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Legal Status of a Man in Assisted Reproductive Technology in Polish Law**

ABSTRACT: The purpose of this article is to describe the legal status of a man who is a donor of reproductive cells; he might be the husband or cohabiting partner of a woman who is to be a recipient of either these cells or an embryo created from them. The author answers the question of whether this man, in the capacity of a husband, partner, and father, is treated as a subject in medical procedures related to artificial insemination. He stresses that the Polish Law of 25 June 2015, on the treatment of infertility—with its many weaknesses, which, however, are not the subject of this article—makes only married couples and cohabiting heterosexual couples eligible for the assisted reproductive technology treatment. This should be viewed positively as a protection of children's rights, including the right to live in the family. Special attention has been paid to those provisions that relate to both the informed consent of a man to perform medical procedures and the withdrawal of his consent. In conclusion, the view expressed was that the Polish legislation adequately regulates this issue.

KEYWORDS: procreation, assisted reproductive technology, artificial insemination, consent, good of the child, partner donation, non-partner donation, reproductive cell, embryo.

1. Preliminary remarks

When a child is born, attention is overwhelmingly focused on the child and their mother. This is understandable, because it is natural. At that moment, the father is a kind of background figure. The purpose of this article is not to question this fact but to highlight the role of the man—father or cell donor, in the case of assisted reproductive technology (hereinafter ART).

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The titular "man", according to the provisions of the Infertility Treatment Act of 25 June 2015[1] (hereinafter ITA), is the donor of the reproductive cells, but also (often at the same time) the husband of the woman who will give birth to a child conceived through ART, or her cohabiting partner, referred to in the legislation and in this paper, as a partner, that is, a man remaining in permanent cohabitation with the woman (recipient). Sometimes, it is also the donor of an embryo created from reproductive cells or a person subjected to medical measures to prevent infertility in the future.

2. Eligibility for assisted reproductive technologies: The context of man's participation

Among the many questions and doubts formulated in connection with the idea of assisted reproductive technology, the most important is the so-called "decisive" question: Is ART a morally permissible action, should it be performed, and should it be allowed?[2] The answer to this question has been, is, and will be contingent on the adoption by the respondent of a certain philosophical and/or religious doctrine, that is, on the adoption/acceptance of some concept of morality.[3] An increasing number of countries accept the view that what is technically possible is also doable. Whether as a result of the rejection of moral principles or despite ethical doubts, these countries have adopted legislation that leans towards the liberal side. However, almost nowhere is the politico-legal (legislative) victory of the proponents of ART absolute. Restrictions on its eligibility refer to the scale of availability of certain medical procedures (e.g., surrogate motherhood is banned in Poland)[4] as well as the imposition of certain requirements on ART applicants. Differences between countries exist in the scope of the protection of embryos conceived through ART. All of these issues, as well as many others, are of high moral importance once the question "whether ART can be used" has been answered in the affirmative. Many specific

[1] Ct. Journal of Laws 2020, item 442.
[2] The Congregation for the Doctrine for the Faith, 1987; Czujek, 2014, pp. 102-148; Singer and Wells, 1988.
[3] A representative review of positions on this subject in Galewicz, 2010, pp. 241-371.
[4] Cf. Article 61(1) of the FGC: 'The mother of the child is the woman who gave birth to them'; Bączyk-Rozwadowska, 2018, p. 524.

questions about "how to use it" are, of course, far less relevant because they are secondary in nature.

As previously mentioned, one of the questions concerning the legal regulations of ART is: Who should these procedures be available? The obvious addressee of ART (so to speak, the target group) are married couples, especially those who have not been successful in conceiving a child. The infertility rate of married and cohabiting couples is not precisely defined, and the officially reported figures are unreliable, due to how widespread these figures are.[5] However, even personal observations of one's circle of close and distant friends allow us to conclude that this is not a marginal phenomenon. At the same time, the desire to have a child by those who want to experience parenthood—despite anti-natalist tendencies—is strong.[6]

Owing to the high cost of ART, it is not targeted at married couples who already have a child (or children) and are trying to have another child, although this is not excluded. In practice, such situations are rare.

Because of widespread negative demographic trends in Europe (dramatically low fertility rates, declining marriage rates, and rising divorce rates), ART treatments have also been extended to informal heterosexual unions (here, cohabitating couples). This is only occasionally criticised[7], and if so, due to concerns about the permanence and stability of such unions, which are not legally established and thus may entail greater risks than marriages to the protection of the interests of the child to be born into them. The argument about the formally lesser protection of the permanence of cohabitation (and thus the good of their children) than the legal protection of marriages loses strength in the face of the high rate of divorce, which constitutes a grim social phenomenon.[8]

It follows from Polish literature that the law on infertility treatment can be circumvented, and in defiance of the ban, the status of a parent of a child born through ART can be obtained by a single person or a person

[5] After all, the information that there are between 60 and 168 million infertile people in the world, or that infertility affects about 15-25%. 60-180 does not say much; Dudziak, 2016, pp. 467.

[6] Bielawska-Batorowicz, 2014; Bidzan, 2010, p. 146; Domagalska, 2015.

[7] Smyczyński, 1996.

[8] Central Statistical Office (GUS), 2022, Rocznik Demograficzny ('Demographic Yearbook 2022') 2022, [Online]. Available at: https://stat.gov.pl/download/gfx/portalinformacyjny/en/defaultaktualnosci/3328/3/16/1/demographic_yearbook_of_poland_2022.pdf (Accessed: 20 June 2024), pp. 230-249.

living in a stable same-sex relationship. By law, partner donation involves the donation of reproductive cells for use in ART by a male donor to a female recipient who is married to the donor or remains in a cohabiting relationship, i.e., cohabitation (Article 2(8) of the ITA). The latter situation must be confirmed by a consensus statement from both cohabitating partners. However, these declarations have not been verified. In addition, persons declaring cohabitation may not in fact be in cohabitation nor does the law require them to prove that they have been in a relationship for a specific, legally designated number of months prior to ART treatment to make it permissible. However, as in the case of married couples, cohabiting partners are required to remain in therapy other than ART for one year prior to ART treatment. Declarations of cohabitation are not made under oath nor are any sanctions imposed in case they turn out to be false. Such legal regulation may lead to abuse, for instance, by submitting untrue declarations to bring about the birth of a child by a single person or a person in a same-sex relationship.[9] Such behaviour cannot be ruled out if one considers that representatives of the same-sex community firmly claim that under the banner of the so-called reproductive rights (recognised in numerous publications and declarations of a political nature as human rights) and the protection of reproductive health, same-sex partners are entitled to adopt children and undergo ART treatment. They treat failure to be granted those rights as discrimination.[10]

It should be added that the abuse of cohabitation to circumvent the law and obtain undue benefits occurs in Polish social welfare law, in which many provisions favour single people. However, the status of this singlehood is not vetted, and some of these people (almost exclusively women) live in cohabitation. They do not apply to establish the paternity of their children; they actually live with their father in cohabitation but formally have the status of a single parent. They receive social benefits in the form of cash and, for example, privileged access to nurseries and kindergartens. This raises objections in society, because in practice, there is a preference for cohabitation over marriage, contrary to Article 18 of the Constitution of the Republic of Poland.[11]

[9] Gałązka, 2018, p. 163.
[10] Pogodzińska, no date.
[11] Ruling of Constitutional Tribunal, of May 18, 2005. File reference K 16/04, Journal of Laws 2005, item. 806.

A strong argument in support of only married couples and cohabiting couples being eligible for ART treatment is rooted in pedagogy and developmental psychology. It stems from the thesis that for optimal development a child needs both a female (mother) and a male (father) role model.[12] The ITA additionally invokes the principle of the good of the child to be born as a result of artificially assisted procreation, as well as the protection of the child's rights. One of the most important rights of the child, in light of the provisions of the Convention on the Rights of the Child[13] (CRC), is the child's right to a family (understood traditionally, i.e., based on the union of a man and a woman, as parents (though not necessarily spouses) and their child, or children.[14]

What should especially be emphasised and ensured is respect for the right of the child to be born through ART and live in a family grounded in the permanent union of a woman-mother and a man-father. After all, it is technically possible to apply these procedures while not giving due respect to the natural biological, psychological, and pedagogical environment in which the child should grow. There are doubts as to whether some of the issues raised by ART can be considered within the area of family law or even whether they can be placed in the broader category of legal protection of the family. I negate the validity of legal solutions that would allow a few people to aspire to be the parents of a child conceived through ART (the two donors of reproductive cells, the surrogate mother, the people who ordered and paid her for the "service" and possibly others).[15] Such an arrangement does not constitute family relations; rather, it is a manifestation of the irresponsibility of legislators and the aforementioned individuals, fulfilling their wishes without regard for the devastating influence on the child's life at their inception.

For those who intend to resort to ART treatment, the issues it generates are the most important in their individual lives, the history of their families, and the children to be born. Therefore, they must be thoroughly considered by all those individuals. It should be emphasised, however, that ITA regulations do not require verification of applicants' personal characteristics, education, economic status, etc. (patterned after the adoption

[12] Czub, 2014; Rydz, 2014, pp. 247-251; Petri, 2012.
[13] Journal of Laws 1991, item 526.
[14] Smyczyński, 1999; Stadniczeńko, 2015; Andrzejewski, 2003, 163-269; Haberko 2016, pp. 78-79.
[15] Soniewiecka, 2020.

proceedings), particularly to exclude persons whose motivation or other characteristics raise legitimate concerns about whether they will create living conditions appropriate to the child's well-being. However, the similarity between ART treatment and the procedure of adoption is the intended result: the appearance of the child in the family. The only provision of the ITA specifying an intention to check the motivation of candidates is one year of conventional infertility treatment before the candidates are admitted to ART treatments. The adoption procedure provides for the training and testing of candidates by adoption centres set up specifically for this purpose and staffed with psychologists and educators. In contrast, the candidates for the ART procedure are examined only medically.

In many countries, a subject of fierce dispute has been, and still is, the eligibility of ART treatment for same-sex couples. It is a known fact that in many legal systems, in countries where civil same-sex unions were legislated, what followed was the renaming of the unions into marriages, who—after some time—were eligible to adopt children, as well as to ask for ART treatment. These changes applied both to female as well as male same-sex couples. In Poland, the results of public opinion polls prove the reticence of the majority of the public towards this idea, as well as towards the possibility of single-sex couples adopting children.[16] Doubts about the eligibility of single people, both men and women, for ART.

According to the ITA regulations, the use of ART procedures cannot serve solely to satisfy the desires of adults to become parents. This is because the regulations mandate respect for the principle of the good of the child to be born and protection of the child's rights. Despite the growing influence of progressive philosophical trends in the Polish debate, the thesis of the alleged right to have a child loses out to the claim that there is no such right; , but there is instead the right of the child to live in a family.[17] Consequently, ART treatments leading to procreation are permitted in Poland for married men and women, or in a permanent de facto union

[16] Increase in support for adoption by same-sex couples, "Wciąż jest wiele do zrobienia", *Rzeczpospolita* 19 June, 2024, [Online]. Available at: https://www.rp.pl/spoleczenstwo/art40664161-wzrost-poparcia-dla-adopcji-przez-pary-jednoplciowe-wciaz-jest-wiele-do-zrobienia (Accessed: 03 September 2024).

[17] Czujek, 2014, pp. 123-130; Brachowicz, 2010; Grzymkowska, 2009, pp. 186-189; Haberko and Olszewski, 2008, p. 67.

(concubinage). [18]This is because this is a model arrangement from the perspective of a child's developmental needs.

3. P*articipation of men in ART treatment*

3.1 Introductory remarks

Anyone who participates in medically assisted reproductive technology treatment to overcome one's infertility is entitled to the right to respect their dignity as well as legal protection of their private and family life, with particular regard to the legal protection of life and health (Article 4 of the ITA).[19] The phrase "anyone" makes it possible to claim that it includes both persons undergoing treatment and donors of reproductive cells, as well as embryos, i.e., children conceived as a result of these procedures. These statutory declarations are of significant importance, particularly when seeking the correct interpretation of the ITA.

It is in the context of the dignity of the human person, which is a constitutional value in Poland (Article 30 of the Constitution of the Republic of Poland), and their protection that the following injunctions should be interpreted: a ban on the creation of 'human embryos for purposes other than the ART treatment', as well as chimeras and hybrids; the prohibition of any interventions aimed at making 'hereditary changes in the human genome that can be passed on to future generations'; and finally the ban on formatting 'an embryo whose genetic information in the cell nucleus is identical to the genetic information in the cell nucleus of another embryo, foetus, human being, corpse, or human remains' (Article 25 of the ITA).

As indicated above, in Poland artificial forms of infertility treatment are not available to anyone who applies for it. Married couples and cohabiting couples, for whom ITA has been adopted, are admitted to the relevant medical procedures after a minimum of 12 months of treatment with other methods. It is possible to launch such a medical procedure before the 12 months have elapsed, even though other methods of treatment have not been exhausted, only exceptionally—based on a doctor's opinion, if the doctor determines that 'according to current medical knowledge, it is not possible to obtain a pregnancy as a result of these methods' (Article 5(2) of the ITA).

[18] Bączyk-Rozwadowska, 2018, pp. 217-235, 676-705.
[19] Haberko, 2016, pp. 73-80.

Cells taken from a man can be used within three frameworks:

- partner donation (when the recipient of these cells is his wife or cohabiting partner),
- non-partner donation (when the recipient is a stranger, anonymous to the donor), or
- donation of an embryo.

The law also provides a procedure for preserving fertility.
If the reproductive cells taken from a man have not been used in ART treatment, he may, at any time, demand their destruction or donation for research purposes (Article 19 of the ITA).

3.2 Male informed consent in ART

3.2.1 Preliminary remarks

As previously mentioned, only married and cohabiting couples are eligible for the infertility treatment specified in the ITA. This condition implies that a man—the husband or cohabiting partner of the recipient, as well as an anonymous donor of cells or an embryo—participates in all medical procedures involved in this treatment.[20] In each of them, he is treated as a subject, which is mainly manifested in his competence to consent to the implementation of these procedures as well as to withdraw his consent. The fact that medical procedures are contingent on patients' consent statements is obvious under medical law.[21] In the context of infertility treatment, this condition precipitates a further argument, namely, that these marriages and cohabitating partnerships are seen as unions formed by persons loyal to each other, for whom procreative decisions have been jointly made. Moreover, the ITA provisions promote the child's right to a family and to be raised in a family, as well as the realisation of the principle of the good of the child to be born in the family as a result of ART treatment.

3.2.2 Giving consent - general issues

In any situation in which a patient's consent is sought, the physician or other authorised person is obliged to ensure that the patient, or a person acting on

[20] Ibid. pp. 75-76.
[21] Nesterowicz, 2008, pp. 119-145.

the patient's behalf, obtains knowledge of the issue to which the consent relates.[22] It is the duty of the staff to guarantee maximum access to that knowledge and make it comprehensible so that patients fully understand what they are consenting to. In particular, it is paramount that patients are made aware of the possible effects of the medical action taken, including side effects, the degree of risk involved, alternative treatment options to those proposed, or the consequences that may result from resigning from it, among others.

To ensure that consent is not reduced to mechanically signing a pre-prepared formula, the ITA regulations mandate that the persons who give consent must have the full legal capacity and give it voluntarily in the presence of a doctor, in writing, and that they must have the opportunity to ask questions about the medical procedure and receive comprehensive answers.

The cell donor must also be informed of the legal consequences of the action taken, especially with regard to the provisions of the Family and Guardianship Code (hereinafter the FGC) regarding the legal situation of a child born as a result of ART treatment.

Without going into detail, it should be stated that the issue of the consequences of applying ART in law is very complicated. By its nature, it is difficult to explain this, in particular, to persons unfamiliar with the law, and such people are predominantly cell donors. Therefore, it would be sufficient to point out the need to make a man aware that, after a possible divorce, his ex-wife can have a frozen embryo created from their cells while they were married implanted in her body. This might happen many years after their possible separation. It must be emphasised that the task of addressing this very topic with respect to a couple intending to undergo ART is very daunting. The intention of the couple in question or a couple in permanent cohabitation, is to have a child. Under these circumstances, the topic of the consequences of a possible divorce is outside the scope of their thinking.

In addition, doctors and other medical personnel are subject to the duty of confidentiality concerning issues of consent in particular medical procedures or their subsequent stages.

[22] Nesterowicz, 2008, pp. 146-160.

3.2.3 Giving informed consent - specific issues

Several ITA provisions clarify the manner and circumstances in which consent is to be given for each separate activity of a medical procedure. Each time, the legislator tried to reflect on peculiar characteristics of the situation in which informed consent is to be given; for example, in each case of cell donation other than partner donation, the donor is informed prior to the procedure regarding the legal aspects of such a procedure, in particular about its legal consequences, including the fact that information will not be made available to him on the further handling of the donated reproductive cells and that he will have no rights to the child who will be born as a result of ART treatment. Before consenting to the procedure, the donor of reproductive cells should also be informed about what information concerning his person may be transferred to the recipient of the cells and the person born as a result of ART after coming of age (Article 30(1), Item 5cand Article 38 of the ITA). This information does not identify the donor but discloses the donor's health status, that is, the results of the medical and laboratory tests he underwent prior to the procurement of reproductive cells or prior to the creation of an embryo from his cells (Article 37(2), Item 3 of the ITA).

Such information can be provided to the legal representative of a child born as a result of an ART procedure if the information can contribute to averting imminent danger to the life or health of the child. The basis for providing ‘the information about the donor shall be determined by the child's physician treating the child and it shall be noted in the medical records’; moreover, the information shall be made available by the Minister of Health at the request of persons authorised to learn about it (Articles 37(4) and (5) of the ITA).

In addition to consenting to donate cells for non-partner donation, the donor also consents to the posthumous use of the reproductive cells taken from him and to the donation of an embryo created from these cells.

In addition to the role of reproductive cell donor, a man may also find himself in the position of husband or partner of a woman who is the recipient of reproductive cells from another man. In both cases, the donor remains an unknown person. In such situations, the use of reproductive cells or embryos in a procedure involving this woman is performed after obtaining the written consent of her husband or cohabiting partner. Before

giving his consent, he must be informed in writing about the legal consequences of the use of ART that concern the paternity of the child born as a result of the treatment.

3.2.4 Consent at embryo donation

A man's legal position is modified when, as a result of ART treatment, a human embryo is created using his reproductive cells, or the cells of another man and the reproductive cells of his wife or cohabiting woman.

The transfer of embryos created from a combination of reproductive cells taken from a woman's husband or cohabiting partner into a woman's uterus requires her consent and the consent of the man.

On the other hand, if an embryo resulting from non-partner donation (when the donor of reproductive cells is anonymous) is to be transferred into a woman's uterus, consent must be obtained from that woman (the recipient) and her husband. On the other hand, if the recipient woman is living in a cohabiting relationship, then she consents to the transfer of an embryo resulting from anonymous donation when her cohabiting partner makes a declaration of acknowledgement of paternity of the child born following an ART treatment using that embryo, and the recipient woman confirms that the father of the child will be that man (Article 75(1) of the FGC).

In describing the legal status of a man involved in embryo donation, it is important to note that embryo donors must be informed of the legal consequences of the treatment before giving their informed consent, and in particular that they will not have access to information on the further handling of the donated embryos nor will they have rights and obligations to the child born as a result of the ART treatment. They will not be informed of whether and what information about their health has been obtained by the person (or their legal representative) born as a result of embryo donation.

The above consent must be granted before ART treatment begins. However, if the donors of the embryo have withdrawn their consent to its transfer, or the recipient has done so, or her husband or cohabiting partner has not given his consent, then the treatment is impermissible (Article 22 of the ITA).

In the specific case when it is not possible to directly use the embryos created from the husband's or cohabiting partner's reproductive cells and it is necessary to transfer them for storage, all of the above consents shall be

given again ‘before restarting ART treatment in which the stored embryos are to be used’ (Article 20(3) of the ITA).

3.2.5 Consent in case of a change in the application of reproductive cells

Written consent from the donors of reproductive cells is also necessary if cells collected for partner donation are to be used in an ART treatment for non-partner (anonymous) donation.

The reverse situation can also occur, i.e., cells originally collected for non-partner donation in an ART treatment can be used for partner donation. This requires the withdrawal of consent by the donor for the original purpose for which his reproductive cells were intended. Again, the medical justification for using reproductive cells collected for non-partner donation for partner donation is assessed by a physician (Articles 18(2) and (3) of the ITA).

3.3. Lack of consent and withdrawal of consent given in ART treatment

As a rule, a statement of consent to undergo treatment can be subsequently withdrawn; however, this move is subject to limitations. In the period between the expression of consent and the performance of the action contingent upon it, various circumstances, including afterthoughts, may arise that prompt one to change one’s mind.

Under the ITA, both the submission of consent and its withdrawal must be done in writing and given ‘in the presence of a person employed by the reproductive cell and embryo bank where the reproductive cells are stored’ (Article 30(2) of the ITA). Regardless of whether consent is given in the context of partner or non-partner donation, withdrawal of consent ‘may take place until ART treatment is initiated in the recipient’. As for the in-vitro fertilisation procedure *(inseminatio*), that moment is marked by the insertion of reproductive cells inside the woman's uterus, whereas in the case of in vitro fertilisation outside the uterus, it is the beginning of the process of creating an embryo from those reproductive cells (Articles 29(3) and 30 of the ITA). If the withdrawal of consent occurs before these events, then a prohibition is imposed on the use of cells taken from that donor (Article 18(1) Point 1) of the ITA) or an embryo created from his cells (Article 22 of the ITA) in ART treatment.

If the above situation occurs, it is the responsibility of the gamete and embryo bank to immediately communicate the withdrawal of consent to the

assisted reproductive techniques centre or the gamete and embryo bank to which the gametes or embryos were transferred (Articles 29(4) and 30 (4) of the ITA).

Of particular relevance is the withdrawal of consent for the transfer of an embryo. As indicated, this forfeits the transfer of embryos donated for embryo donation to a recipient (Article 22(1) of the ITA). However, if an embryo has already been created, then the provisions of the ITA mandate the protection of human life created as a consequence of the inception of ART treatment. In this regard, the ITA is in compliance with Article 38 of the Constitution of the Republic of Poland,[23]the Law of 7 January 1993 on family planning, protection of the human foetus, and the conditions of the permissibility of abortion.[24] This is consistent with the jurisprudence of the Constitutional Tribunal of the Republic of Poland on the protection of life.[25] Indeed, the relevant provision reads as follows:

> If the husband or the donor of the reproductive cells taken for the purpose of partner donation from which the embryo was created does not consent to the transfer of the embryo, permission for the transfer shall be granted by the guardianship court (Article 21(2) of the ITA).[26]

Withdrawal of consent for embryo transfer became a contentious issue between former spouses, which became the subject of a court decision.[27] Based on the cited provision, a district court issued a ruling[28] in which the court took the following position: 'The embryo's right to life and to be borne by the genetic mother outweighs the right to be raised in a full family and the father's autonomy to decide on his procreation.'

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[23] Lis, 2022; Żelichowski, 1997.
[24] Ct. Journal of Laws 2022, item 1575.
[25] Nawrot, 2022; Żelichowski, 1997.
[26] The permissibility of replacing the consent of the donor of reproductive cells by a court decision raises serious objections in the doctrine, the essence and complexity of which go beyond the scope of this article, cf. Haberko, 2016, pp. 148-151; Smyczyński and Andrzejewski, 2024 pp. 234-238; Igantowicz and Nazar, 2016, pp. 407-415.
[27] File reference: III RNs 266/23 (unpublished).
[28] Cydzik, S.: Sąd: prawo zarodka do życia jest ważniejsze od tego, co myśli ojciec, Rzeczpospolita, [Online]. Available at: https://www.rp.pl/ochrona-zdrowia/art40916181-sad-prawo-zarodka-do-zycia-jest-wazniejsze-od-tego-co-mysli-ojciec (Accessed: 05 August, 2024).

The ruling was based on facts, which were presented as follows. The couple underwent an in vitro fertilisation procedure, which resulted in the birth of a child; however, a second embryo was frozen. Subsequently, the couple lived to see the birth of two naturally conceived children, after which they divorced. The parties agreed that the woman was given the right to decide on the future of the second embryo. She also agreed that her ex-husband (the biological father) would not bear the cost of storing the embryo nor any subsequent child support. When the woman decided to give birth to the child, her ex-husband demanded that the embryo be disposed of or put up for adoption.

From the legal perspective, this case is not problematic as only the recipient's refusal to consent to the embryo transfer is absolute. However, the man (donor of reproductive cells) has no way of forcing his wife/partner to allow the embryo to continue its development in her body. The same is true when the dispute involves a woman wishing to give birth to a child whose embryo has already been created through an assisted reproductive technique, wherein the donor of the reproductive cells is a man who opposes it (wants to withdraw his previously given consent). In such a case, the woman can override this objection by taking legal action so that a court ruling will supersede the man’s consent (Article 21(2) of the ITA).

The court was correct in assuming that the essence of the case is the personal status of the human embryo[29] and its subjectivity, and therefore, its right to life.[30] What is less relevant is that the embryo was created as part of a partnership donation and that the dispute arose when the man and woman were no longer married. In this context, it is also less relevant that the woman's will to give birth limits her ex-husband’s autonomy and reproductive rights. An argument that also carried far less weight than the protection of the child's life was the child’s father’s claim that in this situation, the newborn's right to know their origins would be violated and that the child would not be raised in a complete family. In this context, the man's willingness to dispose of the embryo blatantly demonstrated a lack of parental responsibility.[31]

[29] Lis, 2022, pp. 196-206; Haberko, 2016, p. 8.
[30] Haberko, 2016, pp. 78-79.
[31] Haberko, 2016, p. 145.

4. Procedure to prevent infertility

The ITA regulations on male infertility treatment have been supplemented with provisions for a procedure to prevent infertility (Articles 10 and 31 of the ITA). Many circumstances pose serious threats to a fertile person's ability to conceive a child. If knowledge of the threat is obtained in time, then treatment can be implemented to secure fertility in the future by collecting reproductive cells from a donor.[32] This procedure can, for example, ensure having a child for a man who has become infertile as a consequence of life-saving treatment related to testicular cancer. The extraction of reproductive cells before he undergoes chemotherapy or radiation and their deposition in a sperm bank provides such an opportunity.

This procedure, too, is preceded by obtaining written consent from the sperm donor after he is provided with information, specifically regarding the type, purpose, risks, expected consequences and nature of the procedure, the right to obtain the results of pre-treatment tests, medical confidentiality, and security measures leading to the protection of the donor's data and others.

The procedure in question can be applied to a minor or an incapacitated person. The extraction of reproductive cells can then be carried out on the basis of the written consent from the patient's legal representative. His consent is also needed if he is at least 13 years old or partially incapacitated.

5. Summary

This article deals with only a few of the many complex issues related to assisted reproductive treatment. However, if the assumption of the ITA is correct—that a child conceived artificially should be born in the family and grow within it—then the legal position of their father also requires due attention. The same applies to the legal position of a man who is a donor of reproductive cells for the birth of a child in a marriage or a cohabiting relationship in which he is not a part. However, a critical approach should be adopted towards a regulation that allows for the circumvention of the law, which leads to the application of ART procedures for the conception of a child by a single person or person in a permanent same-sex relationship.

[32] Haberko, 2016, pp. 103-105.

This article's research premise dispenses with elaborating on the question of the status of a man who is the father of a child conceived through the ART treatment, that has already been born. This issue is specifically addressed by Articles 68 and 75 of the FGC. The first provision does not raise any doubts. This is a consequence of the previously adopted theoretical reflection that if a wife gives birth to a child as a consequence of ART treatment for which the husband has consented, the presumption is that he is the child's father.[33] The second provision, on the other hand, contradicts the assumptions of filiation law regulated by the FGC and has been met with deep criticism in the doctrine,[34]since it allows a child to be recognised by a cohabiting partner before the fusion of reproductive cells has been completed, and thus before the embryo has been formed. This has several negative consequences under family and inheritance law, the description of which goes beyond the scope of this article.

The analysis of the ITA law provisions allows us to conclude that the man who is the husband or cohabiting partner of the woman who is to give birth to an ART-conceived child is treated as a subject in Polish law. The legal situation for male donors of reproductive cells in partner and non-partner donations should be assessed similarly. The preliminaries of his informed consent to various procedures, including providing him with full knowledge of the complex characteristics of his situation, were formulated in such a way as to allow him to participate in the measures as a fully informed subject.

Legal regulations on obtaining a man's consent to particular procedures—including provisions mandating that he should be fully informed of the complex specificities of his situation—are formulated in such a way as to allow him to participate in the actions taken as a subject. As indicated above, one may be concerned whether, in practice, institutions performing complex ART procedures have developed ways to provide cell donors with full information about their legal status.

[33] Radwański, 1979, pp. 171-187.
[34] Smyczyński and Andrzejewski, 2024, pp. 234-238; Igantowicz and Nazar, 2016, pp. 407-415.

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The dignity of the conceived child in the teachings of Christian churches and religious associations and in Judaism**

ABSTRACT: The present study focuses on understanding the dignity of the conceived child by selected churches and religious associations. The discussion was narrowed down to Christian communities and Judaism. These confessions build their doctrines on biblical teachings. The similarities and differences found in the approaches to the status of the unborn child were characterised. The positions of particular confessions have been discussed in the context of the doctrinal principles and legal norms they proclaim.

The question of how the dignity of the unborn child is perceived is crucial as it determines from which moment a human being becomes a subject of rights (in particular, the right to life). Indeed, questioning the dignity of the human person from the moment of conception has important consequences for the quality of life and health of the unborn child. It creates the possibility of treating human foetuses instrumentally, subjecting them to treatments, experiments, or other practices that may violate their personal integrity.

KEYWORDS: dignity, conceived child, churches and religious associations, Judaism.

1. The essence of the human being's dignity

The dignity of the human person is the source of human and civil rights and freedom in democratic states. This value is inseparably connected with the human being and gives him/her the possibility of enjoying the rights guaranteed by legitimate authorities as well as those granted to the individual, independent of the will of the decision-makers. The present

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study addresses the understanding of a conceived but not yet born child's dignity through selected churches and religious associations.

These considerations will be narrowed down to Christian communities and Judaism. These confessions build their doctrines on the teachings of the Bible. It is worth examining the similarities and differences in their approaches to the status of the conceived child. The position of the particular entities will be characterised in the context of their doctrinal principles and legal norms.

It is agreed that after birth, the child enjoys the rights of freedom and possesses the dignity of every human being. However, some isolated views question whether a human being is endowed with this attribute at all. In his study, Buller refers to the opinion of the orthodox behaviourist Skinner, who rejects human dignity as a supreme value. The researcher interprets human behaviour according to the assumptions of classical behaviourism. This leads him to the conclusion that, first, observations of animal behaviour can be directly applied to human attitudes; second, he believes that a pattern of behaviour as a response to a stimulus should be considered sufficient.[1]

The present study mainly intends to answer the following question: How is the dignity of the unborn child perceived? This is a key question, because it determines the moment a human being becomes a subject of rights (in particular, the right to life). Questioning the dignity of human beings from the moment of conception has important consequences for the quality of life and health protection of the unborn child. This creates the possibility of treating human foetuses instrumentally and subjecting them to treatments, experiments, or other practices that may violate their personal integrity.

However, before presenting the position of individual Churches and other religious associations, an attempt should be made to define what the human being's "dignity" is and how it is perceived in the literature on the subject, by the judiciary as well as in normative acts.

