. Such an analysis intervenes, when, after in vitro embryo formation, the couple breaks up, and one of them wants to destroy the conception products, withdrawing their consent for their implantation, while the other seeks the use of the embryos.

In the case we refer to, as the petitioner was found to have pre-cancerous tumours in the ovaries, she was recommended ovariectomy, not before she was harvested several ovules for in vitro fertilization. To this end, the couple agreed to carry out the procedure and conserve the embryos, after being told that, according to the existing legislation at that time, donors of gametes are granted the right to withdraw their consent, at any time before embryos were implanted in Mrs. Evans' womb. As the separation of the two partners subsequently took place, Mrs. Evans' boyfriend informed the clinic where the procedure was being held that he opposed to the keeping of the embryos, not agreeing with their use by the petitioner.

As regards the coexistence of the two conflicting rights, equally protected by the provisions of the European Convention on Human Rights, whatever the decision of the national authorities, the interest of one of the two partners would have been harmed, although the petitioner is the one who claimed that her rights should prevail in the light of her subsequent sterility, a personal situation that prevents her from having a child to be genetically linked to, if the embryos are destroyed.

---

<sup>21</sup> ECHR, Case *Evans v. The United Kingdom*, nr.6339/05, April 10, 2007, available [Online] at: <https://hudoc.echr.coe.int>

As just noted, in the further doctrinal developments on this case<sup>22</sup>, the question was whether UK law struck a fair balance between the competing public (legal certainty, the importance of consent) and private (Article 8 rights of both parents) interests involved. The court referred to the complexity of the issue, the detailed consideration it had been given in Parliament and in the courts, and the fact that at the time of the procedure the rules were clear and had been made clear to the applicant. On this basis, the Court disagreed that the applicant's right to respect for her decision to become a parent in the genetic sense should be accorded greater weight than her ex-partner's right to respect for his decision not to have a genetically related child with her".

#### **4. The national margin of appreciation manifested by the prohibition within the domestic law to use the ovules and the sperm that come from the donors, for in vitro fertilization**

This debate was triggered by the cause *S.H. and others v. Austria*<sup>23</sup> and it was based on the Austrian law that had been adopted starting from the idea that the medical assisted procreation should remain as close as possible to the natural conception, in order to avoid possible conflicts between the uterine and the genetic lineage. The legal problem was that, through the control carried out by the Strasbourg Court, it should be ascertained whether or not the Austrian state exceeded its margin of appreciation or not, taking into account that there is no European consensus for the authorization of sperm donation, respectively ovules, for the purpose of in vitro fertilization.

The Court concluded, at the time of solving this case, within the meaning of the absence of the breach of the fundamental right protected by Article 8, but the doctrine accepted that the field in question knows a particular dynamic, which requires a permanent review by the Member States, being a "clear signal by the Court that continuing developments in this area will be kept under review and that different conclusion might be reached in a future case"<sup>24</sup>.

#### **5. Refusal of the request regarding medically assisted reproduction in case of detained persons**

In *Dickson v. The United Kingdom*<sup>25</sup>, the Court was called upon to balance between on one hand the interests of detained petitioners who wished to have a

---

<sup>22</sup> D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights*, Oxford University Press, 2018, p.527

<sup>23</sup> ECHR, Case *S.H. and others v. Austria*, 57813/00, November 3, 2011, available [Online] at: <https://hudoc.echr.coe.int>

<sup>24</sup> D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *op. cit.*, p.527

<sup>25</sup> ECHR, Case *Dickson v. The United Kingdom*, 44362/04, December 4, 2007, available [Online] at: <https://hudoc.echr.coe.int>

child together, their only possibility being artificial fertilization, given the date of the first petitioner's release and the age of the second petitioner, and on the other hand, the general policy of the respondent State according to which such requests could only be admitted in exceptional circumstances.

The refusal that the two petitioners received from the authorities included arguments related to the fact that the punitive elements of the first petitioner's punishment would be annihilated if he was allowed to conceive a child by artificial fertilization, during his detention.

In the control carried out, the Court sought to achieve a fair balance between the public-private interests in the conflict and to see whether the proportionality of the restriction was evaluated. Here are some of the considerations of the Court, on which the solution of the breach of Article 8 of the Convention was based:

-- par. 75: „However, and while accepting that punishment remains one of the aims of imprisonment, the Court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence”.

- par.76: „The Court is prepared to accept as legitimate for the purposes of the second paragraph of Article 8 that the authorities, when developing and applying the Policy, should concern themselves as a matter of principle with the welfare of any child: conception of a child was the very object of the exercise. Moreover, the State has a positive obligation to ensure the effective protection of children [...]. However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released”.

- par. 81. “The Court notes, as to the European consensus argument, that the Chamber established that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination. However, while the Court has expressed its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits [...]. Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals” .

- par. 82. [...] “the Court considers that the Policy as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case. [...] the Policy placed an inordinately high “exceptionality” burden on the applicants when requesting artificial insemination facilities [...]. They had to demonstrate, in the first place, as a condition precedent to the

application of the Policy, that the deprivation of artificial insemination facilities might prevent conception altogether (the “starting-point”). Secondly, and of even greater significance, they had to go on to demonstrate that the circumstances of their case were “exceptional” within the meaning of the remaining criteria of the Policy (the “finishing-point”). The Court considers that even if the applicants’ Article 8 complaint was before the Secretary of State and the Court of Appeal, the Policy set the threshold so high against them from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic courts in their case, as required by the Convention [...].

## Conclusions

Medically assisted human reproduction is the subject of a series of debates, the lack of consensus in this direction leading the European Court of Human Rights to recognize, in this regard, a margin of appreciation for the Contracting States, in the evolutionary interpretation of its provisions.

However, as shown in the Guide on Article 8 of the European Convention on Human Rights<sup>26</sup>, once by acting within its limits of appreciation the State adopts rules that are relevant in this area, the legal framework designed for this purpose should be formulated coherently, so as to allow the various legitimate interests involved to be duly taken into account and in accordance with the obligations arising from the Convention. This can be achieved by reference to the standard of proportionality, which allows an objective assessment of the existence or non-existence of an imperative social need able to justify the interference of the authorities in the exercise of a right defended by the Convention.

---

<sup>26</sup> Consulted [Online] at: [http://ier.gov.ro/wp-content/uploads/2019/04/Ghid\\_art\\_8\\_31.12.2018.pdf](http://ier.gov.ro/wp-content/uploads/2019/04/Ghid_art_8_31.12.2018.pdf)