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**MBROJTJA E JETËS PERSONALE DHE FAMILJARE NË  
RASTET PRANË GJYKATËS EVROPIANE PËR TË DREJTAT E  
NJERIUT**

**ЗАШТИТА НА ЛИЧНИОТ И СЕМЕЈНИОТ ЖИВОТ НА  
СЛУЧАЕВИ ПРИ ЕВРОПСКИОТ СУД ЗА ЧОВЕКОВИ ПРАВА**

**PROTECTION OF PRIVATE AND FAMILY LIFE IN CASES AT  
THE EUROPEAN COURT OF HUMAN RIGHTS**

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Abstract

Protection of private and family life in cases at the European Court of Human Rights is exercised under article 8 of the Convention on Human Rights and Fundamental Freedoms of the Council of Europe. Article 8 protects a wide range of personal interests spanning thru various aspects of personal life and family relationships. The space of free assessment of the European Court of Human Rights in these areas is wide and jurisprudence in some way follows the social and technological development. Nevertheless, the European Court of Human Rights maintained a relatively conservative approach for a long time, regarding the protection of private and family life, especially for issues which do not have a tendency for intense social acceptance and societal recognition. But, in jurisprudence we can notice a certain evolution of the views of the Court who seriously takes into account the societal acceptability and

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legitimate access to topics which are sensitive from a moral and legal perspective.

This paper analyzes the jurisprudence of the European Court of Human Rights in cases related to the area of protection of private and family life. Special emphasis is placed on new challenges facing court-imposed diversity of modern family arrangements, the progress of reproductive medicine and other modern trends.

Keywords: European Court of Human Rights, private life, family life

## Introduction

Article 8 of the European Convention on Human Rights and Fundamental Freedoms guarantees the respect of private and family life, home and correspondence. Public authorities should not interfere in the exercise of this right except that is provided by law to protect the legitimate interests (referred in paragraph 2 of Article 8) in a democratic society. Article 8 of the Convention has an extremely wide range and guarantees the protection in many areas that are related to privacy of an individual. Hence, the doctrine of discretion is important in the development of case law relating to Article 8. It provides a degree of discretionary freedom of states in sensitive areas where the European Court of Human Rights (ECHR) doesn't dare to interfere in the decisions made by those in direct context with stakeholders or when a different approach is justified by local conditions.<sup>134</sup> Therefore, the protection of areas of interest varies from case to case depending on the situation and practice in certain countries.

The right to respect of personal and family life can be harmed by entering the zone where each individual has a reasonable level of expectation for privacy, confidentiality or intimacy. Violation of

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<sup>134</sup> Харис, О'Бојл и Варбрик, *Право на Европската конвенција за човекови права (превод)*, Скопје, Просветно дело, 2009, стр. 363

privacy means unjustified intrusion into the private sphere through the disclosure of confidential data, information or facts that may cause embarrassment or emotional injury to a reasonably sensitive person. Any unauthorized intrusion into privacy means injury of the person, the dignity of human freedom, personal autonomy, and the emotional feelings of intimacy.<sup>135</sup> Article 8 imposes an obligation on the state to refrain from interference with the privacy of individuals, but also an obligation to take appropriate measures in order to create positive conditions for respect of the rights protected by this Article.

The practice of the ECHR in the sphere of privacy has evolved gradually and at a slow pace because the Court kept the relatively conservative approach to many, limiting "and new questions of state interference in private life, and entered new territory when it was firmly convinced that this practice appears in many countries, and based on that decided that this discretion should be limited".<sup>136</sup> In the proceedings, the Court takes into consideration the standards accepted in European society and the European Convention on Human Rights interpreted in the context of current conditions, not in conditions that dominated the time of the adoption of the Convention. Although the Court usually follows and applies their previous decisions, it is not absolutely bound by its previous interpretations of the Convention. The court may depart from its previous decisions, especially when there is a need for interpretation to take into account social changes and current conditions. Regarding the protection of private and family life, this approach of the Court is of great importance because the treatment of these areas necessarily requires a flexible approach to them. The need for adaptation of the jurisprudence of the ECHR with new or changed social circumstances was especially apparent when the Court was faced with the challenge of acting in cases of violation of private and family life in cases of assisted reproduction, changing gender identity, same-sex