Among the researchers dealing with the issue we are interested in, special attention should be paid to Janusz Franciszek Mazurek, a representative of the "Lublin school", who made a significant contribution to Polish literature on the subject by shaping the idea of the dignity of human beings.[2] He distinguishes between individual and personal dignity. Individual dignity has its source in morally valuable action. The individual

[1] Buller, 2012, p. 49.
[2] See: Mazurek, 1993, pp. 261-271; idem, Mazurek, 1996, pp. 5-41.

influences and shapes the development of this value through his or her behaviour.[3] In addition, the level of individual dignity is influenced by other people, the sociocultural environment, and various types of groups and communities.[4] Personal dignity, on the other hand, is an innate category to which every individual is entitled because of his or her privileged place in the world. In addition to its innate character, personal dignity is recognised as inalienable, permanent, universal, and dynamic.[5] Significantly, no one decides whether someone is a person because, as Mazurek emphasises, this is determined by the fact of existence itself, to which dignity is attributed. Dignity is equal to existence as a person.[6]

We can observe different understandings of dignity in the literature on this subject. The *Stanford Encyclopedia of Philosophy* distinguishes dignity as *gravitas*, dignity as *integrity*, *status* and dignity as *human*. The last category indicates a value or status.[7] Marinski defines dignity as an inalienable, irreducible, nontransferable, and absolute value.

From the perspective of the issues discussed in this study, personal dignity, a source of individual rights and freedom, is fundamentally important. As Pavel Dancák points out, this idea has had a significant impact on law-making processes in the civilised world.[8] Furthermore, Wojcieszek notes that human dignity can be interpreted at two basic levels: value and law. As a value, it influences the process of interpreting norms contained in normative acts such as the Constitution, building an axiology for existing legal solutions. However, in legal terms, dignity appears as a constitutional and subjective right. Public authorities must create appropriate guarantees to which the individual is entitled.[9] The author, while analysing the evolution of the concept of dignity in the jurisprudence of the Supreme Court of the United States of America, emphasises that the understanding of dignity has been changing depending on various conditions, such as social transformations, historical events, and the evolution of political and legal traditions. Currently, two features of dignity are distinguished in American doctrines. First, it is the source of rights and

[3] Mazurek, 1988, p. 29.
[4] Chałas, 2021, p. 36.
[5] Ibid. p. 39.
[6] Ochman, 2020, p. 146.
[7] Stanford Encyclopedia of Philosophy, Dignity, [Online]. Available at: https://plato.stanford.edu/entries/dignity/ (Accessed: 21 August 2024).
[8] Dancák, 2017, p. 20.
[9] Wojcieszek, 2021, p. 706.

freedoms, and second, it is the value on which the legal system is based.[10] As Krajewska notes, both the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) refer to the dignity of the human person in their judgments but avoid defining the concept. Therefore, each case concerning possible interference with dignity is examined individually.[11] The ECHR noted in the judgment of 16 June 2022 that any interference with human dignity strikes the very essence of the Convention.[12] The CJEU, on the other hand, in its judgment of 9 October 2001, confirmed that the fundamental right to human dignity is part of European Union law.[13]

The Polish Constitutional Tribunal (CT) has repeatedly clarified the definition of dignity is and its role in shaping the Polish legal system.[14] On 23 March the CT emphasised that the Polish Constitution is an expression of an objective system of values which shapes individual rights and freedoms. The central place is occupied by the principles of inherent and inalienable human dignity.[15] The Constitutional Tribunal recognises human dignity as a transcendent value, primarily in relation to other human rights and freedoms (for which it is the source), inherent, inalienable, and permanent, which cannot be violated by either the legislator or other subjects. In this sense, according to CT, humans always possess dignity, and no action can deprive or violate it. The second meaning of human dignity, in the opinion of the CT, is the "individual dignity" covering the values of a person's psychological life and the values determining the subjective position of the individual in society and those which affect the respect due to every person. In the opinion of the Constitutional Court, only dignity comprehended in this way can be the subject of interference, both at the normative level and in interpersonal relations.[16] The Polish judiciary frequently refers to the protection of human dignity in judgments. The Supreme Court, in its judgment of 26 March 2024 notes that

[10] Ibid. p. 712.
[11] Krajewska, 2006, p. 124.
[12] *Case of Skorupa v. Poland* App. No. 44153/15, 16 June 2022.
[13] Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, 9 October 2001, points 70-77.
[14] Potrzeszcz, 2005, p. 27.
[15] Judgment of the Constitutional Tribunal of 23 March, 1999. (K 2/98 - OTK 1999/3/38).
[16] Judgment of the Constitutional Tribunal of 5 March, 2003. (K 7/01 - Dz.U. z 2003, nr 44, poz. 390).

> [...]The concept of inherent and inalienable human dignity referred to in the Article 30 of the Polish Constitution [...] should be referred to humanity itself and not to the colloquial notion of "dignity" as a subjective sense of self-esteem or self-respect. Violations of dignity, in the sense referred to in the Article 30 of the Polish Constitution, occur only in truly drastic situations that objectify human beings or treat them in an inhumane way.[17]

Referring to ongoing research and medical experiments, the Supreme Court stated that conducting clinical trials or medical experiments against the provisions of the law violates human dignity and freedom. Moreover, both these values belong to the group of the most important personal goods protected by the constitutional order, and their effective protection is the primary duty of public authorities.[18] The tasks of the entities exercising power were pointed out by the Supreme Court in its decision of 25 June 2022 when it stated that

> [...]it is necessary to respect the primary constitutional value in each case i.e. human dignity (Article 30 of the Constitution of the Republic of Poland) which implies the obligation to create and apply the law by all bodies of public authority within the scope of their competence in such a way that takes into account the guarantees of creating the conditions for the proper functioning of a person in society and the creation of opportunities for self-fulfilment, i.e. the free development of one's personality.[19]

The judiciary's position corresponds to the normative status of human dignity. This category is included in both international and national regulations.

The normative nature of the protection of the dignity of human beings was confirmed by the Universal Declaration of Human Rights of 10

[17] Judgment of the Constitutional Tribunal of 26 March, 2024. (II NSNc 304/23 - OSNKN 2024/2/9).
[18] Judgment of the Constitutional Tribunal of 21 September, 2022. (I NSNc 75/21 - OSNKN 2022/4/23).
[19] Decision of the Supreme Court of 25 June, 2022. (I CSK 3548/22 - LEX nr 3456157)

December 1948 (UDHR). According to Article 1, all human beings are born free and equal in terms of dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood.[20] It has been pointed out in doctrine that the UDHR does not specify what it means to be "born human", nor does it specify when one becomes a human being (whether at the moment of conception or birth). This was done intentionally so that it could be adopted by as many countries as possible to promote different value systems.[21] While interpreting this norm, Mazurek states that freedom as an innate attribute of human beings, together with reason and conscience, forms the basis of dignity.[22] Although the document is not generally applicable law, the regulations contained therein have had an enormous impact on the shape of the guarantees to which the individual is entitled, both in international and particular terms. These rights are universal. Their formulation was the first attempt in history to cover these issues comprehensively in a single normative act.[23]

Dignity, together with the equal and inalienable rights of all members of the human community, has been recognised as the basis and source of freedom, justice, and peace in the world in preambles to the International Covenant on Civil and Political Rights[24] and the International Covenant on Economic, Social, and Cultural Rights.[25] Protection of a child's dignity is also guaranteed in the Convention on the Rights of the Child of 20 November 1989 (CRC). Relevant guarantees were assigned to potential situations in which the child may find himself or herself. According to Article 23, a mentally or physically disabled child should ensure a fully normal life under conditions that guarantee his or her dignity. In addition, in matters relating to education, parties are obliged to take appropriate measures to ensure that school discipline is administered in a manner consistent with the human dignity of the child (Article 28(2) of the CRC). In situations when a child is deprived of his or her liberty, he or she is to be treated humanely and with respect to the inherent dignity of the human being in a manner that considers the needs of the person at the relevant age (Article 37(c)). A child who has been the victim of any form of neglect,

[20] UN, 1948.
[21] Jaskólska, 1998, p. 63.
[22] Mazurek, 1988, p. 37.
[23] Jaskólska, 1998, p. 50.
[24] UN, 1966a.
[25] UN, 1966b.

exploitation, abuse, torture, or any other form of cruel, inhuman, or degrading treatment or punishment or armed conflict, and is undergoing rehabilitation as a result, is to be provided with conditions so that the process is conducive to the child's health, self-respect, and dignity (Article 39 of the CRC). Treatment contributing to a child's sense of dignity is supposed to occur when the child is suspected, accused, or found guilty of violating criminal law (Article 40(1) of the CRC). When analysing the norms contained in the CRC, it should be emphasised that Article 1 formulates the legal definition of a child. According to the disposition contained therein, "child is every human being below the age of eighteen years, unless the national law considers majority attained at an earlier age". This indicates an upper limit without specifying when the existence of a human being begins. This approach seems to have been a deliberate attempt to obtain as many parties as possible to ratify the document. The Convention also contains passages related to the status of unborn children. The preamble states that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'. Notably, there are different definitions of children in the Polish legal system. In the Act on the Ombudsman for Children, the legislator states that a child is every human being from conception to adulthood (Article 2).[26] This fact causes disagreements in interpretation and gives the impression of inconsistency among Polish legislators. Since the moment of conception is recognised here as the beginning of the existence of a human being, it seems to be incoherent with the norms contained in the *Act on Family Planning, Protection of the Human Foetus* and the *Conditions for the Permissibility of Abortion,* where Article 4a includes the conditions for pregnancy termination when it is a threat to the life or health of the woman or there is a justified suspicion that the pregnancy has resulted from a prohibited act (Article 4a, par. 1 and 3).[27] The doctrine draws attention to the evident inconsistency and postulates the need to unify current legal solutions.[28]

[26] The Act of 6 January 2000 on the Ombudsman for Children [o Rzeczniku Praw Dziecka] (Dz. U. z 2023 r. poz. 292 t.j.).

[27] The Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and the Conditions for the Permissibility of Abortion [o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży] (Dz. U. z 2022 r. poz. 1575 t.j.).

[28] See: Rzewuski, 2007, pp. 186-191.

In addition to universal regulations, the issue of the protection of human dignity is addressed in regional documents. The Charter of Fundamental Rights of the European Union (CFR) refers to this value in its content.[29] The preamble states that '[...]the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law'. According to Article 1 of the CFR, human dignity is inviolable and must be respected and protected. The Charter of Fundamental Rights issued by the Presidium of the Convention and updated by the Presidium of the Convention of the European Union states that the dignity of the human person is not only a fundamental right in itself but also constitutes the real basis of fundamental rights.[30] Therefore,

> [...] none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

In addition to universally applicable norms, indications for the protection of human dignity appear in the Union's *soft low* normative acts. An example is the Recommendation of the European Parliament of 20 December 2006.[31] It states, inter alia, that the European Union should gear its political actions to prevent any form of violation of the principle of respect for human dignity (p. 2). In turn, Member States were recommended to take the necessary measures to ensure the protection of minors and human dignity in all audiovisual and on-line information services in the interests of promoting the development of the audiovisual and on-line information services industry', (Recommendation I), as well as 'to examine the possibility of creating filters which would prevent information offending against human dignity from passing through the Internet' (Recommendation II).

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[29] EU, 2007a

[30] EU, 2007b

[31] Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, [Online]. Available at: https://eur-lex.europa.eu/legal-content/RO/LSU/?uri=CELEX%3A32006H0952/(Accessed: 23 August 2024).

In Polish law, as adopted by the national legislator, there are also numerous references to the need to respect human dignity. Article 30 of the Constitution of the Republic of Poland refers to this basic norm. It states: 'the inherent and inalienable dignity of a person shall constitute a source of freedom and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities'. In addition to the Constitution, numerous laws and acts of lower rank refer to this category.

The dignity of the human person, in normative and doctrinal terms as well as in light of the position expressed by judicial authorities, is a source of individual rights and freedoms. The nature of dignity is interrelated to human beings. However, there is no agreement as to the moment when a person is endowed with dignity. Normative regulations are not unambiguous and sometimes even contradictory. On the one hand, there are norms and positions which recognise a human being from the moment of conception; on the other hand, there are regulations where the moment of birth is indicated as the critical moment for determining whether we are dealing with a human being. However, everyone supports the need for authorities to respect this category and create appropriate formal guarantees.

2. Position of churches and religious associations

Confessional entities often refer to the need to respect the dignity of the human person in their doctrine. This paper presents the positions of selected religious communities. The focus is on the teachings of the Latin Rite Catholic Church, which has frequently addressed the issue of human dignity. First, the concept of dignity and its nature will be presented. Second, the focus will be on the essence of the dignity of the conceived child.

2.1. The Catholic Church

The Second Vatican Council, which "opened the Church to the world", referred to the dignity of the human person in many documents. Nevertheless, systematised teaching was contained in the Pastoral Constitution on the Modern Church -*Gaudium et spes* (G.S.).[32] Chapter I

[32] Pastoral Constitution on the Church in the Modern World Gaudium et spes of 7 December 1965, [Online]. Available at: https://sip.lex.pl/#/act/286768068 (Accessed: 23 August 2024).

focuses on human dignity. Referring to the Sacred Scripture, the Church teaches that 'man was created "to the image of God", is capable of knowing and loving his Creator, and was appointed by Him as master of all earthly creatures that he might subdue them and use them to God's glory'. (n. 12 G.S.). According to the Constitution, every human being constitutes a unity of the body and soul. Therefore, it is unacceptable to despise "the life of the body". The dignity which belongs to everyone requires man 'to glorify God in his body and forbid it to serve the evil inclinations of his heart' (n. 14 G.S.). An important point is the emphasis on the fact that 'man [...]has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged' (n. 16 G.S.).

The Constitution thus recognises that the dignity of the human person is a consequence of man's creation of the image and likeness of God. A corresponding message emerges from the Catechism of the Catholic Church (CCC).[33] Recognising the basis of dignity in creation in the image and likeness of God, the CCC teaches, among other things, that dignity is inherent in the human being (n. 1700 CCC). It further states that God created man as a rational being, giving him the dignity of a person endowed with the ability to decide and to have dominion over his actions (n. 1730 CCC).

Accordingly, in the 1983 Code of Canon Law the ecclesiastical legislator states that 'by virtue of their regeneration in Christ, all the believers are equal in dignity and action, as a result of which each, according to his/her own position and task and cooperates in building up the Body of Christ...'.

The doctrine of the Catholic Church identifies dignity as an individual and unique category belonging to each human person. A human being created by God has this inherent value, and each individual is by nature a unique and qualitatively distinct entity.

One of the most recent official statements of the Catholic Church on the dignity of the human person is contained in the Declaration *Dignitas infinita* on Human Dignity of the Dicastery for the Doctrine of the Faith (D.I.) of 2 April 2024.[34] It states, inter alia, that [...]Every human person

[33] Catechism of the Catholic Church, [Online]. Availbale at: http://www.katechizm.opoka.org.pl/ (Accessed: 23 August 2024).

[34] Dicastery for the Doctrine of the Faith, Declaration "Dignitas Infinita" on Human Dignity of 2 April 2014, [Online]. Available at:

possesses an infinite dignity, inalienably grounded in his or her very being, which prevails in and beyond every circumstance, state, or situation the person may ever encounter (n. 1 D.I.). This document distinguishes the following understandings of the concept of dignity: ontological, moral, social, and existential. The most important among these is the ontological dignity that belongs to the person simply because he or she exists and is willed, created, and loved by God. Ontological dignity is indelible and remains valid beyond any circumstances in which the person may find themselves (n. 7 D.I.). It is clearly emphasised here that dignity is not something granted to the person by others. Were it so bestowed, it would be given in a conditional and alienable way (n. 15 D.I.). What is considerable for the present deliberations is that the Church clearly teaches that dignity remains "independent of all circumstances" and the recognition of this dignity cannot be contingent upon a judgment about the person's ability to understand and act freely. (n. 24 D.I.). No circumstances affect the denial of dignity. The practice of interfering with dignity according to an individual's sexual orientation is strongly condemned (n. 55 D.I.).

The Dicastery for the Doctrine of the Faith explicitly refers to the status of the unborn child when it states that: '[...] the person always subsists as an "individual substance" with a complete and inalienable dignity. This applies, for instance, to an unborn child [...]' (n.9 D.I.). Elsewhere, it is noted that '[...] every individual possesses an inalienable and intrinsic dignity from the beginning of his or her existence as an irrevocable gift. [...]' (n. 22 D.I.) This Constitution further emphasises that 'the dignity of every human being has an intrinsic character and is valid from the moment of conception until natural death' (n. 47 D.I.). Practices interfering with the natural conception of a child within the marriage of a man and a woman have been declared as detrimental to the dignity of the human person. It was emphasised in a straightforward manner that [...] Because of this unalienable dignity, the child has the right to have a fully human (and not artificially induced) origin and to receive the gift of a life that manifests both the dignity of the giver and that of the receiver. [...]. Considering this, the legitimate desire to have a child cannot be transformed into a "right to a child" that fails to respect the dignity of that child as the recipient of the gift of life (n. 49 D. I.).

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https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_ddf_doc_20240402_dignitas-infinita_pl.html (Accessed: 23 August 2024).

The task of the Congregation for the Doctrine of the Faith (Dicastery of the Doctrine of the Faith) is to care for the development and safeguarding of the doctrine of faith and morals throughout the Catholic world.[35] In the *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation* [36] it is pointed out, among other things, that, from the first instant, the living being has a fixed structure; it is a man, this individual man with his characteristic aspects already well determined. Right from fertilisation the adventure of human life begins, and each of its great capacities requires time ... to find its place and to be in a position to act (n.5, p. 1). Correspondingly, 'human embryos obtained in vitro are human beings and subjects with rights: their dignity and right to life must be respected from the first moment of their existence' (n.5 p. 5). In another document, the Congregation for the Doctrine of the Faith teaches that human life '[...] from the moment the zygote has formed, demands unconditional respect, [...]. The human being is to be respected and treated as a person from the moment of conception [...]' (n. 4).[37] Furthermore, 'At every stage of his existence, man, created in the image and likeness of God, reflects "the face of his Only-begotten Son [...]"' (n. 8). The teaching of the Catholic Church emphasises the need to recognise the dignity of the human person from the moment of conception. Catholic doctrine also takes a rigorous approach to any interference with the natural process of conception. Children conceived in vitro are endowed with the dignity of the human person. The Catholic Church, as the dominant Christian confession, devotes a great deal of attention to issues of human dignity, but it is worth considering approaches to these issues in other religious communities.

[35] Dicastery for the Doctrine of the Faith, [Online]. Available at: https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_pro_14071997_pl.html (Accessed: 26 August 2024).

[36] Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation of 22 February 1987, [Online]. Available at: https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_pl.htm (Accessed: 26 August 2024).

[37] Congregation for the Doctrine of the Faith, Instruction Dignitas personae on Certain Bioethical Questions - 8 September 2008, [Online]. Available at: https://www.vatican.va/roman_curia/congregations/cfaith/documents/ (Accessed: 26 August 2024).

2.2. Protestant Churches

Respect for human life from the moment of fusion of the male and female cells to its creation, and thus, the indirect recognition of the dignity of the human being, is present in the teachings of the Protestant Church in the Republic of Poland, which in a 1991 statement declared itself clearly in favour of the protection of life from its conception. However, it was emphasised that legal protection, its form, and fulfilment is the responsibility of the secular authority.[38] This position was supported by the church hierarchy in 2020, however, it was emphasised that, 'it is not the task of the church to influence the legislature to criminalise abortion. [...] we Lutherans, do not want to impose our worldview or moral vision on other citizens of our state'.[39] Łukasz Filipiuk notes that although the Evangelical Lutheran Church in Poland strongly opposes any form of abortion and supports the protection of life at every stage of its development, other countries lack such a strong stance. Local communities leave final decisions to the judgment of individual conscience.[40]

2.3. Orthodoxy

Orthodoxy, alongside Catholicism and Protestantism, constitutes the third largest branch of Christianity. As noted by Halina Nikolai Alexeyuk (a nun), the Orthodox Church has defended the sanctity of conceived life from the very beginning. Orthodox doctrine is grounded in the Bible, the teachings of the Church Fathers, and the canons of Church councils and synods. Today, this stance is reaffirmed in declarations issued by local Churches, which oppose abortion and advocate for the right to life of unborn children..[41] The author also points out that, in a circular dated 9 July 2019, the Holy Synod of the Greek Orthodox Church established the first Sunday after Christmas

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[38] On the protection of life. Statement of the Evangelical Church of Augsburg on the protection of life 1991, [Online]. Available at: https://old2020.luteranie.pl/o_kosciele/oswiadczenia_kosciola/w_sprawie_ochrony_zycia.html (Accessed: 25 August 2024).

[39] Statement of the Conference of Lutheran Bishops of November 3, 2020, [Online]. Available at: https://old2020.luteranie.pl/nowosci/oswiadczenie_konferencji_biskupow_luteranskich,7057.html (Accessed: 26 August 2024).

[40] Filipiuk, 2023, pp. 237-239.

[41] Mniszka, 2020, p. 248.

as the “Day of the Unborn Child.”.[42] Another study on the Orthodox doctrine states that

> the fetus is under special protection, regarded as a divine creation that must be respected. It is therefore seen as possessing inherent dignity and belonging not to its parents, but to God. Consequently, anyone who contributes to abortion in any way is viewed as destroying God's work and acting against His will.[43]

2.4. Judaism

Along with Christianity and Islam, Judaism is a major monotheistic religion. The sources of Jewish law are primarily the books of the Old Testament and the Talmud, which are recognised by so-called righteous Jews. The Talmud is a collection of explanations and commentaries on biblical texts. It appears in two varieties: the Jerusalem Talmud and Babylonian Talmud.[44] The statements of rabbis who comment on the surrounding reality are also of great importance to the Jewish community. However, it should be emphasised that teaching in the field of bioethics is complex, and there are certain differences between the Orthodox, Conservative, and Reform branches of Judaism. As Agata Strządała points out, a broad consensus has been reached on many issues, such as in vitro fertilisation, stem cell research (including embryonic stem cells), and euthanasia.[45] In publications discussing basic legal principles, references to issues related to the status of the unborn child can be found. In principle, abortion is forbidden by Jewish law (the helacha) except in particular situations when it is the only way to save the mother's life.[46] As emphasised in the literature on this subject, a human foetus does not represent the same value as the life of a born child. This is the case until the head or other main body parts of the newborn child appear in the birth canal. However, this does not imply that the unborn child should not be protected[47].

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[42] Ibid. p. 241.
[43] Olszewska et al., 2013, p. 536.
[44] Mizgalski, 2017, pp. 199- 200.
[45] Strządała, 2019, pp. 7-8.
[46] Judaism and abortion, [Online]. Available at: https://chabad.org.pl/judaizm-a-aborcja/ (Accessed: 30 August 2024); Olszewska et al., 2013, p. 538.
[47] Strządała, 2019, pp. 9-10; Shurpin, Y. Judaism and Abortion - The Jewish View of Abortion, [Online]. Available at:

According to Reform Judaism, the decision concerning abortion should be made by the woman in each case. The mother's existing life is sacred and must be primary over the existence of a potential life. According to this position, pregnant women should have full autonomy in deciding whether to terminate their pregnancy, regardless of whether their life is in danger.[48]

Artur Aleksiejuk presents Judaic concepts for the animation of human embryos.[49] They concern the indication of the moment at which a human exists by virtue of being endowed with a soul. In this connection, he distinguishes among simultaneous animation, delayed animation, and animation at birth. Supporters of simultaneous animation assume that the moment of conception is decisive. One representative of this approach is Rabbi Eric Cohen, who argues, among other things, that human dignity does not depend on being wanted by others. Additionally, the view that the embryo up to the fortieth day after fertilisation is "just water" seems to be a manifestation of arrogance and ignorance in light of scientific knowledge.[50] In turn, the theory of delayed (successive) animation assumes that the foetus receives a soul when it takes humanoid form (around the fortieth day after fertilisation). Finally, in light of the representatives proclaiming the theory of animation at the moment of birth, this particular moment is decisive for the incorporation of the soul into the body.[51]

3. Conclusions

The positions of religious communities originating from biblical traditions are not homogeneous on issues concerning the status of the unborn child and its dignity. There were also differences in opinion regarding particular confessions. The following conclusions were drawn from the findings of this study:

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https://www.chabad.org/library/article_cdo/aid/529077/jewish/Judaism-and-Abortion.htm (Accessed: 30 August 2024).

[48] What is the Reform Jewish perspective on abortion?, [Online]. Available at: https://reformjudaism.org/learning/answers-jewish-questions/what-reform-jewish-perspective-abortion (Accessed: 30 August 2024).

[49] Aleksiejuk, 2011.

[50] Ibid. pp. 306-307

[51] Ibid. p. 309

- In democratic states, the dignity of the human person is the source of human and civil rights and freedom.
- Questioning the dignity of a human from the moment of conception has significant consequences for the quality of life and health of the unborn child.
- Not recognising the conceived child as a human being creates the possibility of treating human foetuses instrumentally, subjecting them to treatments, experiments, or other practices that may violate their personal integrity.
- "Personal dignity" is an innate category to which every individual is entitled because of his or her privileged place in the world. It is recognised as inalienable, permanent, universal, and dynamic.
- "Individual dignity" has its source in morally valuable action. The individual influences and shapes the development of this value through his or her behaviour. In addition, the level of individual dignity is influenced by other people, the socio-cultural environment, and various types of groups and communities.
- Both the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) refer to human dignity in their judgments but avoid defining this concept. Each case involving a possible interference with dignity is examined individually.
- The Polish justice system frequently refers to human dignity in its rules. The Constitutional Tribunal recognises human dignity as a transcendent value, primary in relation to other human rights and freedoms (for which it is the source), inherent, inalienable, and permanent, which cannot be violated by either the legislator or other subjects.
- This position of justice corresponds to the normative status of the dignity of the human person. This category is included in both international and national regulations.
- The nature of dignity is integrally linked to the human person. Normative regulations are ambiguous and sometimes contradictory to the moment a person is endowed with an attribute of dignity. The moment of conception or birth is decisive.
- Churches and religious associations often refer to the need to respect the dignity of the human person in their doctrine.

- The Catholic Church recognises that the dignity of the human person is a consequence of the creation of man in the image and likeness of God.
- The doctrine of the Catholic Church identifies dignity as an individual and unique category belonging to each human person. The human being created by God has this inherent value, and each individual is by nature a unique and qualitatively distinct entity.
- In the light of the teachings of the Catholic Church, ontological dignity, which refers to the person as such by the very fact of his or her existence, is the most important. This dignity can never be erased and remains valid regardless of the circumstances in which individuals find themselves. Moreover, as the Church teaches, the person always exists as an "individual substance" with his or her inalienable dignity. This also concerns the unborn child.
- The teachings of the Catholic Church emphasise the need to recognise the dignity of the human person from the moment of conception, regardless of whether conception was natural or by means of external factors.
- Protestant communities in Poland support the protection of life from the moment of conception. However, in other countries, there is no firm stance, and the final decision is left to the mother's conscience.
- The Orthodox Church recognises that conception is the moment of the beginning of the existence of the human person and that the foetus is endowed with dignity.
- In Judaism, there are different concepts regarding the moment from which a child is endowed with a soul, and therefore, from when its full protection begins. Therefore, the decisive factors may be conception, the moment at which the foetus reaches a humanoid shape, or the moment of birth.

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The Creative Use of Non-Specific Legal Provisions Regarding Assisted Reproduction in Romania[***]

ABSTRACT: Romania, like any other contemporary high-income society, has its share of fertility and demographic problems. The last several decades have seen a resurgence in both medically assisted reproduction techniques and the societal demand for solutions to fertility issues. The statutes currently in force have not kept pace with technical evolutions and, due to both political and technical reasons, there is currently no comprehensive and targeted statute concerning medically assisted reproduction. However, society at large and the fertility services market have not been kept back by this lack of specific statutory provisions. General, non-specific or tangentially relevant normative provisions have been brought to the fore to construct a patchwork statutory environment for the needs of medically assisted reproduction providers and beneficiaries.

This patchwork approach is not without its drawbacks, and we will try to identify the gaps and unanswered legal questions that arise at each step using a black-letter approach to applicable Romanian law up to October 2024. A future statute on assisted reproduction should cover at least the areas of parental eligibility, informed consent, allowed and banned techniques, liability, parental filiation and confidentiality.

KEYWORDS: family, fertility, parents, children, medically assisted reproduction.

1. Introduction

Romania has never had a comprehensive and specific statute on assisted reproduction. Although technical possibilities for assisted reproduction have

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been present in the country since at least the 1990s, the legal framework has never kept pace with medical capabilities. Some relevant traditional tenets of Romanian private law are, first, that a court cannot refuse to adjudicate a matter brought before it on the grounds that the law is either unclear or lacking, and second, that any conduct that is not expressly forbidden by law is *prima facie* presumed to be allowed. These prior theoretical foundations and the strong societal demand for medically assisted reproduction have led to the creative use of existing non-specific regulations to bring a semblance of order and legality to the gamut of medically assisted human reproduction techniques. Predominantly using a black-letter law approach, this study will explore the current relevant provisions of Romanian law that can be used to regulate assisted reproduction while also highlighting the deficiencies of this patchwork approach and the areas where legal doctrine or case law have identified practical and theoretical uncertainties brought about by the lack of specific and comprehensive statutory norms. The referred legal doctrines and relevant statutes are current up to October 2024.

2. Infertility as the Main Reason for Assisted Reproduction

Infertility is the primary reason for the development of medically assisted reproductive techniques.[1] The first historical attempts at artificial insemination, dating back to the 18th and 19th centuries, were performed in order to supplant natural reproduction when the latter was unsuccessful.[2] The first successful artificial insemination with frozen sperm dates back to 1953, while the first human to be conceived by in vitro fertilisation was born in 1978. The first successful embryo transfer to a surrogate mother occurred in 1984.[3]

Infertility statistics are always inconsistent, but credible estimates put the number of infertile couples worldwide at least 90 million at any given time, and approximately 40% of these instances are attributable to male infertility.[4]

The 2017 Policy Audit on Fertility – Analysis of 9 EU Countries reported, for Romania, a primary infertility rate (difficulty in having a first child) of 1.6% and a secondary infertility rate (difficulty in having a second

[1] Predescu, 2022, p. 44, pp. 64-65.
[2] Ibid. pp. 54-55
[3] Ibid. p. 31, p. 40, pp. 60-61; Hageanu, 2023, p. 210.
[4] Predescu, 2022, p. 51.

child) of 15.9%.[5] The same study reported a 41.33% success rate for the publicly funded In Vitro Fertilisation Programme.[6]

Other infertility statistics in Romania were collected in two sampling/polling studies conducted in 2018 and 2023 by the Romanian Association for Human Reproduction.

