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# DRAFT OF THE CROATIAN ACT ON MEDICALLY ASSISTED PROCREATION – BALANCING PROCREATIVE RIGHTS

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The paper analyses the medical-legal regulation of medically assisted procreation *de lege lata* and *de lege ferenda*, as well as the basic family-law consequences. The Republic of Croatia is a country-signatory of international conventions regulating procreative rights. Therefore it is obliged to act in accordance with the accepted international conventions. The Draft of the Croatian Act on Medically Assisted Procreation is the reflection of an attempt to balance the individual's right to decide freely on childbirth and the child's right to live in a family with both parents and be informed of its origin. The medical-legal regulation, taking into consideration the accepted standards of human rights, should be based on the following principles: the *ultima ratio* principle, the principle of the protection of participants in the procedure, the principle of state control and the principle of protection of the child's welfare.

## INTRODUCTION

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Medically assisted procreation in Croatia has been regulated since 1978 by the Act Concerning Medical Measures for Exercising the Right to Free Decision about Giving Birth to Children.<sup>1</sup> This act regulates three important parts of human reproduction: voluntary miscarriage, sterilisation and artificial insemination. The name of this act reflects the attitude of that time, according to which everybody has the right to free decision about giving birth to children. As such, that right also found its place in Article 272 of the Constitution of the former Socialist Republic of Croatia of 1974.<sup>2</sup>

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

After political changes, this right has not been recognised by the Constitution of the Republic of Croatia of 1990,<sup>3</sup> because the Croatian Parliament hesitated to give too great a liberty to the procreative rights of individuals at the constitutional level. The proclamation of the right to free decision of giving birth to children could produce a strong argument for the "pro choice" movement that this right should be unconditionally formulated in other legal acts. As in 1990 it was not clear which political forces would create new legislation, the creators of the Croatian Constitution did not want to predict the content of future laws, especially liberties or restrictions concerning abortion.

Although there is no constitutional provision protecting reproductive rights, Croatia is still bound by the *Convention on the elimination of all forms of discrimination against women*.<sup>4</sup> This Convention is a ratified international agreement, and as such by virtue of Article 134 of the Constitution, the source of law at the internal level.<sup>5</sup> The Convention guarantees to women: "The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;" Article 16 Paragraph 1 – e. That means that women in Croatia still have the right to decide on the number and spacing of their children, and that future Croatian laws will have to be in accordance with this right (although it is not a constitutional right and is not an absolute one).

Noting international agreements, one must mention the Convention on the Rights of the Child.<sup>6</sup> It contains a very important provision, entitling the child to know his/her origin as far back as possible. Also, the child has the right to be cared for by his or her parents (Art. 7). Absolute procreative rights of a parent could challenge these rights of the child. This is a problem that has to be solved at the domestic level by evaluating interests of all parties (the parents and the child).

In the meantime, the Ministry of Health decided to draft proposals for several laws on reproductive issues. The commission incorporating physicians, lawyers and clergyman has drafted separate laws regulating abortion, sterilisation, and medical measures concerning family planning and medically assisted procreation. This paper will present *the Draft of the Croatian Act on Medically Assisted Procreation*.

## **DE LEGE LATA AND PRESENT SITUATION**

*The Act Concerning Medical Measures for Exercising the Right to Free Decision about Giving Birth to Children* has become obsolete and insufficient (by just five articles – Art. 29-34) for legal regulation of the medical aspects of the assisted human procreation.<sup>7</sup> It regulates only two procedures: artificial insemination by husband (AIH) and artificial insemination by donor

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

(AID). Only a married couple can request these procedures, if it is not able to have children by other means.

Family law<sup>8</sup> regulates that fatherhood is presumed (*presumptio iuris et de iure*), if a husband has given his consent to insemination by donor. If the consent is missing, only the husband is entitled to contest his fatherhood. He can do this within six month of finding out that the child has been conceived and born by AID, but not after the tenth birthday of the child (Article 135 of the Croatian Marriage and Family Relations Act). If the strict terms have expired without his fault, he could only sue the hospital<sup>9</sup> in a civil litigation for the material and nonmaterial damage he eventually suffered from.