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<sup>135</sup> Шкарик, С., Уставно право, Матица Македонска, Скопје, 2006, стр. 290

<sup>136</sup> See: Kilkelly, U., Pravo na poštovanje privatnog i porodičnog života prema Evropskoj konvenciji o ljudskim pravima (clan 8), Priručnik za pravnike, 2006, p. 1

communities of life, etc. In this context, the Court has used a “dynamic” approach to the interpretation of the Convention in the light of changing social values, as the idea according to which, the states may be imposed with positive obligations, where they are required, for example, to adopt legislation respect for the rights of homosexuals, children born outside of marriage and transsexuals.<sup>137</sup>

### Protection of private life in cases at the European Court of Human Rights

Respect of private life is an extremely broad concept that involves the right to personal autonomy, physical integrity, the right to choose sexual identity, lifestyle and behavior patterns. The private life primarily concerns the sphere in which each individual can fully express their personality and develop relationships with other individuals. Private life broadly denotes immediacy of close relationships with people, independence of institutions or rules, or the independence of the external expediency or moral acceptability.<sup>138</sup> The term „private“ must be understood referring to the right to select certain intimate aspects of personal life, without regulation by the government.<sup>139</sup> In determining whether a private life is at stake, the Court takes every case and evaluates on its own merits. Hence, it is estimated that the case law regarding the meaning of private life is packed with neither clarity nor discipline.<sup>140</sup> Despite the absence of a unified definition for the notion of private life, in the case of

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<sup>137</sup> Харис, О’Бојл и Варбрик, Право на Европската конвенција за човекови права (превод), Скопје, Просветно дело, 2009, стр. 32

<sup>138</sup> Dropulič, J., Pravo na privatni život i duševni integritet, Vizura, Zagreb, 2002, p. 47

<sup>139</sup> Janis, M.W., Kay, R.S., Bradly, A.W., European Human Rights Law, Oxford University Press, 2000, p. 329

<sup>140</sup> Харис, О’Бојл и Варбрик, Право на Европската конвенција за човекови права (превод), Скопје, Просветно дело, 2009, стр. 363

Niemietz v. Germany,<sup>141</sup> ECHR gave clear guidance that private life cannot be limited to the "inner circle" in which an individual lives his personal life. According to the Court, that would be too restrictive, because the outside world cannot be excluded entirely, and the respect for private life must embrace, to a certain degree, the right to establish and develop relationships with other human beings.

From the current practice of the ECHR we can identify the following segments entering the sphere of private life:

1. Personal identity is manifested in the Court rulings, primarily through issues of the right to choose the first name and the surname. In judicial practice observes examples of complaints due to the refusal of a request for a change of surname, or rejection of the choice to use the surname of the wife as joint marital surname, as well as disabling the use of the chosen name for the newborn child (the case in France, where the authorities did not accepted the name that one couple chose for their newborn).<sup>142</sup> In terms of personal identity an evolution can be observed of the position of the ECHR in the treatment of the legal consequences of gender change. This is in relation to the refusal of the homeland to applicants to update their data in registers and to enter a new identity (gender) performed after surgery intervention. A milestone in this direction was made in the case B. v. France,<sup>143</sup> where the ECHR found a violation of the right

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<sup>141</sup> Niemietz v. Germany, 23.11.1992 (13710/88)

<sup>142</sup> Guillot v. France, 23.09.1996 (No. 22500/93). In this case, the ECHR did not find a violation of Article 8, considering the fact that the applicants were offered an alternative name (Fleur-Marie) in exchange for the selected (Fleur de Marie) in the home country which was regarded as eccentric and bizarre.