The 2018 poll was conducted online on 4680 respondents, of which 3331 were considered the fertile demographic contingent, including women between 25 and 45 years of age and men between 25 and 60 years of age, in relationships with partners in the appropriate age range. Of these, 16.8% were affected by infertility, either currently or in the past. Considering only those couples who wanted children as soon as possible (29.1%), 27% had failed to have a child despite trying for between one and five years was, while an additional 11% had been trying unsuccessfully for more than five years. [7]

A 2023 follow-up study on infertility in urban environments reached similar conclusions. On average, 18% of the pregnancies between 2018 and 2023 were the result of some form of fertility treatment. 17.1% of the couples who responded either were still or had been infertile. Only 21% of the interviewed couples wanted to have a child as soon as possible. Of these, 40% had been trying unsuccessfully for children aged between 1 and 5 years, while 10% had been trying for more than 5 years. Between January and February 2023, 23% of extant pregnancies were already the result of fertility treatment. Between 2018 and 2023, there were about 102,000 successful fertility treatments, so the average is approximately 20,000 per year. However, we can speculate that the total number of fertility treatments required to obtain this result must be at least two times or possibly three times higher (40,000 to 60,000 per year) because the reasonable target success rate for public funding is 30%.[8]

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3. The Legal Concept of Infertility

Infertility is caused by factors related to both members of the reproductive couple. For women, the most common medical issues causing infertility are vaginal infections, endometriosis, obstructed or surgically removed tubes, lack of ovulation, high levels of prolactin, polycystic ovaries, uterine fibrosis, side effects of medication, and thyroid issues. For men, the most common medical issues are related to lack of sperm cells, reduced number of sperm cells, reduced mobility or structurally deficient sperm cells, and genetic disease. Other issues affecting fertility are lifestyle-related, such as nutrition, stress, radiation exposure, and exposure to toxic factors.[9] Infertility is medically defined in women below 35 years of age as not having conceived after one year of vaginal sexual activity without contraception.[10]

The 2019 official Health Ministry Guide on infertility considers it an affliction defined by the failure to get pregnant after 12 months of regular unprotected intercourse or as the reduced capacity for reproduction of either member of the reproductive couple.[11] Interventions for infertility can be initiated after less than one year based on medical, sexual, and reproductive history, age, clinical exams or diagnostic tests.[12] The generally accepted breakdown of the underlying causes of infertility is as follows: 25% unexplained infertility, 20% ovulatory dysfunction, 20% tube dysfunction, 30% male infertility factors, 10% uterine and peritoneal afflictions. In 40% of cases, both partners exhibit infertility-inducing afflictions.

The joint Order no. 2155/20917/2022 of the Work and Social Solidarity Minister and Family, Youth and Equal Opportunities Minister on the regulations concerning the implementation of the social national interest programme of supporting couples and single persons for increasing childbirth broadly defines infertility as having an affliction that is incompatible with natural reproduction, diagnosed by an OB-GYN M.D., with further specialisation in medically assisted reproduction (Article 4).

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[9] Iordăchescu, 2020, p. 169.
[10] Vlădăreanu and Onofriescu, 2019, p. 8.
[11] Adopted as Annex no. 30 of the Health Minister's Order no. 1241/2019 regarding the approval of official guides for gynecology and obstetrics, published on September 10th, 2019, in the Official Journal no. 738bis.
[12] Ibid. Section 1.

4. Assisted Reproduction Techniques

The previously mentioned official guide on infertility approved by Annex No. 30 of the Health Minister's Order No. 1241/2019 regarding the approval of official guides for gynaecology and obstetrics specifically mentions the following assisted reproduction techniques: intrauterine (artificial) insemination, in vitro fertilisation (IVF), embryo transfer, intracytoplasmic sperm injection (ICSI), and artificial insemination with sperm or oocytes from a third-party donor. This guide is a technical one, addressed mainly to health professionals, containing medical recommendations and best practices, without any concern whatsoever for a legalistic point of view; it rarely defines the concepts it uses and does not address the legal issues that may arise from medically assisted reproduction situations. Still, because it is a lower-level regulation, it should only legally define the concepts and techniques used from a technical point of view and leave the more controversial issues of parental eligibility, informed consent, liability, banned techniques and parental filiation to a higher-level statute enacted by parliament.

Due to the lack of a comprehensive and specific statute on assisted reproductive procedures, their legal regulation can be inferred from several non-specific statutes such as the Civil Code of 2009, the Law on Healthcare Reform no. 95/2006, the Law on the Rights of the Patient no. 46/2003, as well as lower-level regulations such as the Health Minister's Order on Therapeutical Transplants no. 1763/2007, the Health Minister's Order no. 964/2022 on the Implementation of National Public Health Programmes or the aforementioned joint Order no. 2155/20917/2022 on the regulations concerning the implementation of the social national interest programme of supporting couples and single persons for increasing childbirth. The legal regimes of fertility treatments and medically assisted reproductive procedures must be inferred from the different regulations pertaining to adjacent issues.

Assisted reproductive procedures (ARPs) are not extensively regulated in either the primary legislation (laws enacted by the parliament and governmental decrees or emergency decrees) or in secondary legislation (such as ministerial orders). There are no identifiable bans on specific assisted reproductive procedure techniques; thus, we can confidently assert that both intracytoplasmic sperm injection (ICSI) and in vitro fertilisation (IVF) are allowed. Moreover, both IVF and ICSI were mentioned without

being defined as such, in the 2019 Health Minister's official technical guide on infertility for the use of health professionals. Most restrictions pertaining to assisted reproductive procedures are broad and principled ones included in the Civil Code of 2009, which came into force on 1 October 2011.

5. Relevant Regulations Pertaining to Assisted Reproduction in the Romanian Civil Code

The Romanian Civil Code has a special section, number 2, on the rights to life, health, and physical integrity of natural persons, which is part of Chapter II, with respect to human beings and their inherent rights, and part of broader Title II regarding the natural person.[13] Article 61 guarantees the "inherent" rights of the human being by equally safeguarding the life, physical and psychological health of any human being. The well-being and interests of any human being should take precedence over those of society as a whole.[14] Article 62 of the Civil Code bans eugenics and any attempt to alter the human species, which is understood to refer to alterations of the human genome. Eugenics is legally defined as any practice which tends to organise the selection of persons, whereas the scientific definition of the concept refers to the practical applications of hereditary biology in the genetic enhancement of individuals.[15]

The Civil Code also bans any medical intervention on the genetic characteristics of a person with the purpose of modifying that person's descendance, with the sole exception of curative and preventative interventions for genetic diseases (Article 63, paragraph 1). The legal ban extends to human cloning with the purpose of creating identical human beings and human embryos solely for research purposes (Article 63, paragraph 2). Human medically assisted reproductive procedures are not allowed to choose the sex of the future child unless it is to avoid a gender-related genetic disease (Article 63, paragraph 3).[16]

The current Civil Code also regulates the sanctity of the human body (Article 64), restricting the examination of genetic characteristics to medical, research and judicial purposes (Article 65), and forbids giving monetary value to the human body or its component parts (Article 66). It

[13] Diaconescu and Vasilescu, 2022, pp. 303-307.
[14] Chelaru, 2021, pp. 77-78.
[15] Ibid. pp. 78-79.
[16] Ibid. pp. 79-81.

also states broad principles for medical interventions on a person and for transplants from a living person (Articles 67-68 of the Civil Code).[17]

6. Medically Assisted Reproduction with a Third-party Donor

The 2009 Civil Code includes a specific seven-article section concerning medically assisted reproductive procedures with a third-party donor. These general provisions were supposed to be followed by a new special and detailed law on medically assisted reproductive procedures with third-party donors; however, almost 13 years have passed without result.[18]

The general provisions of Article 441, paragraph 3 of the Civil Code specifically determine that both heterosexual couples and single women have access to medically assisted reproduction with a third-party donor. This provision is not restricted to married couples but specifically refers to `heterosexual` couples (a man and a woman)[19]. Legal doctrine debates whether a `single woman` refers only to women that do not have a partner whatsoever or if it also includes women whose partner has not consented to the medical procedure. Some further provisions, which allow the husband to deny paternal filiation if he had not previously agreed to the medically assisted reproduction with a third-party donor, suggest that this procedure is also available for women who are not technically `single`, but whose partner does not wish to agree to take part in and consent to such procedures.[20] This 'progressive' aspect of Romanian law stops short of recognising a right to take part in medically assisted reproduction with a third-party donor for same-sex couples or for single men.[21] However, without an outright ban, women who are a part of a consensual same-sex couple could use this procedure as 'single' women, with the caveat of lacking any future possibility of establishing some kind of formal parental rights for their same-sex partner in regard to the child born out of this procedure.

The law does not distinguish between male and female third-party donors, so it can be broadly construed to include both types as well as simultaneous donations of both sperm and oocytes for the same receiving

[17] Ibid. pp. 82-87.
[18] Florian, 2022, p. 468; Avram, 2022, p. 309; Nicolescu, 2023, p. 463; Hageanu, 2023, p. 211; Irinescu, 2014, p. 16; Neamț, 2022, pp. 634-635.
[19] Motica, 2021, p. 224; Hageanu, 2023, p. 212.
[20] Florian, 2022, pp. 474-475; Avram, 2022, pp. 310-311; Nicolescu, 2023, p. 468; Irinescu, 2014, pp. 19-21.
[21] Nicolescu, 2023, p. 468.

couple or single woman.[22] Recent legal doctrine has emphasised that these regulations are not applicable if the gametes come only from "inside" the beneficiary couple, even if they receive medical assistance for reproduction and that these provisions are also not applicable to surrogacy.[23]

One aspect that is extensively regulated in this section is the issue of parental consent for medical procedures. Consent must be given by both prospective parents before the procedure, confidentially, in written form, authenticated by a notary; the latter is also required to explain the consequences of their act regarding filiation (Article 442, paragraph 1).[24] Parental consent is without effect in cases of death, initiation of divorce procedures, or *de facto* separation before conception (Article 442, paragraph 2).[25] Any consenting parent can withdraw their consent in writing before conception, even in front of the attending physician.[26]

The lack of detailed regulations on the procedure and conditions of oocyte donation in Romanian law has led to avoidance by local medical professionals of using this technique, preferring to work with foreign fertility clinics in countries where the legislation is more permissive and unequivocal.[27]

A child born through an assisted reproduction procedure with a third-party donor has the same legal status as a child born through natural procreation (Article 446 of the Civil Code).[28]

7. Lower-level Ministerial Regulations on Reproductive Techniques

Regarding the regulation of reproductive techniques other than medically assisted reproduction with a third-party donor, we identified only secondary legislation concerning transplants (such as the Health Minister's Order no. 1763/2007) that tangentially referenced access to these procedures. This secondary legislation only mentions different-sex couples in a (declared) intimate relationship as having access to reproductive cell `transplants` between partners.

Romanian legislation is notably traditional and restrictive regarding

[22] Motica, 2021, p. 224; Florian, 2021, pp. 594-595; Nicolescu, 2023, pp. 464-465.
[23] Nicolescu, 2023, pp. 464-465.
[24] Hageanu, 2023, p. 213.
[25] Ibid. p. 214.
[26] Ibid.
[27] Nicolescu, 2023, p. 465.
[28] Ibid. p. 467.

civil partnerships and same-sex marriages. The Civil Code only recognises the `traditional` marriage between a man and a woman and specifically bans, in Article 277, the recognition in Romania of any effects of a foreign civil partnership of any kind or a foreign same-sex marriage, except for freedom of travel purposes derived from secondary European Union laws (Article 277, paragraph 4). The 2018 European Court of Justice decision in Case No. C-673/16, *Coman and Hamilton*[29], as well as the subsequent and related Romanian Constitutional Court decision no. 534, rendered on July 18th, 2018,[30] have stressed that same-sex marriages contracted in a European Union member state allow spouses to reside for more than 3 months in Romania, according to the requirements of E.U. freedom of travel regulations, if one of them is a third-country national. On 23 May 2023, the European Court of Human Rights found in Case no. 20081/19 *Buhuceanu and others* that Romania had violated the plaintiffs' (21 same-sex couples) rights to family and private life, which was enshrined in Article 8 of the European Convention on Human Rights, by not providing any form of legal status or recognition for same-sex couples.[31]

Publicly funded in-vitro fertilization (IVF) with embryo-transfer (ET) is subject to a national public health subprogramme since 2011[32], with extended funding from 2022 under the renewed Government's Decision no. 1.103/2022 regarding the approval of a national-interest social programme for supporting couples and single persons for raising the birthrate It is restricted to infertile heterosexual couples, defined as couples diagnosed (by a certified specialist M.D.) with an affliction incompatible with natural reproduction or who could not reproduce after one-year of unprotected sexual relations, with no third-party donations allowed for sperm or oocytes, as well as specifically excluding surrogacy in what is perhaps one of the few specific mention of this procedure in Romanian domestic law[33]. To receive public funding for in vitro fertilisation (IVF), both partners must have public health insurance, the woman must be between 20 and 45 years of age (which is a change, since 2022, from the previous 24-40 years age interval),

[29] Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne,* 05 June 2018.

[30] Available in Romanian online at https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_534_2018.pdf (Accessed: 19 October 2024).

[31] *Case of Buhuceanu and Others v. Romania* App. Nos. 20081/19 and 20, 25 September 2023.

[32] Brodeala, 2016, p. 64.

[33] Ibid. pp. 64-65; Florian, 2022, p. 473.

with a body mass index (BMI) between 20-25 and an ovarian reserve determined to be within the normal limits.[34] A 2024 amendment (as part of the modifications brought about by the Government's Decision no. 590/2024) expressly stipulates that at least one member of the infertile couple or the single woman requiring public funding must be a Romanian citizen domiciled in the country.

8. Anonymity in Third-party Donations

All assisted reproductive procedures are considered confidential according to the general provisions of Article 445, paragraph 1 of the Civil Code, which has been interpreted to cover the identity of the parents or single parent, the identity of the child born through these procedures, the identity of the third-party donor and the notarised parental agreement to undergo the procedure—all considered integral parts of the constitutional right to private life.[35] As it is also a medical procedure, assisted reproduction is also covered by the patient's right to confidentiality of medical information, which is stipulated by Article 21 of Law No. 46/2003 on the rights of the patient.[36]

The only specified exceptions to the confidentiality requirements are made in Article 445, paragraph 2 of the Civil Code, for the court-authorised transmission of information to a physician or to competent authorities to prevent serious health harm to children born out of these procedures or to their descendants.[37] Confidentiality can also be curtailed at the request of the descendants of the child born out of this procedure, in order to avoid serious health harms to them or their close ones, according to Article 445, paragraph 3 of the Civil Code. Legal doctrine has interpreted this provision to mean that only children or their descendants have legal standing to demand this kind of information.[38]

All details about ensuring the confidentiality of medically assisted reproduction should have been included, according to Article 447 of the Civil Code, in a special statute on the matter of assisted reproductive procedures with third-party donors, which has yet to be adopted in the 13

[34] Florian, 2022, p. 473.
[35] Florian, 2022, pp. 470-471; Nicolescu, 2023, p. 465; Hageanu, 2023, p. 216.
[36] Florian, 2022, p. 471.
[37] Avram, 2022, p. 312; Nicolescu, 2023, p. 465.
[38] Florian, 2022, p. 471; Nicolescu, 2023, p. 466.

years since the new Code came into force on October 1st, 2011.

The Health Minister's Order on transplants mentions, for transplants of reproductive cells (other than from the recipient's partner), the requirement to register information about the donor's age, health, medical history, medical risks for themselves or others, tests for transmissible diseases (which specifically include HIV, syphilis, hepatitis B or C, Human T-cell Lymphotropic Virus, Chlamydia), supplemental tests depending on risk factors (including malaria, cytomegalovirus, *Trypanosoma cruzi*) and genetic screening for autosomal recessive genes.

Recent legal doctrine has made a subtle distinction between the expressly stated principle of 'confidentiality' and the implied 'anonymity' of this type of reproductive procedure[39], mainly because the latter collides with the child's fundamental human right to know one's origins, which would include at least knowing the generic age, physical characteristics, and medical history of the donor.[40] The right to know one's origin is a fundamental human right that serves as the 'outer' limit of the confidentiality principle of medically assisted reproduction with a third-party donor.[41] Both these principles must endure in a future detailed regulation of medically assisted reproduction, allowing the child reaching a certain age threshold, probably between 14 and 18 years of age, to receive generic and non-identifiable information about the donor (age, physical characteristics and medical history) even in the absence of medical necessity or, in certain cases, to be detailed by the law, to receive even more precise information about the identity of the donor.[42] Nonetheless, a complete cancellation of the confidentiality principle would imperil the availability of third-party donations; therefore, we can presume that not all information about the donor's identity is freely available.

Because specific regulations on information transmission regarding this procedure have not yet been enacted, there are only general regulations on patient information confidentiality and the Civil Code provisions on the court-authorised transmission of information to a physician/authority to prevent serious harm to children or their descendants.

[39] Florian, 2018, pp. 128-129.
[40] Florian, 2022, pp. 470-471; Nicolescu, 2023, p. 466.
[41] Nicolescu, 2023, p. 466; see also ECHR, 2012, pp. 44-45.
[42] Nicolescu, 2021, pp. 693-694.

9. Patient's Rights Regulations and Assisted Reproduction

Although 2003's Law No. 46 on patients' rights does not primarily target beneficiaries of medically assisted reproduction, its broad provisions are highly relevant to these peculiar situations.

First, the statute considers both healthy and sick individuals using health services as patients. Beneficiaries of assisted reproduction receive medical services for diagnostic and curative purposes.

Second, the generous principles embodied in this statute are relevant to assisted reproduction situations: patients have the right to receive the best available medical care (Article 2), to be respected as human beings without discrimination (Article 3), the right to medical information and a second opinion (Articles 4 -12), the requirement of prior and informed patient consent for any medical intervention (Articles 13-20), the right to confidentiality and private life (Articles 21-24)[43], and the right to receive treatment and medical care (Articles 29-36).

In addition to the generally applicable provisions mentioned above, the statute on patients' rights has a brief three-article section specifically on the rights of the patient concerning reproduction, although it is not specifically targeted towards medically assisted reproduction. Article 26 states that a woman's right to life takes precedence when pregnancy represents a major and immediate risk to her life. Patients also have the right to receive information, education and the services necessary for a normal sexual life and healthy reproduction without discrimination (Article 27). Women have a guaranteed right to decide whether to have children, but only without endangering their own lives (Article 28, paragraph 1). All patients have the right to choose the safest methods for healthy reproduction (Article 28, paragraph 2) and to use efficient and risk-free methods for family planning (Article 28, paragraph 3).

10. Issues Regarding the Preservation of Biological Material

Cryopreservation of gametes or embryos is legally allowed in Romania, although it has been specifically excluded from public funding from in vitro fertilisation (IVF) with embryo-transfer (ET) national public health programs since 2017, even in the more generously funded fertility program that started in 2022. Romanian law has no specific conditions for the

[43] Florian, 2022, p. 471.

cryopreservation of gametes or embryos. The only general conditions are the informed consent of the 'donor' and a contract with the authorised medical institution that harvests and deposits the biological material.[44]

This lack of regulation gave rise to serious legal issues when the "ownership" of the frozen embryos was questioned in a court case resulting from a criminal investigation and asset seizures involving a fertility clinic: were they mere material goods or living beings?[45] This case (*Knecht v. Romania,* application no. 10048/10) reached the European Court of Human Rights[46], which rendered a decision in 2012, stating that the case involved the applicant's (mother's) right to private life, not her property rights. A later case (*Nedescu v. Romania,* application no. 70035/10) was decided in 2018 based on the breach of the right to private life by the Romanian authorities' incoherence and unpredictable administrative procedures for giving back frozen embryos to a parental couple after they were seized during a criminal investigation of the fertility clinic.[47]

11. Legal Parenthood as a Consequence of Medically Assisted Reproduction

The gamete 'donor' can only be the parent of a child conceived through assisted reproductive procedures if there is a reproductive cell 'transplant' between partners, which can be construed as the basic in-vitro fertilisation (IVF) or other forms of artificial insemination. Third-party gamete donations, either male or female, do not give rise to legal parenthood because maternal filiation depends solely on giving birth to the child, in a similar manner to `natural` motherhood[48], while the 'fatherhood' of the third-party donor (the 'genetic` father) is specifically excluded by Article 441, paragraph 1 of the Civil Code, which states in broad terms that medically assisted reproduction with a third-party donor does not give rise to any filiation between the child and the donor.[49] A child's filiation cannot be challenged by any person, including the children themselves, for reasons solely pertaining to its medically assisted nature (Article 443, paragraph 1).

[44] Tec, 2017, p. 246.
[45] Ibid., pp. 236-239.
[46] *Case of Knecht v. Romania* App. No. 10048/10, 02 October 2012.
[47] *Case of Nedescu v. Romania* App. No. 70035/10, 16 April 2018.
[48] Florian, 2022, p. 475; Nicolescu, 2023, p. 465; Neamț, 2022, p. 650.
[49] Nicolescu, 2023, pp. 466-467; Hageanu, 2023, p. 212.

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There are no special presumptions of parenthood for the assisted reproductive procedures, the mother is the person giving birth and the father is presumed to be the mother's husband at the time of birth[51], the former husband at the time of conception or the mother's cohabiting partner at the time of conception (the latter presumption is applied only during paternity trials).

The true source of paternal filiation in the case of medically assisted reproduction with a third-party donor is the notarised written consent provided by the mother's husband or consensual partner to undergo the procedure. Paternal filiation can be contested only for the lack of prior notarised written consent from the father or if the pregnancy did not arise from a medically assisted procedure, but because of straightforward intercourse.[52]

A consensual partner who gave his consent to this medically assisted procedure was liable to recognise paternal filiation after birth[53] if there was no intervening marriage between the parents before the child's birth, which would automatically presume the child to be the son of the mother's husband at the time of birth.

12. The Controversies Regarding the Legal Status of Surrogacy in Romania

Surrogacy is not expressly forbidden, but neither is it specifically allowed or regulated in Romania.[54] The provisions that the mother is the one giving birth (irrespective of the genetic relationship), even in medically assisted reproductive procedures[55], and that parental authority cannot be voluntarily transferred to another person, make surrogacy legally difficult.[56]

Article 408, paragraph 1 of the Civil Code makes no distinction in stating that motherhood is always derived from the fact of birth, thus making no special provisions for medically assisted pregnancies, artificial

[50] Nicolescu, 2023, p. 467.
[51] Florian, 2022, p. 475.
[52] Ibid. pp. 476-477; Motica, 2021, p. 228; Nicolescu, 2023, pp. 470-471; Hageanu, 2023, p. 215.
[53] Florian, 2022, pp. 478-480.
[54] Hageanu, 2023, p. 222.
[55] Florian, 2022, p. 469; Nicolescu, 2023, p. 474.
[56] Dobozi, 2013, pp. 64-65.

insemination or in vitro fertilisation.[57] The source of the biological material was not relevant, and genetic testing for motherhood was used only as a proxy for determining who gave birth to a certain child.

Parental authority is usually exercised by both biological parents, who agree on how to "divide" it in practice. However, parental agreement alone cannot voluntarily relinquish parental authority or transfer it to a third party. Only through court-approved adoption can parental authority be permanently transferred from biological to adoptive parents.[58] All other court decisions regarding the exercise of parental rights, even the most dramatic ones concerning the removal of the exercise of parental rights, are essentially temporary in nature and can later be reversed when the parents' situation improves. Thus, there is no legal means to "contractually" transfer parental authority from the birth mother to another woman, even if she is the parent of the child.

Both types of surrogacy, gestational and traditional[59], are equally impeded by legal provisions on birth motherhood and the impossibility of voluntarily relinquishing or transferring parental authority.

One of the 'legal' ways to circumvent the 'scepticism' of Romanian legislation regarding surrogacy is using a simplified adoption where the biological father first voluntarily recognises paternity and then his wife adopts the child, with the consent of the 'surrogate' mother, who was legally registered as the child's biological mother. This option implies that the male gametes come from the father, with a compulsory DNA test to verify paternity and that the surrogate mother agrees to adopt after giving birth without any financial reward.[60]

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

Surrogacy is heavily impeded in all cases, but medical infertility or gestational impediments sometimes bring an undeclared `sympathy` from the courts in trying to overcome the legal hurdles to its recognition. There were a few published court cases where the effects of surrogacy have been

[57] Nicolescu, 2023, p. 474.
[58] Ibid. pp. 478-479.
[59] Predescu, 2020, p. 477; Nicolescu, 2023, p. 472.
[60] Nicolescu, 2023, pp. 478-479.

recognised[61] with circumvented legal reasoning. Paternal filiation (fatherhood) was voluntarily recognised by the genetic parent and maternal filiation (motherhood) was recognised, on demand, as an effect of the so-called *possession of civil status (status by habit and repute)* and genetic filiation. There was also special regard to the provisions of Article 8 of the European Convention of Human Rights about the right to private and family life.[62]

The best known and most discussed domestic case involving surrogacy involves the 2013 decision rendered by the Court of Appeals in Timișoara, sitting on an *appeal on points of law* ('recurs') and reversing the lower courts' decisions by recognising the effects on maternal filiation of an altruistic gestational surrogacy. The woman giving birth was the sister of the intended mother, the latter providing the genetic material but lacking an uterus to carry the pregnancy to term.[63] While the effects on paternal filiation were recognised even by the Lower Court due to the genetic link between the father providing genetic material and the child, the recognition of maternal filiation went against the clear national rule that the mother is giving birth, with maternal genetic links being relevant only insofar as they serve as proof of birth. The court's decision heavily referenced Article 8 and the right to private and family life from the European Convention on Human Rights. This type of "judge-made" law is quite unusual in a statute-based justice system such as the Romanian one, and it cannot sustainably cancel the explicit statutory rules on maternal filiation, being *de lege lata* inextricably tied to birth.

13. Issues Regarding Cross-border Surrogacy for Romanian Parents

Filiation in Romanian private international law, regulated by Book VII, Chapter 2, Section 2 of the Civil Code, is subject to either the law that governs the general effects of parents' marriage for children born or conceived during marriage (Article 2.603), or to the national law of the child at the time of birth for children born out of wedlock (Article 2.605).[64] There are no special provisions for surrogacy in Romanian private

[61] Ibid., pp. 482-485; Brodeala, 2016, pp. 70-73.
[62] Irinescu, 2019, pp. 213-214; Hageanu, 2023, pp. 221-222.
[63] Decision no. 1196/26.09.2013, detailed by Nicolescu, 2023, pp. 482-485; Motica, 2021, pp. 229-230; Avram, 2022, p. 274.
[64] Macovei, 2017, pp. 343-345; Popescu and Oprea, 2023, pp. 463-480.

international law because there are few references to this procedure in domestic legislation.

In cases concerning surrogacy performed abroad or with a foreign element, Romanian courts would probably apply either the national law of the woman giving birth, who would be the surrogate mother if she was single, or possibly the law that governs the general effects of her marriage. If these foreign laws allowed for surrogacy and the voluntary transfer of parental authority from the birth mother to the intended parents due to their previously concluded agreement, we could speculate that only international public order grounds could lead to a refusal to recognise the lawful consequences of these procedures in Romania.

On the other hand, the ECHR case law is quite narrow in scope in cases concerning surrogacy (*Menesson v. France*, application no.56192/11; *Labassee v. France*, application no. 65941/11; *Paradiso and Campanelli v. Italy*, application no. 25358/12; *K.K. and others v. Denmark*, application no. 25212/21), recognising a violation by the state of the right to private or family life only in very qualified circumstances when there were insurmountable obstacles to legal recognition for people already having an established *de facto* family relationship.[65] The Strasbourg Court weighs each time the competing public order and private life interests and takes a holistic approach in examining whether domestic law provides means for legal recognition, considering not only the situation when the child was born or even when it considered the complaint but also whether there was a possibility for subsequent legal recognition.

The European Court of Human Rights found, in a 2019 Grand Chamber advisory opinion on the request of the French Court of Cassation, *"that the child's right to respect for private life within the meaning of Article 8 of the Convention does not require a specific form of legal recognition such as entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests."* [66] A distinguished Romanian legal scholar immediately

[65] Hageanu, 2023, pp. 219-220.

[66] Grand Chamber of the European Court of Human Rights, *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy*

commented on this 2019 E.C.H.R. advisory opinion that it leaves unsettled several similar situations that could be brought to the fore based on the principle of non-discrimination: unmarried intended parents, same-sex couples as intended parents and single women as intended parents.[67]

In Romanian domestic law, a genetic link is required only for paternal filiation (fatherhood) out of wedlock, whereas maternal filiation (motherhood) is intrinsically dependent on giving birth. Paternal filiation (fatherhood) is legally presumed for the current husband at the time of birth or for the former husband at the time of conception, and is presumed to be between 300 and 180 days prior to giving birth. An apparent maternal filiation, even if it is based on a birth certificate, coherent with 'habit' and 'repute', could still be challenged if the listed mother is not the woman having given birth (Article 411, paragraph 3 of the Civil Code). On a domestic birth certificate, a woman who has given birth is automatically listed as the mother of the child, whereas her current or former husband, or the person who voluntarily recognises the child, is listed as the father.

The civil status of a person is subject to national law, according to Article 2.572, paragraph 1 of the Civil Code.[68] Foreign birth certificates are registered in Romania if they concern a person born abroad. The 2022 European Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European certificate of parenthood[69] would have a dramatic effect on the recognition of parenthood in cross-border situations by automatically recognising court decisions and authentic instruments from other Member States about the establishment of parenthood. Due to the very limited grounds for refusing recognition and the severe constraints imposed on the public policy/*ordre*

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arrangement abroad and the intended mother, requested by the French Court of Cassation, request no. P16-2018-001, April 10th, 2019, [Online] Available at https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-6380464-8364383%22]} (Accessed: 19 October 2024); Florian, 2022, pp. 469-470.

[67] Tec, 2019, section 2.1.

[68] Popescu and Oprea, 2023, p. 195.

[69] Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood {SEC(2022) 432 final} - {SWD(2022) 390 final} - {SWD(2022) 391 final} - {SWD(2022) 392 final}, [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF (Accessed: 1 September 2023).

public exception, such a regulation would ensure that any type of parenthood that is recognised even by a single Member State whose law is deemed applicable would be granted automatic recognition in every other Member State, even if the local family law provisions on parenthood of the forum were very different.

14. The Romanian Criminal Law Approach to Assisted Reproduction

Because it is not a regulated procedure, surrogacy could give rise to criminal charges for each of its constituent acts for the participating parties (surrogate mother, gamete, donor and facilitator), either as an author, instigator or accessory.

Healthcare Reform Law no. 95/2006 criminalises donating cells or tissues for material gain (Article 156, paragraph 1), advertising for cell/tissue donation for material gain (Article 156, paragraph 3), and organising or harvesting cells or tissues for transplantation for material gain for either the donor or the person who organises the process (Article 157, paragraph 1).

There were several well-publicised cases involving 'oocyte trafficking', in 2009-2014, some finalised with jail time for the owners, involving private fertility clinics in Bucharest and Timisoara, that were carrying out IVF procedures without proper authorisations, involving 'buying' oocytes from poor women and implanting them using IVF for foreign infertile couples. The most common unlawful practices publicly recorded were the remuneration of gamete (female) donors and selling gametes to couples for IVF procedures.

There have also been attempts to circumvent the restrictions on surrogacy by making the surrogate mother give birth outside medical institutions and then declaring the birth in the special procedure for the late registration of births, which involves a DNA test for the mother. This could allow the genetic mother to be registered by hiding the fact that she did not give birth to the child.[70]

15. Conclusions

In Romania, regulation of human reproductive procedures tends to be scant and general. Although the Civil Code attempted to go further by regulating

[70] Dobozi, 2013, pp. 65-66.

medically assisted reproduction with a third-party donor, while also banning eugenics and genetic manipulation without a therapeutic purpose, the special legislation meant to implement these generous principles is still lagging. Although there are detailed provisions on all types of transplants, including reproductive cell transplants, and firm regulations on patient confidentiality and informed consent for any medical procedure, these lack a specific focus on reproductive issues. Public financing for reproductive procedures is very limited, and the surrounding regulations tend to be very restrictive, with a traditionalist approach to reproductive health.

De lege ferenda, Romania should have a comprehensive statute on assisted reproduction, regulating not only the medically assisted reproduction with a third-party donor, referenced by art. 441-447 of the Civil Code, but also the other types of commonly used medically assisted reproduction techniques such as artificial insemination, all types of in-vitro fertilisation, intracytoplasmic sperm injection, intratubal or intrafallopian gametes transfer[71], gametes and embryo preservation and at least some direct regulations in regard to gestational and traditional surrogacy. This statute should at least cover the areas of parental eligibility, informed consent, allowed and banned techniques, liability, parental filiation, and confidentiality. The difficult political choices implied by the controversies surrounding some types of medically assisted reproduction techniques should not preclude a healthy political and legal debate or the choice of whether to explicitly ban certain techniques or allow them in some clear and predictable conditions.

