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Assisted Reproductive Technologies: Impact on Parenthood Law**

ABSTRACT: This study analyses changes in parenthood law as a consequence of using assisted reproductive technologies (ART) for bearing a child, particularly focusing on the following treatments: ova donation, surrogate motherhood, homologous artificial insemination, heterologous artificial insemination (artificial insemination by donor), posthumous fertilisation, and embryo donation. The study examines Serbian legal solutions and court practice, as well as comparative solutions and relevant decisions of the European Court for Human Rights. It primarily aims to determine the legal grounds for establishing motherhood and fatherhood in the cases using ART and examine the issue of legal status and rights of the donor of the genetic material.

KEYWORDS: ART, motherhood, fatherhood, donor, child.

1. Introduction

Contemporary family law attempts to determine legal solutions to reach a concurrence between biological and legal parenthood, as far as possible. The development of biology and medicine has enabled legal and biological motherhood and fatherhood to coincide completely owing to biomedical analysis, particularly DNA analysis. However, developments in biology and medicine cause discrepancies in legal and biological motherhood and fatherhood in the context of biomedical-assisted conception if donor genetic material is used. Thus, the autonomy of the parties gains importance, and legal parental relations are based on the will of the parties; thus, the principle of biological truth loses importance. Legal parents are persons who participate in the process of biomedical-assisted conception to produce a

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child. Persons wanting a child may indeed become legal parents, irrespective of being parents in genetic terms or not being able to become parents.

2. Grounds for Establishing Motherhood

For a long time in legal history, the question regarding the mother of a child was rarely raised. The principle of ancient Roman law, *mater semper certa est etiam si vulgo conceperit* was widely accepted.[1] The woman who gave birth to the child was considered the mother. Statutory provisions in contemporary family law often establish or define motherhood. This is the case in Serbian family law.

In Serbia, motherhood resulting from assisted reproductive technologies (ART) is regulated by the Family Act.[2] There is an explicit stipulation that the mother of a child conceived with biomedical assistance is the woman who gives birth to the child.[3] The legislator has given primacy to carrying and delivering the child over genetic origins. Irrespective of whether the child can be conceived with a donated ovum (or embryo), the legal mother is the woman who gives birth to the child. This means that even if the child does not carry her genetic characteristics, she is the legal mother. The other rule concerns the prohibition of establishing motherhood of the woman who has donated ova.[4] The purpose of donating genetic material is that the woman who wants the child and whose ova cannot be fertilised, obtains an ova from another woman, which is then fertilised with the sperm of her partner; after the transfer of the embryo into the body of the woman who wants the child, whom she carries and gives birth to. In this case, the child carries the genetic characteristics of the female donor and the partner of the woman who wants the child. Considering that the child would be raised by the woman who delivered the child, establishing motherhood for the woman who donated the ova would not serve any purpose. However, if there is a (covered-up) case of surrogate motherhood, this stipulation has a

[1] Corpus Juris Civilis, Dig. 2.4.5. (Mommsen and Watson, 1985, eds.): 'quia semper certa est, etiam si vulgo conceperit'.
[2] Family Act (Porodični zakon), Official Gazette of Serbia no. 18/2005, 72/2011, 6/2015. More in: Kovaček Stanić, 2010, pp. 147-161.
[3] Art. 57/1.
[4] Art. 57/2.

much greater significance because the mother whose ova is fertilised wants to be the mother.

The previous law regulating ART in Serbia, the Law on Treating Infertility by Biomedical Assisted Fertilization (LBMAF)[5] had a provision that stipulated that a woman who gave birth to a child should be considered the child's mother.[6] Moreover, the LBMAF forbade the establishment of donor's maternity.[7] In addition, the LBMAF explicitly established the mother of the foetus, stating that the mother is a woman who is carrying the foetus or was carrying the foetus as the result of an implantation of the embryo, sperm, or ova in her body/womb in the process of a biomedical-assisted conception.[8] This type of solution is unusual in comparative law. The Serbian legislators' reason for incorporating this provision into the LBMAF is questionable. In addition, the LBMAF forbade contesting motherhood when using the ova of the same woman (or early embryo) if she gave consent to this procedure.[9] This provision appears unnecessary; if the ova of the same woman is used for conception, this woman is the mother, both genetically and gestationally, and she does not have any interest in contesting maternity. It would be logical to forbid contesting maternity if the ova of the other woman (donor) is used, therefore, if the woman who gives birth to the child consented to the use of donor ova, she should not have the right to contest biological (genetic) motherhood. However, Serbian legislators failed to regulate this situation. This Act explicitly forbade surrogate motherhood.[10]