It could be concluded from the wording of *The Act Concerning Medical Measures for Exercising the Right to Free Decision about Giving Birth to Children* that the intention of the legislator was not to regulate surrogate motherhood.

Still, there are two explicit family-law provisions concerning motherhood, although there are no data showing that procedures resulting in surrogate motherhood exist in the practice of Croatian medical institutions. A woman who gave birth to the child is presumed to be the mother of the child (Article 122 of the Croatian Marriage and Family Relations Act, formulated as *presumptio iuris*: it is allowed to prove otherwise in a court procedure). She can contest her maternity only if she did not consent to assisted procreation by a donated ovum (Article 136 of the same Act).

Medical institutions in Croatia apply various technologies: AIH, AID, in vitro fertilisation by the gametes of the couple, gamete intrafallopian transfer (GIFT) by the gametes of a couple, storage of semen and storage of embryos (according to a questionnaire from 1994). In the year 1993/1994 318 children were born after medically assisted procreation: 98 children by artificial insemination by husband, 26 children by artificial insemination by donor, 190 children after in vitro fertilisation of the couples' gametes and 4 children by gamete intrafallopian transfer.<sup>10</sup> Medical institutions try to overlap insufficient legal regulation by introducing their own rules; some of them formulated by hospitals' ethic committees. This situation is not satisfactory because these ethic committees are paralegal bodies, which do not offer legal procedure to protect individuals seeking medical help.

## **DE LEGE FERENDA – SOME IMPORTANT PRINCIPLES**

One of the most difficult tasks of a legislator is to find appropriate solutions in the field of reproduction and bioethics. Law systems offer different provisions, based on the acceptable values in a national community. They differ from each other by allowing more or less freedom to individuals seeking medical help.<sup>11</sup>

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

The draft of the Ministry of Health has followed the Austrian model.<sup>12</sup> It regulates, restrains and balances procreative rights of individuals by the general principle of reasonableness.

The creation of the draft has been guided by some other important principles. They could be divided as the *ultima ratio* principle, the principle of the protection of the participants (parents and donor) in these procedures and the principle of the state's control of the hospitals, which undertake the procedures of medically assisted procreation. The paramount principle should be the protection of human dignity, including the protection of welfare of the conceived child.

### Ultima ratio principle

*Ultima ratio* principle involves the idea that medical assistance should not be provided whenever a person seeks medical help, no matter what the reasons are. Medical assistance may be provided to a woman or a man only if owing to infertility they cannot achieve pregnancy in marital/non-marital union, and after other trials and therapies have failed (Article 5, Par. 2). Singles are not able to request medically assisted procreation because it is considered that they have psychosocial problems in finding a partner, rather than medical problems with procreative health.

The choice of medical procedures reflects the rather restrictive attitude of this proposal. The procedures are determined and include:

- intracorporal fertilisation by implantation of the semen into female sexual organs,
- intracorporal fertilisation by implantation of the oocytes or the oocytes with the semen into female sexual organs,
- extracorporal fertilisation by linking oocytes and spermatozoa outside the female body, and by implantation of the fertilised oocytes into the womb or the Fallopian tubes, as well as storage of the unfertilised and fertilised oocytes and spermatozoa (Article 4, Par. 1).

Other procedures may not be undertaken. The usage of another woman's ovum is explicitly excluded (Article 6).

Draft law orientates medical procedures mainly to the purpose of achieving pregnancy. Other research activities are not permitted (Article 3).

There is the explicit ban of using the semen or ovum for another purpose than for achieving pregnancy. Intervention in the nucleus of either cell – the ovum or semen is not allowed. It is forbidden to select the sex of the child by selecting the cell of semen. The exemption could be the case when the selection is made to prevent some serious hereditary dis-

ease linked to sex (Article 19), which is in accordance with the European Convention on Human Rights and Biomedicine.<sup>13</sup>

### **The principle of the protection of participants (parents, donor and the physicians)**

Medical assistance is provided for the well being of both man and woman who are planning a family, according to the requirements of medical science and experience taking special care of health protection (Article 2). The couple has to give informed consent, which includes the information on possible effects and perils from the proceedings to the woman and child (Article 9, Par. 1). The Ethics committee of the hospital would and should resolve some more complicated cases (Article 9, Par. 2).