<sup>143</sup> B. v. France 25.03.1992 (No. 57/1990/248/319). In this case, the Court takes a different view of some previous decisions in which the object is identical, because among other things, take into account the fact that in France, unlike the United Kingdom, the stem books are treated as a document for registration of personal data arising and change throughout life. However, later in Goodwin v. United Kingdom, ECHR would indicate that the country (UK) where stem books are treated as a document for registration of historical facts may no longer refer to this (historical) treatment of stem books because exceptions have been made in relation

for respect of private life because of a legal non recognition of the new sexual identity of post-operative transsexual. In this case the ECHR concluded that the necessary fair balance that should exist between the general interest and the interest of individuals is not established. In the creation of its position, the Court took into consideration the medical and scientific nature of transsexual and justified the evolution of attitude with the permanent international tendency for intense social acceptance and legal recognition of the new sexual identity after surgery with the purpose to change gender.

2. Moral and physical integrity. The moral and physical integrity are the most intimate aspects of personality. The range of issues that fall under the moral and physical integrity is pretty versatile. Under violation of physical integrity jurisprudence has bend issues of forced medical intervention, prevention of pregnancy termination, arbitrary confiscation of passport issues regarding the right to a healthy environment, etc. In terms of the positive obligation of the state to prevent violations of the physical and moral integrity of a person, in case *Georgel and Georgeta v Stoicescu v. Romania*,<sup>144</sup> ECHR noted that this obligation exists not only when an injury comes from civil servants, but by another person, in cases when the state knew or should have known of such injuries. Violation of moral and physical integrity can result from violation of other rights protected by the European Convention on Human Rights and Fundamental Freedoms. Thus, in the case *Gjorgjevic v. Croatia*,<sup>145</sup> in connection with a violation of Article 3 of the European Convention for failing to take adequate measures by the state to prevent the constant harassment of physically and mentally disabled child, the Court stated it is also a violation of the moral integrity of the mother of the disabled person, as an element of private and family life protected by Article 8.

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of adopted children when issuing an updated document (extract) containing personal data of altered birth certificates.

<sup>144</sup> *Georgel and Georgeta v Stoicescu v. Romania*, 26.06.2011 (9718/03)

<sup>145</sup> *Gjorgjevic v. Croatia*, 24.07.2012 (41526/10)

3. Social life and establishing relationships with other people. This segment refers to relations establish relationships of all kinds and especially sex as extremely intimate sphere as a right of personal choice. After the submitted appeals, ECHR decided on certain aspects of the right to sexual privacy, particularly in relation to transsexuals and homosexuals. Regarding homosexuals, the practice of the ECHR has seen several examples of lawsuits because of their discrimination, for example, the procedure for hiring or dismissal from service in the army of the state, and the question now is almost stale and concerns incrimination and sanctioning of homosexual activities. In *Dudgeon v. United Kingdom*<sup>146</sup> ECHR underlined that issues of sexual orientation and activity fall within the intimate aspect of private life where the state shouldn't interfere.

Relations in professional and business life are also treated as matters of social life with other individuals, especially given the fact that in the business area individuals can develop different relationships with other individuals, and given the fact that sometimes is clearly impossible to distinguish whether an activity is part of private and professional life of the individual.<sup>147</sup>

4. Confidential data. This section applies to personal information, photographs and medical records to be properly protected and may not be made available to other parties without the consent of the person concerned. Court on several occasions (in items *Peck*, *Amann*, *Rotaru*, *Shimovolos*) estimated that the systematic collection and storage data of certain persons by state security services, interferes with their private life, even when data is collected in public places or referred exclusively to their professional or business activities. This segment also includes the right of access to confidential data by the person to whom they relate, and that of the sphere of private life. In connection with this segment we can stress the position which ECHR expressed in case *Gaskin v. United Kingdom* -

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<sup>146</sup> *Dudgeon v. United Kingdom*, 30.10.1981 (No. 7525/76); *Norris v. Ireland*, A 142 (1988); 13 EHHR 186

<sup>147</sup> From the previously mentioned *Niemietz v. Germany*, 23.11.1992 (13710/88)

refused to allow access to individual records which contain information about their private life, is a violation of the right to respect for private life.<sup>148</sup>

Besides the above mentioned, as special aspects of private life are also highlighted the issues regarding immigration, issues to prove paternity, artificial insemination, issues of implementation of mandatory blood and urine tests to check against prisoners using drugs, alcohol tests on drivers compulsory vaccination, dental treatment, tests children against tuberculosis or check X-rays, the effective enjoyment of social life, cultural and linguistic uniqueness, etc. The attitudes toward certain relations of human relationships that generate new questions concerning the private lives of individuals or groups are almost in constant evolution. The questions are never-ending, and list of relationships that can be defined under private life is not closed.