In comparative law, the Human Fertilisation and Embryology Act of 1990 of UK specifically regulates maternity in relation to ova and embryo donation. It stipulates that a woman who carries or has carried a child born as a result of placing an embryo or sperm and ova cells in her body, and no other woman (27.1), is considered a mother. The bioethical laws of France allow and regulate the donation of both male and female gametes and embryos. The gamete donation procedure includes providing consent in the presence of a notary or judge who informs the parties about the

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[5] Law on Treating Infertility by Biomedical Assisted Fertilization, Official Gazette of Serbia no. 72/2009.
[6] Art. 65/2.
[7] Art. 65/4.
[8] Art. 65/1.
[9] Art. 65/3.
[10] Art. 6/25.

consequences related to the parenthood of a future child.[11] If the embryo of another couple is used, written consent from all persons is required, and the judge decides on the use of the embryo based on the interests of the future child.[12] Gamete donors (woman or man) must live in a heterosexual union and have children within that union; consent must also be provided by the other member of the couple.[13]

Beginning in 2005, Swedish law allowed heterologous artificial insemination and *in vitro* fertilisation for lesbian partners, in addition to partners of different sexes. In this case, the woman who gives birth to the child is the child's mother, and the other woman receives the status of a parent. The condition is that the procedure should be performed at a state hospital. A woman's consent to the procedure applies to her partner, whether the partnership is registered or an extramarital union of two women, and leads to legal parenthood over the child, which is completely equal to the parenthood of the woman who gave birth to the child. The parenthood of a woman who has given consent must be established in a special manner, based on her written acknowledgement of the presence of witnesses, or a court decision, if there is no acknowledgement. Recognition can be given even before the birth of the child and must be confirmed by the council for social care and the mother who gave birth.[14]

The most recent procedure for ova donation is the donation of only a part of the ova (mitochondrial DNA). In this case, the child has three genetic parents: two genetic mothers and one father. Legally, a child has one mother (the woman who delivers the child) and one father. One potential outcome of recent research is the ability to create human embryos without any male genetic contribution by transferring the nucleus of a somatic cell from one woman to the enucleated ova of another. In such a case the child would not have a genetic father at all.

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[11] Art. L152-5.
[12] Art. L152-5.
[13] Art. L673-2.
[14] Provisions of the Children and Parents Code (1949:381) (Föräldrabalken), in particular Section 1, Part 9 as amended by the Act (SFS 2005:434) and the Insemination Act (1984: 1140) (amended SFS 2005:443) and the Law (1988:711) on fertilisation outside the body (amended SFS 2005:445), Maarit Jänterä-Jareborg, "Sweden: Lesbian Couples are Entitled to Assisted Fertilization – towards Equal Legal Rights for Homosexual Couples", Zeitschrift für das gesamte Familienrecht (FamRZ), 2005.

2.1. Surrogate Motherhood

Surrogate motherhood is a procedure in which a woman consents to pregnancy and birth and relinquishes the child to a couple that has commissioned the pregnancy.[15] In Europe, the procedure of surrogate motherhood is applied in the UK, the Netherlands, Israel, Greece, Russia, Ukraine, Armenia, Georgia, and North Macedonia, and is prohibited in France, Austria, Spain, Italy, Germany, and Switzerland.