Taking care of specific circumstances and consequences of conceiving the child, the doctor of medicine shall recommend the couple to attend psychological or psychotherapeutical counselling. The psychological and legal counselling is a requirement for the couple who has agreed to an artificial insemination by donor (Article 10).

The Ministry of Health was not certain whether the wife or her partner are allowed to withdraw their consent. This has been proposed as an alternative solution. Thus they could request the suspension of the procedure of medically assisted procreation at any time until the semen, unfertilised or fertilised ovum are not implanted into the woman's body (Article 11, Par. 3). There are some attitudes that this provision should not remain in the proposal. The argumentation is that human genetic material (especially the embryo) has to be protected and to be enabled to develop. These attitudes seem to be rather unrealistic. Namely, if a woman gives up, nobody could force her to undergo medical procedures. If her partner gives up, the situation would be more complicated because he can't physically prevent insemination.

The provisions that allow withdrawal are better, because they try to protect the free will of the participants, taking care of family stability and the happiness of the child conceived.

Another problematic issue is if an unmarried couple in a stable relationship would also require medical help. Although registered partnership is acknowledged in family law, in many branches of Croatian law an extramarital couple does not enjoy the same privileges as the married one. This situation is the consequence of conservative attitudes in Croatian society. If the alternative in favour of extramarital couples is passed in Parliament, the family law provisions should be adequately changed, to protect in advance the establishment of parenthood.<sup>14</sup>

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

The donor is required to give a written, informed consent and entitled to withdraw it at any time. After the withdrawal the use of the donated semen is no more allowed (Article 14). Informed consent should contain the information that his identity can be revealed to the child after the child comes of age.

The draft law incorporates the right of a physician to the conscience clause. A physician shall not suffer from any disadvantageous consequences if he/she performs or rejects to perform the proceedings of medically assisted fertilisation (Article 23). Anyway, the medical institution should secure the staff willing to perform medically assisted procreation.

### **The principle of state control**

Medically assisted procreation may be carried out only in a hospital specially approved for this purpose by the Minister of Health (Article 7, Par. 2). The hospital can get the approval if it has been established that there are adequate specialists, facilities and equipment for performing the medical procedure in accordance with the requirements of medical science and experience. The hospital ought to provide psychological and legal counsel, when so prescribed by laws (Articles 7 and 8).

The quality of medical service will be controlled. The Minister of Health shall withdraw his approval, if the medical service is not satisfactory. This will be the case if the hospital is not proved to fulfil the conditions determined for performing the medical procedure any further, or to achieve the effects in a year's time which, as a rule, is achieved in other hospitals. This also applies if the hospital fails to observe the law provisions (Article 8, Par. 2).

The authorised hospitals have to report to the Minister of Health on the number and type of the performed proceedings and on their success as well as the storage of semen cells and unfertilised or fertilised cells of ovum.

The hospitals are obliged to record all important data in a special register. These are personal data concerning the woman and husband, the type of the applied fertilisation proceeding, the register mark of the donors, the data on counselling and written consents, the relevant data relating to pregnancy, birth, progress and health of the baby (Article 24, Par. 1).

The hospital is required to keep a register of donors and application of donated semen and keep the register for good. Access to the register will be allowed to the child after he/she reaches the age of maternity. The child's legal representative may have access to the register only if that is approved by the court in a non-litigant proceeding on behalf of the child's well-being because of an exceptional and medically justified reason (Article 17).

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

There will be a unified register of semen's donors, if there are more hospitals authorised to carry out the proceedings (Article 12 Par. 2). The idea is to prevent potential donors to go around and offer their genetic material, which in such a small country could result in a dangerous number of siblings not knowing for each other. To prevent such a situation, a donor may donate his semen only to one of the hospitals (Article 12 Par 3).

The draft law has provisions on fines for the violation of some of the most important orders.

### **The protection of welfare of the conceived child<sup>15</sup>**

Croatia has no specific regulation on the protection of the embryo or genetic material. The Draft law regulates how embryos, ovum and semen cells should be treated. Some of these provisions protect directly or indirectly the potential child. For example, indirect provisions are that fertilised ovum's cells may be kept up to three years, they may not be left at the disposal neither of the persons from whom they were taken nor of other persons. Post mortem conception is prohibited (Article 21).