[71] Motica, 2021, p. 223.

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The Best Interest Principle in the Context of Assisted Reproduction Legislation**

ABSTRACT: This article explores the application of the best interest of the child principle within the context of Assisted Reproductive Technologies (ART). While the principle is well-established in international family law, the rapid advancements in ART - encompassing practices such as in vitro fertilization (IVF), surrogacy, and genetic screening - raise new legal, ethical, and social questions. The article examines how traditional interpretations of the best interest principle must evolve to address the rights and welfare of unborn and intended children conceived through ART. It further investigates the complex relationships between prospective parents, surrogate mothers, donors, and children, and how legal frameworks should adapt to prioritize the welfare of children in ART arrangements. Adopting a multidisciplinary lens that incorporates law, ethics, medicine, and cultural perspectives, this inquiry argues that safeguarding the welfare of children conceived through ART requires a shift from adult-centric regulation to genuinely child-focused policies. It concludes that the future of reproductive law depends on legal frameworks capable of balancing scientific innovation with an uncompromising commitment to the dignity, identity, and well-being of every child—long before birth and throughout their lives.

KEYWORDS: Best Interest of the Child, Assisted Reproductive Technologies (ART), Surrogacy, In Vitro Fertilization (IVF), Child Welfare, Children's Rights, Reproductive Autonomy.

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1. Introduction

The principle of the best interest of the child is a foundational element of international family law and human rights, embedded in various legal frameworks and global agreements. This principle mandates that any decisions or actions related to children must prioritise their welfare and protection. However, the evolving field of assisted reproductive technologies (ART) introduces new complexities, particularly concerning unborn and intended children, those yet to be conceived or born but planned through medical intervention. The application of the best interest principle to these children raises both legal and ethical questions.

Although firmly entrenched in international child protection law, the best interest principle is now being tested by the expanding practice of ART, which pushes the boundaries of its traditional interpretation. This study aims to lay a theoretical foundation for applying the principle in the evolving realm of ART. It examines how existing legal and ethical norms must adapt to the unique demands of ART, where the interests of unborn children have to be factored into arrangements involving donors, biological parents, and surrogates.

In an era where parenthood can begin in a petri dish and family bonds are brokered through science, what does "child welfare" really mean? The notion of safeguarding a child's well-being is evolving quietly yet profoundly amid the rise of assisted reproductive technologies. Once, child welfare primarily concerned protecting a living child from harm and neglect; now it compels us to consider the fate of a child who might still be a frozen embryo, a line of genetic code, or a promise in a surrogacy contract. Even the drafters of international law dimly foresaw this shift – the UN Convention on the Rights of the Child (UNCRC) notably calls for protecting children "before as well as after birth". But implementing that ideal in the age of in vitro fertilization (IVF), gestational surrogacy, and preimplantation genetic screening is anything but straightforward. Time-honored principles like the "best interests of the child" – enshrined in Article 3 of the UNCRC as a primary consideration in all actions concerning children – now face unprecedented questions when applied before a child has even been born. As reproductive medicine pushes the boundaries of creation, the meaning of child welfare itself is quietly being redefined by technology and necessity.

This new era of technological reproduction brings to light a central tension at the heart of law and ethics. On one side stands reproductive autonomy – the freedom of individuals and couples to make intimate decisions about having children, including the use of IVF, surrogacy arrangements, or genetic selection of embryos. This autonomy is grounded in fundamental human rights and personal liberty. Yet on the other side is an equally compelling mandate of child-centered ethics: the insistence that the welfare of the child-to-be must guide and sometimes limit these decisions. International child rights advocates remind us that the child's best interests should remain the paramount consideration in such contexts, just as they are for any child already born. In practice, this means questions increasingly arise about how far would-be parents' choices should be constrained for the sake of the future child. Should an IVF clinic deny treatment if a prospective parent's circumstances might jeopardize the future child's welfare? Can a surrogacy contract or a genetic selection decision be deemed unacceptable because it conflicts with the hypothetical best interests of an intended child? These dilemmas illustrate a clash between adult autonomy and an ethic that places the child's welfare at the center of reproductive decision-making. The collision of these values – the right to reproduce versus the responsibility to safeguard offspring – sets the stage for a nuanced debate that law and society can no longer avoid.

Applying the "best interest of the child" principle to children who do not yet exist presents a conceptual and practical challenge. By definition, an unborn or intended child has no voice, no legal personhood, and an unknowable future – yet decisions in the present may shape that future irrevocably. Law and ethics struggle with this paradox. In some jurisdictions, regulations on assisted reproduction explicitly invoke the future child's interests to justify limits on parental choice, such as criteria for embryo selection or access to fertility treatments. The idea is seductively simple: prevent harm by acting in the unborn child's best interests. However, philosophers have long pointed out the non-identity problem – the notion that a child who will likely have a life worth living cannot be said to be "harmed" by being brought into existence. Indeed, some even argue that non-existent entities cannot hold interests at all, making any appeal to an unborn child's "welfare" inherently fraught. How can it be in a child's best interest to never be born? And if a decision ensures one possible child is never conceived (perhaps to avoid a genetic disease), is that a victory for child welfare or a troubling overreach of state power? The unborn child

occupies a liminal space in legal theory – anticipated as a subject of rights and protection, yet not fully a person before the law. This ambiguity complicates every attempt to weigh the best interests principle in reproductive choices. We are, in a sense, trying to safeguard the well-being of a shadow: a future person who cannot advocate for themselves and whose very existence depends on the outcome of our choices. Balancing such intangibles requires grappling with ethical gray zones and unanswered questions.

Amid these complexities, this article seeks to chart a clearer path forward. It advances a legal and ethical framework for assisted reproduction that is grounded in the bedrock principles of international child rights law, particularly the UNCRC. In the pages that follow, we aim to reconcile the drive for reproductive freedom with an unwavering commitment to child welfare, even at life's earliest stages. Drawing on the Convention's mandate that the child's best interests be a primary consideration, as well as broader international human rights norms, we propose guidelines for decision-making in IVF, surrogacy, and genetic screening that keep the future child in focus without unduly infringing on parental liberties. The discussion synthesizes insights from law, ethics, and emerging medical practice to show how a child-centric approach can be realized for unborn or intended children. In doing so, it strives to fill the current gaps in legislation and policy – offering a coherent framework that anticipates new technological realities while ensuring that the rights and welfare of every child, even before birth, remain paramount. This approach aspires to honor the promise of the "best interest" principle in an era of technological reproduction, guiding us toward a future where innovation in creating families goes hand in hand with an enduring respect for the welfare of the child.

The urgency of this inquiry is heightened by the global rise in ART and the varying degrees of legal oversight across jurisdictions. Technologies such as in vitro fertilisation (IVF), surrogacy, and genetic editing challenge conventional notions of parentage and prenatal care. They also broaden the scope of children's rights by extending protection to the period before conception.

This study seeks to outline a comprehensive framework for applying the best interest principle to safeguard the welfare of intended children in the rapidly advancing field of assisted reproduction. Through an examination of international treaties such as the United Nations Convention on the Rights of the Child (UNCRC) hand relevant case law, this study

provides a legal foundation to address the complex ethical and practical issues raised by ART.

Moreover, the study adopts a multidisciplinary approach—integrating ethical theories, cultural perspectives, and medical practices—to provide a holistic analysis of how the best interest principle can be realised for unborn, intended children. In doing so, it contributes to ongoing debates in international family law and child protection by proposing pathways that anticipate future technological and legal developments. Throughout, the overarching goal is to ensure that the rights and welfare of every child, even before birth, remain of paramount importance.

In the context of family law and reproductive rights, applying the best interest of the child principle, as articulated in the UNCRC, presents unique challenges for unborn children conceived through ART. While the principle is clear and straightforward when applied to born children, its extension to the unborn, particularly those conceived via ART, exposes critical gaps and ambiguities in both legal interpretation and ethical discourse.

The core challenge in applying the best interest of the child principle to unborn children in the context of assisted reproduction lies in the complex nature of ART itself. Technologies, such as IVF, surrogacy, and genetic screening, raise profound questions regarding the rights and welfare of the child prior to birth. Current legal frameworks focus on the rights of prospective parents, whereas the rights of the unborn child are either inadequately addressed or remain vulnerable to interpretation. This oversight can lead to ethical and legal dilemmas, particularly in decisions concerning genetic screening, use of donor gametes, and surrogacy arrangements. Furthermore, the application of this principle is complicated by issues of donor anonymity, the commodification of reproductive elements, and the rights of surrogates, all of which may conflict with the child's best interests. These complexities are exacerbated by the international variability in ART regulations, where different jurisdictions balance parental rights, donor and surrogate rights, and child welfare in diverse ways.

2. The Best Interest of the Child Principle

The term "best interest of the child" is widely recognised; however, its precise definition remains elusive and ambiguous. This fundamental concept, which is crucial in the field of child protection, has a long history

in legal and social discourse. However, its significance was substantially amplified when it was formally embedded into the UNCRC.[1] Despite its pervasive use, there remains a lack of clarity regarding what constitutes the best interest in various contexts, underscoring the need for a more defined and operational understanding of both legal and practical applications. Although essential, this concept suffers from a degree of indeterminacy that challenges its effective implementation, particularly as new societal and technological issues arise.

The UNCRC is more than just a list of children's rights. While it certainly outlines these rights in detail, its impact is much broader. The UNCRC introduced a significant shift in how children are viewed legally and socially. In earlier times, as seen in documents such as the Geneva Declaration of 1924[2] and the Declaration on the Rights of the Child of 1959,[3] children were mainly seen as beings who needed protection and care; they were more like objects of concern than individuals with their own rights.

However, since the UNCRC was adopted in 1989, this perspective has changed dramatically. Children are now recognised as individuals with their own rights. This is not merely a symbolic change. The UNCRC, ratified by nearly every country in the world, legally enforces this view by establishing clear principles and rights for children. This broad acceptance underscores the strength and seriousness of the CRC's approach, firmly placing children as rights-holders in international law. This evolution marks a critical advancement in how we understand and protect children's rights globally.

The new legal status of children as active rights-holders is primarily grounded in two interconnected articles of the UNCRC: Article 3, which focuses on the best interests of the child, and Article 12, which emphasises the child's right to express opinions on all matters affecting them. Together, these articles not only uphold the right of children to have a say in decisions impacting their lives, but also ensure that their best interests are always considered in such decisions. These articles serve dual roles in

[1] UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989 [Online]. Available at: https://www.refworld.org/legal/agreements/unga/1989/en/18815 (Accessed: 6 June 2024).
[2] General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924.
[3] UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959.

the UN CRC. They are recognised as two of the four foundational principles of the Convention, underscoring their importance in the overall framework. However, they are also distinct rights in their own right:

1. The right for a child's best interests to be assessed in any decision or action that affects them.[4]
2. The right for a child to be heard, ensuring that their opinions are not only expressed but also given due consideration.[5]

This dual recognition emphasises not only the procedural aspect of involving children in decisions that affect them but also the substantive right of having their best interests as a primary consideration. This approach represents a significant shift towards acknowledging and respecting children as individuals with agency and rights, aligning legal practices with the evolving understanding of children's roles in the society. These rights, as outlined in Articles 3 and 12 of the UNCRC, are granted not only to individual children but also collectively to all children defined by their age, such as those under 18.

Despite the adoption of the CRC by the United Nations 35 years ago, numerous questions remain regarding the real-world impact of these rights. Specifically, it remains unclear how this recognition of children as rights-holders has influenced national legislation, relevant legal frameworks, and various other contexts. There is an ongoing debate and inquiry into whether these rights are fully integrated and respected at the national level, and how these legal principles are applied in practical settings affecting children. The effectiveness of the CRC in bringing about substantive changes in the treatment and rights of children across different countries continues to be a critical area of research and discussion.

When we delve into the concept of what is best for children in legal terms, it is evident that the phrase "best interest" is relatively new to our legal systems. Previously, the focus was on "the well-being of the child", but this has evolved into what we now know as the "best interest" principle, which is articulated in Article 3 of the UNCRC. This marks it as a thoroughly modern concept within legal discussions—a concept that, despite its importance, has not yet been fully explored in academic circles.

The definition of "best interest" is still somewhat unclear and can be applied in different ways, making it a flexible yet complex tool in legal contexts. It is particularly useful when addressing specific legal challenges

[4] Article 3.
[5] Article 12.

or when refined and expanded through court decisions. However, its broad and adaptable nature implies that careful interpretation is required to ensure that it effectively protects children's welfare.

2.1 The evolution of the Principle of the Best Interest of the Child

The concept of "the best interest of the child" originated long before children were formally recognised as having specific human rights. Originally, the reference to "the best interest" served as a guiding standard for decision-making concerning children, especially in contexts where explicit rights were not yet established. This standard was inherently broad and somewhat vague, yet it provided a fundamental benchmark for evaluating actions and interventions affecting children.

Historically, the principle of best interests has been applied to justify a variety of actions, ranging from mundane to transformative. For instance, in late 19th century England, Dr. Barnardo's advocacy for the transition from residential placements to foster care is a notable example of the principle in action.[6] This move, considered progressive at the time, was predicated on the belief that foster care settings would better serve the developmental and emotional needs of children than institutional environments, illustrating the early application of the best interests standard to promote child welfare. Such historical instances highlight the longstanding reliance on the best interest principle as a crucial consideration in shaping child welfare practices, even in the absence of formally articulated children's rights.

However, the application of the "best interest" principle has not always led to outcomes that would be considered acceptable by today's human rights standards. Throughout several decades in the mid-20th century, measures such as forced adoption and forced migration were often justified under the guise of acting in the best interests of children. These actions, which are now recognised as severe violations of human rights, reflect the darker implications of how broadly and ambiguously the principle can be interpreted. The concept of acting in the "best interest" of the child has, at times, been used to justify actions that are now widely condemned from a human rights perspective. This is particularly evident in historical policies and initiatives that involved the large-scale removal of

[6] Barnardo's UK. (2012). The history of Barnardo's. Retrieved from [Online]. Available at: http://www.barnardos.org.uk:80/what_we_do/who_we_are/history.htm (Accessed: 10 May 2024).

children from their parents for placement in various forms of alternative care, both domestically and abroad, under the guise of offering them "a better life". Reflecting on these instances is crucial, as they are now universally recognised as abuse, although they were once promoted as beneficial for the children involved.

One example of such misguided practice can be found in the history of forced adoption in Australia, as detailed in a Senate committee report in February 2012.[7] This report preceded a national apology for these practices issued by then Prime Minister Julia Gillard in 2013.[8] From the late 1940s to the early 1980s, an estimated 150,000 babies born to unwed mothers were forcibly adopted in Australia. This policy, endorsed by the government and supported by various churches and charities, was justified on the grounds that it was in the children's best interests. The rationale was that children born to individuals deemed to be of low moral standard or living in poverty would have better lives if adopted by infertile couples with a higher social standing.[9]

The Senate report illustrates how the principle of the best interests of the child was exploited to legitimise these practices. It mentions how beliefs regarding social standing and moral criteria were used to manipulate decisions affecting the lives of many, with devastating effects on children and their biological families. An adoptee quoted in the report summarizes the situation succinctly saying, "My true mother was told to give me away because it was in the best interests of the child".[10]

The concept of acting in the "best interest" of children has historically been used to justify the systematic removal of indigenous children from their families in both Australia and the USA. This practice, framed as a means of educating and improving the lives of these children,

[7] Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

[8] Gillard, J., 2013. National Apology for Forced Adoptions. Parliament House, Canberra. Retrieved from [Online]. Available at: http://resources.news.com.au/files/2013/03/21/1226602/365475-aus-file-forced-adoptions-apology.pdf (Accessed: 10 May 2024).

[9] Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

[10] Para 4.7. Australian Senate, Community Affairs References Committee. (2012). Commonwealth contribution to former forced adoption policies and practices. Commonwealth of Australia: Canberra.

was deeply intertwined with broader governmental policies aimed at assimilation in the United States and absorption in Australia. Throughout the 19th and 20th centuries, such policies led to a disturbingly systematic approach to stripping indigenous children of their cultural roots under the guise of protection and improvement.[11]

In the United States, the assimilation agenda evolved post World War II into policies such as termination and relocation. The era of Indian boarding schools continued, but child removal increasingly occurred through social workers who took Native American children from homes they judged as unfit, placing these children in white foster care systems. This practice was rationalised as a necessary measure to integrate children into mainstream society, albeit through methods that stripped them of their cultural identities.[12]

In Australia, similar practices were evident with the removal of Aboriginal children, famously known as part of the Stolen Generations. The child removal efforts were officially portrayed as welfare initiatives aimed at transforming Aboriginal children into "decent and useful members of the community". Under this policy, entities, such as the New South Wales Aborigines Protection Board, were endowed with the authority to take custody of Aboriginal children if deemed in the best interest of the child's moral or physical welfare. This language of benevolence masked the profound harm and cultural dislocation inflicted on the children and their communities.[13] In both countries, these practices, ostensibly aimed at benefiting children, have since been widely recognised as acts of cultural genocide. The legacy of these policies continues to affect indigenous communities deeply, prompting calls for justice, reconciliation, and the re-evaluation of what truly constitutes the "best interest" of a child within such historical and cultural contexts.

A similar strategy was adopted in Switzerland, where Jenisch-travelling communities experienced systematic child removal from their families from the late 1920s to the early 1970s.[14] This practice was rationalised as being for the children's own good. In 1926, the Œuvre des enfants de la grand-route (Action for travelling children), in collaboration with various charitable organisations and backed by the Confederation,

[11] Haskins and Jacobs, 2002.
[12] Marten, 2002, pp. 227–229.
[13] Haskins and Jacobs, 2002.
[14] Cantwell, 2014, pp. 7-9.

initiated the forced removal of approximately 800 Jenisch children. These children were placed with foster families or confined in psychiatric hospitals and even prisons with the stated objective of assimilating them into a sedentary lifestyle. This policy remained unchecked until 1973 when the affected individuals successfully brought these practices to an end with the aid of media exposure.

The underlying belief that such drastic measures were in the best interests of children justified not only the forced removals within Switzerland but also set a precedent that such forced migration could be deemed acceptable. This mindset underscores a broader historical pattern in which state and societal interventions, claimed to benefit children, often resulted in severe disruptions to their lives and cultural identities. The case of Jenisch children in Switzerland is a poignant example of how the notion of best interest can be manipulated to support harmful policies that, in retrospect, are recognised as grave injustices.

The United Kingdom has a particularly troubling history of forced child migration, serving as the origin of some of the most severe cases of long-term displacement of children to other countries. According to an in-depth examination by a Parliamentary Committee, approximately 150,000 children were subjected to this practice during the 19th and 20th centuries.[15] Most (approximately two-thirds) were sent to Canada, whereas the rest were dispatched to Australia, New Zealand, and other British dominions or colonies. Notably, child migration to Canada ceased after the Second World War, but between 1947 and 1967, 7,000–10,000 children were sent to Australia and 549 to New Zealand.[16]

The Committee's report acknowledges that the best interest principle was sometimes cited as a justification for these migrations, although it was likely used to obscure other more dubious motivations. The report outlines that the motivations behind child migration policy were complex and not solely humanitarian. There was indeed a philanthropic intent to rescue children from destitution and neglect in Britain, coupled with a desire to shield them from the moral dangers associated with their home environments, such as having mothers who were prostitutes. However,

[15] UK Parliament Select Committee on Health. (1998). Third Report, para. 11. [Online]. Available at: http://www.publications.parliament.uk/pa/cm199798/cmselect/cmhealth/755/75502.htm (Accessed: 10 May 2024).
[16] Ibid.

economic factors also played a significant role. Child migration relieved Britain of the financial burden of child welfare and was seen as beneficial to receiving countries, where these children were often regarded as future members of a trained workforce. In reality, many of these children were exploited as cheap labour.

Furthermore, the report reveals that it was mostly the charitable and religious organisations that sustained the child migration policy, often driven by the financial necessity of keeping their institutions in the colonies viable. Despite the varied justifications for the practice, the report ultimately describes the policy of forced child migration as "a bad and, in human terms, costly mistake" and draws concerning parallels between these historical practices and modern-day intercountry adoptions. This comparison underscores the enduring need to scrutinise the motives and outcomes of child relocation policies to ensure that they truly serve children's best interests and do not repeat past mistakes.

These historical examples highlight the potential dangers of misusing the best interests principle as a blanket justification for drastic interventions in children's lives. They underline the need for vigilance and a more nuanced approach to ensure that such principles truly serve the welfare of children and do not simply reflect broader societal prejudices or the interests of more powerful groups.

Conversely, the principle of "best interest" has also been employed constructively in legal contexts, particularly in family law. Courts in many countries have used this principle as a critical criterion in deciding custody and access arrangements during parental divorce proceedings. This underscores the principle's intended role in safeguarding children's welfare, ensuring that their needs and well-being are prioritised in legal decisions that profoundly affect their lives.

The significant emphasis placed on the best interest principle in the UNCRC is both undeniable and deeply fascinating. It is somewhat challenging to account for how Article 3 of the UNCRC was comprehensively framed. To understand this, it is essential to review historical texts on children's rights. The 1924 Declaration of the Rights of the Child,[17] also known as the Declaration of Geneva, which is often regarded as the foundational international text concerning children's rights, does not mention the best interest of the child at all.

[17] General Assembly of the League of Nations, Declaration of the Rights of the Child, 26 September 1924.

However, the situation began to evolve with the subsequent 1959 Declaration on the Rights of the Child,[18] which is considered to have enshrined the concept, although in reality, it only explicitly mentions best interests in two specific and relatively narrow contexts. First, the best interests of the child are deemed "the paramount consideration" in the crafting of laws designed to enable the child's development across various dimensions—physical, mental, moral, spiritual, and social.[19] Second, the declaration advises parents and other caregivers to regard the child's best interests as "the guiding principle" in their upbringing efforts.[20]

This perspective, focusing primarily on lawmakers and primary caretakers, shaped Poland's initial proposal for a convention in 1978, which later influenced the development of the UNCRC. This historical context highlights the evolution of the best interest principle from non-existent in early declarations to a cornerstone of contemporary international child rights law, as encapsulated in the UNCRC. The broad, all-encompassing phrasing of Article 3 in the UNCRC marks a significant expansion from these earlier, more limited references, reflecting a growing global consensus on the importance of prioritising children's welfare in all aspects of the society.

The initial draft proposed by Poland for the UNCRC was ultimately rejected as the foundation for the treaty, leading to a significant revision in the following year. This revised proposal unexpectedly set the stage for a substantial expansion of the best interest principle within the UNCRC.[21] It now proposed that the best interests of the child should govern "all actions concerning children", whether these actions were undertaken by parents, guardians, social or state institutions, especially by courts of law and administrative authorities, and it maintained that these interests should be considered as "the paramount consideration".

During the drafting process, this formulation underwent some changes—most notably, the references to parents and guardians were relocated, legislators were explicitly included among the actors responsible for considering children's best interests, and "the paramount" was

[18] UN General Assembly, Declaration of the Rights of the Child, A/RES/1386(XIV), UN General Assembly, 20 November 1959.
[19] Principle 2.
[20] Principle 7.
[21] United Nations Commission on Human Rights (UNCHR), Working Papers of the 34th Session (7 February 1978) E/CN.4/L.1366.

moderated to "a primary consideration". However, the discussions around the profound shift in perspective that this expanded scope represented were surprisingly limited. The drafters came closest to addressing these issues in response to a last-ditch, unsuccessful effort by the Venezuelan delegate, who sought clearer guidelines for implementing this principle in practice.[22] Consequently, the comprehensive scope of Article 3 as it stands today was established, with little debate regarding its broader implications.

The definitive formulation of the principle was solidified in the 1989 UNCRC, specifically within Article 3. This article lays down a foundational principle that defines modern approaches to child welfare and legal standards: the principle of the best interests of the child. According to this principle,

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration".[23]

This wording not only mandates that children's best interests be prioritised in all decisions affecting them, but also broadens the scope of this consideration to include a variety of entities that might influence a child's life. Whether it is through the actions of courts, policies of social welfare institutions, or laws passed by legislative bodies, this principle demands that all such actions uphold the child's best interests as a central concern. By explicitly including both the public and private sectors, Article 3 ensures that the protective umbrella it casts over children is comprehensive, leaving no area where the best interests of the child are not to be considered.

The principle of the best interest of the child is not only a cornerstone of the UNCRC, but has also been incorporated into other significant international legal frameworks. Notably, this principle is articulated in the UN Convention on the Rights of Persons with Disabilities (Article 23 (2)),[24] which underscores the importance of considering children's best interests in contexts involving persons with

[22] OHCHR, Legislative History of the Convention on the Rights of the Child (OHCHR/Save the Children, 2007).

[23] UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, November 1989. vol. 1577, p. 3.

[24] UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, A/RES/61/106, 24 January 2007.

disabilities. Similarly, the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Article 4 (b))[25] emphasises that the best interest of the child should be a primary consideration in intercountry adoption processes.

This concept is a fundamental legal principle used to moderate the extent of authority that adults, whether parents, professionals, teachers, medical doctors, or judges, hold over children. It is predicated on the understanding that adults are tasked with making decisions on behalf of children primarily because children lack the experience and judgment needed to make such decisions themselves. This principle serves as a crucial check on adult authority, ensuring that decisions impacting children prioritise their welfare and rights above all else. By mandating that children's best interests are at the forefront of all relevant decision-making processes, this principle advocates a protective and respectful approach to handling matters affecting the most vulnerable population.

It is clear from exploring the evolution of the principle that it has been extensively developed even beyond its initial articulation in the UNCRC. This development is evidenced by a range of supplementary instruments associated with the Committee on the Rights of the Child. These include various General Comments, Days of General Discussion, and Protocols to the UNCRC that collectively enhance and elaborate the application of the best interest principle. Notably, General Comment No. 14 stands out as a pivotal document in this regard.[26]

General Comments are crafted by the CRC Committee to provide clarity on the normative contents of specific rights under the Convention or to address significant themes pertinent to the Convention's framework. These documents offer an interpretation and detailed analysis of particular articles of the CRC, focusing on both the rights stipulated and the measures necessary for their implementation. As authoritative interpretations, the General Comments set forth the expectations for State parties as they work towards fulfilling the obligations imposed by the CRC.

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[25] Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 33, Hague Conference on Private International Law, 29 May 1993

[26] Committee on the Rights of the Child (2013) General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). CRC/C/GC/14. United Nations.

General Comment No. 14, adopted during the Committee's 62nd session, specifically addresses the right of the child to have his or her best interests taken as a primary consideration, as prescribed in Article 3 of the CRC. The Comment defines the steps required for the consideration of the child's best interests in judicial and administrative decisions and in the broader context of law. General Comment No. 14 provides a structured framework for assessing and determining what constitutes the best interest of the child. It intentionally refrains from prescribing fixed solutions, recognising that what may be deemed in the best interest of a child can vary widely depending on the specific circumstances and over time. The primary aim of General Comment No. 14 is to enhance the understanding and application of the right of children to have their best interests assessed and taken as a primary or, in some cases, the paramount consideration. This objective seeks to create a change in attitudes towards recognising children as active holders of rights.

2.2 The Best Interest Principle in Different Environments

When assessing the best interests of the child, it is crucial to consider the full spectrum of the child's rights. Beyond the standards set by the UNCRC, there are additional legal frameworks at the international, regional, and national levels that may influence such determinations. According to Article 41 of the CRC, whenever a discrepancy exists between standards, the higher standard must always prevail.

Relevant international and regional instruments include general human rights, international humanitarian law, refugee law, and other child-specific conventions. Moreover, non-binding guidelines, often referred to as soft law, such as the General Comments issued by the Committee on the Rights of the Child and conclusions from the UNHCR Executive Committee (Conclusion No. 107),[27] serve as important interpretative tools that help in understanding and applying these principles.

At the national level, laws and court decisions provide tailored guidance on these general principles. Historically, within domestic legal frameworks, the principle of the best interests of the child has often been specifically applied to matters such as custody disputes and adoption proceedings. However, the Committee on the Rights of the Child has vigorously advocated the integration of this principle, along with other

[27] Executive Committee of the High Commissioner's Programme, Conclusion on Children at Risk No. 107 (LVIII) - 2007, No. 107 (LVIII), 5 October 2007.

foundational principles of the CRC, into all relevant areas of domestic legislation such as education, health, and justice. The Committee emphasises that these principles should be implemented in such a manner that they are justiciable, meaning they can be directly invoked and enforced in courts.[28]

Furthermore, the Committee has pointed out that proper adherence to the CRC requires a comprehensive review of existing national legislation and administrative procedures. This review aims to identify and amend any laws and regulations that do not adequately reflect the best interest principle. This process ensures that all legal and administrative frameworks are aligned with the intent and objectives of the CRC.

Since its adoption in 1989, the principle of the best interests of the child has been a cornerstone in numerous legal instruments related to children's rights within the Council of Europe. This principle is prominently featured in several key conventions, including the European Convention on the Exercise of Children's Rights,[29] European Convention on the Adoption of Children,[30] and Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.[31] These documents underscore the Council's commitment to integrate this principle across various aspects of children's rights.

Moreover, various bodies within the Council of Europe that focus on issues related to children's rights have acknowledged and emphasised the importance of considering the best interests of the child in their deliberations and actions. A notable example is the work of the Venice Commission, which has actively examined how children's rights are represented in the constitutions of member states. This review was aimed at assessing both the direct and indirect influences of the rights outlined in the UNCRC. Following its review, the Venice Commission went a step further by recommending that member states enshrine the principle of the

[28] UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

[29] Council of Europe, European Convention on the Exercise of Children's Rights, ETS 160, 25 January 1996.

[30] Council of Europe, European Convention on the Adoption of Children (Revised), Council of Europe, 2008, (CETS No. 202).

[31] Council of Europe, Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse, CETS No.: 201, 12 July 2007.

best interests of the child in their national constitutions, providing a strong constitutional guarantee for this fundamental principle.

The principle of the best interests of the child has fulfilled several critical functions within the framework of the Council of Europe's efforts to protect and promote children's rights. First, it serves to integrate various rights associated with children, ensuring that these rights are considered holistically rather than in isolation. Second, it helps in balancing conflicting rights, providing a framework to navigate situations where different rights might intersect or come into conflict. Last, it guides the implementation of these rights, ensuring that all measures and actions taken in respect of children's rights are aligned with their best interests.

Moreover, the principle of the best interests of the child serves several crucial functions within the legal framework of children's rights, the primary function of which is the integration of various rights. This principle acts as a tool to bolster and reinforce existing children's rights by providing a broader context within which these rights can be interpreted and applied. A notable illustration of this is the approach to prohibiting corporal punishment. While the UNCRC itself does not explicitly ban corporal punishment, the prohibition has been effectively established by combining Article 19 of the UNCRC, which calls for protection against all forms of violence, with the principle of the best interests of the child. This synthesis has empowered the Council of Europe to advocate strongly against corporal punishment, leading to its full prohibition in more than half of the member states. This progress underscores the role of the best interest principle in extending and enhancing the protective measures afforded to children under international law.