There are two forms of surrogate motherhood; one is when a woman gives birth to a child who is genetically hers ("partial" genetic surrogacy), and the other when the surrogate mother only carries and delivers the child, the child genetically belongs to the couple who wants the child, either the ova of the third woman (donor) is fertilised or the embryo is donated ("full", "total" gestational surrogacy). In the first case of conception and childbirth, there are two female participants, whereas in the second case, there is also a third woman who will bring up the child. From a biological perspective, the woman whose ovum is fertilised could be called the genetic mother, and the woman who carries the child the gestational mother.[16]

Currently, the Serbian legislation does not permit surrogate motherhood. Relevant acts include the Family Act of Serbia passed in 2005 and the Law on Biomedical Assisted Fertilisation passed in 2017.[17] Articles about motherhood in the Family Act did not create conditions for the use of surrogate motherhood, as it stated that the mother is the woman who gives birth to the child. The Law on Biomedical Assisted Fertilisation explicitly prohibits this practice.[18] Surrogate motherhood creates criminal offences with the punishment of imprisonment for three to ten years. [19]

As the research focuses on the grounds for establishing legal motherhood, it examines the legal grounds in different legislations which permit surrogate motherhood and whether surrogate mothers can change their minds and keep the baby.

In the United Kingdom, there are two acts concerning surrogate motherhood: Surrogacy Arrangements Act 1985 and Human Fertilisation and Embryology Act 2008 (earlier: HFEA 1990). Section 30 provides

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[15] In addition to surrogate motherhood, terms used to label this form of reproduction using medicine are surrogate pregnancy, surrogate gestation, surrogate parenting, and in Serbian literature "birth out of favour".

[16] More in: Kovaček Stanić, 2013, No. 1, pp. 1-21.

[17] Law **o**n Biomedical Assisted Fertilisation, Official Gazette of Serbia no. 40/2017.

[18] Art. 49/18.

[19] Art. 66.

circumstances in which "parental order" in respect of gamete donors can be sought.[20]

> Where a woman, a 'surrogate mother', has carried a child on behalf of another couple who were either: (i) both that child's genetic parents (full surrogacy) or (ii) where one of the couple is the child's genetic parent, having donated sperm or an ova, they may apply for an order to be treated as legally the child's parents.

At the time of birth, under s.33(1) of Human Fertilisation and Embryology Act 2008, 'the woman who is carrying or has carried a child as a result of placing in her of an embryo or sperm and ova, and no other woman, is to be treated as the mother of the child'.

Therefore, surrogate mother is a legal mother at the time of birth. In legal theory it is envisaged that 'the primary way in which surrogacy is regulated in England and Wales is through the criteria for the transfer of parenthood'. Commissioning parents must apply to the courts for a parental order to acquire legal parenthood.

One of the key requirements of s. 54 of the HFEA is that 'both the surrogate mother, and any other man or woman recognized as a legal parent, must have freely, unconditionally, and with full understanding, consented to the making of the order [21] – unless such parent cannot be found or is incapable of giving consent.[22] 'The consent of the surrogate mother must be given more than six weeks after birth. Another requirement is that 'there must be a genetic relationship between the commissioning parents and the child'.[23]

If the surrogate mother changes her mind and keeps the baby, ordinary private law rules apply in relation to parenthood and custody of the child.[24]

However, in one case, ReP (Surrogacy: Residence), where the surrogate mother actually used a surrogate contract to become pregnant with no intention of giving the child to the commissioning parents, the court

[20] Surrogacy Arrangements Act 1985, Human Fertilisation and Embryology Act 1990. Human Fertilisation and Embryology Act, 2008. [Online]. Available at http://www.legislation.gov.uk/ukpga/2008/22/contents (Accessed: 19 September 2024).
[21] s.54(6).
[22] s.54(7).
[23] s.54(1).
[24] Fenton-Glynn, 2019, p. 118.

made a decision in favour of the child living with the commissioning parents, stating that they would provide the most beneficial environment for the child. The child's biological father was the commissioning parent.

Mr Justice Coleridge stressed that the mother's deceptive conduct in relation to the surrogacy was only relevant to the issue of whether she was suitable for the parental role – she should not be penalized for breaking the agreement, as such agreement are not enforceable under English law, and a legal mother (as the birth mother will always be) has every right to decide to keep the child should she so wish.[25]

In Israel, the Surrogacy Agreements (Approval of Agreement and Status of the Child) was passed in 1996. Regarding the status of the child, Rhona Schuz states:

> Within 24 hours of the delivery, notification of the birth should be given to the Welfare Officer who is deemed to be the sole guardian of the child until a Court order is made. As soon as possible after the birth the baby is to be handed over in the presence of the Welfare Officer to the prospective parents who have the custody of the child and owe him/her parental duties and responsibility. Within seven days of the birth, an application for a Parental Order must be submitted to the Court. The Court must grant this application unless it considers, after reading the report of the Welfare Officer, that such an order would be contrary to the welfare of the child. The effect of the Parental Order is to transfer full and exclusive guardianship to the prospective parents, who are then treated as the natural parents for all purposes... Until the Parental Order has been made, the surrogate mother can seek to renege on the agreement and request the child. However, the Court will not allow this unless, in the light of the Welfare Officer's report, it finds that there has been a change in the circumstances justifying her change of mind and that would not harm the welfare of the child.[26]

In Greece, Law 3089/2002 on medically assisted reproduction was adopted in 2002 and incorporated into the Greek Civil Code. This law permits surrogate motherhood. Efie Kounougeri-Manoledaki explains:

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[25] Ibid.
[26] Schuz, 1996, pp. 243-245.

> ...the mother of the child is presumed to be the woman who wanted the child and sought and received the judicial permission mentioned in CC art 1458, provided that the conditions laid down in this latter article have been met.
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> … the positive aspect of the new Greek legislation is that the child's kinship with the woman who wants the child it is established as soon as it is born, whereas under the previous law the legal mother was initially the birth mother and the child then had to be adopted by the woman who wanted it.[27]

The presumption of motherhood in Art. 1464 is rebuttable, as within six months of birth, there is a legal possibility of proving that the child is biologically related to the birth mother. This is a consequence of the condition required to obtain judicial permission that the fertilised ova to be implanted into the birth mother's uterus (surrogate mother) must not be her own.

Another condition required to obtain judicial permission is a written agreement between the parties: the woman who is to give birth to the child and the persons who want the child.[28]

In Russia, according to the Family Code 1995, spouses who give their consent to the implantation of the embryo to the other woman who gestates and gives birth to the child have the possibility to enter their data as parents into the birth register. The consent of the woman who gives birth to the child (the surrogate mother) is necessary.[29] After the registration of the birth in the birth register, neither the spouses nor the surrogate mother can contest motherhood or fatherhood, referring to these circumstances.[30] The problem could arise if the surrogate mother refuses to give her consent. According to the general opinion of the Plenary Session of the Supreme Court of Russia, accepted by the Constitutional Court in 2018, the fact that a surrogate mother refuses consent cannot be used as an unconditional basis for

[27] Law 3089/2002, Kounougeri-Manoledaki, 2005, pp. 267- 274.
[28] Ibid. Other conditions are that the woman who wants the child must be unable to sustain pregnancy herself (medical proof), the woman who is going to undergo pregnancy must be medically fit to do so and there is a condition of residency in Greece for both women.
[29] Art. 51/4.
[30] Семейный кодекс и брачный договор, (1996) Социальная защита, br. 5.

resolving the issue of parental rights. Instead, to assess the case correctly, courts should consider the circumstances of each case, primarily whether the parties concluded a surrogacy agreement and, if so, consider its provisions to determine whether the intended parents are also the child's genetic parents, why the surrogate mother failed to consent to the intended parents being registered as the child's legal parents, and, after considering all the circumstances of the case, as well as the principle best interest of the child, decide in the best interest of the child.[31]

Examining countries in the ex-Yugoslavia region,[32] surrogate motherhood has been only allowed in North Macedonia since 2014.[33] This procedure is reserved for married partners of both sexes.[34] An embryo can be created using a man's sperm and a woman's ovum as married partners, where the child will have a genetic connection with both married partners, who will be his/her legal parents. In addition, an embryo can be created by combining the sperm of a man from a married couple and a donated ova, where the child will have a genetic link with the legal father. An embryo can be created by joining the ova of a woman from a married couple and donated sperm, where the child will have a genetic link with the legal mother. The possibility of using the ova of a surrogate mother is not allowed, which means that genetic surrogacy is not allowed in North Macedonia.

After the child's birth, the woman and man of the married couple, who requested the ART procedure with a gestational carrier, are registered in the birth register as parents of the child (children). Registration is based on a certificate issued by the Ministry of Health.