## 2. Protection of family life in cases at the European Court of Human Rights

Respect for family life implies a right to enjoy family relationships without interference by public authorities and by other individuals. Family life is closely related to private life. The issues that are the focus of the right to respect for family life primarily relate to relationships in marriage and relationships between parents and children as subjects of a family. Questions for which there isn't completely clear views and can't with certainty be "stored" in the sphere of family life, summed up by the appropriate scope of private life as significantly broader concept. Similar to the concept of respect for private life, the ECHR maintains a flexible approach to the interpretation of family life, taking into account the diversity of modern family arrangements, the implications of divorce on marital

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<sup>148</sup> Gaskin v. United Kingdom, 07.07.1989 (No. 10454/83)



communities and medical progress.<sup>149</sup> As a rule, the existence of family life within Article 8 of the European Convention on Human Rights, the ECHR based on the facts that suggest the existence of a close personal relationship between individuals. Marriage as a formal union of two persons of different sex in the context of the right to respect for family life is interpreted broadly and beyond the scope of this or a similar definition of marriage in the national legislation. It is relevant for the marriage to be formalized and to be real, not fictional. Children born in the formal and actual marriage are part of that community from the moment of their birth. But, the established formal union between two people, it is not just, and is not the only relevant precondition. Informal community of actual cohabitation is equal to the formal marriage in terms of rights arising for individuals in that community. Hence, as family life ECHR treats community partners who are not married and live together with their children.<sup>150</sup> In this respect, as family life within Article 8, the Court has treated the relationship between parent (father) and child at times when partners (the child's parents) did not live together,<sup>151</sup> and the relationship of the mother with her children, regardless the lack of marital status with the father.<sup>152</sup> The reason for these attitudes is the increase of the actual union between persons who are not formally registered, and children who are born in these communities. In some borderline cases, the existence of family life in terms of the right under Article 8, taking into account other circumstances, regardless that formal marriage is not official (such as the stability of the established relationship, mutual commitment, continuity of communications between people, the intention for marriage, etc.). In other words, we have to assess the quality of established relationship with the purpose to determine whether in this case it is about family life

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<sup>149</sup> Kilkelly, U., *The right to respect for private and family life, A guide to the implementation of Article 8 of the European Convention on Human Rights*, Council of Europe, Strasbourg, 2001, p. 16

<sup>150</sup> *Johnston & Ors v. Ireland*, 18.12.1986 (No. 9697/82)

<sup>151</sup> *Boughanemi v. France*, 27.03.1996 (No. 22070/93)

<sup>152</sup> *Marckx v. Belgium*, 27.04.1979 (No. 6833/74)

and to further assess whether the right has been infringed according to Article 8. For existence of family in terms of Article 8, a lack of blood relation and biological kinship is irrelevant. The position of the Court is that biological kinship indicates the existence of a close personal relationship, but only relationship without further factual elements should not be considered sufficient for the realization of the right to respect for family life. Accordingly, the relationship between adopted children and adoptive parents, as a rule, is protected as family life within the Article 8. The relationship between sperm donors and children born, as a rule, does not fall under the family, unless there is sufficient evidence that they have established a close personal relationship, in addition to the blood bond.<sup>153</sup> In context, assisted reproduction is one of the new challenges risen before ECHR. As a result of all the huge advances in reproductive medicine, it is expected that subjects with this content in the future will be more present in the ECHR, especially as the biomedical reproduction which helped open an array of sensitive ethical and legal issues. In the case of *Evans v. UK*,<sup>154</sup> ECHR decided upon the appeal of applicant for alleged violation of Article 8 because denial of the request for use of frozen embryos created by *in vitro* fertilization with her husband, who then disagreed to perform fertilization. In the case of *S. H. and Others v. Austria*,<sup>155</sup> the ECHR concluded that in the laws of the Member States of the Council of Europe there is a clear trend of allowing the donation of cells for *in vitro* fertilization, which shows that the Court appears to have a European consensus on this issue. The Court noted that this consensus indicates the degree of development of a dynamic area of law and narrows the space for free evaluation by states. Because of the lack of a uniform approach to the issue, the states have wide space for evaluation in this area. However, in the above mentioned case, the Court finds that the respondent State has not exceeded the free space