The Council of Europe Commissioner for Human Rights frequently employs the best-interest principle to strengthen and clarify existing rights. Through his recommendations, the Commissioner provides practical guidance on how the principle can be operationalised to genuinely serve children's best interests. This guidance is particularly vital in situations involving migrant children, where national laws and procedures may not sufficiently safeguard their welfare. By emphasising that children should be treated primarily as children, regardless of their migration status, the Commissioner advocates for all actions and decisions by the state authorities to prioritise the best interests of these vulnerable groups. Furthermore, he actively campaigned against the forced return of children to countries where their safety and well-being could not be guaranteed. In

his efforts to address statelessness among children, the Commissioner leveraged the best interest principle, arguing that it is clearly in a child's best interests to possess citizenship from birth. He emphasises the responsibility of states to ensure that no child born within their borders is left stateless, illustrating how the best interest principle can guide policy and legislative changes to protect and promote children's rights effectively.[32] These applications of the best interest principle demonstrate its broad scope and pivotal role in shaping policies that profoundly impact children's lives across Europe.

The second critical function of the best interest principle is its role in balancing conflicting rights. This task is particularly common in judicial settings where rights may appear to be at odds with one another, a challenge frequently addressed by the European Court of Human Rights. Although the European Convention on Human Rights[33] does not explicitly refer to the best interests of the child, the Court has consistently interpreted the Convention as aligning with Article 3 of the UNCRC. This approach underscores the Court's commitment to prioritising the best interest of the child as a fundamental consideration in its deliberations.

The Court has recognised the international consensus that the best interest of the child should be paramount in all decisions affecting children. In practice, this often involves adjudicating between the competing interests of children, their parents, and broader public order considerations. For example, in family law cases, the Court might need to weigh the benefit to a child of maintaining family ties against the potential benefits of growing up outside the family environment. In such instances, the best interest principle provides crucial guidance for navigating these complex scenarios and achieving a balance that most effectively serves the child's welfare.

Similarly, the European Committee of Social Rights frequently encounters situations where it must balance conflicting rights involving children. This Committee systematically incorporates the best interest principle into its evaluations of children's rights issues. A common application involves assessing restrictions on parental rights, where the

[32] Council of Europe Commissioner for Human Rights. (2013). Governments should act in the best interest of stateless children. Human Rights Comment.

[33] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950.

Committee must determine whether such limitations are justifiably necessary to protect the child's best interests and facilitate family rehabilitation. In these contexts, the best interest principle is indispensable because it provides a structured framework for making decisions that might otherwise seem intractable.

Overall, the best interest principle not only helps reinforce and interpret children's rights but also plays a crucial role in mediating between competing rights. This dual function is essential to ensure that children's rights are protected in a balanced and thoughtful manner that respects the dynamics of individual cases and the broader implications for rights jurisprudence.

The third key function of the best interest principle is to guide the effective implementation of rights. This principle serves as a vital directive in the practical application of existing legal and policy measures. Various bodies within the Council of Europe frequently invoke this principle, particularly in contexts concerning the rights of children.

An illustrative example of this principle is the activities of the Committee for the Prevention of Torture and Inhuman, or Degrading Treatment or Punishment (CPT). The CPT conducts visits to detention centres to assess conditions, particularly focusing on the circumstances under which children are deprived of their liberty. Through numerous country reports, the CPT has underscored the critical need to ensure that children in vulnerable situations are housed in environments that respect their dignity and developmental needs. Moreover, the CPT has stressed the importance of maintaining familial contacts for children in detention. In its standards, the CPT explicitly refers to the best interests principle, advocating that considering the best interests of the child, the detention of a child can rarely be justified and that it certainly cannot be motivated by a lack of residence status.

The principle of best interests of the child has significantly enriched the work of the Council of Europe, providing a framework for promoting child-centric policies and practices. The Council encourages its member states to apply this principle thoughtfully and balance it within the broader context of human rights. However, owing to the abstract nature of the best interests principle and its adaptability to diverse situations, it is challenging to pin down a definitive, one-size-fits-all definition. This flexibility, while valuable, makes it imperative that applications of the principle are carefully tailored to the specific circumstances of each case,

ensuring that the outcomes genuinely serve the best interests of the children involved.

When the European Union adopted its Charter of Fundamental Rights,[34] it aimed to integrate the principles of the UNCRC, focusing on the best interests of the child. This focus is clearly articulated in Article 24 of the Charter, which mandates that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". This language mirrors Article 3 of the UNCRC. Additionally, Article 24 of the Charter asserts that "every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests".

The principle that a child's best interests should be the primary consideration is also deeply embedded in various pieces of EU legislation, highlighting its widespread application across legal areas. Notable examples include the following.

- The Brussels IIbis Regulation,[35] which addresses jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility.
- Directive 2011/36/EU on trafficking in human beings[36] and Directive 2011/93/EU combating the sexual abuse and sexual exploitation of children and child pornography,[37] both of which stress the necessity to prioritize children's best interests to effectively protect them from severe crimes.

[34] European Union, Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012.

[35] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[36] European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, 15 April 2011.

[37] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

- Directive 2012/29/EU, which establishes minimum standards on the rights, support, and protection of victims of crime,[38] mandates that assessments of the child's best interests be tailored to the individual needs and circumstances of each child.

Furthermore, even in areas where children's issues are not the primary focus, the importance of the best interest principle is acknowledged. For instance, Directive 2008/52/EC on mediation in civil and commercial matters[39] ensures the confidentiality of mediation, except when disclosure is necessary to protect the best interests of children.

The Dublin III Regulation 604/2013[40] exemplifies how the EU integrates the best interest principle in specific contexts such as asylum procedures, detailing criteria for assessing a child's best interests. These criteria include possibilities for family reunification, the child's overall well-being and developmental needs, the child's views regarding age and maturity, and safety and security considerations, particularly concerning risks of trafficking.

Cross-border family conflicts represent a significant and complex issue within the European Union, attracting considerable attention from both the European Commission and Parliament owing to the numerous queries and complaints they receive annually. These conflicts directly impact the welfare of thousands of children across the EU each year, often entangling them in prolonged legal battles. In some distressing instances, these disputes can escalate to parental abductions, further complicating the situation.

The Brussels IIa Regulation serves as a fundamental piece of legislation in European family law that addresses these intricate issues. Having been in effect for over 20 years, this regulation is pivotal in establishing a cohesive judicial area within the EU. Central to the Brussels IIa Regulation is the principle of the best interests of the child, which is

[38] European Union: Council of the European Union, Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, L 315/57, 14 November 2012.

[39] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters in OJ L 136.

[40] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

consistently prioritised throughout its provisions, especially in cases concerning the return of abducted children. This principle is not merely a guideline but is integrated into the fabric of regulation. This is explicitly mentioned in the regulation's recitals and permeates numerous specific provisions ensuring that all judicial decisions under the regulation consider what is most beneficial for the child. This approach underscores the EU's commitment to safeguarding children's rights and welfare in all legal proceedings, particularly those that are sensitive and potentially traumatic, such as cross-border family disputes. The ongoing application of the Brussels IIa Regulation reflects a broader effort within the EU to protect children and prioritise their best interests in all legal contexts, particularly in scenarios that cross national borders and involve conflicting parental rights.

This extensive integration demonstrates the EU's commitment to ensure that the best interests of the child are not only a fundamental legal principle but also a practical guide in policy-making and legislative frameworks across the Union.

The principle of the best interests of the child has been widely adopted and incorporated into national legislations across various jurisdictions in the EU, underscoring its fundamental role in legal systems worldwide. In several countries, this principle is embedded directly in the constitution (examples include Belgium, Hungary, Slovenia, and Spain) highlighting its foundational importance in national legal frameworks. Additionally, numerous countries have integrated the principle into specific legislation, with Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Greece, France, Italy, Lithuania, Luxembourg, Malta, Slovenia, Slovakia, Spain, and Sweden acknowledging the best interests of the child as a guiding force in decision-making processes related to children.

However, the implementation and emphasis of this principle can vary significantly. In some cases, such as Belgium and Italy, the legislation acknowledges the need to consider the child's best interests but stops short of mandating that these interests be the primary or paramount consideration. This distinction is crucial because the weight given to the child's best interests can influence the outcome of legal proceedings and the extent to which children's rights are protected.

Moreover, the application of the best interests principle is not uniformly distributed across all areas of law within these jurisdictions. In

some countries, explicit references to this principle are primarily found in civil judicial procedural codes rather than administrative judicial procedural codes. Often, these references concentrate on sector-specific legislation, particularly concerning family disputes and child protection, as observed in Malta. This application suggests a more limited scope of the principle's influence, potentially overlooking its relevance in broader administrative or legal contexts.

In the context of implementing the principle of the best interests of children, this approach varies significantly across European Union member states. Notably, this principle has not been formally enshrined in national legislation in the three member states of Cyprus, Estonia, and Ireland. This absence indicates a gap in the statutory framework, which could affect the uniform application of the principle across various legal proceedings involving children.

Conversely, a few jurisdictions such as Austria and Finland have taken proactive steps by developing specific criteria within their legislation to aid judges in assessing what constitutes the best interests of the child in particular types of legal proceedings. These criteria are intended to provide clear and actionable guidance to ensure that decisions reflect the welfare and rights of the child consistently and effectively.

In other member states, including Belgium, Czech Republic, Denmark, Greece, Spain, Luxembourg, Latvia, the Netherlands, Poland, and Slovenia, the approach to determining the best interests of the child is less prescriptive. These countries typically rely on looser guidelines or parameters, often derived from the case law of higher courts, though they are sometimes supplemented by legislation. This approach allows for more interpretive flexibility but may result in less consistency in how children's best interests are considered across different cases.

Furthermore, in Belgium, Croatia, Cyprus, Estonia, France, Lithuania, Portugal, and Sweden, no specific criteria or guidelines have been established to guide the application of the best interest principle. Particularly in Sweden, this lack of prescribed criteria is a deliberate choice by the government, which argues that the authorities and courts should retain the flexibility to determine what best serves the child's interests in each individual case. This approach is predicated on the belief that case-by-case discretion allows for tailored solutions that are most suitable for the unique circumstances of each child.

Given these variations, there is a compelling need to advocate for a more comprehensive application of the best interest principle across all legal areas, ensuring that the welfare of the child is a primary consideration in all cases, and not just those explicitly related to family or child protection issues. Expanding the scope and application of this principle would better safeguard children's rights and wellbeing across the entire spectrum of legal and administrative actions.

3. Assisted Reproductive Technologies and the Best Interest Principle

In my discussions on family law with students, I always stress that the child must remain at the centre of all considerations. This perspective reflects a significant shift in how we approach issues such as adoption. The core objective of adoption should not be fulfilling the desires of childless couples but providing a stable, loving family environment for children. However, this principle has often been overlooked in today's world. Similarly, while the use of ART arises from valid and heartfelt desires to build families, the children are unfortunately often overlooked when discussing these technologies.

Amid the rapid evolution of ART, a pressing question arises: Are we fully accounting for the rights of children conceived and born through these technologies? The best interest of the child, as stipulated in the UNCRC, demands that in all matters affecting children, whether undertaken by public or private institutions, courts, or legislative bodies, the child's welfare must be a primary concern.

As our capabilities in reproductive technologies advance, it is essential to reflect on whether our ethical standards and legal frameworks are keeping pace. We must critically examine whether current ART practices and surrogacy effectively safeguard the rights and best interests of the resulting children. These young individuals deserve to have their rights acknowledged and their best interests upheld in a process that fundamentally shapes their lives and future.

The legal ramifications of ART are as complex and varied as the technologies themselves, presenting unique challenges within family law. A fundamental issue arises in determining legal parentage, which traditional laws typically link to genetic relationships or the act of childbirth. However, ART disrupts these conventional bases by decoupling the biological aspects of conception from the gestational role, leading to

intricate legal questions. For instance, the legal system must address whether egg or sperm donors should retain any parental rights or bear responsibilities, and how to define the parental rights of non-biological, intended parents in surrogacy agreements. The responses to these questions differ widely across jurisdictions and reflect diverse societal values and legal standards.

Another significant challenge involves safeguarding the rights and welfare of children born through ART. The principle of the best interest of the child, which is a foundational element of family law, requires that all decisions affecting children prioritise their well-being and development. Within the context of ART, this principle is particularly challenging to navigate. Key issues include the anonymity of donors, the child's right to know their biological origins and ensuring a stable family environment for the child. These considerations raise complex questions regarding the identity, privacy, and emotional and psychological well-being of children born via these technologies.

As ART continues to evolve and become more integrated into the society, it is crucial for legal systems to adapt and refine their approaches. This adaptation involves not only redefining traditional concepts such as parentage but also developing comprehensive regulations that protect the interests of all parties involved, especially children born from these technologies. The goal must be to harmonise the incredible possibilities offered by ART with ethical standards and legal protections that uphold the dignity and rights of individuals and families.

In the drafting of the UNCRC, the question whether unborn children are included in the definition of the child or not was left unanswered, which we know was a compromise solution which ensured that the UNCRC became the most widely ratified convention in the world.

The application of the best interest of the child principle is not without its challenges. One of the main difficulties lies in its subjective nature: what is in the best interest of one child may not necessarily be in the best interest of another. This subjective evaluation requires a nuanced understanding of each individual child's circumstances, needs, and background. Moreover, the principle must be balanced with other legal rights and societal values. In cases of international adoption or cross-border custody disputes, for instance, the principle may intersect with issues of cultural heritage and national identity, adding layers of complexity to legal decisions.

The ethical welfare of potential children resulting from infertility treatments is a critical aspect of policy-making for ART. Globally, legislative frameworks vary significantly in how they prioritise the welfare of children who are not yet conceived but may be born as a result of these technologies. The level of importance placed on this issue reflects the differing ethical priorities and legal standards across countries.

In some jurisdictions, such as the Government of South Australia[41] and the Government of Victoria,[42] the interests of any child potentially born from ART procedures are considered to be "paramount", that is, they are the most important consideration in the decision-making process surrounding the use of ART. This designation underscores the commitment to ensure that the rights and well-being of the future child are at the forefront of all medical and ethical considerations.[43]

Conversely, in places such as Canada, the Parliament stipulates that these interests should not be "given priority".[44] While this still places significant emphasis on the welfare of the potential child, it suggests a slightly more balanced approach, wherein the needs and rights of the child are weighed alongside other factors.

Meanwhile, other regions adopt a more cautious approach. The Government of Western Australia, for example, has decreed that the interests of any potential child need only receive "proper consideration".[45] This phrasing implies a requirement for a thoughtful assessment of the

[41] Government of South Australia. (1988). Assisted Reproductive Treatment Act. [Online]. Available at: http://www.legislation.sa.gov.au/LZ/C/A/Assisted%20Reproductive%20Treatment%20Act%201988.aspx (Accessed: 10 May 2024).

[42] Government of Victoria. (2008). Assisted Reproductive Treatment Act, No 76. [Online]. Available at: http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3ADFC9FBA2C0F526CA25751C0020E494/$FILE/08-076a.pdf (Accessed: 10 May 2024).

[43] Lacey, Peterson and McMillan, 2015, pp. 616–624.

[44] Parliament of Canada. (2004). Assisted Human Reproduction Act. Retrieved from. [Online]. Available at: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c6&Parl=37&Ses=3 (Accessed: 10 May 2024).

[45] Government of Western Australia. (1991). Human Reproductive Technology Act. [Online]. Available at: http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_435_homepage.html (Accessed: 2 May 2024).

child's future welfare, although it may not necessarily override other considerations. Similarly, in the United Kingdom, legislation mandates that ART treatments should not be provided unless the welfare of any potential child has been considered, ensuring that such treatments are contingent on a positive assessment of how they might impact the child.[46]

These variations highlight the complex ethical questions that surround ART. They reflect a broad recognition of the need to consider the future welfare of children born as a result of such technologies, although the degree of emphasis can differ significantly. This diversity in legislative approaches necessitates ongoing dialogue and international collaboration to foster policies that adequately protect the interests of children born through ART, while balancing the rights and needs of parents-to-be.

Thus, we see that the best interest principle is mentioned in some form in most ART regulations, but when we take a deeper look at these texts, the best interest principle is very much at the surface level, and the texts of these regulations are completely adult-centric—it is not the best interest of the child at the forefront, but the reproductive rights of the adults.

While the concept of considering a child's interests before conception may seem novel to many, the notion of child welfare is well-established in healthcare settings. Traditionally, child welfare principles suggest that prospective parents undergo screening similar to what is required for adoption and fostering. This idea stems from the belief that assessing the suitability of individuals to become parents can help safeguard the future welfare of children conceived through such means. However, the practice of screening potential parents for their fitness to raise a child before providing access to medical treatments, such as ART, has sparked significant debate. Some ART physicians and patient advocacy groups argue that such screening is inherently unfair and discriminates against individuals or couples who wish to become parents.[47]

Furthermore, there is an ongoing debate regarding the role of healthcare professionals in the screening process, which raises ethical concerns regarding the consistency and fairness of the application of screening procedures.

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[46] Government of United Kingdom. (2008). Human Fertilisation and Embryology Act, c.22. [Online]. Available at: http://www.hfea.gov.uk/134.html (Accessed: 2 May 2024).
[47] Baker and McBain, 2005.

Additional concerns revolve around the boundaries of such screenings. Questions persist regarding the extent of screening that should be authorised and the limits of discretion allowed by clinicians. These issues highlight the delicate balance between protecting potential children and respecting the rights of individuals seeking ART.

Overall, the debate on the preconception consideration of a child's welfare in ART settings involves complex ethical, legal, and social dimensions. It challenges healthcare providers, lawmakers, and the society to carefully weigh the implications of such policies and develop guidelines that are both ethically sound and respectful of individuals' reproductive rights.

The intersection of ART and legal principle of the best interest of the child presents unique challenges and considerations. ART, which encompasses practices such as in vitro fertilisation, surrogacy, and gamete donation, raises complex questions about parentage, identity, and welfare that are central to understanding and applying this principle. This principle, traditionally applied to safeguard the rights and welfare of existing children, encounters unique dilemmas when extended to the context of ART, in which the child in question is yet to be conceived.

A critical question arises regarding the application of the best-interests framework to potential future children. The principle is traditionally meant for children who already exist, and not for determining whether allowing conception would align with the best interests of any resulting child. This means that we need to differentiate between applying the principle in family law and family autonomy and in reproductive law and reproductive autonomy.[48] This issue is further complicated by the unknowns surrounding the future child's health and mental condition, making it difficult to assess their best interests in advance. For example, when we look at surrogacy, the best-interest principle becomes even more nuanced as we have to balance the interests of the child, surrogate mother, and prospective parents, with an emphasis on the child's right to know their genetic origin and the principle of human dignity for the surrogate mother.[49]

Another significant challenge is the lack of reliable predictive criteria for inadequate parenting. The current methods do not provide a guarantee to ensure the child's best interests as there is no foolproof way

[48] Cohen, 2011, p. 96.
[49] Henriksson, 2016.

to predict the future parenting capabilities of individuals. The complexities of surrogacy agreements, including the logic of donation and primary interest of the child, necessitate a careful and ethical approach to ensure the child's welfare.[50]

We must also emphasise the distinction between reproductive and parental rights in ART. While adults have reproductive rights, the future child's welfare, as per the best-interest principle, must be assessed primarily through the parents' ability to ensure their well-being. This perspective aligns with the observations of G. Stanić, who discusses the challenges of cross-border reproductive medicine in the European Union, noting the paramount importance of the child's best interest in contemporary family law.[51] As T. Barzó argues often psychological expertise can help make the right decision in the child's best interests,[52] this is of course not an option when we are talking about future children.

The most obvious facet of the best interest principle focuses on the physical needs of the child, including nutrition and care. While intended parents opting for surrogacy or ART often have the financial means to support these needs, it is crucial to understand that financial resources alone do not determine parental capability. Furthermore, the emotional well-being of the child deserves equal attention. Every child deserves to grow up in a nurturing and loving environment that supports their future development and education. This reasoning is used by many states that restrict or outright prohibit surrogacy based on the child's best interest.[53]

The child's right to know about their origins, including their genetic ties, is an integral aspect of their identity and must be considered when utilising ART. This principle of acknowledging the child's interest in a genetic tie is critical for their sense of self and connection to their heritage.[54]

For instance, in the context of embryo donation, the best interest of the child principle takes on nuanced dimensions. Genetic connections play a significant role in establishing kinship ties between donors, recipients, and the offspring.[55] The ethical responsibility towards the child's welfare

[50] Chini, 2016.
[51] Stanić, 2015, pp. 5-23.
[52] Barzó, 2022, pp. 105-146.
[53] Bosch, 2018.
[54] Vij, 2015.
[55] Goedeke, 2014.

in decisions involving embryo donation cannot be forgotten, and the best interest of the child has to be interpreted broadly, not only as a matter of physical well-being, but also of emotional and psychological integrity. The ethical considerations in embryo donation are vast, ranging from informed consent and confidentiality to the financial aspects of the process. To ensure the ethical dimensions of embryo donation, it is imperative to respect the autonomy of donors and recipients, ensure informed decision-making, and maintain confidentiality. A critical aspect here is the right of the child to know their biological origin, balancing this with the principles of justice and respect for autonomy.[56] Consenting processes in embryo donation also play a crucial role in safeguarding the interests of all parties involved, including the potential child. An aspect of consent is the consent to the disposition of surplus embryos, which highlights the decisional conflicts arising from the moral status of embryos and evolving personal values.[57]

The case of surrogacy and its implications for child welfare further illustrates the complexities involved in applying the best interest of the child principle.[58] Surrogacy legislation faces the intricate task of balancing the best interests of the child born via surrogacy with the rights and expectations of the surrogate and intended parents. The challenge lies in ensuring that the child's welfare remains the paramount consideration in all aspects of surrogacy, a goal that requires careful legislative and ethical considerations. Various surrogacy models have addressed child welfare issues in varying ways. Studies have indicated a correlation between the level of protection afforded to intended parents and the focus on the child's best interests.[59] In certain jurisdictions such as California, surrogacy laws heavily emphasise the fulfilment of contractual obligations, potentially at the expense of the child's welfare. This approach may lead to scenarios wherein despite the intended parents' inability to provide adequate care, legal parenthood is still established in their favour. This model raises concerns regarding prioritising contractual rights over the child's well-being.[60] The enforcement of surrogacy regulations presents unique challenges. For example, the UK's emphasis on the best interest

[56] Farin, Yousef, Ehsan and Mahmoud, 2014, pp. 153-182.
[57] Khorshid and Alvero, 2020.
[58] Tan, 2019.
[59] Trowse, 2013, pp. 199-209.
[60] Neofytou, 2018.

principle in practice may render legislative regulations ineffective. This can lead to a situation where parties involved in surrogacy arrangements bypass legal rules, assuming that the court will transfer legal parenthood to the intended parents based on the best interest principle. Such practices highlight the difficulty in striking a balance between protecting the child's welfare and ensuring the enforceability of surrogacy laws.[61]

Creating balanced surrogacy laws requires addressing the competing interests of all parties involved: the surrogate, intended parents, and child born to the surrogate. Legislation must be crafted to discourage misconduct and abuse in surrogacy arrangements, ensuring the protection of all parties, especially the child. This includes considering the legal and ethical implications of surrogacy arrangements. The international surrogacy context adds another layer of complexity. Different countries have varying stances on surrogacy, influencing the legal recognition of these arrangements and the protection of the child's rights and interests.

The application of Preimplantation Genetic Diagnosis (PGD) raises ethical objections and poses challenges to the best interest of the child principle.[62] This technique, which involves genetic profiling of embryos before implantation, has ignited debates regarding its implications for the welfare of children conceived through this method. One of the critical issues is the potential for PGD to be used for non-medical purposes, such as sex selection for family balancing or screening for traits unrelated to medical necessity, such as intelligence or beauty. This aspect raises ethical dilemmas regarding the potential commodification of human life and the societal implications of designer babies. The ethical concerns extend to the rights of the child, particularly concerning their welfare and the potential impact of selective reproduction on their future quality of life.[63] Another controversial aspect of PGD is the practice of selecting for disability. This discussion brings into focus the complex interplay among parental autonomy, the rights of the child, societal values surrounding disability, and genetic selection.[64]

The application of the best interest principle in ART extends beyond simply prioritising the interests of children over those of adults; it requires a nuanced balancing of the needs of all involved. While there are situations

[61] Norrie, 2016, p. 29.
[62] Bączyk and Rozwadowska, 2017.
[63] Øivind, 2014.
[64] Elliston, 2012.

in which the welfare of the child must take precedence, the goal should be to find a compromise that reasonably accommodates the interests of all parties, prospective parents, surrogate mothers, and the children themselves. This balancing act is particularly critical in surrogacy and other ART practices, where the rights and welfare of various stakeholders are intricately connected. In ART cases, applying the best interest principle necessitates carefully weighing technological possibilities against ethical considerations, always with the child's welfare as the focal point. The principle serves as an ethical compass, guiding decisions to ensure that the child's physical, emotional, and psychological well-being is prioritised in a world that is increasingly shaped by advanced reproductive technologies.

4. Conclusion

Advancements in assisted reproductive technologies have opened remarkable pathways to parenthood, yet they also force us to confront profound questions about the rights and welfare of the children born through these methods. This paper's exploration of the best interest of the child principle in the ART context reaffirms that while reproductive autonomy is a cherished value, it cannot eclipse our ethical and legal duty to the child. From IVF to surrogacy, each innovation has illustrated the tension between would-be parents' freedom to pursue family-building and society's obligation to safeguard children's well-being. In revisiting the core arguments, we find that the best-interest principle – a cornerstone of international child law – must be more than a platitude in ART; it should function as a guide to resolve the delicate balance between parental desires and child welfare. The inconsistent global application of this principle, ranging from jurisdictions where a future child's welfare is deemed paramount to those where it is only one consideration, underscores the pressing need for clearer standards that put children first. Too often, ART laws remain adult-centric, prioritizing reproductive rights over child-centric concerns. A more engaging, child-focused lens is required – one that treats the unborn child not as an afterthought but as a rights-bearing individual at the heart of every decision.

Throughout the analysis, a recurring theme is the ethical and legal tension between reproductive autonomy and child welfare. Prospective parents rightfully value their freedom to make intimate choices about family

creation, yet the exercise of this autonomy sometimes collides with the future child's interests. Decisions about embryo selection, surrogate arrangements, or donor anonymity each raise the question: does honoring the adults' choices risk compromising the child's physical or psychological well-being? This study has highlighted how unchecked reproductive liberty – for instance, enabling surrogacy contracts or gamete donations without adequate child safeguards – can leave the child's rights vulnerable. We must recognize that reproductive freedom carries responsibilities. Ethically, the desire to have a child by any available means cannot justify practices that might harm the very life being created. Legally, this calls for recalibration: frameworks must neither unduly trample on adults' hopes of parenthood nor treat the resulting children as mere outcomes. Instead, laws should mediate these competing interests, ensuring the child's welfare is paramount without wholly negating reproductive choice. In practice, this means fortifying the best-interest principle as a normative guardrail in ART. By explicitly acknowledging the potential for conflict – say, when a surrogate's contractual rights or an infertile couple's wishes might not align with the child's future needs – policymakers can craft balanced solutions that honor both sets of interests. The conclusion drawn is that child welfare considerations should act as a limiting principle on reproductive autonomy: a society committed to children's rights will not permit an adult's choice to become a parent via technology to proceed if it egregiously undermines the prospective child's well-being.

Given these insights, there is a clear imperative for child-centric legal reform in the realm of ART. This goes beyond superficial invocations of the "best interest" mantra and requires reimagining policies with the child truly at the center. Several policy recommendations emerge from this forward-looking reflection. First, legal frameworks worldwide should explicitly embed the best-interest principle into ART regulation, requiring that any procedure – from IVF treatments to surrogacy agreements – be evaluated in light of its anticipated impact on the child. In practical terms, jurisdictions could mandate a formal child welfare assessment as part of ART processes, analogous to the scrutiny applied in adoption proceedings. While such measures must be implemented with care to avoid unfairly restricting who can become parents, they would enshrine a preventative ethos: that we do not wait until after a child is born to consider their interests. Second, reforms should affirm the child's right to identity and origin. Many children conceived via donor gametes or surrogacy struggle with questions of genetic

heritage; laws should ensure they can access information about their biological origins in due course. This might entail, for example, ending anonymous sperm or egg donation and establishing registries that children can consult when they come of age. Such a change strikes a humane balance between donors' privacy and a child's deep-seated need to know where they come from – a key aspect of psychological welfare. Third, surrogacy and ART contracts must be regulated with the child's welfare as paramount. This could mean setting enforceable standards for surrogate screening, requiring post-birth safeguards (like legal parentage orders contingent on the child's best interests), and disallowing any agreement terms that clearly conflict with a child's rights to care and stability. International collaboration is also vital: as long as people can travel to jurisdictions with laxer rules, a patchwork of laws will persist. Global or regional guidelines – perhaps through treaties or soft-law frameworks – could help harmonize minimum child-centric standards in ART, ensuring that no matter where a child is born, certain baseline protections are in place. By championing these reforms, the legal community can move from rhetoric to reality in applying the best-interest principle to ART.

As we look ahead, the intersection of rapid technological advancement and timeless principles of child welfare will only become more complex. The conclusion here is not an endpoint but a call for ongoing vigilance and adaptability. Emerging technologies like gene editing, reproductive cloning, or artificial wombs are on the horizon, promising to redefine what is possible in human reproduction. Confronting these developments with a child-centric mindset is essential. Policymakers and ethicists should proactively ask: how do we ensure the next generation of ART innovations aligns with the best interest of the child? One recommendation is to institute multidisciplinary ethics committees that review new ART techniques before they are widely adopted, evaluating not just safety and efficacy for parents but also long-term outcomes for children. Additionally, a commitment to research is crucial. Longitudinal studies tracking the health, identity formation, and social well-being of ART-conceived individuals can inform evidence-based policies, allowing us to course-correct if certain practices are shown to have adverse impacts on children.

Embracing a child-centric approach to ART is a moral imperative that speaks to our humanity. The true legacy of assisted reproduction will not be measured by how many new parents it creates or how far the technology advances, but by how those children fare in life and how society treats them.

As Nelson Mandela profoundly stated, “There can be no keener revelation of a society’s soul than the way in which it treats its children”. This insight humanizes the entire debate, reminding us that behind every legal principle or medical procedure is a child – a person with a future, feelings, and rights. Ensuring that each child born through ART enters the world to an environment of love, dignity, and respect is how we, as a global community, will be judged. The long-term significance of this issue cannot be overstated: the policies we shape today will resonate for decades in the lives of ART-conceived children and the societies they become a part of. Therefore, as we conclude this scholarly inquiry, we do so with a commitment to action and empathy. It is incumbent upon lawmakers, medical professionals, and all stakeholders to craft frameworks that honor scientific innovation and uphold our highest human values.

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The right of the child conceived by a donor to know his/her origin – Croatian legislation and trends in Europe**

ABSTRACT: The Convention on the Rights of the Child under Art. 7 para. 1 provides the right of the child to know his or her origin as far as possible. It is not specifically designed for children conceived by donor gametes or embryos, but applies to them as well. The European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8) guarantees protection of private and family life. The European Court of Human Rights interpreted that Art. 8 encompasses "the right to an identity and to personal development" and finally ruled in Gauvin-Fournis and Silliau v. France that it applies to donor-conceived people and that they have, in principle, a right to know each of their genetic parents. Historically, a donor had the right to privacy and, therefore, remained anonymous; a changed paradigm shifted the focus to persons conceived by the donor's gametes or embryo.

This study analyses the development of representative national legislations that adopt different approaches: those that accept the anonymity of the donor principle, those that accept the non-anonymity principle, and those that accept multiple choices concerning donor's anonymity.

The first has been slowly abandoned in national legislations, however, it continues in liberal and some Central European states. Some states attempt to provide protection, at least by providing choice of non-anonymity/anonymity to the donor.