In case of death of the wife and husband of the married couple, who requested the ART procedure, which occurs during the pregnancy of the gestational carrier, they are registered as parents and the right of guardianship is exercised in accordance with the regulations of the field of family law. The gestational carrier can also be appointed as a guardian if the child as a person under guardianship does not have a living close relative. If the marriage of the couple at whose request the procedure was initiated is

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[31] Khazova, 2016, pp. 281–306., Draškić, 2022, pp. 341-373., Barać, 2023, pp. 259-289.
[32] Stanić, 2018, pp. 357-367.
[33] Закон за изменување и дополнување на Законот за биомедицинско потпомогнато оплодување Македоније, Службени весник 149/2014, Законот за биомедицинско потпомогнато оплодување Македоније, Службени весник 3/2008 (Law on biomedical assisted fertilisation).
[34] Art 5.

divorced in the course of the pregnancy of the gestational carrier, the care, support, and education of the child (children) that will be born are decided in the divorce proceedings.

The married couple and the gestational carrier enter into an agreement that governs the mutual rights and obligations arising from the procedure with the gestational holder, which is in accordance with the Law on Biomedical Assisted Fertilisation.[35] This agreement must be ratified by the notary public.

The gestation holder does not have parental rights or obligations towards the child (children) to whom she will give birth. The given statement of consent for the application of the ART procedure with a gestational carrier under this law has the legal meaning of a declaration of renunciation of recognition of maternity after the birth of the child/children.[36] Gestational carriers do not have the right to initiate a procedure to establish motherhood or exercise parental rights in accordance with family law regulations.

In the case child (children) are left without parental care by a married couple with an unknown residence for more than one year, or if they temporarily or permanently do not perform their parental rights and duties, as well as when the husband and wife of the married couple have been deprived of their legal capacity or have been deprived of the exercise of parental rights, it is possible to adopt the child. The gestational carrier has the right to be registered as the mother of the child (children) if she fulfils the conditions for adoption established by family law regulations before the adoption procedure is initiated.

The grounds for establishing motherhood and fatherhood under Macedonian law appear to be certificates issued by the Ministry of Health. Based on this certificate, the woman and man (on whose request the procedure with a gestational carrier has been initiated, commissioning parents) are registered as parents of the child (children) in the birth register. An agreement between married couples and gestational carriers precede the issuance of the certificate.

Comparatively speaking, it could be concluded that the legal grounds for establishing the motherhood of the woman in the commissioning couple are mostly court decisions based on the surrogacy agreement. The court decision could be issued after the birth of a child (the UK, Israel) or prior to

[35] Art. 12-e.
[36] Art. 12-b para. 1.

the birth of a child (Greece). In Russia, it is possible for the commissioning couple to enter data as parents into the birth register after the birth of a child based on the surrogacy agreement. In North Macedonia, the basis for establishing the motherhood of a woman in the commissioning couple appears to be a certificate issued by the Ministry of Health (administrative decision).

The possibility of a surrogate mother changing her mind and keeping a child exists in most jurisdictions. In the UK, this possibility exists for more than six weeks after birth, however, in English court practice, the surrogate mother's deceptive conduct has resulted in the decision that the child should live with the commissioning parents (with the biological father and his wife), despite the fact that the surrogate mother is the legal mother of the child. In Israel, the surrogate mother has the possibility of changing her mind until a Parental Order has been made. However, the Court will not allow this unless, considering the Welfare Officer's report, it finds that there has been a change in the circumstances justifying her change of mind and that it would not harm the welfare of the child. In Russia, the fact that a surrogate mother refuses consent cannot be used as an unconditional basis for resolving the issue of parental rights in court proceedings considering the best interests of a child. Therefore, in all jurisdictions, the best interests of a child have a significant impact on the court's decision-making.

In Greece and North Macedonia, there is no legal possibility for the surrogate mother to refuse to give the child to the commissioning couple.

The European Court for Human Rights in decisions involving children born as a result of surrogate motherhood examined, among others, the interest of the child to identity, as an element of a child's right to respect their private life. A child's right to respect their private life is stipulated in Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[37]

In the case of Mennesson v. France 2014, the Court found that the refusal to grant legal recognition in France to parent-child relationships established overseas was a violation of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (children's right to private life).[38]

As the Court has observed, respect for private life requires that everyone should be able to establish details of their identity as individual

[37] Stanić, 2021, pp. 199-210.
[38] Ibid.

human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned. Although aware that the children have been identified in another country as the children of the first and second applicants (commisioning parents), France nonetheless denies them that status under French law. The Court considers that a contradiction of that nature undermines the children's identity, nationality and their inheritance rights. The Court considers, having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation.