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<sup>153</sup> *G v. Netherlands*, 1993 (No.16944/90)

<sup>154</sup> *Evans v UK*, hudoc (2007); 46 EHHR 728 GC

<sup>155</sup> *S. H. and Others v. Austria*, 3.11.2011 (No. 57813/2000)

evaluation to ban donating reproductive cells include third parties, noting that assessment was based on the intention to prevent the creation of unusual personal relations. The ECHR pointed out that moral considerations and social acceptability, should seriously be accepted as legitimate access to sensitive areas such as artificial insemination.

The right to respect for family life is closely related to Article 12 of the European Convention on Human Rights which guarantees the right to marry and found a family. This article protects the right to marry and create a family, from the moment you gain requirements of national laws. Unlike Article 8 of the European Convention on Human Rights, Article 12 is closely fitted and it applies to family life in the area of marriage. All border issues in line with the marriage and the family are successfully covered by case law under the broad umbrella set provisions of Article 8. However, the traditional approach to marriage as a union of persons of opposite sex, is not immune to the impact of modern social trends, almost the same ones that have a strong impact in the treatment of certain aspects of the right to respect for private life. Changes are evident in the recent case law regarding the treatment of marriage. The reasons for this change can be seen in the trend of continuity in accepting transsexuals and change their sex. Notably, unlike previous attitudes in case *Rees v. UK*, confirmed in *Cossey v. UK*, as in the cases that are denied the right of a transsexual to marry a person who is now the opposite sex of his, in its subsequent decisions, the Court will change the position. Citing the significant social changes in marriage and dramatic change in the development of medicine and science in the field of transsexual in case *Cristine Goodwin v. United Kingdom*,<sup>156</sup> the ECHR took the stand that the terms "husband and wife" as creators of marriage should not only differ according to biological criteria, while taking into account the fact of the legal basis for a sex change on the one hand and tremendous changes in medical science in the field of transsexuality, on the other side. In this context, the

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<sup>156</sup> *Goodwin v. United Kingdom*, 11.07.2002 (No. 28957/95)

ECHR established the existence of family life within the meaning of Article 8 in the case *Kerkhoven, Hinke & Hinke v. Netherlands*,<sup>157</sup> established in terms of a stable relationship between two women and a child born on one of them with donor insemination, as in *X, Y & Z v. the United Kingdom*,<sup>158</sup> in respect of the same kind of connection between transgender and child born through artificial insemination. As border situations, in which there is a decision whether it falls under the standards of Article 8 or Article 12, jurisprudence registers cases the implications of divorce of marriage or termination of the actual communities,<sup>159</sup> issues of children born marriage or cohabitation,<sup>160</sup> domestic violence,<sup>161</sup> immigration and the impact of deportation on relationships in marriage and family,<sup>162</sup> visits to prisoners by spouses and family,<sup>163</sup> and other matters of relationships on marriage

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<sup>157</sup> *Kerkhoven, Hinke & Hinke v. Netherlands*, No. 15666/89 hudoc (1992) DA

<sup>158</sup> *X, Y & Z v. the United Kingdom*, 1997-11, 24 EHHR 143

<sup>159</sup> In *Berrehab v. Netherlands*, A 138 (1988); 11 EHHR 322, ECHR points out the importance of maintaining contact with the children's parents after the termination of the formal or actual community of life between parents of these children and the disabling of an opinion that these contacts will be priced as a violation of the respect for family life.