At the European level, Recommendation 2156 (2019) – Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children of the Parliamentary Assembly of the Council of Europe pushes towards non-anonymity; however, it is not binding. This concept is questionable if the European Union has jurisdiction over such issues, therefore, the 2024 Regulation of the European Parliament and of the Council on standards of quality and safety for substances of human origin

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(SoHO) intended for human application did not intervene in this area, leaving its regulation to national states.

The concluding remarks offer arguments in favour of anonymity and non-anonymity and conclude that legislators should always consider the interests of children and persons conceived, as the state is responsible for the protection of their rights.

KEYWORDS: the right of the child to know his/her origin, identity, donor anonymity, donor non-anonymity, medically assisted reproduction, Recommendation 2156 (2019), SoHO Regulation.

1. Introduction

The right of the child to know his/her origin derives from the right to protection of private and family life and the right of the child to know his or her parents as far as possible. It is closely connected to the right to personal identity.

The first right is incorporated in different international global and regional treaties, and the second is contained in Art. 7 para. 1 of the United Nations Convention on the Rights of the Child of 20 November 1989 (hereinafter, CRC).[1]

As stated in the Handbook on the Convention on the Rights of the Child[2] several decades ago, the definition of "parent" was understood differently and was simpler than it is today. It was clear who were "biological" parents, and eventually "psychological" or "caring" parents, such as adoptive or foster parents.[3]

CRC applies solely to children; therefore, other international treaties apply to adults. For example, Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950)[4]

[1] Convention on the Rights of the Child, of 20 November 1989, United Nations Treaty Series, Vol. 1577, p. 3.

[2] Hodgkin and Newell, 2007, p. 105.

[3] 'When Article 7 was drafted, it was pointed out that the laws of some countries – for example, the former German Democratic Republic, the United States of America and the former Union of Soviet Socialist Republics – upheld "secret" adoptions whereby adopted children did not have the right to know the identity of their biological parents (E/CN.4/1989/48, pp. 18 to 22; Detrick, p. 127)'. Ibid., p. 105.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950, European Treaty Series, No. 5.

offers protection for the private and family life of children and adults. At the beginning of the XXI[st] century, the European Court of Human Rights interpreted that Art. 8 encompasses "the right to an identity and to personal development", which includes the right to access information that would make it possible to trace "some (one's) roots", the right of a person to know their origins and circumstances of their birth and a right to have access to the certainty of paternal filiation.[5] So far, none of the Court's decisions have specifically concerned the right of a person conceived by a donor's gamete to know the identity of the donor.[6]

As medically assisted reproduction (MAR)[7] enables using donor gametes (eggs, sperms, and embryos), it is not clear who the biological parent is, as a parent may be a genetically related mother (from whom the egg stems) or a birth mother. Therefore, the old Roman principle mater semper certa est was jeopardised.[8] Parenthood confusion may influence the child's perception of identity, therefore, different approaches exist regarding

[5] More about the European Court of Human Rights Mulligan, 2022, pp. 127-131, Explanatory Memorandum, 2019, Chapter 10.

[6] Explanatory Memorandum, 2019.

[7] Medically assisted reproduction is 'reproduction brought about through various interventions, procedures, surgeries and technologies to treat different forms of fertility impairment and infertility. These include ovulation induction, ovarian stimulation, ovulation triggering, all ART procedures, uterine transplantation and intra-uterine, intracervical and intravaginal insemination with semen of husband/partner or donor'. Zegers-Hochschild and others, 2017, p. 1796.

[8] Different legislations offer different legal solutions. Family law legislations (for example Greece, the United Kingdom and Portugal) that enable surrogate motherhood changed this Roman rule completely.

In the case of medical fertility treatment, the situation is complex because the legislator may accept either the rule that the mother of a child is the woman who gave birth or the woman whose egg had been fertilised. In Croatian law, there is a general rule that the woman who gave birth to the child is his mother if both the woman whose cell was (possibly) used in the fertility treatment procedure and the woman who gave birth to the child had given their consent to the medical treatment. If the corresponding consent had not been given, it would have been possible to initiate the proceedings for challenging the maternity of the woman who gave birth to the child and subsequently establish the maternity of the woman from whom the child genetically originated. When a donor's semen was used, if the child's (genetic) father and the man who is the mother's marital or extramarital partner had given their consent for medically assisted reproduction with another man's semen, and the mother's non-marital partner had given his consent to the acknowledgment of paternity ahead of time, then the child's father is the mother's marital or the non-marital partner.

Korać, 2022, pp. 48, 49; Margaletić, Preložnjak, and Šimović, 2019, pp. 778-802.

whether the child should be told the truth about the genetic origin, and if so, to what extent should the child be informed of the general description of the gamete's donor or the identity of the donor.

Similar to the history of adoption, it appears that trends are towards revealing the identity of the donor and enabling persons conceived by the donor's gamete to determine the personal identity of the donor.

This study presents the development of Croatian legislation concerning this topic and European tendencies (without the European Court of Human Rights jurisprudence) that gradually, but with more certainty, move towards the disclosure of the identity of a donor.

2. Croatian legislation

In 1978, Croatia regulated for the first time certain aspects of MAR through the Act Concerning Medical Measures for Exercising the Right to the Free Decision about Giving Birth to Children.[9] This type of medical help was regulated by only five provisions (29 – 34 of the Act), and medical techniques were described simply as homologous and heterologous fertilisation (insemination).

It was possible to use a donor's semen (donation of eggs was not regulated at that time, nor was embryo donation). The medical staff of the clinic that performed "artificial insemination" was obliged to keep secret the information from which the sperm donor, the "artificially inseminated" woman, and her husband could be determined. In the case of heterologous insemination, the sperm donor should not know for which woman his semen was used, and the "artificially inseminated" woman should not know who the sperm donor was.[10] Five years after legally regulating the medical aspects of medically assisted procreation, in 1983, the first baby conceived in vitro was born. It is difficult to obtain reliable data for past periods,

[9] The Act Concerning Medical Measures for Exercising the Right to the Free Decision about Giving Birth to Children (*Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece*) Official Gazette, No. 18/78. This act has been changed later, Official Gazette, Nos. 31/86., 47/89., 88/09.)

[10] In the year 1993/1994, 318 children were born after assisted reproduction technologies: 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.
Šimonović, 1996, pp. 306-332.

however, some children were conceived by donors; for example, in 1993/1994, 26 out of 318.[11]

Provisions[12] that regulated assisted reproduction technologies were in force until 2009, when an Act completely dedicated to medically assisted reproduction was introduced.[13]

This Act (2009) provided that not only a donor's semen, but also a donor's egg may be used for couples that need such medical help. The donor of gametes was prescribed to have no family law responsibilities or rights towards a child conceived with the use of their gametes in medical insemination procedures.[14] Interestingly, if a donor was married, consent from his or her spouse should be taken as well.[15] It was prohibited to provide or receive compensation or any other benefit for the donation of gametes; to conclude contracts, agreements, or other forms of written or oral agreements on gamete donation between a gamete donor and one or both spouses in the process of medical insemination; and such contracts or agreements should be null and void.[16]

The Act on Medically Assisted Procreation introduced the right of a person born after medical insemination with a donated sperm or a donated egg, after reaching the age of majority, to gain access to the register of data on conception and donors kept at the State Register of Medical Insemination of the Ministry of Health. Exceptionally, because of a medically justified reason and the welfare of the child, an authorised person in the State Register had to enable access to the register to the legal representative or doctor of the child. The last possibility may be important because of the health needs of the child to know some genetically important medical data. Finally, a court or administrative body may request data from the aforementioned Register. [17]

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[11] Predominant previous modest assisted reproduction technology was named 'artificial insemination'. That was the expression without elementary sensitivity for patients. Nowadays notion of 'artificial' has not been used anymore, as it is considered as non-sensitive, rude, and pejorative.

[12] Arts. 29-34.

[13] The Act on Medical Assisted Procreation *(Zakon o medicinskoj oplodnji*), Official Gazette No. 88/2009.

[14] Art. 12 para. 2.

[15] Art. 11 para. 2.

[16] Art. 14.

[17] Art. 10.

Legal theory points out that 'this provision will discourage many potential donors, although the child cannot establish legal relation to his/her father. It is obvious that the interests of the child has prevailed'.[18] This is what occurred because after 2009 in Croatia, there was no donor program, no gamete bank, and no children conceived by male or female donor.

The Medically Assisted Reproduction Act (2012),[19] which continues to be in force, enables the donation of sperm, egg cells, and embryos. It preserved the non-anonymity of donor.

The Explanatory Report of the Draft on the Medically Assisted Reproduction Act explains this political decision:

> The non-anonymity of gamete or embryo donors is prescribed in order to protect the child's right to know his or her own origin, as protected in Article 7 by the Convention on the Rights of the Child, ratified by the Republic of Croatia ("Official Gazette of the SFRY", no. 11/81, "Official Gazette", - International Treaties No. 12/93). In Article 7, paragraph 1. The Convention on the Rights of the Child states that a child has: "as far as possible, the right to know who his parents are". The Committee on the Rights of the Child, to which states submit regular reports on the application of the Convention, criticizes the non-application and endangerment of this right. In the case of medically assisted reproduction with a donated gamete, i.e. an embryo, it cannot be claimed that it is not possible to determine the origin of the child. In addition, the right of the child prescribed in this way is a reflection of modern understandings in developmental psychology and child psychiatry that clear knowledge of one's own origin forms a healthy mental identity of an individual and the possibility of building quality personal relationships with other people.[20]

[18] Korać, 1999, p. 235.

[19] The Medically Assisted Reproduction Act (Zakon o medicinski pomognutoj oplodnji), Official Gazette No. 86/2012.

[20] Nacrt prijedloga zakona o medicinski pomognutoj oplodnji. [Online]. Available at: https://vlada.gov.hr/UserDocsImages//2016/Sjednice/Arhiva//21.%20-%201.pdf (Accessed 1 September 2024). The author's translation.

The provision of Art. 15 of the 2012 Act extended the right of the child who reached the age of majority to know his/her origin in a way that obliged parents to inform the child conceived by the donor's gamete that he or she was conceived by medically assisted reproduction (Art. 15 para. 2).[21] Parents may easily avoid this obligation, as there is no legal trace in personal documents or birth registrars of how the child was conceived. This means that a child may accidentally discover the circumstances of conception; however, although parents are obliged to convey this to the child, nobody checks whether they did so.

As the right to know one's own origin is a personality right, the child would have the right to pecuniary compensation owing to non-pecuniary damage towards their parents,[22] however, in real life, it is not certain that the child would sue his or her parents. There was no such litigation in Croatian judicial practice.

It is important to emphasise that according to the Medically Assisted Reproduction Act, there are no mutual legal obligations among donors and children conceived by the donor's gamete.[23]

As the donor program in Croatia was neither established nor had gamete bank(s), many couples sought help abroad, financed by the Croatian

[21] Art. 15 para. 2.

[22] Just Pecuniary Compensation Art. 1100

'(1) In the event of violation of personality rights, the court shall, where if finds that this is justified by the seriousness of the violation and circumstances, award a just pecuniary compensation, irrespective of the compensation for material damage and in the absence of the latter.

(2) In deciding on the amount of just pecuniary compensation, the court shall take into account a degree and duration of the physical and mental pain and fear caused by the violation, the objective of this compensation, and the fact that it should not favour the aspirations that are not compatible with its nature and social purpose.

(3) In the event of compromised reputation and other personality rights of a legal person, the court shall, if it assesses that this is justified by the seriousness of the violation and the circumstances, award to that legal person a just pecuniary compensation, irrespective of the compensation for material damage and in the absence of the latter'.

The Civil Obligation Act (Zakon o obveznim odnosima), Official Gazette Nos. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023.) Non-official translation published at the website of the Supreme Court of the Republic of Croatia.

[23] The donor and donor of gametes or embryos do not have any family or other obligations or rights towards the child conceived with the use of their gametes, that is, the embryo in medically assisted reproduction procedures (Art. 19 para. 5 of the Medically Assisted Reproduction Act).

Health Insurance Fund. If they wished to transfer their sex cells abroad, they required permission from the National Committee for Medically Assisted Reproduction. Recently, this high body has changed the practice of accepting the right of the child to know his or her origin, allowing the transfer of sex cells only to clinics where the legislation enables the child to determine the identity of the donor. This new practice was driven by the consciousness that the state may be found legally responsible, enabling transfer to a country where the rights of the child, ensured by national law, are not secured equally. This opens the possibility of the child suing the state for the breach of his or her right to know the origin as a personality right.

3. Overview of some national legislations

The member states of the European Council have different approaches. Legal systems can be divided into three groups: those that support the principle of anonymity of a donor, those that support the principle of non-anonymity of a donor, and those that allow donors and prospective parents to choose what is acceptable (dual or even triple system).[24]

3.1. Anonymity of donor principle

Similar to adoption, the fact that a child was conceived by a sperm donor and later by other donor gametes was considered important for protecting the privacy of donors, recipients, and children. It is understandable that struggling with infertility was a type of disability that brought about negative social connotations. Moreover, it reflected the legal status of organ donors for transplantation.

Initially, sperm donor anonymity was introduced to protect both donors and recipients. Donors, often motivated by altruism or financial incentives, were assured of privacy so that they could contribute without fear of future emotional or legal complications, such as claims for child support. Historically, medical doctors discouraged openness, as heterosexual couples prevailed as recipients. Arguments were needed to protect family dynamics, societal stigma, legal considerations, and the

[24] As legislative changes are rapid, the reader should consider that this text was delivered in September 2024.

historical context surrounding the perceptions of biological versus social parenthood.[25]

A few European countries retained the anonymity rule: Spain, the Czech Republic, Ireland, and Greece (as examples of the liberal approach), and Hungary, Italy, Poland, and Serbia (as examples of balanced towards the conservative approach).

Sperm, egg, and embryo donation in Spain is governed by a series of laws and regulations: Law 14/2006, 26 May on Medically Assisted Reproduction Techniques[26] for sperm donation; Royal Decree 9/2014 for egg donation; and Order SCO/3260/2007 for embryo donation.

Law 14/2006 on assisted reproductive technology stipulates that gamete donation is anonymous and that gamete banks will guarantee the confidentiality of the personally identifiable data of the donor, as will any established donor registries and registries of the activity in associated facilities. Simultaneously, the same law dictates that all information must be documented in individual health records, guaranteeing confidentiality, as it concerns the identity of the donor, the data and health information of the users, and the circumstances surrounding the origin of donor-conceived individuals. Although donation is anonymous, both gamete recipients and offspring have the right to obtain general information about the donors, excluding their identity, and allowing, under extraordinary circumstances that pose a certain risk of death or to the health of the child, disclosure of the identity of the donor.

The diagnosis of a genetic disorder in a child that could pose a serious threat to the health of the donor has been proposed as a potential exception to anonymity. In such cases, it would be possible for the healthcare team to contact the facility where the ART procedures were performed to inform the donor and prevent the use of the donated gametes or, if the latter had already been used, to inform any other offspring of the risk. These exchanges of information can be performed without breaking the anonymity of donors as they do not require the disclosure of their identity.

Therefore, when there is an important health issue, it may be necessary to share only health information without disclosing the donor's identity, with very rare exceptions. 'Therefore, the debate about anonymity

[25] For Belgium, Casteels, Nekkebroeck and Tournaye, 2024.
[26] LEY 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida.

does not arise from arguments related to health, as current law contemplates breaking anonymity when necessary'.[27]

In Greece the Art. 1460 of the Greek Civil Code establishes the principle of anonymity for the third persons who have offered gametes or fertilised eggs (donors). Medical information concerning the third donor is secret and in coded form in the cryopreservation bank and in the national file of donors and recipients of Art. 20 § 2 ed. c´ Law 3305/2005.[28]

The Assisted Reproduction Authority maintains two files[29]: one with confidential medical data of the donors of fertilised material and fertilised eggs, whose data were registered in a coded form. Access to this file is allowed, only to the child, for reasons related to his health[30] after permission of the Assisted Reproduction Authority; and second, completely secret files containing the identity data of the donors of genetic material and fertilised eggs, as well as the corresponding code.[31] Anyone who discloses in any way the identity of donors and recipients of gametes or fertilised eggs in violation of the relevant legislation is punished with imprisonment of at least two years unless a heavier sentence is provided by another law.[32]

In Hungary, a child conceived and born as a result of donated reproductive cells and/or embryos has the right to learn about the circumstances of his/her conception and birth upon reaching the majority, which shall include making available all personal and special data learned by the health service provider or the research facility, except information on name and address.[33] This sensitive approach attempts to balance the rights of MAR participants.

In Slovenia, the Infertility Treatment and Procedures of Biomedically Assisted Procreation Act[34] preserves the anonymity of a donor, as does the MAR legislation, in Serbia.[35]

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[27] Riano-Galán, Martínez González and Gallego Riestra, 2021, p. 337e3.
[28] See also Art. 8§6 Law 3305/2005.
[29] Art. 20 § 2 ed. c & d Law 3305/2005
[30] Art. 20 § 3 Law 3305/2005.
[31] Art. 20 § 3 Law 3305/2005.
[32] Koukoulis, 2023.
[33] 1997. évi CLIV törvény az egészségügyről.
[34] The Act on Infertility Treatment and Biomedically Assisted Fertilization Procedures (Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo), Official Gazette, Nos. 70/00 in 15/17.
[35] Art. 37, The Act on Biomedical Assisted Reproduction (Zakon o biomedicinski potpomognutoj oplodnji, Official Gazette Rs, Nos. 40/2017 and 11372017.

It is interesting that the anonymity principle is driven by different goals. One tendency appears to be to protect legal families in countries such as Poland, Hungary, and Italy. In this context, older Serbian family law theory expressed the opinion that the anonymity of the donor should be preserved 'so that factual family would be able to successfully defend the principle of the welfare of the child in competition with the family by blood'.[36] Serbian academics warned that waving donor's anonymity would prevent donors from donating because of social circumstances.[37]

The other reason in the liberal regulation of MAR may be the wish to protect the freedom of reproductive clinics (and not to end the source of donated gametes and embryos) to provide medical services for national and foreign citizens, such as in Spain and Greece, as financial profit is a public and private interest as well.[38]

3.2. Non-anonymity of donor principle

In 1985, Sweden became the first country to grant a child conceived by donor semen the right to obtain identifying information about the donor upon reaching an age of sufficient maturity.[39]

The law states that the sperm donor remains anonymous to the recipient couple and *vice versa*, and it does not oblige the parents to inform the child that she/he was conceived by a donor.

Legal-political discussions before introducing the right of a person conceived by donor's gamete provoked the Haparanda case in 1981.[40] In a later legislation of 2006, the Genetic Integrity Act prescribed the following:

> a person conceived through insemination with sperm from a man to whom the woman is not married or with whom the woman does not cohabit has the right to access the data on the donor recorded in the hospital's special journal, if he or she has

[36] Draškić, 192, p. 243.
[37] Kovaček and Stanić, 2008, p. 23.
[38] Similar view is expressed by some Spanish authors: 'We cannot neglect to mention that in a field in which economic aspects are very important, potential conflicts of interest surrounding ART may result in the silencing of ethical arguments concerning the protection of the best interests of the child'.
Sandel, 2013, Lo que el dinero no puede comprar: los limites morales del mercado. Barcelona Debate, cited by Riano-Galan, Gonzalez and Gallego Riestra, 2021.
[39] The Act on Insemination (Lag om insemination) 1984:1140, SFS 1984:1140.
[40] Amplius Preložnjak, 2020, p. 1189.

> reached sufficient maturity. If a person has reason to assume that he or she was conceived through such insemination, the social welfare committee is obliged, on request, to help this person find out if there are any data recorded in a special journal.[41]

The same right is secured to 'a person conceived through fertilisation outside the body using an egg other than the woman's own or sperm from a man who is not the woman's spouse or with whom the woman does not cohabit'.[42]

The United Kingdom has developed a donor non-anonymity policy step-by-step. The first legislation was the Human Fertilisation and Embryology Act of 1990, which was amended in 2005 and 2008.

No information about donors who donated before 1 August 1991 may be revealed through official channels. A person born because of a donation could only access non-identifying information about the donor at age 18 via the Human Fertilisation and Embryology Authority (HFEA)[43] as the authorised provider of this information.

The government decided to remove donor anonymity in the UK via the Disclosure of Donor Information Regulations 2004.[44] The result of this approach was that donor-conceived people should be able to obtain information about their genetic origins if they wished. This legislation came into effect in 2005 for applicants when they reached the age of majority,

[41] Chapter 6, Insemination, Section 5.

[42] The Genetic Integrity Act (2006:351).

[43] The Human Fertilisation and Embryology Authority (HEFA) oversees the use of gametes and embryos in fertility treatment and research. It licenses fertility clinics and centres carrying out in vitro fertilisation (IVF), other assisted conception procedures, and human embryo research.
HFEA is an executive non-departmental public body, sponsored by the Department of Health and Social Care. [Online]. Available at: https://www.gov.uk/government/organisations/human-fertilisation-and-embryology-authority (Accessed: 17 September 2024).

[44] This decision was brought after Rose v Secretary of State for Health and the HFEA [2002] EWHC 1593, (a test case brought by Joanna Rose, born via donor conception before the 2005 Act was passed. [Online]. Available at: https://www.hfea.gov.uk/media/nacb35fx/lrag-discussion-paper-donor-anonymity-and-information-provision-2022-05-27.pdf (Accessed: 17 September 2024).

meaning that the first applicants were able to apply to the HFEA for identifiable donor information in 2023.[45]

Donors who had donated before these changes could also voluntarily register with the HFEA to become identifiable.[46] Donors who did not re-register and those who donated before 2005 were kept anonymous. In 2008, the legislation was changed to allow donor-conceived people aged 16 years and older to apply for non-identifying information about their donors. The HFEA established the Donor Sibling Link to facilitate donor-conceived adults, born post-1991, to share their contact details with others who share the same donor.[47]

The newest legislation proposal intends that parents of donor-conceived children should be able to apply to the HFEA shortly after the birth of their child or anytime from that point for identifiable information about the donor. Julia Chain, the head of HFEA, emphasised:

> We recommend the law is changed so that parents can find out who a donor is from the birth of a child. Our proposal reflects the fact that the current system, where identifiable information about a donor is disclosed to the donor-conceived person at 18 and only upon request, can no longer effectively keep up.[48]

The Law Commission of England and Wales and the Scottish Law Commission (the Law Commissions) have proposed the establishment of a national register of surrogacy arrangements as well, that should maintain records of the identity of the intending parents, the surrogate, and any donors if donor gametes were used. Moreover, the Law Commissions have proposed replicating the provisions set out in regulations in respect of donor-conceived children and extending the availability of "non-identifying" donor information to surrogate-born children.

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[45] HFEA, Donor anonymity and information provision, 2022. [Online]. Available at:https://www.hfea.gov.uk/media/nacb35fx/lrag-discussion-paper-donor-anonymity-and-information-provision-2022-05-27.pdf. (Accessed: 17 September 2024).

[46] Some 220 donors who donated anonymously between 1991 and 2005 have re-registered with the HFEA to be identifiable until 2022.

[47] Ibid.

[48] Modernising the regulation of fertility treatment and research involving human embryos, HFEA. [Online]. Available at: https://www.hfea.gov.uk/about-us/modernising-the-regulation-of-fertility-treatment-and-research-involving-human-embryos/ (Accessed: 17 September 2024).

In Germany, any child older than 16 years, who suspects that he or she has been conceived through artificial insemination, has the right to seek relevant information from the German Institute for Medical Documentation and Information[49]. Persons younger than 16 years may only enforce this right through their legal guardians.[50] In Germany, the donation of oocytes or embryos is not allowed. [51]

In Austria, since the passing of legislation in 2015, a donor-conceived person has the right to access the gamete donor's identity from the age of 14 years.[52] The information is maintained by the clinic, which the child can contact directly. The right is exercised personally by the child, and his/her parents cannot access this information, except in limited circumstances. The donor is required to provide the healthcare facility or practitioner all information about himself or herself and agree to this being provided on request to the child conceived with his or her gametes. This consent can be withdrawn by the donor at any time, which prohibits any further use of his or her gametes.[53]

France lifted the anonymity of donors for all those who donated gametes after the 1 September 2022, although gametes donated anonymously before 1 September 2022 can be used until 31 March 2025.[54]

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[49] Deutsches Institut für Medizinische Dokumentation und Information – DIMDI.

[50] Gesley, 2017, Germany: Right to Know Biological Father for Children Conceived Through Sperm Donation. [Web Page] Retrieved from the Library of Congress. [Online]. Available at: https://www.loc.gov/item/global-legal-monitor/2017-07-27/germany-right-to-know-biological-father-for-children-conceived-through-sperm-donation/.(Accessed: 17 September 2024).

[51] The Act to Regulate the Right to Know One's Heritage in Cases of Heterological Use of Sperm (Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen), July 17, 2017, Federal Law Gazette I at 2513, BGBl website.)

[52] Art. 20 para. 2 of the Reforming Reproductive Medicine Act (Fortpflanzungsmedizinrechts-Änderungsgesetz) 2015.

[53] Griessler and Hager, 2016.

[54] Decree No. 2022-1187 of 25 August 2022 on access to non-identifying data and the identity of the third-party donor issued pursuant to Art. 5 of Law No. 2021-1017 of 2 August 2021 on bioethics and amending the provisions relating to medically assisted procreation (Décret n° 2022-1187 du 25 août 2022 relatif à l'accès aux données non identifiantes et à l'identité du tiers donneur pris en application de l'article 5 de la loi 2021-1017 du 2 août 2021 relative à la bioéthique et portant modification des dispositions relatives à l'assistance médicale à la procreation).
This legal-political decision was brought after several pending applications before the European Court for Human Rights.

Donors who wish to donate their gametes (sperm and oocytes) or frozen embryos must consent to reveal their surname, first name, date, and place of birth, as well as other non-identifying data, such as their general condition and age at the time of donation, family and professional situation, physical characteristics, and motivation to donate. Upon request, this information can be made available to the children resulting from these donations, when they reach the age of majority. Lifting anonymity does not mean that adult children will be able to contact their biological father or mother, who retain the decision on whether to have such interactions. Filiation to their legal parents remains intact.[55]

Since 2006, Portugal has regulated donations as anonymous.[56] In 2018, gamete donations became non-anonymous. In Portugal, identity release donations allow the donor to remain anonymous to the intended parents during treatment (although they may have access to non-identifying information about the donor). The child can request access to the donor's personal information (full name) from the National Council for Medically Assisted Reproduction, after reaching the age of majority. Interestingly, the identity release framework did not appear to affect the number of donations.[57] Before the changes in 2018, the Constitutional Court of Portugal ruled:

> The right to know one's genetic identity forms part of the right to identity of the person born as a result of these techniques, of

[55] Before legislative changes, the European Court for Human Rights in the case Gauvin-Fournis and Silliau v. France, Applications Nos. 21424/16 and 45728/17, in Judgement 7.9.2023, stated that France 'did not overstep the margin of appreciation enjoyed by it in choosing to grant access to information about one's origins solely subject to the condition that the third-party donor gave his or her consent'.
It was the first ruling of the Court on the rights of donor conceived persons. The Court emphasised that Art. 8 of the Convention applies to donor-conceived people and that they have, in principle, a right to know each of their genetic parents.

[56] In 2016, Portugal's legal framework for medically assisted reproduction changed, and was broadened to all women, independent of their marital status and sexual orientation. Therefore, treatment with donor sperm, oocytes, and embryos became available to recipients, including heterosexual couples, lesbian couples, and single women.

[57] Galhardo, 2024: From secrecy to transparency: The journey of donor identity in reproductive medicine in Portugal, Human Reproduction, Volume 39, Issue Supplement_1, July 2024, deae108.208. [Online]. Available at: https://doi.org/10.1093/humrep/deae108.208. (Accessed: 18 September 2024).

> his/her personality and of his/her personal historicity, regardless of the absence of a loving relationship.
> According to Stela Barbas, human beings have '…. the right to genomic identity. There cannot be two types of people: those who can know their genomic roots and those who can't. Allowing – or allowing as a priority – the child the right to know his/her true genetic and biological identity does not constitute a reduction in or discrimination against legal filiation or any other rights inherent therein: the recognition of one's genetic or biological origin does not contend with the legally established filiation, in the sense that recognition does not imply any paternal or maternal duty towards the person whose origins are being investigated. The various conflicting fundamental rights are, in fact, respected and safeguarded in a balanced manner, in strict compliance with the constitutional directives. We are talking about mere knowledge, but a knowledge that is fundamental if no one is to be barred from the possibility of knowing their own history and reaffirming their individuality.[58]

Identifying information about donors is provided to children in countries such as Iceland, Finland, the Netherlands, Norway, and Switzerland.

3.3. Multiple choices concerning anonymity

Some states have dual systems depending on the donor's option (Belgium, Denmark, Iceland, and the Russian Federation). Thus, some children conceived by the donor's gamete will be able to identify identity information, whereas others will not.

In Denmark, the law enabling the use of medically assisted reproduction techniques is Act No. 460/1997, and after several amendments (last in 2012), parents have been able to choose from a permanently anonymous donor, one who is anonymous at the time of donation but agrees that his or her identity may be revealed later to the children conceived by his or her donation, or a donor who is known at the time of donation. Until

[58] Ruling No. 225/2018, [Online]. Available at: https://www.tribunalconstitucional.pt/tc/en/acordaos/20180225.html, (Accessed: 17 September 2024).

2012, only the child had the right to request access to the donor's identity and only if his or her parents had access to a non-anonymous donor.[59]

Interestingly, there is a warning to patients who decide to use non-identity donors on the website of one of the world's largest sperm and egg bank Cryos:

> Nevertheless, with today's DNA-testing services, there is a possibility that children and donors will find each other, despite the donor being Non-ID Release. We understand that you may be curious to know more about your donor, but our advice is to hold back and respect that the donor has made a choice of being Non-ID Release and wishes to preserve his anonymity.[60]

For patients who wish to know the donor's identity (if a donor agreed as well):

> By choosing an ID Release Donor, you provide your child with the possibility to know more about the donor than what has been enclosed in the donor profile. Whether your child wants to receive the identifying information about the donor is up to him or her. Some donor-conceived children would like to know as much as possible about their genetic heritage. In those cases, choosing an ID Release Donor will be a big help for your child. Other donor-conceived children may never even wish to contact the donor even though they may appreciate having the possibility to do so.[61]

Since 1996, donors in Iceland have had a choice at the time of donation. He or she either asks to remain anonymous or not. In the latter case, persons born by his or her donation will be able to access his or her identity from the age of 18.[62]

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[59] Binet, 2022, p. 32.
[60] Non-ID Release and ID Release Sperm Donors, Cryos. [Online]. Available at: https://www.cryosinternational.com/en-gb/dk-shop/private/how-to/how-to-choose-a-sperm-donor/id-release-or-non-id-release-sperm-donors/ (Accessed: 18 September 2024).
[61] Ibid.
[62] Binet, 2022, p. 32.

Belgium does not recognise the right to know one's origin when a child is conceived through an anonymous donation. The donation of embryos to third parties can only be anonymous, without exception, to prevent commercialisation. When gamete donation is considered, the anonymity rule is more flexible; therefore, non-anonymous donation is based on the consent of the donor, and the recipient(s) is allowed.[63]

4. Trends in European legal sources

4.1. Recommendation 2156 (2019) – Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children

Regional trends at the European level are undoubtedly towards the principle of non-anonymity of donors. The reasoning and direction of the changes are best presented in the recommendation of the Parliamentary Assembly of the Council of Europe adopted in 2019[64] – Anonymous donation of sperm and oocytes: balancing the rights of parents, donors, and children. However, it has to be adopted by the Committee of Ministers. This recommendation has only seven chapters explaining contemporary social, medical, and human rights aspects, and the need for change towards non-anonymity.