In the case of Paradiso and Campanelli v. Italy 2017[39], the Court decided that there was no violation of Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to private life), considering removal of a child born abroad as a result of a surrogacy arrangement entered into by a couple later found to have no biological link with the child. The Court accepted that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake while remaining within the wide margin of appreciation available to them in the present case.

The Court did not underestimate the impact which the immediate and irreversible separation from the child must have had on the applicant's private life. While the Convention does not recognise the right to become a parent, the Court cannot ignore the emotional hardship suffered by those whose desire to become parents has not been or cannot be fulfilled. However, public interests at stake weigh heavily in the balance, while comparatively less weight is attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parent, would have been tantamount to legalising the situation created by them in breach of the important rules of Italian law.

With respect to the child's interests, the minors' court regarded the fact that there was no biological link between the applicants and the child, and held that a suitable couple should be identified as soon as possible to

[39] *Case of Paradiso and Campanelli v. Italy* App. No. 25358/12., 24 January 2017.

take care of him. Considering the young age of the child and the short period spent with the applicants, the Court did not agree with the psychologist's report submitted by the applicants, suggesting that separation would have devastating consequences for the child. It was concluded that the trauma caused by the separation was not irreparable.

The biological origin did have an impact on establishing a parent-child relationship in the court practice of the European Court for Human Rights. In the case of Mennesson v. France[40] the biological origin was one of the reasons for the opinion that there was a violation of Art. 8, as the parent–child relationship was not established between children and their biological father who was part of the commissioning couple. In the case of Paradiso and Campanelli v. Italy lack of biological origin was one of the facts, among others (which actually prevailed), for the court's opinion that there was no violation of Art. 8, although the child-parent relationship was not established between commissioning parents and the child.

3. Grounds for Establishing Fatherhood

Marital fatherhood is established based on the legal presumption that the mother's husband is the father of the child (pater is est quem nuptiae demonstrat), whereas non-marital fatherhood is established with acknowledgement or through court proceedings. Thus, according to Serbian law, marital fatherhood is established ex lege, whereas non-marital fatherhood must be established with the acknowledgement of the father or through court proceedings.

The Serbian Family Act regulates the fatherhood of a child conceived through biomedical assistance, stating that the mother's husband (or the mother's partner) is to be considered the father of a child conceived through biomedical assistance provided he has granted written consent for the procedure of biomedical-assisted fertilisation.[41] Thus, if the mother's husband has not granted written consent for biomedical-assisted fertilisation with donated sperm, he can contest his fatherhood. If the mother's partner has not granted written consent for biomedical-assisted fertilisation, he will not be considered as father, as there is no legal presumption that the mother's partner is the father of the child born in a non-marital cohabitation.

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[40] *Case of Mennesson v. France* App. No. 65192/11, 26 June 2014.
[41] Art. 58/1,2.

The fatherhood of the man considered to be the child's father may not be contested, except if the child was not conceived through biomedical-assisted fertilisation. If a child is conceived through biomedical assistance from donated semen, the fatherhood of the man who donated the semen may not be established.[42] A man considered to be the father of a child conceived through biomedical assistance may initiate action to contest his fatherhood within one year from the date of learning that the child was not conceived through a procedure of biomedical-assisted fertilisation, and no later than ten years from the birth of the child.[43]

The ground for establishing legal fatherhood when using the donor's semen (or donated embryo) is the consent of the husband/partner to artificail insemination by donor (AID) or using embryo donation). Genetic links do not have any impact on establishing fatherhood.

The previous law regulating ART in Serbia, the Law on Treating Infertility by Biomedical Assisted Fertilization (LBMAF), stipulated that the father of a child conceived by biomedical-assisted fertilisation is the mother's husband or partner if he has provided written consent for the procedure in which his sperm is used. In addition, the LBMAF forbade establishing the paternity of the donor if the donor's sperm is used in the procedure.[44] The LBMAF forbade contesting paternity when using sperm from the mother's husband or partner unless there is reasonable doubt that he is not the father, as in the procedure his sperm was not used.[45] However, the LBMAF omitted to regulate situations in which the mother's husband or partner provided written consent for the procedure in which the donor's sperm would be used. No article forbids contesting paternity in this situation. This omission enables the mother's husband or partner to change his mind regarding AID and initiate court proceedings to contest his paternity, leaving the child fatherless as the law forbids establishing the donor's fatherhood. Unfortunately, the Serbian legislator lacks an understanding of the family law relations which may arise from the AID. It is a type of relief that the existing law abandoned such controversial solutions in parenthood using ART, as some of them were not only theoretically inconsistent, but also contrary to the best interests of a child.