Direct provision is that the conceived child will be entitled to obtain information concerning the donor and to have access to the hospital's register of donors, when it reaches the age of eighteen (Article 17). This is in accordance with the demand that a child has the right to know his/her biological origin as far back as it is possible (Convention on the Rights of the Child, Art 7). This provision will discourage many potential donors, although the child is not able to establish legal relation to his/her father. It is obvious that the interest of the child has prevailed.

Present family law protects the social parents of the child and a biological parent and as a rule prohibits the denial of the paternity of the child conceived by artificial insemination.<sup>16</sup> New family law provisions will retain the same principle that the intention (expressed in written consent) of the mother's partner in the moment of conception to be the father of the child, will be enough to establish permanent legal child-parent relationship. This provision protects also the family unit of the child, no matter how the child has been conceived.

### **CLOSING REMARKS**

Medically assisted procreation is not just a medical problem. It became an ethical problem, personal problem, legal problem and the problem of the whole society that has to decide how to balance the interest of an individual to become a parent and the interest of the child to grow up in a stable family with both parents.

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

International agreements provide some guidelines, but sometimes they are controversial. The decision how to solve the conflict of interests and how to balance attitudes in a pluralistic society is upon the domestic legislator.

The Croatian Act on Medically Assisted Procreation has been drafted for the last four years. This paper presents just the approach to general moral values, affecting the principles incorporated in an act regulating such delicate issues. It is obvious that the principles reflect the attitude of the rather traditional Croatian society, expressing fear of possible manipulation of medical professionals. New legal regulation will impose firmer borders of the possible medical procedures and guarantee more legal security.

The Parliament has the last word, after public debate, which has not been launched yet. According to the experience of other states one can never be sure that this Draft will pass unchanged through the legislative procedure. It is to be seen which values will prevail.

## NOTES

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<sup>1</sup> Act for Exercising the Right to Free Decision of Giving Birth to Children, *Narodne novine* 18/1978.

<sup>2</sup> Constitution of the Socialist Republic of Croatia, *Narodne novine* 8/1974.

<sup>3</sup> Constitution of the Republic of Croatia, *Narodne novine* 56/90 and 135/97.

<sup>4</sup> *Convention on the Elimination of all Forms of Discrimination against Women*, 1979, United Nations, G. A. Res. 34/180, Doc. A/34/46.

<sup>5</sup> Article 134 of the Constitution: "International agreements concluded and ratified in accordance with the constitution and made public shall be part of the republic's internal legal order and shall in terms of legal effect be above law. Their provisions may be changed or repealed only under conditions and in the way specified in them, or in accordance with the general rules of international law."

<sup>6</sup> *Convention on the Rights of the Child*, 1989, United Nations, G. A. Res. 44/25, in Croatia in force since 1990.

<sup>7</sup> The act does not solve many practical problems: what if one of the spouses changes his mind, what if one dies, how long can the genetic material be stored, which interventions on the embryo may be done, what to do with spare embryos and many others.

<sup>8</sup> The Croatian Marriage and Family Relations Act, *Zakon o braku i porodičnim odnosima*, *Narodne novine* 51/1989 and 55/1990.

<sup>9</sup> This could be the case if the husband did not consent to AID, but his wife underwent the procedure. If he gave his sperm for some other purpose, without the intention to AIH procedure, he would not be entitled to contest the paternity. Though, the medical institution might be liable for unwanted expenses of fatherhood and for nonmaterial damage.

<sup>10</sup> Dubravka Šimonović, *Legal Regulation of Medically Assisted Procreation*, *doctoral thesis*, Zagreb, 1996, 306-332. In the year 1993 in

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

Croatia there were born 48535 children, as in 1994. So, the number of the born children conceived by medically assisted procreation is about 0,65%. *Statistical Yearbook*, Central Bureau of Statistics, Zagreb, November 1997, 93.