In the Council of Europe, the Parliamentary Assembly recommends that the Committee of Ministers make recommendations to member states to improve the protection of the rights of all parties concerned, focusing on the rights of the donor-conceived person, who is in the most vulnerable position and for whom the stakes appear to be higher.

Chapter 1 of the Recommendation explains that more than 8 million children worldwide have been born because of assisted reproductive technologies, many of whom were conceived after sperm or oocyte donation. Most states have traditionally favoured anonymous donation models, as legislation in this area was often derived from laws in the organ

[63] In academic literature, Baetens et al. (2000) highlight that it is not quite understandable why the non-commercialization argument was not applied to donated oocytes as well. However, most oocyte donors in Belgium are sisters or good friends of the recipients and more than half of them opt for known donation, meaning that the recipient only accepts if she receives the oocytes of the woman she recruited and/or the donor only accepts to donate if she can direct her oocytes to that specific recipient. Therefore, recipients want to know more about the donor and to transfer this information to the child. Non-anonymous sperm donation in Belgium is rarely performed.

[64] Recommendation 2156 (2019) Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children.

donation or international adoption fields. States have also sought to respect the filiation of donor-conceived children, following the United Nations Convention on the Rights of the Child (Articles 3, 7, and 8). Thus, most states restrict the right of donor-conceived people to know their origins.

Chapter 2 of the Recommendation explains that there has been movement towards the recognition of the right to know one's origins, connected to the right to an identity and to personal development: particularly in international human rights law, there was an inclusion in the United Nations Convention on the Rights of the Child as a "stand-alone" right for children, and through the case law of the European Court of Human Rights. The jurisprudence of the European Court recognised this right as an integral part of the right to respect private life. This right includes the right to access information that would make it possible to trace one's roots, know the circumstances of one's birth, and have access to the certainty of parental filiation.

The Recommendation emphasises that:

> this right is not absolute and must thus be balanced with the interests of the other parties involved in sperm and oocyte donation: principally those of the donor(s) and the legal parent(s), but also those of clinics and service providers, as well as the interests of society and the obligations of the State.[65]

The Recommendation recognises that the donor's right to privacy (meaning anonymity as well) prevails in balancing different rights, interests, and obligations. The Parliamentary Assembly, in its Recommendation, points out that states that have decided to wave donor anonymity have concluded that the state has the responsibility to provide all donor-conceived people with an opportunity to access information, including identifying information about their donors. In 2019, the legislation (only 5 years ago) and practices of the Council of Europe member states varied significantly in the field of medically assisted procreation.[66]

In Chapter 7 the Parliamentary Assembly invited the Committee of Ministers of the Council of Europe to adopt recommendations on anonymity based on the following principles:

[65] Similar: Korać, 1999.
[66] Chapter 4.

7.1. anonymity should be waived for all future gamete donations in Council of Europe member States, and the use of anonymously donated sperm and oocytes should be prohibited. This would mean that (except in exceptional cases, when the donation is from a close relative or friend) the donor's identity would not be revealed to the family at the time of the donation, but to the donor-conceived child upon their 16th or 18th birthday. The donor-conceived child would be informed at that time (ideally by the State) of the existence of supplementary information on the circumstances of their birth. The donor-conceived person could then decide whether and when to access this information containing the identity of the donor, and whether to initiate contact (ideally after having had access to appropriate guidance, counselling and support services before making a decision);
7.2. the waiving of anonymity should have no legal consequences for filiation: the donor should be protected from any request to determine parentage or from an inheritance or parenting claim. The donor should receive appropriate guidance and counselling before they agree to donate and their gametes are used. The donor should have no right to contact a child born from donation, but the donor-conceived child should be given the option to contact the donor, as well as possible half-siblings, after their 16th or 18th birthday – subject to certain conditions being met;
7.3. Council of Europe member States which permit sperm and oocyte donation should set up and run a national donor and donor-conceived person register with a view to facilitating the sharing of information, as stipulated in paragraphs 7.1 and 7.2, but also with a view to enforcing an upper limit on the number of possible donations by the same donor, ensuring that close relations cannot marry and tracing donors if the medical need should arise. Clinics and service providers should be required to keep and share adequate records with the register, and a mechanism should be established to provide for cross-border exchanges of information between national registers;
7.4. the anonymity of gamete donors should not be lifted retrospectively where anonymity was promised at the time of the

> donation, except for medical reasons or where the donor has consented to the lifting of the anonymity and thus inclusion on the donor and donor-conceived person register. Donors should be offered guidance and counselling before they decide whether or not to agree to the lifting of anonymity;
> 7.5. these principles should be applied without prejudice to the overriding consideration that gamete donation must remain a voluntary and altruistic gesture with the sole aim of helping others, and thus without any financial gain or comparable advantage for the donor.

This Recommendation sets up considerable demands (particularly the far-reaching request that a person be informed by the state about the circumstances of conception). The Committee of Ministers has not fulfilled the Recommendation's proposal to adopt these rules, however, it has some time as the suggested period for drafting such a document is until the end of 2025.[67]

The special rapporteur, Ms Petra de Sutter, in the Explanatory Memorandum (Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children) stated that the anonymity of human gamete donors is no longer a principle unanimously accepted at the European level. Gradually, since 1984, when Sweden became the first country to waive the principle of anonymity of gamete donations, there has been a growing tendency to prioritise the rights of donor-conceived persons to know their origins and in favour of waiving the anonymity of gamete donors in Germany, Switzerland, the Netherlands, Austria, Finland, Iceland, the United Kingdom, and Portugal (after the decision of Portugal's Constitutional Court).

The special rapporteur warned that, in the context of cross-border assisted reproduction, it would be advisable to propose such a recommendation to find the best balance of interests.[68]

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[67] It is interesting to examine the Vote on Recommendation - Doc. 14835.
An anonymous donation of sperm and oocytes: balancing the rights of parents, donors, and children, Assembly's voting results, as 42 parliamentarians voted in favour, one (from the Czech Republic) against, and two representatives were abstentions (from Austria and the Czech Republic). [Online]. Available at: https://pace.coe.int/en/votes/37742. (Accessed 15 September 20024).

[68] Chapter 2 of Explanatory Report: The international/European legal framework: gradual recognition of the right to know one's origins. *Ibid.*

4.2. Regulation of the European Parliament and of the Council on standards of quality and safety for substances of human origin (SoHO) intended for human application

The European Parliament adopted a new regulation on substances of human origin (SoHO): the Regulation of the European Parliament and of the Council on standards of quality and safety for substances of human origin intended for human application and repealed Directives 2002/98/EC and 2004/23/EC on 24 April 2024 (hereinafter, SoHO Regulation)**.**

The SoHO Regulation aims to set high quality and safety standards by ensuring, inter alia, the protection of SoHO donors, SoHO recipients, and offspring born out of medically assisted reproduction, as well as by providing measures to monitor and support the sufficiency of the supply of SoHO that is critical for the health of patients.

The importance of this document is emphasised by choosing a regulation, not a directive, as a legal framework for such important issues. Several amendments aimed at removing donor anonymity in medically assisted reproduction during the drafting process.[69] European Society for Human Reproduction and Embryology (ESHRE) stated that the EU only has legal competency regarding the quality and safety of SoHO, and that amendments should be outside the scope of this regulation. ESHRE supported Amendments 296 and 734, stating the need to inform donors of reproductive cells about the possibility of ID release, as full donor anonymity can no longer be guaranteed considering the increasing use of direct-to-consumer genetic testing.[70]

Although donor anonymity has not been waived, the traceability of gametes is emphasised in Arts. 3(53), 32, 42, and 43 of SoHO Regulation. Entities shall have a traceability system in place to link each person from whom substances of human origin (including sperms, eggs, and gametes) are collected. This is particularly important for inter-country MAR use. Each medical entity shall maintain the data necessary to ensure traceability in electronic or paper form for at least 30 years. In the case of third-party donations, or if SoHO for within-relationship use is moved between SoHO

[69] Amendments 295, 571, and 675.

[70] ESHRE letter to MEPs about amendments to the SoHO regulation,
ESHRE statement ENVI amendments SoHO reg May 2023.pdf. [Online]. Available at: https://www.eshre.eu/Europe/Position-statements/Letter-to-MEPs-amendments-SoHO-regulation (Accessed 28 September 2024).

entities, a code needs to be applied that is unique within the EU and does not reveal the identity of the person from whom the SoHO was collected.[71]

Traceability may help donor-conceived persons when there is a transfer to another clinic in the same country or abroad, and future legislation enables a donor to reveal his or her identity. In that case, a donor-conceived person may contact the clinic where gametes were collected and obtain some donor information, depending on national legislation.

5. Concluding remarks

This study aims to present the trends from anonymity to non-anonymity of donors in national legislation in representative European countries. This study was conducted considering the historical development of the approach to this issue, which remains controversial.

This study determined that arguments in favour of anonymity of the donor are:

- the parents' right to privacy
- the possible risk of destabilising the legal family (the role of the parent may be undermined by the figure of the donor, which may have a negative impact on the family and interfere with the healthy development of attachment and identity)[72]
- the donor's right to anonymity
- the risk of reduction in gamete donations[73,74]

[71] This code should be machine-readable, unless this is not possible owing to the size or storage conditions of the SoHO. The code should be on the labels applied to the SoHO or on the documents accompanying the distributed SoHO, where it can be guaranteed that such documents will not be separated from the SoHO or will be kept digitally linked to the SoHO concerned. If SoHO for third-party donation are moved between entities, the code additionally needs to comply with the requirements for the Single European Code (SEC), which the European Commission will set out in another legal document.
ESHRE, Regulation on standards of quality and safety for substances of human origin intended for human application (SoHO Regulation) – summary for professionals in the field of medically assisted reproduction, September 2024. [Online]. Available at: https://www.eshre.eu/Europe/Factsheets-and-infographics. (Accessed 27 September 2024).

[72] Muñoz, Abellán-García and Cuevas, 2019.

[73] Bay, Kesmodel and Ingerslev, 2014, p. 254. According to Danish experience in 2012, the most frequently stated factor was altruism, motivating 90% of the sperm donors, which was not significantly different from the previous surveys. If economic compensations were removed, only 14% would continue to donate. The proportion of anonymous donors who would stop their donations if anonymity was abolished was 51%, 56%, and 67% in 1992,

- protection of all MAR participants' future interference
- the donor's interest in being protected from legal, financial, or parenting claims

Cynics may notice that the risk of reduction in gamete donations, consequently causing less income for MAR clinics, is one of the most influential factors in this debate.[75]

Arguments in favour of non-anonymity of donors are louder and slowly prevailing in different legal systems:

- the right of a person conceived by a donor to know his/her genetic origin
- the health rights of a person conceived by donor's gamete to know the risk of genetic diseases
- building capacity for honesty in family
- preserving the mental health of a person conceived by donor's gamete
- prevention of incestuous relationships
- the existence of widespread commercial DNA kits that make anonymity questionable
- registrars of non-anonymous donors can prevent potential donors from donating uncontrollable gametes to different clinics[76]

2002, and 2012, respectively. There was a significantly increasing proportion of donors who felt positive about donation to lesbian couples. The authors conclude that the motivation for sperm donation is multifaceted and primarily based on economic compensation and altruism. Most Danish donors would stop their donations if economic compensation or anonymity were abolished.

[74] Binet, 2022, p. 14.

[75] Infertility Treatment Market, 2024: The global sales of infertility treatment are estimated to be worth USD 1,899.8 million in 2024 and are anticipated to reach a value of USD 3,843.3 million by 2034. Sales are projected to rise at a CAGR of 7.3% over the forecast period between 2024 and 2034. The revenue generated by infertility treatment in 2023 was USD 1,770.6 million. The industry is anticipated to exhibit a Y-o-Y growth of 7.4% in 2024…. High treatment costs using assisted reproductive technologies (ART) are a major restraint to market growth. Procedures under ART, such as in vitro fertilization, also known as IVF, may run into a significant amount for a couple, up to USD 15,000 to USD 30,000 per cycle in the USA. These high costs can limit access to treatment and lead to financial hardship for those seeking to conceive. … The growth of infertility treatment industry was positive as it reached a value of USD 3,843.3 million in 2034 from USD 1,899.8 million in 2024.

[76] Kesmodel and Ingerslev, 2014, p. 254. In a Dutch study, 69 donors (71%) stated that the number of children conceived by a donor did not matter. More about very recent case of a man who fathered more than 500 children: "Dutch court orders man who fathered 550 kids

Donor anonymity is not simply a question about the person who helped conceive the child. It is primarily the ethical and legal issue that touches on a person conceived with the donor's help.
A recently published Belgium survey on insights of donor-conceived adults concluded:

> Early revelation of donor conception is generally regarded as advantageous, whereas delayed disclosure can result in psychological challenges. Offspring from heterosexual couples show a heightened emphasis on the donor's role, indicating a greater need for donor information compared to those from lesbian couple-parented or single-parent families. Furthermore, a significant portion of donor-conceived individuals express a strong desire to obtain various levels of donor-related information, a possibility currently limited by the existing Belgian legislation. To circumvent this limitation, half of the respondents had already registered with international DNA databases, with many having successfully identified a genetic relative through this method. Consequently, donor anonymity has essentially become obsolete.[77]

Moreover, the majority (57.6%) of donor-conceived adults agreed that donors should be informed of the number of children born out of their donation(s).[78]

Therefore, if enabled, many donor-conceived adults would opt for non-anonymous donors and endorse the release of donor information at specific stages, including allowing donors to become aware of the number

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to stop donating sperm", April 28, 2023, Politico. [Online]. Available at: https://www.politico.eu/article/dutch-court-orders-man-who-fathered-550-kids-to-stop-donating-sperm/ (Accessed: 28 September 2024). Clearly, certain donors are not aware of possible consequences, or are simply irresponsible.

[77] Casteels, Nekkebroeck and Tournaye, 2024.

[78] There was a difference between heterosexual families, lesbian couple parented or single-parent families. Offspring from heterosexual couples demonstrate a greater need for donor information compared with those from lesbian couple parented or single-parent families. A significant portion of donor-conceived individuals express a strong desire to obtain various levels of donor-related information; therefore, half of the respondents had already registered with international DNA databases, with many having successfully identified genetic relatives.

of children they have helped conceive. Moreover, a significant percentage of donor-conceived individuals contemplated becoming donors themselves, with the highest inclination being observed among those raised by two-parent lesbian families.[79]

The identity issue is so painful for donor-conceived persons that they have founded different national organisations that represent them. They founded Donor Offspring Europe, a European association, as well. Its aims are: 'to protect the interest of donor conceived persons: in particular the right to information about your ancestry', 'to put pressure on policy makers at a European level', 'to inform the public about donor conception and particularly the objectives of donor-conceived persons', and 'promote contact amongst donor conceived persons'.[80]

Moreover, ideological positions and social values may influence legal solutions. Traditionalists are more likely to advocate for the anonymity of donors, as MAR techniques that use donor gametes are more an exception than a rule. Thus, generally, family is based on kinship, and parental rights and responsibilities, as a rule, should not be transferred to another person. A child should be raised by his/her genetic parents. Based on the importance of genetic connections, this view defends heterosexual families as the only acceptable family type. It appears that the fact that a child is conceived with a donor's help should remain a secret (thus, it arises that legal parents are biological parents). Pennings argues that the anti-anonymity group adopts a weak version of bio-normative ideology, as they emphasise the importance of genetic ties. However, the practice of gamete donation is based on the socio-normative or 'new ideology of the family', that had been constructed to enable people who cannot have children the natural way (families without functional gametes, gay fathers, lesbian mothers, single women). It places weight on the psychological relations within a family, which are more important than genetics.[81]

Although ideology is not irrelevant, it does not place the rights of donor-conceived persons in the focus. It appears that their rights must be guided by national legislation. Genetic truth cannot be rejected simply

[79] Ibid.

[80] Donor Offspring Europe. [Online]. Available at: https://donoroffspring.eu/. (Accessed: 28 September 2024).

[81] Pennings: The forgotten group of donor-conceived persons. [Online]. Available at: https://academic.oup.com/hropen/article/2022/3/hoac028/6628588?login=false, p. 5. (Accessed: 29 September 2024).

because of the reasoning that there will not be sufficient donors, or it will interfere in family relations. If this occurs, something is not right with the choice of funding of a family or with family relations, irrespective of how the child was conceived. There are many experiences with adoption and suggestions on how parents should communicate with their children to preserve family ties. However, compared with adoption, it is noteworthy that adoption saves the child, while MAR creates the child. For adoption, it is a positive obligation of the state to protect the child, while for donor-conceived persons, it is the obligation of the state to set up a legislative frame that will not endanger their rights and interests, particularly by enabling conception to fulfil the wishes of adult participants, irrespective of whether they intend to be the child's legal parents or are altruistic donors.

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[18] ESHRE, *Regulation on standards of quality and safety for substances of human origin intended for human application (SoHO Regulation)* – summary for professionals in the field of medically assisted reproduction, September 2024. [Online]. Available at: https://www.eshre.eu/Europe/Factsheets-and-infographics (Accessed 27 September 2024).

[19] *Explanatory Memorandum: Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children*, by Mrs Petra de Sutter, (2019), Report, Doc. 14835 20 February 2019. [Online]. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25439, (Accessed 28 September 2024).

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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

[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.

[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.
>
> … 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

[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.

[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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Legal Regulation of MAR and Their Impact on the Child's Right to Origin Disclosure – A Slovenian Perspective**

ABSTRACT: Having a child remains one of the fundamental values of life for individuals. However, many individuals and couples face difficulties in conceiving a child naturally. The rapid development of medicine—in particular, reproductive medicine—has brought hope and the realisation of the desire to have a child to individuals and couples who, in the past, would have remained childless. Artificial reproductive technologies have been developed, enabling the conception of a child who is genetically related to both parents, as well as a child whose conception involves a third party (e.g., a gamete donor, surrogate mother, or mitochondrial parent). The rapid development of reproductive medicine also requires appropriate legal regulations. In particular, issues relating to the right to disclosure of persons conceived with donated gametes and the related right to know the (genetic) origin have been raised in recent years. Many legislations, including that of Slovenia, still lean more toward maintaining donor anonymity, with possible exceptions (e.g., medical reasons), primarily regarding access to non-identifying information about the donors. While Slovenian legislation emphasises the right of the child to information on their origin, it limits this to essential medical information and does not include personal data about the donor. This paper discusses possible amendments to existing Slovenian legislation in light of defining a child's right to origin disclosure and balancing the interests of the other parties involved.

KEYWORDS: infertility, artificial reproductive technologies, gamete donation, right to know the origin, personal data, anonymity.

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1. Introduction

Fertility is a key element of the reproductive system, enabling the continuation of the human species in the broadest sense. However, couples have faced infertility not only today but also throughout history.[1] The approach to and the understanding of infertility today and in the past are diverse. Throughout history, infertility has been considered a social stigma and was often treated as a socially, mentally, and physically harmful experience for women who could not conceive. Fatherhood has been perceived as a social rather than a biological concept**.** Consequently, the burden of infertility fell entirely on women, as infertility was also a legitimate reason for divorce and a source of shame for women.[2]

Although, nowadays, we are aware that the causes of infertility are very diverse and that the development of medically assisted reproduction (MAR) has made remarkable progress in recent years, infertility remains a public health and a societal problem[3] that leaves an indelible imprint on the lives, emotions, and experiences of individuals and couples (also, in some cases, in the broader family) facing infertility.

According to the European Society of Human Reproduction and Embryology (ESHRE), one in six couples worldwide will experience some form of infertility at least once in their reproductive lifetime. The World Health Organization (WHO) defines infertility as 'a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse'.[4] Infertility can be classified into primary and secondary types. Primary infertility in women refers to the inability to conceive for the first time, whereas in men it refers to the inability to impregnate any partner. Secondary infertility in women is defined as the inability to conceive again after a previous pregnancy. Secondary infertility in men refers to the inability to impregnate the same or a previous partner after a prior

[1] Following statistics, on average, between 1,100 and 1,200 children are conceived with biomedical assistance every year in Slovenia. Slovenia is one of the few countries where the first IVF procedures are fully covered by health insurance. After the birth of a child, a woman is entitled to four more procedures for each subsequent birth. (Arsovski, 2024).
[2] Sharma, Saxena and Singh, 2018, p. 10.
[3] Najzdravnik, n.d.
[4] World Health Organization, 2023, p. ix.

successful conception.[5] The ESHRE estimates that between 8% and 12% of women aged 20 to 44 worldwide have experienced infertility lasting at least 12 months. Most MAR treatments are performed on women aged 30–39 years.[6] The WHO further estimates that approximately 186 million people are affected by infertility worldwide.[7]

It is, therefore, not surprising that countries are striving in various ways to assist individuals facing infertility. Appropriate legislative frameworks are among the key factors that can support such couples. Inadequate, insufficient, or ambiguous legal regulations can be highly restrictive, harmful, and potentially result in human rights violations.

It is estimated that more than eight million children worldwide have been born using assisted reproductive technologies[8] (ART). Many of these children were conceived using donated sperm or eggs. Traditionally, most countries have favoured anonymous donation models because legislation in this area has often been based on organ donation laws or international adoption regulations.[9] In recent years, however, guidelines have been shifting toward the disclosure of donor information. On the one hand, this shift raises new legal and ethical questions, while on the other hand, the legislative frameworks of different countries remain highly diverse, adding to the uncertainty. Acknowledging that the right to know one's origin is not absolute, it must be balanced with the interests of children conceived with donated gametes, the legal parents of these children, and the donors themselves. Additionally, the interests of clinics, service providers, society at large, and the obligations of the State should also be considered.[10]

2. General

2.1. Fundamental Principles of MAR under Slovenian Law

The desire to have a child can be so strong that individuals who cannot conceive naturally seek other possible alternatives to become parents (e.g.,

[5] WHO, 2023.
[6] ESHRE, 2022.
[7] Seiz, Eremenko and Salazar, 2023, p. 6.
[8] Jain and Singh (2023) provide that ART are used to aid in achieving pregnancy conception in individuals who are having difficulty doing so spontaneously.
[9] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para. 1.
[10] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para. 3.

adoption, ART). Of course, international documents do not recognise the 'right to have a child', as having a child is not a good or service that the State can guarantee or provide. A child is a human being, regardless of age and maturity, who is a bearer of rights.[11]

Countries regulate MAR in various ways, but these procedures often remain inaccessible owing to issues such as inadequate health insurance coverage, high costs, and legal inconsistencies. Legal regulations, legalisation, or prohibition of certain MAR practices and eligibility criteria for (co)financing reproductive technologies vary from country to country. Consequently, many individuals and couples choose to seek reproductive medical assistance outside their home country.[12]

Thus, MAR procedures have become established as an important and effective method for treating infertility.[13] Article 55(1) of the Constitution of the Republic of Slovenia[14] (CRS) stipulates that everyone shall be free to decide whether to bear children. The State shall guarantee opportunities for exercising this freedom and shall create conditions that will enable parents to decide to bear children (Article 55(2) of the CRS). The constitutional provision of Article 55 of the CRS is further supplemented by Article 2(1) of the Infertility Treatment and Procedures of Medically-Assisted Reproduction Act[15] (Infertility Act), which provides that everyone has the 'right to infertility treatment' in the manner and under the conditions defined by the Infertility Act. Article 1 further specifies that the Infertility Act regulates medical measures to assist men and women in conceiving a child, thereby enabling them to exercise freedom in deciding on the birth of their children. Treatment under the Infertility Act is defined as

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[11] United Nations – General Assembly, *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/HRC/37/60, 15 January 2018, p. 15. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement (Accessed: 12 September 2024).

[12] See more on so-called reproductive tourism Kraljić, 2020.

[13] Reljić, 2019, p. 185.

[14] Constititution of the Republic of Slovenia (CRS - Slovene *Ustava Republike Slovenije):* Uradni list RS (Official Gazette), 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99, 75/16 – UZ70a, 92/21 – UZ62a

[15] Infertility Treatment and Procedures of Medically-Assisted Reproduction Act (Infertility Act - Slovene: *Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo*): Uradni list RS, št. 70/00, 15/17– DZ.

a) determining the causes of infertility or reduced fertility;
b) addressing these causes through professional counselling, medication, or surgical procedures;
c) collecting and storing male sperm or female egg cells in cases where, according to the findings of and experience of medical science, the individual is at risk of becoming infertile (Article 3 of the Infertility Act).

As a rule, MAR procedures use the reproductive cells (gametes) of a woman and a man in a marital or non-marital partnership (Article 8(1) of the Infertility Act) (so-called endogenous techniques). In this case, there is no distinction between parenthood as defined by the provisions for motherhood and fatherhood under the Family Code[16] (FC). The parents are, in this instance, also the biological parents of the child, meaning that the child is the biological descendant of both the mother and father, who are recognised as such based on the legal presumption of maternity[17] and paternity[18] under the FC. According to Slovenian law, MAR is not permitted with the simultaneous use of donated eggs and sperm (Article 8(3) of the Infertility Act).[19] Therefore, at least one of the parents must be the biological parent of the child conceived through this procedure.

MAR techniques can also involve a third party. MAR procedures may also use donor eggs or sperm cells from the donor (so-called exogenous techniques). According to Article 14(1) of the Infertility Act, donors must

[16] Family Code (FC – Slovene *Družinski zakonik):* Uradni list RS, št. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US, 5/23, 34/24 – odl. US.

[17] Comp. Article 112 of the FC: '*The woman who has given birth to a child shall be considered the mother of the child'.;* see more Kraljić, 2022, p. 41 *et seq.*

[18] Comp. Article 113 of the FC: *'(1) The husband of the child's mother shall be considered to be the father of a child born within marriage. (2) If the marriage terminates with the death of the husband of the child's mother, and the child is born within 300 days of the termination of the marriage, the late mother's husband shall be considered to be the child's father. (3) The mother's husband from a new marriage shall be considered to be the father of a child born in a new marriage concluded by the mother 300 days after the termination of a previous marriage, regardless of the manner in which the previous marriage ended'.*

[19] Under Slovenian law, it is also not allowed to i) donate human embryos, ii) use a mixture of sperm from two or more men or mixture of oocyte from two or more women in MAR procedures (Article 13 of the Infertility Act), and iii) use the donor's sperm to fertilise a woman who, due to a familial relationship, would not be able to enter into a valid marriage with the donor. Likewise, donor's oocyte may not be fertilised by the sperm of a man who, due to a familial relationship, would not be able to enter into a valid marriage with the donor (Article 14(2) of the Infertility Act).

be adults, healthy, and of sound mind. Under Slovenian legal regulations, donor gametes can be used if:

a) based on biomedical science, pregnancy cannot be achieved using the reproductive cells of the spouses or non-marital partners, or
b) other MAR procedures provided by the Infertility Act have been unsuccessful, or
c) it is necessary to prevent the transmission of a severe hereditary disease to the child (Article 8(2) of the Infertility Act).

MAR procedures, such as using a donor's sperm for artificial insemination, in vitro fertilisation of a donor's oocyte and then implanting the embryo into a woman's uterus, or receiving an embryo conceived by another couple (which is not allowed in Slovenia!) result in a form of parenthood that is incompatible with biological reality. In such cases, issues concerning access to information about the child's origin arise, such as identifying the sperm donor, the oocyte donor, or the couple who provided their embryo.[20] We must also not forget about newer MAR technologies, such as mitochondrial transfer[21] and even gene editing[22], which raise additional legal questions regarding the right to know genetic origins.[23]

[20] Binet, 2022, p. 11.

[21] Mitochondrial transfer techniques (MT) (also known as 'mitochondrial donation', 'mitochondrial replacement', 'mitochondrial therapy', 'mitochondrial transfer', or 'three-parent IVF') are being developed as a method that allows at-risk couples to avoid giving birth to a child with mitochondrial disease. MT is a technique that prevents a woman from passing mitochondrial diseases to her children while still using her own ovum, thereby maintaining her genetic connection with the child (Ravitsky, 2017, p. 1). Healthy mitochondria from a ovum donor replace the mitochondria of the intended mother, while the mother's nucleus, responsible for her genetic identity, is retained. Thus, a child born using MT has DNA from three persons (a genetic father and two women) (Ravitsky, 2017, p. 4). The United Kingdom was the first country that regulated MT by passing regulations that came into force on October 31, 2015 (Newson, Wilkinson, Wrigley, 2016, p. 589; Cohen et al., 2020). In April 2016, the first baby boy conceived using MT was born. This technique was performed for a Jordanian couple by an American physician in Mexico, where the legislation was somewhat ambiguous (Ravitsky, 2017, p. 4).

[22] Following the WHO, is genome editing a method for making specific changes to the DNA of a cell or organism? It can be used to add, remove or alter DNA in the genome (World Health Organization, n.d.). See more Liu, 2020; Soni, 2024.

[23] Ravitsky, 2017, p. 1.

2.2. General about Paternity and Maternity for Children Conceived through MAR – Slovenian Regulation

Provisions regarding parenthood for children conceived through MAR were previously covered under the Infertility Act. Today, these provisions have been incorporated into the FC, which contains explicit rules concerning motherhood and fatherhood for children conceived through MAR. If the mother has consented to ART in accordance with the regulations governing it, her motherhood cannot be challenged. However, if the child was conceived with the help of a donor oocyte, the motherhood of the oocyte donor cannot be established (Article 133 of the FC).

For a child conceived through ART, the father is considered to be the mother's husband or her non-marital partner, provided that both have consented to the procedure in accordance with the regulations governing ART. The paternity of the individual recognised as the child's father cannot be challenged, except in cases where it is claimed that the child was not conceived through ART. If the child was conceived by using the donor's sperm, the paternity of the sperm donor cannot be established (Article 134 of the FC).

Under Slovenian law, a woman who intends to give the child to a third party, whether for payment after birth (surrogacy) is not entitled to MAR (Article 7 of the Infertility Act). The Criminal Code[24] (CC-1) stipulates in Article 121(4) that anyone who unlawfully performs an assisted reproductive procedure for surrogacy shall be punished by imprisonment for up to three years.[25]

Starting from Article 27 of the Infertility Act, donors have no legal or other obligations or rights in respect of children conceived through ART.

[24] Criminal Code (CC-1 - Slovene: *Kazenski zakonik*): Uradni list RS, št. 50/12 – official consolidated version, 6/16 – popr., 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNŠPP, 16/23.

[25] Deisinger, 2017.

3. Child and their 'right to know origin'

3.1. Convention on the Rights of the Child (CRC) as the Cornerstone of the children's rights

In 1989, the United Nations General Assembly adopted the CRC,[26] which is an international human rights treaty that defines civil, political, economic, social, health, and cultural rights for children. It has established a collective responsibility for the welfare of children.[27] With the adoption of the CRC, children's rights have gained new dimensions and become an indispensable basis for decision-making in all matters concerning them. This area illustrates the intersection of law with the actual lives of children. Although infertility issues pertain to couples or individuals facing such challenges, it is crucial to recognise that ART (especially MAR) contributes to the birth of a child who, upon birth, acquires legal capacity, thus becoming a bearer of rights and obligations.

The principle of the child's best interests, enshrined in Article 3 of the CRC, is a fundamental principle of children's rights law that obligates State Parties to follow it in the application and interpretation of all provisions of the CRC. Thus, the best interests of the child constitute a legal standard, and its content is determined on a case-by-case basis, including in situations concerning the child's right to know their origins. State Parties are, thus, obliged to ensure that the rights of the child, as a member of a vulnerable group, are protected. With the development of ART, specifically MAR, particular articles of the CRC have been given new aspects that could certainly not have been foreseen at the time of its adoption, in the light of today's rapid developments in, for example, the medical field (e.g., the aforementioned MT and gene editing). The latter has led to new perspectives, understandings, and interpretations of children's rights and individual articles on CRC. Article 7 of the CRC—' […] *and as far as possible, the right to know* […]'—is certainly one of these articles.