[42] Art. 58/ 3,4 and 5.
[43] Art. 252/5.
[44] Art. 66/1,3.
[45] Art. 66/2.

4. Legal Status of Donor

If a child is conceived through biomedical assistance from donated sperm, the fatherhood of the man who donated the sperm may not be established. In Serbian law it is explicitly regulated.[46] Thus, the donor has no rights towards the born child.

In one case on donor rights towards the child, the European Court for Human Rights decided that there were no visiting rights and no right to respect for family life with the child.[47]

In 1985, the applicant and his then wife met Mrs T. and Mrs J., a lesbian couple. Mrs T. and Mrs J. expressed their wish to have and raise a child, not from an anonymous sperm donor but from a known donor. They considered it important for a child to know his/her father. After conversation, Mrs T., Mrs J., and the applicant agreed that the latter would be the sperm donor. In November 1986, Mrs T. was artificially inseminated and, on 30 July 1987 a daughter was born. Mrs T. is the guardian of the child by law. By judicial order of 27 August 1987, the District Court judge (kantonrechter) of Utrecht appointed Mrs. J as a co-guardian.

During Mrs T.'s pregnancy and after the child's birth, the applicant regularly visited Mrs T. and Mrs J. At the beginning of 1988, referring to alleged previous agreements on raising the child, the applicant informed Mrs T. and Mrs J. that he wished to establish certain visiting arrangements. Mrs T. and Mrs J. denied that any previous agreements had been made in this respect, and in May 1988, broke off all contact with the applicant and refused further contact between the applicant and the child.

The applicant complained under Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms that the Dutch authorities had unjustly concluded that there was no family life between him, in his capacity as a sperm donor, and a child born out of this donorship.

The Commission considered that a situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not give the donor the right to respect for family life with the child.

The applicant complained under Art. 14 in conjunction with Art. 8 of the Convention, that the decision by the Dutch courts to declare his request

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[46] Art. 58 FA.

[47] *J.R.M. v. Netherlands.* App. No. 16944/90. 8 February 1993.

inadmissible discriminated against him compared with the father of a legitimate child.

The Commission noted that the applicant seeks to compare himself to the father of a legitimate child. Considering the fundamental differences between the applicant and the father of a legitimate child, the Commission does not find that these two situations can be compared or considered analogous; therefore, no question of discrimination arises in the present case.

Another issue concerning donors is the secrecy (or lack thereof) of donor identity. From a comparative perspective, several countries have introduced the right of a child conceived through artificial insemination by donor genetic material to know the identity of the donor.

In 1984, Sweden's Act on Insemination introduced this right of a child.[48] This was a departure from the principle of donor anonymity and such a solution may be considered revolutionary in its approach to ART. In Sweden, donation of ova was introduced in 2002, where the child has the right to know the identity of the donor of ova. Nowadays, several countries have introduced the right of a child to know the identity of a donor. Examples include the UK, Austria, the Netherlands, and Switzerland.[49]

The right to obtain information on donor identity is granted to a child when he/she reaches the necessary level of maturity (Sweden); at the age of 14 (Austria); at the age of 16 (the Netherlands); at the age of 18 without any condition, or in other age if material interest is proved (Switzerland). The data on donors should be maintained up to 80 years from the birth of a child (the Netherlands and Switzerland).

Several countries have retained the principle of secrecy regarding donor information. Examples include Russia, France, and Serbia.[50] In

[48] Act on Insemination of Sweden 1984:1140. The IVF Act was repealed by the Genetic Integrity Act on 1 June 2006. The right to identifying information about the donor in Chapters 6 and 7 Genetic Integrity Act, in: Jane Stoll, "Swedish donor offspring and their legal right to information", 2008, p. 144.