<sup>11</sup> UK medicine reproductive law is the most liberal one, even allowing the production of embryos for the purpose of research. Some European countries have no statutory regulation of assisted reproduction, for example Poland or Italy. Lang, Wies<sup>3</sup>av, *The Legal Status of the Human Foetus*, in *Conceiving the Embryo, Ethics, Law and Practice in Human Embryology*, 1996, Martinus Nijhoff Publishers, the Hague/London/Boston, 259 and 263.

<sup>12</sup> *Fortpflanzungsmedizingesetz*, 1992, 275. Bundesgesetz, mit dem Regelungen über die medizinisch unterstützte fortpflanzung getroffen (Fortpflanzungsmedizingesetz – EMedG) sowie das Allgemeine Bürgerliche Gesetzbuch, das Ehegesetz und die Jurisdiktionsnorm geändert werden, Bundesgesetzblatt für die Republik Oesterreich, Jahrgang 1992, ausgeg. am 4. Juni 1992, 105. Stück.

<sup>13</sup> *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Oviedo, 4. IV. 1997, Council of Europe, European Treaties, ETS No. 164 and *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, Paris, 12. I. 1998, Council of Europe, European Treaties, ETS No. 168.

<sup>14</sup> The husband of the mother is considered to be the father of the child by virtue of law. The fatherhood of a man who is not the husband of the mother has to be established in an administrative or court procedure after the birth of the child.

<sup>15</sup> The child's welfare should be the paramount interest, but it is situated at the end because the birth of the child is at the very end of the medical procedure.

<sup>16</sup> The exemption is when the mother's husband has not given consent to the insemination by donor, so it would be injustice to prevent him from contesting his paternity.

## Nacrt hrvatskog Zakona o oplodnji uz medicinsku pomoć – kako uravnotežiti prokreativna prava

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Rad razlaže medicinsko-pravno uređenje oplodnje uz medicinsku pomoć de lege lata i de lege ferenda te osnovne obiteljsko-pravne posljedice. Republika Hrvatska je država stranka međunarodnih ugovora koji utječu na uređenje prokreativnih prava, tako da mora poštovati preuzete međunarodne obveze. Nacrt Zakona o oplodnji uz medicinsku pomoć odraz je težnje da se uravnoteži pravo

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 8 (1999),  
BR. 2-3 (40-41),  
STR. 229-238

KORAĆ, A.:  
DRAFT  
OF THE CROATIAN...

pojedinka da slobodno odlučuje o rađanju djece i pravo djeteta da živi u obiteljskoj zajednici s oba roditelja te da zna svoje podrijetlo. Medicinsko-pravno uređenje, uzimajući u obzir prihvaćene standarde prava čovjeka, trebalo bi počivati na nekoliko načela: ultima ratio načelu, načelu zaštite sudionika u postupku, načelu državne kontrole te na načelu zaštite djeteta.

## Der Entwurf des kroatischen Gesetzes über ärztlich überwachte Befruchtung – Zur ausgewogenen Definierung der Fortpflanzungsrechte des Menschen

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Der Artikel befaßt sich mit der medizinisch-rechtlichen Regelung der ärztlich überwachten Befruchtung *de lege lata* und *de lege ferenda* sowie mit den wichtigsten familienrechtlichen Konsequenzen. Die Republik Kroatien ist Mitunterzeichnerin internationaler Abkommen, die die Regelung der Fortpflanzungsrechte des Menschen beeinflussen, und ist daher an die Erfüllung der übernommenen Pflichten gebunden. Der Entwurf des Gesetzes über ärztlich überwachte Befruchtung ist Ausdruck des Bestrebens, einerseits das Recht des einzelnen, frei über die Zeugung von Nachkommen zu entscheiden, und andererseits das Recht des Kindes auf ein Leben in der Familie mit beiden Eltern und auf die Kenntnis seiner Herkunft in ein ausgewogenes Verhältnis zueinander zu bringen. Die medizinisch-rechtliche Regelung der ärztlich überwachten Befruchtung müßte den geltenden Standards in den Menschenrechten Rechnung tragen und auf folgenden Prinzipien beruhen: dem Prinzip der *ultima ratio*, dem Prinzip des Schutzes aller am Befruchtungsvorgang Beteiligten, dem Prinzip der Kontrolle durch staatliche Einrichtungen und dem Prinzip des Schutzes des Kindes.