<sup>160</sup> In accordance with the general standard that the interpretation of the terms of Article 8 should be in the broadest sense when it comes to the interests of children, in *Hoffman v. Austria*, 26.05.1993 (No. 15/1992/360/434), ECHR concluded that the decision to grant the children of a parent who is essentially based on the religion of one of them, is an act of discrimination in the exercise of the right to family life.

<sup>161</sup> In case *Eremia v. Moldova*, 28.05.2013 (No. 3564/11) ECHR stipulates that the state has not fulfilled its positive obligation when authorities knew of the danger of further violent behavior on husband towards his wife and have not taken any action against him, and the violence occurred in the presence of their children.

<sup>162</sup> In the previously mentioned case *Berrehab v. Netherlands*, the applicant was a Moroccan national who was deported from the Netherlands although whilst there married a Dutch woman and had a child together. Marriage formally ended in divorce, but the applicant *Berrehab* maintained regular contact with the child and common contributor to his livelihood.

<sup>163</sup> In this context, particular complaints relating to the limit of the number of visits from family members, the presence of the guards during the visit, the inability for receiving packages sent by family members, etc. In the decisions of these, the

and family. We expect further expansion of the range of these issues and inclusion of Article 14 as an alternative treatment when the specific issue can be subsumed under the standards of this Article of the European Convention on Human Rights. Article 14 guarantees the exercise of recognized rights and freedoms "without any discrimination based on sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or any other status." The recent case law of the ECHR confirms expectations. For example, the decision in the case *X and Others v. Austria*,<sup>164</sup> the Court found a violation of Article 14 in conjunction with Article 8, finding that the ban on adoption of a child of one partner by the other same-sex couples, such as adoption is permitted in extramarital couples of the opposite sex, is different treatment based on sexual orientation. Court also concluded violation of Article 14 in relation with Article 8 in the case *Topčić-Rosenberg v. Croatia*<sup>165</sup> because of refusing the request adoptive parent for use on maternity leave after adoption of child, in circumstances where the biological mother after childbirth has such a right. Also, the decision on the case *Vojnity v. Hungary*,<sup>166</sup> the ECHR concluded that the exercise of the right to respect for his family life applicant is discriminated against based on his religious beliefs and irrational "view of the world". In this case, the Court finds different treatment and disproportionate restriction on the right to respect for family life because of the applicant's home country has been banned meetings with his son who was under the custody of his ex-wife (or later under the tutelage of his adult son).

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European Court indicates the importance of maintaining family relationships between prisoners and their relatives.

<sup>164</sup> *X and Others v. Austria*, 19.02.2013 (19010/07)

<sup>165</sup> *Topčić-Rosenberg v. Croatia*, 14.11.2013 (19391/11)

<sup>166</sup> *Vojnity v. Hungary*, 12.02.2013 (29617/07)

## Conclusion

From the previous segments we can see the wideness and sensitivity of relations from the area of private and family life within of Article 8 of the European Convention. The European Court of Human Rights in cases of violation of private and family life approaches them in the context of their specific characteristics. In their decisions ECHR constantly emphasizes that in determining the wideness of a free evaluation of states to decide when and what is the case under Article 8, must be taken into account numerous factors. When it comes to very important aspects of an individual's existence or identity, space for a free evaluation will certainly be limited. However, in cases where there is no consensus among member states of the Council of Europe, and especially when a specific event opens sensitive ethical issues, then the space for free evaluation is broader.

European Court of Human Rights undoubtedly faces challenges in the prevention and treatment of private and family life within the Article 8. The court takes into consideration the fact of the changed circumstances in the field of scientific, legal and social elements. Therefore, a relatively conservative approach to new and evolving noticeable border issues and the views of the Court clearly adapt to the continuing international trend in relation to certain issues such as the legal consequences of gender change. Also, a serious challenge to the Court is the fact that the reproductive medicine has been developing very rapidly from a scientific perspective, but also in terms of the legal framework for its medical application. ECHR approaches and accesses this theme very cautiously, especially as this development imposes some concerns about the achievements of medicine in the field of artificial insemination, as well as sensitive ethical and moral questions that are open.

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