[49] UK Human Fertilisation and Embryology Act 1990, 1990 c. 37, replaced by UK Fertilisation and Embryology Act 2008, 2008 c. 22. [Online]. Available at: http://www.legislation.gov.uk/ukpga/2008/22. (17 September 2024). Act on procreative medicine of Austria 1992 in Bernat and Vranes, 1996; Act on artificial insemination (information on donor) of Netherlands 2002 in Forder, 2000, pp. 256-261; Act on medically assisted procreation of Switzerland 1998 in Guillod, 2000, p. 365.

[50] France: Bioethical Laws 1994, 2004, 2011; Terminal, 2016, p. 39.
Russia: Federal Law on the basic health protection of the citizens 2011. [Online]. Available at:

Russia, in the Federal Law on the basic health protection of the citizens in the Russian Federation, it is stipulated that in the usage of donor reproductive cells and embryos, citizens have the right to obtain information on medical and medical-genetic examination of the donor, his race, nationality, and outward appearance (Art. 55/8).[51]

In Serbia, the child has the right to obtain only medical data of the donor. Serbian Law on biomedical-assisted fertilisation states in Art. 57:

> The child conceived by biomedical assisted fertilization with reproductive cells of the donor has a right to ask for medical reasons to get data on donor from the Board of Directors for Biomedicine kept in the State Registry. This right the child obtains when reaches 15 years of age if is able to reason. These data are not on personal nature of the donor, but only the data of medical importance for the child, his future spouse or partner, or their future offspring.
> Legal representative or guardian of the child may ask for these data from the Board of directors for biomedicine on the permission from the court in extra civil procedure given if justifiable medical reasons exist.
> The medical doctor of the child may ask, for medical reasons, information from the State registry to prevent risk to child's health…

It is noteworthy that the right to know a donor's identity is the right of a child. Contrarily, the donor does not have the right to know the identity of the child born from his/her semen/ova. If the child knows the identity of the donor, he/she may attempt to find the donor and make contact. In such a case, relations between them do not have a legal nature; they would only be relations via facti if both persons agree to them. Neither the donor has any parental rights towards the child, despite the fact that he/she is the biological parent of the child, nor does the child have any rights towards the donor.

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http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/ (17 September 2024).

[51] Art 55/8.

5. Concluding Remarks

ART changes the grounds for establishing legal parenthood in different ways depending on the techniques used.

When legal motherhood is concerned, in the case of using a donor's ova, the basis for establishing legal motherhood is giving birth to a child. The genetic link does not have any impact for establishing motherhood.

In the case of surrogate motherhood, the legal grounds for establishing parenthood are comparatively different in different legislation. The ground could be a court decision issued before or after the birth of a child (after parental order in the UK and Israel, before the birth of a child in Greece), surrogacy agreement between parties (Russia), and administrative decision (North Macedonia). In all jurisdictions, the will of the parties is the most important factor in establishing motherhood and determining motherhood legality. Motherhood is based on a surrogacy agreement in all jurisdictions, and consent of the surrogate mother after the birth of a child is required in most jurisdictions. The best interests of a child has (and should have) an important role in disputes between surrogate mothers and commissioning parents.

When legal fatherhood is concerned, in the case of using a donor's semen, the basis for establishing legal fatherhood is the consent of the husband or partner to AID. Genetic links do not have any impact on establishing fatherhood.

The different artificial reproduction technologies and their influence on the legal rules of the establishment of motherhood and fatherhood widen the legal principle of the autonomy of the parties as grounds for the establishment of parenthood, which is widened in comparison to the principle of material truth. Those who wish become legal parents, although they are not genetic parents. Sometimes, they cannot be genetic parents because of infertility and sometimes because they are of the same sex. Surrogate mothers and genetic material donors are not considered as parents. Considering that the donor and surrogate mother are actually parents (genetic parent if donation of sperm, ova, or embryo is concerned, or bearing the child in surrogate motherhood with genetic link in the genetic surrogacy), the question could arise if in the future it could be imaginable that family law accepts the fact that the child could have more than two parents with different roles (biological-genetic parents, gestational mother,

social-legal parents). However, family law could advance in the direction of respecting truth in family relations only if social and individual perceptions of parenthood change radically.

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