Article 7 of the CRC explicitly states that a child has the right to know their parents and to be cared for by them. State Parties must ensure the implementation of this right in accordance with their domestic laws and obligations imposed on them by the relevant international instruments in

[26] Convention on the Rights of the Child (CRC - Slovene *Konvencija o otrokovih pravicah*): Uradni list SFRJ, št. 15/90; Uradni list RS, št. 35/92.
[27] Kraljić and Drnovšek, 2019, p. 114.

this field. However, according to Article 7(1) of the CRC, this right is only to be realised if possible. Simultaneously, there is a conflict of interest between the child's right to know their genetic origin and that of the gamete donor to anonymity. The provision in Article 7 of the CRC does not impose states to guarantee an absolute right for children to know their parents. Instead, Article 7(1) of the CRC merely states that the child 'shall, as far as possible, have the right to know their parents' and that State Parties will ensure the implementation of this right in accordance with their domestic laws and international obligations. Thus, while every child has the right to know the truth about their origins, unless this is the case, their best interests do not justify disclosure.[28] The European Court of Human Rights (ECtHR) has addressed the right to know one's origins in several cases, initially concerning adoption. ECtHR in 1989, in the case of *Gaskin v. United Kingdom*[29], has established*:* 'Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification*'.*

The CRC leaves the decision on how States will legally regulate this right of the child to the individual State Parties.[30] Consequently, there are significant differences between the legal frameworks of the CRC's State Parties. However, according to Preložnjak, the text of Article 7(1) of the CRC, which states 'and, as far as possible, the right to know one's parents', can be interpreted more broadly also to include not only knowledge of gestational (surrogacy) and biological (donated gametes) but also mitochondrial parents (MT technologies).[31]

Article 7 of the CRC is complemented by Article 8, which provides the child's right to maintain their own identity.[32] However, the CRC does not clearly define what constitutes as 'identity' but provides three examples of what 'own identity' includes: nationality, name, and family relations (Article 8(1) of the CRC). This implies that, while nationality, name, and family relations are essential components of a child's identity, they are not

[28] Fortin, 2009, p. 337.
[29] *Gaskin v. United Kingdom* App. no. 10454/83, 7 July 1989, para. 89.
[30] Novak IN: Novak, 2019, p. 742.
[31] Preložnjak, 2020, p. 1178.
[32] The word 'identity' derives from the Latin word '*identitas*' and means a group of individual characteristics that distinguish one person from another. (Petrović and Blašković, 2014, p. 79).

the only elements.[33] To swiftly restore identity, appropriate assistance and protection shall be provided in cases where some or all elements of a child's identity have been unlawfully deprived (Article 8(2) of the CRC). State Parties are, thus, obligated to ensure the prompt restoration of a child's identity.[34] Family relations, as mentioned in Article 8 of the CRC, are a fundamental part of a child's right to know their identity. This includes the knowledge of both legal-social parents (e.g., adoption) and genetic (e.g., in MT) or gestational parents (e.g., in surrogacy). In recent years, this has gained importance, as many children who were adopted, born through ART, or anonymous birth tend to search for their biological parents and, thus, their origins. While, in the past, this search relied mainly on paper documents and personal testimonies, the rapid advancement of modern technology has further facilitated and enabled children—many of whom are now adults—to search for their biological parents.[35]

Article 1 of the CRC already states that for its purposes, a child is defined as any human being under the age of 18 unless the law applicable to the child provides that the age of majority shall be reached earlier. However, individuals typically begin their search for their origins and identity after gaining the majority (adulthood). The ECtHR also affirmed this in the case of *Jäggi v. Switzerland*, where it explicitly pointed out that an individual's interest in knowing their parents' identity does not diminish over time but rather tends to increase.[36] A child who is informed during childhood[37] that they have been adopted (which also applies to children born through gamete donation) often embarks on a search for their biological parents upon reaching adulthood. The UN Committee on the Rights of the Child has explicitly called on State Parties to take necessary measures to ensure that all children, regardless of the circumstances of their birth, have the ability to

[33] Kraljić, 2021, p. 101.
[34] Čolaković, 2021, p. 2021; Clark, 2012, p. 627.
[35] Kraljić, 2021, p. 101.
[36] *Jäggi v. Switzerland* App. no. 58757/00, 13 February 2006.
[37] Such a regulation can be found in Article 92 of the Family Act of the Federation of Bosnia and Herzegovina (FA-FBH - *Porodični zakon Federacije Bosne i Hercegovine*: Službene novine FBIH, br. 35/2005, 41/2005, 31/2014, 32/2019). The FA-FBH explicitly states that a child has the right to know who their parents are. It even imposes an obligation on the adoptive parent to inform the adopted child about the adoption no later than by the child's seventh year or immediately after the adoption if the child was older at the time of adoption.

obtain information about their parents' identities to the extent possible.[38] This would also ensure the right to respect for private life, which includes the right to access information that would make it possible for an individual to trace their roots, understand the circumstances of their birth, and obtain certainty regarding parental filiation.[39]

However, the CRC does not provide any guidance or condition under which children should be granted this right.[40] the CRC does not provide any criteria for balancing the interests of the child and those of the biological parents in the event of a conflict; thus, it can be concluded that the CRC does not explicitly guarantee the protection of the child's right to know their identity.[41]

3.2. The right to know the origin in the light of MAR

Persons conceived with donated gametes live with and are raised by their social-legal parents. These persons (including those who are already adults) may or may not know that they were conceived with donor gametes, meaning that a third party was involved in their conception. Despite the growing trend towards advocating for the disclosure of genetic parentage, the involvement of a third party is not indicated or recorded in the civil registry—including in Slovenia. Thus, the disclosure of genetic origins remains the responsibility of the social-legal parents.[42]

However, before even discussing whether a child has the right to know information about the gamete donor, it is essential to address whether children conceived with donor gametes should be informed of the method of their conception. This could be considered as a preliminary question or a right to be informed about their conception. If children are not informed, the right to access information about the gamete donor becomes irrelevant.[43] The Slovenian law is already inadequate in addressing disclosure issues in the context of adoption, as such a provision is missing in the *Slovenian FC*. The legislature has missed an excellent opportunity to align Slovenian family law with modern frameworks, which explicitly mandate the duty of parents to inform their children that they were either adopted or conceived

[38] Concluding Observations, recommendations 31 and 32, CRC/C/15/Add.188, 8.
[39] Recommendation 2156 (2019) Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para. 2.
[40] Kraljić, 2021, p. 101.
[41] Preložnjak, 2020, p. 1179.
[42] Ravitsky, 2017, p. 2.
[43] Frith, 2007.

with donated gametes.[44] Based on the Slovenian legal framework, the FC does not impose a duty on parents to disclose this information, nor is it recorded in the civil registry that a child was adopted or conceived with donated gametes.

3.2.1. From 'no information' to 'full access'

As mentioned above, countries approach the right to know one's origins in different ways, even in the field of adoption, which is an established legal institution. However, we are witnessing the rapid development of ART, specifically MAR, which helps people who are unable to conceive naturally in fulfilling their desire to have a child. Every advancement, particularly in the field of ART and MAR, raises several legal questions. One fundamental issue, which is currently the subject of much debate, concerns the approach to accessing information on gamete donors.

Following Łukasiewicz, access to information may be divided into six types:

- No information – a donor-conceived person has no right to find out any identifying information regarding the donor's role in MAR. A child conceived as a result of the gamete donation may not request access to the records about the donor (e.g., in Iceland, the donors may request anonymity. However, a child conceived through artificial insemination can request information concerning their origin upon reaching the age of 18, provided the donor did not request anonymity).[45]
- No information, but with potential exceptions – the fundamental rule is the confidentiality of non-identifying information about the donor. However, there is an exception, as it is possible to disclose medical information stored in a confidential file without any identifying details about the donor. For example, under Greek regulations, access to the confidential file is only permitted for medical reasons.[46]
- Access to non-identifying information – the third group comprises countries that allow access to non-identifying information about the donor. The fundamental premise is that the anonymity of gamete donation is still legally protected, and it is prohibited to open records

[44] Comp. Article 92 of the FA-FBH.
[45] Łukasiewicz, 2020, p. 90.
[46] Calhaz-Jorge et al, 2020, p. 9; Łukasiewicz, 2020, p. 90.

revealing the donor's name and surname for the child. However, individuals seeking non-identifying information about the donor do not need to meet any requirement other than the legal age limit. The scope of non-identifying information available varies between countries. For example, in Poland, a person conceived with donated gametes has access to information about the donor's year and place of birth, as well as some health data. In Estonia, a person conceived with donor gametes can obtain information about the donor's citizenship, skin colour, education, marital status, whether they have children, height, body build, and hair and eye colour.[47]

- Access only to non-identifying information, but identifying data are available if a specific requirement is fulfilled – Spain allows access to non-identifying information about donors. However, in exceptional cases, the disclosure of the donor's identity is permitted. Such an exception is made, for example, in circumstances that pose a threat to the child's life or health.[48]
- Access to non-identifying information, but identifying data are available depending on the donor's choice – some jurisdictions have made significant steps towards disclosing identifying information about donors. In the Netherlands, a person who knows or suspects that they were conceived through donor artificial insemination and who has reached the age of 12 has access to certain non-identifying information about the donor: physical characteristics (height, weight, skin colour, eye colour, and hair colour and type), education and occupation, and information about the social environment (age, marital status, and family composition) as well as a description of distinctive traits and characteristics provided by the donors themselves. Identifying personal information of the donor (name, surname, date of birth, social security number, and place of residence) can be shared with a person who knows or suspects they were conceived through donor insemination and who has reached the age of 16, provided that the donor has given written consent. If the donor does not provide consent, disclosure may be prohibited only if the donor has a severe interest in preventing it due to potential

[47] Łukasiewicz, 2020, p. 90-91.
[48] Riano-Galán, Martínez González and Gallego Riestra, 2021; Łukasiewicz, 2020, p. 91.

consequences for the applicant. If the donor disagrees and has a compelling reason, the transfer and disclosure will not occur.[49]

- Access to non-identifying and identifying information as a rule – certain countries have enacted laws that ensure that individuals who conceived with donor gametes have access to both non-identifying and identifying information about the donor.[50] One such country is Sweden, which has guaranteed non-anonymous donations since 1985.[51] Sweden has achieved this through the '*Genetic Integrity Act*'[52], which addresses the 'right to information'. Section 5 of Chapter 6 provides: 'A person conceived through insemination with sperm from a man to whom the woman is not married or with whom the woman does not cohabit has the right to access the data on the donor recorded in the hospital's special journal if he or she has reached sufficient maturity. If a person has reason to assume that he or she was conceived through such insemination, the social welfare committee is obliged, upon request, to help this person find out if there are any data recorded in a special journal'. Section 5 of Chapter 7 provides: 'A person conceived through in vitro fertilisation using an egg other than the woman's own or sperm from a man who is not the woman's spouse or with whom the woman does not cohabit has the right to access the data on the donor recorded in the hospital's special journal if he or she has reached sufficient maturity. If a person has reason to assume that he or she was conceived through such fertilization, the social welfare committee is obliged, upon request, to help this person determine if there are any data recorded in a special journal'. The data collected and stored include identifying information about the donor, such as name, personal identification number, address, and phone number. Additionally, non-identifying data, such as physical

[49] Łukasiewicz, 2020, p. 91.

[50] The Australian State of Victoria has completely abolished donor anonymity, including retrospectively. The State has concluded that it is responsible for providing all individuals conceived with donor gametes the opportunity to access information about their donors, including identifying details (Recommendation 2156 (2019) Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para. 4; Ishii and de Miguel Beriain, 2022).

[51] Irvine, 2024, p. 4.

[52] 'Genetic Integrity Act (Svensk fbrfattningssamling 2006:351)' (Swedisch: *Lag om genetisk integritet)*, issued 18 May 2006.

characteristics, hair colour, and occupation, may also be collected and made accessible to individuals conceived with donor gametes.[53]

3.2.2. Understanding Origins: A Key Component of a Child's Identity

Most people who know their parents take their origins for granted.[54] However, some children and adults are unaware of their biological parents. Setting aside the sociological aspects, desires, and needs of children to know their parents, and focusing on the legal foundations, it can be confirmed that the rapid development of biotechnology has opened many legally sensitive issues in family law.[55] The right of children to know their origins has gained increasing significance in recent years, both abroad and in Slovenia. Following Besson, 'the right to know one's origins amounts to the right to know one's parentage, i.e., one's biological family and ascendance, and one's conditions of birth. It protects each individual's interest to identify where she comes from'.[56]

The reasons driving an individual's interest in discovering their origins vary. Central to this is the missing piece that individuals seeking their origins feel is crucial for shaping their own identity.[57] In *Mikulić v. Croatia*,[58] the ECtHR emphasised that knowing one's biological father is essential for an individual, as knowledge of one's origins is a significant element in forming one's personality.[59] Therefore, States must ensure effective procedures to facilitate this process. Access to information about one's origins can be important both in childhood (e.g., for health-care reasons) and later in adulthood (e.g., for searching for one's ancestors).

Individuals may have a psychological need for identity, a health-related basis (e.g., knowledge of hereditary diseases), or even material interests (e.g., inheritance, alimony). Curiosity about the donor's characteristics, a desire for a better understanding of ancestral history, family, and genetic background, and a simple wish to answer the question,

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[53] Łukasiewicz, 2020, p. 91; Ishii and de Miguel Beriain, 2022; Sabatello, 2014, p. 37; Irvine, 2024, p. 9.
[54] Besson, 2007, p. 138.
[55] Lamçe and Çuni, 2013, p. 605; Kraljić, 2022, p. 128.
[56] Besson, 2007, p. 140.
[57] Chan and Singer, 1999, S. 174.
[58] *Mikulić v. Croatia* App. no. 53176/99, 7 February 2002.
[59] Čolaković, 2021, p. 225.

'Why am I who I am?' also appear as reasons.[60] Although determining one's origins might lead to unpleasant consequences in the personal and family lives of all involved, the child's interest in learning about their origin should outweigh the interest in legal certainty and the need to protect the stability of existing family relationships.[61] As mentioned, the concept of 'knowing one's origins' can be understood as an umbrella concept that encompasses at least three aspects:

- Medical aspect: The right to know the complete family medical history and medically relevant genetic history of the donor.
- Identity aspect: The right to genetic information about the donor that could help descendants complete their understanding of their own identity.
- Relational aspect: The right to know the full identity of the donor with the aim of attempting to establish a relationship with the donor.[62]

In the case of adoption, a record of the child's biological parents is usually provided in the original birth register; however, this is not the case for children conceived with donated gametes. An example of good practice in the field of adoption is the 'Children Act of 1989'[63] and the 'Adoption Contact Register'[64] (both from the United Kingdom), which allow adopted children to access their original birth records upon reaching the age of 18. They can access and view their original personal name and the details of their parents if recorded. This enables adopted individuals to obtain information about their pre-adoption history.[65] In the case of children conceived with donated gametes, there is no such record, or all the documentation is usually kept at the health institutions that performed these procedures. Therefore, even if social parents decide to disclose, access to information about the gamete donor (according to national legislation) may be prevented. Following Article 18(2) of the Slovenian Infertility Act, a child conceived by MAR with donor gametes may, for medical reasons, request that the medical centre provide them with medically relevant

[60] Wade, 2021.
[61] Decision of the Constitutional Court of the Republic of Slovenia, no. *U-I-328/05-12*, 18 October 2007, para. 14.
[62] Ravitsky, 2007, p. 3; Preložnjak, 2020, p. 1176.
[63] *Children Act 1989*, [Online]. Available at: https://www.legislation.gov.uk/ukpga/1989/41/contents (Accessed: 10 September 2024).
[64] *Adoption Contact Register*, [Online]. Available at: https://www.gov.uk/adoption-records/the-adoption-contact-register (Accessed: 10 September 2024).
[65] Cretney, 2000, p. 329; Colcelli, 2012; Kraljić, 2022, p. 129.

information about the donor gametes, provided that they are of sound mind and at least 15 years old. The child's legal representative may only learn this information with the authorisation of a court in a non-contentious proceeding if there are exceptional medical reasons for doing so.

One of the key questions associated with disclosure is whether not knowing one's genetic origin harms individuals conceived with donated gametes. Two concepts of the right to know one's genetic origin attempt to address this question as follows.

- The consequentialist approach[66] is based on the idea that a lack of knowledge of one's genetic origin harms individuals conceived with donated gametes. The harm experienced by these individuals can be empirically assessed and proven.
- The conceptual approach assumes that knowing one's genetic origin is a fundamental human right. In this approach, empirical data proving that a lack of knowledge about one's origin is harmful to an individual are not required. Notably, simply disclosing the genetic origin does not necessarily result in a better or happier life for individuals conceived with donated gametes. The disclosure itself can also negatively impact an individual. However, failing to inform individuals conceived with donated gametes about their genetic origin is certainly wrong. Such an action violates their right to access this information and deprives them of the freedom to choose. When individuals have all the information about their genetic origin, they can, in accordance with the principle of autonomy, decide how to approach this information and what significance to attach to the genetic components of their identity.[67]

Both approaches confirm that an individual has the right to know their origin (including genetic origin) and that clinical or legal frameworks that violate this right are ethically unacceptable and should be changed both nationally[68] and internationally.[69]

Although the right to know one's origin is incorporated into the CRC and is, therefore, a fundamental right of the child, it cannot be traced

[66] More on consequentalism see Savolescu and Wilkinson, 2019.
[67] Warnock, 1987; Frith, 2007.
[68] The Dutch Supreme Court ruled already in 1994 that a child's fundamental right to fully and freely develop their personality includes the right to know the identity of their biological parents (*HR 15 April 1994, NJ 1994, 608*).
[69] Ravitsky, 2017, p. 2.

explicitly either in the CRS or in the FC. This creates the impression that the Slovenian FC prioritises maintaining the anonymity of biological parents. However, although the right of the child to know their origin is not explicitly specified in either the CRS or the FC, this does not mean that it can be denied. Article 8 of the CRS states that ratified and published international treaties (including the CRC) are applied directly. Nevertheless, the Constitutional Court of the Republic of Slovenia addressed the right to know one's origin in 2007. It took a clear stance that an individual's right to know their origin falls within the scope of personal rights, whose foundation and limits are determined by Articles 34 and 35 of the CRS. Human personality is a composite of various personal goods protected by personal rights that belong to the person as an individual. The guarantee of personal rights ensures those elements of an individual's personality not protected by other provisions of the CRS, thus allowing individuals to freely develop and shape their lives according to their own decisions. Among the elements crucial for the development of an individual's personality is the knowledge of one's origin—knowing who one's biological parents are. This knowledge is essential to an individual's self-concept and place in society. Knowing one's origins also significantly affects family and kinship ties. The inability to determine one's origin can be a severe burden and a source of uncertainty for an individual. Therefore, the right to know one's origin is also part of personal rights.[70]

3.2.3. Broader Interest Regarding the Right to know one's origin?

Enabling access to information about genetic origins for individuals conceived through donor gametes has implications for various other interested parties or stakeholders. The State holds the responsibility of enacting appropriate family law legislation to ensure that gamete donors do not bear parental responsibilities for children conceived using their donated gametes. This is explicitly stated in Article 27 of the Infertility Act.[71] Moreover, it is the State's duty, or that of the industry (e.g., IVF clinics, gamete donation agencies, or sperm banks), to maintain proper records and registers of donors. This requirement is reflected in Article 39 of the

[70] Decision of the Constitutional Court of the Republic of Slovenia, no. *U-I-328/05-12*, 18 October 2007, para. 8.

[71] See Article 27 of the Infertility Act: »*Donors have no legal or other obligations or rights in relation to children conceived through ART.*«

Slovene Infertility Act**,** which mandates the recording and tracking of donor information.

Donors must be fully informed about the consequences of donating with an open identity and the fact that they may be committing to updating their records for life. They should also be aware of the possibility of meeting their genetic offspring one day. This means that parents must also receive counselling and be advised to carefully consider the implications of conceiving a child with a donated gamete. Parents should consider how they will handle the situation if their child wishes to access such information in the future, as well as the potential impact that disclosure might have on their family dynamics.[72]

While the question of gamete donation arises naturally in same-sex families, for heterosexual parents, the decision to disclose is one that they must consciously make. Many families struggle with this decision, even in countries that prohibit anonymous donation (e.g., Sweden[73]). Studies have shown that most parents choose not to disclose the circumstances of their child's conception because of reasons such as the desire to protect the child from the potentially unfavourable knowledge that they are not their genetic parents, concealing infertility, protection of the child from negative social reactions, protection of the family, and so on.[74]

The consideration of removing donor anonymity raises concerns about how this might affect the availability of donors. For example, there could be a shortage of potential donors, which would not be in the best interest of individuals or couples who require third-party assistance to conceive a child. The lack of donated gametes can also occur for other reasons. For example, the lack of male gametes is present in certain parts of Sweden, which changed the law in 2016 and made it possible for single women to undergo artificial insemination with donated sperm. The latter increased the demand for donations. Sweden is, therefore, working towards encouraging donations. With this, they want to shorten waiting times, reduce travelling abroad, and reduce the import of donated sperm from Denmark.[75] However, good practices in various countries have shown that much can be achieved

[72] Ravitsky, 2017, p. 3.
[73] More Sabatello, 2014, p. 30.
[74] Ravitsky, 2017, p. 3.
[75] Irvine, 2024.

through well-managed campaigns that emphasise and build on the altruism of donors.[76]

4. Final Thoughts

National legal frameworks vary significantly regarding the right to know one's origins. Some European countries, such as Norway (2003), the Netherlands (2004), the United Kingdom (2005), and Finland (2006), have abolished the originally established right to donor anonymity. Countries such as Austria, the Netherlands, Switzerland, and Germany permit the disclosure of donor identities. In 2018, Portugal ruled that anonymity was unconstitutional. In contrast, the legal framework in the United States allows donors to choose whether they want to remain anonymous.[77]

The balance regarding the right to know one's origins for children conceived through MAR (e.g., with donated gametes) is slowly but decisively tipping in favour of recognising this right. This means that children conceived through MAR increasingly have the right to know the identity of the donor, should they wish to do so. The right to know one's origins is closely linked to the right to respect for private life, as it encompasses the fundamental aspects of personal identity, family ties, and the freedom to make informed choices about one's life.

In 2019, the Parliamentary Assembly of the Council of Europe adopted 'Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors, and children' (Recommendation 2156)**,** which provided clear guidance regarding the right of children conceived through gamete donation to know their origins. Recommendation 2156 suggests that Member States should abolish anonymity in all future gamete donations and ban the use of anonymously donated sperm and oocytes. That is, except in exceptional cases (e.g., when the donation is from a close relative or friend), the identity of the donor would not be revealed to the family at the time of donation. However, the identity of the donor would be disclosed to the child, conceived with donor gametes, at the age of 16 or 18. Upon reaching the specified age, the child would be officially informed (the State should have this role) about the existence of further information regarding the circumstances of their conception. It is recommended that prior to this, legal parents should also be

[76] Ravitsky, 2017, p. 3; more also Reed and Kant, 2023.
[77] Riano-Galán, Martínez González and Gallego Riestra, 2021.

informed and reminded that their child will soon receive an official notification about their conception and origins. This would encourage parents to disclose this information to their child themselves prior to the official communication.[78] After being informed, the child could decide whether and when to access this information, including the identity of the donor, and whether to establish contact. Ideally, this decision would be supported by access to counselling, guidance, and support services.[79] An alternative approach would be to mandate the recording of donor-conceived status on birth certificates. This would ensure that individuals know they can access further information about the circumstances of their birth, including the identity of donors or surrogates, from the relevant State authorities. In line with the principle of autonomy, this information would only be available to individuals born through gamete donation.[80] Unfortunately, **Slovenia** has not yet adopted legislation to regulate this issue. Lawmakers should focus on placing the child's interests, particularly their right to know their origins, at the forefront of legal reforms in this area.

Recommendation 2156 also states that the waiver of anonymity should not have legal implications for parenthood. The donor should be protected from any claims for parental care (obligations and rights) or inheritance claims. The donor must receive appropriate guidance and counselling before consenting to donation and before their gametes are used.[81] This is appropriately regulated in Slovenian law, as donors do not have any rights or obligations towards children conceived with donated gametes. Additionally, the law provides for counselling before donation and the use of donated gametes.

Member States of the Council of Europe that permit the donation of sperm and oocytes should establish and maintain a national donor registry and a registry of conceived donors to facilitate the exchange of information, as outlined in paragraphs 7.1 and 7.2 of Recommendation 2156. This should also include the implementation of a cap on the number of donations from the same donor. Additionally, measures should be taken to prevent close relatives from marrying and to trace donors if a medical need arises. Clinics

[78] Wade, 2021.
[79] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para 7.1.
[80] Wade, 2021.
[81] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para 7.2.

and service providers should be required to maintain and exchange relevant records with the registry. Moreover, a mechanism should be established for cross-border information exchange between national registries.[82] Under Slovenian law, access to health data is provided, and a national registry and records are maintained. However, challenges arise with cross-border reproductive procedures, for which efforts must be made to enhance the adequacy of information exchange between national registries. A significant step forward has been made with the introduction of the 'Single European Code' (SEC), which ensures greater traceability within the European Union.

As previously mentioned, Australia has completely abolished donor anonymity, including retrospectively. Recommendation 2156 takes a different stance, suggesting that in the case of legislative changes, donor anonymity should not be retrospectively removed if it was promised at the time of donation, except for health reasons or if the donor has consented to the removal of anonymity and, thus, to the registration of donors and persons conceived with donated gametes registry. Before donors decide whether to consent to the removal of their anonymity, they should be provided with guidance and counselling.[83] If Slovenia chooses to amend its legislation to eliminate anonymity, it will need to clearly define when such changes will apply and what this will mean for past and future donors.

The principles and recommendations outlined above must be applied without compromising the most crucial aspect: Gamete donation must remain a voluntary and altruistic act solely aimed at helping others (singles or couples), without any financial or comparable benefit to the donor.[84] Legislative changes in certain countries that have strengthened the right to know one's origin for individuals conceived with donated gametes have also led to a decrease in the number of donors. This decline can be concerning given the increasing issue of infertility among couples. The reduction in donors poses a serious obstacle to achieving the desire for children among couples or individuals who cannot conceive on their own. Therefore, countries need to establish an appropriate system that focuses on informing, promoting, and encouraging donations, while ensuring transparency

[82] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para 7.3.
[83] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para 7.4.
[84] Recommendation 2156 (2019) on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, para 7.5.

regarding the right to know one's origins. A sufficient number of donated gametes in national systems significantly facilitates couples' access to MAR as they do not need to seek treatment abroad. Thus, legislative changes must be twofold: on the one hand, they should prioritise the right to know one's origins, which, according to the CRC, is not absolute. On the other hand, the State should create the opportunity for individuals to decide, in accordance with their autonomy, whether to exercise this right. Thus, Slovenia should adopt this approach.

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ZDEŇKA KRÁLÍČKOVÁ*

The status rights of the child and the search for a new paradigm of parenthood in Czechia**

ABSTRACT: The traditional concept of the status rights of a child, which is based on the concept of natural law that the mother of the child is the woman who gave birth to the child and the father is the man determined by the time-honoured presumption of paternity, has been disturbed in recent years. Many States are now faced with requests from their citizens to register a foreign-born child, particularly through surrogacy. These often involve not only married or unmarried couples, both heterosexual and homosexual, but also individuals. Assisted reproduction, and the "reproductive tourism" frequently associated with it, is a challenge, not only for the "conservative legislator" but also for the "old-world registrar" recording the birth of a child in the public registers, or for the "rigid judge" deciding on the recognition of a foreign public document when the registry office "sticks to" the old order. However, it encompasses not just the controversial issue of assisted reproduction, or surrogacy, but much more: a fresh perspective on family law, family life, parenthood, human rights – including the rights of the child, or the best interests of the child – in the context of public policy, or public order.

KEYWORDS: assisted reproduction, surrogate motherhood, mother, father, gender neutral parenthood, child, rights, status, foreign decision, recognition, public order, case law, Constitutional court, designed law.

1. Introduction

This study aims to highlight "the burning issue" in the field of family law, which breaks the age-old principle that only the woman who gave birth to the child is the mother of the child, as well as the possibility of "double motherhood" or "double fatherhood" under some legal systems. The matter

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of "gender-neutral parenthood" is not alien to the Czech environment either. It can be assumed that the practice related, *inter alia,* to the development of possibilities in the field of assisted reproduction, as well as to the changes in marital or partnership relations, cannot be ignored. Moreover, the reality of "open borders" and, in this connection, the issue of the recognition of "legal facts" arising abroad must be considered.[1]

New phenomena are not only faced by legislators but also by the courts and civil registrars. This study therefore focuses mainly on a key decision of the Constitutional Court of the Czech Republic, which has traditionally been considered rather conservative in matters of family relations. The ground-breaking decision suggests that the existence of a child's two legal fathers—conceived with the help of assisted reproduction technologies and delivered by a surrogate mother abroad—and their registration on the child's birth certificate cannot be unrecognised based on a conflict with public policy or public order. On the contrary, it was held that 'the non-recognition of a foreign decision, which was to determine parenthood of a child of two persons of the same sex in a situation where the family life had been effectively and legally constituted between them in the form of surrogacy, on the ground that Czech law does not permit parenthood between two persons of the same sex, is contrary to the best interests of the child protected by Article 3(1) of the Convention on the Rights of the Child'.[2]

The author of these lines foreshadows that if a child born to a surrogate mother abroad was "acquired" in accordance with foreign law, that is, legally, the conservative regulation of family status rights and established orders must "give way" in favour of this child, his or her rights to continuity of civil and family status. The rights of the child must not be seen only as abstract rights arising in particular from the Convention on the Rights of the Child (in the Czech Republic published under No 104/1991 Sb.) but as concrete rights to be protected.[3]

Furthermore, the author of this article asks what "face" Czech family law should take, whose key source – the Civil Code – has only recently been

[1] Wells-Greco, 2016.

[2] See the Ruling of the Constitutional Court of the Czech Republic from 29th June 2017, No I. ÚS 3226/16. It is available at http://nalus.usoud.cz/Search/Search.aspx (only in Czech).

[3] The relevant decision of the Constitutional Court aroused a lot of emotions and was met with a negative evaluation. For instance, see Telec, 2017, p. 670 ff.

adopted (Act No 89/2012 Sb., as amended, further "Civil Code" or "CC").[4] Its main drafters, as well as the professional public, have favoured the preservation of the traditional concept of status rights of the child in the Czech Republic.[5] However, nothing is immutable. Surprisingly, following the above-mentioned case law of the Constitutional Court of the Czech Republic and the relevant practice of the Supreme Court of the Czech Republic, the traditional concept of status rights is gradually being eroded by amendments to public law.[6] Should the concept of status rights regulated by the Civil Code be fundamentally changed in the spirit of these developments? Is it constitutionally consistent or desirable to allow a child to have two "legal mothers" or two "legal fathers", or for "gender-neutral parenthood" as well as marriage for "same-sex couples"? Furthermore, what about surrogacy as a "method of treatment for infertility"?

First, however, let us present a brief discussion on the concept of status law in the Czech Republic.

2. Law in books: Background to the legal regulation of family status rights[7]

2.1. Marriage, registered partnership, and partnership as forms of family life

It can be said that the inner Charter of Fundamental Rights and Freedoms (Act No 2/1993 Sb., hereinafter "Charter") is entirely congruent with the wide concept of family life guaranteed by international instruments, especially by Article 8 of the Convention for the Protection of Human Rights and Freedoms, which protects the right to respect for private and family life for all individuals (in the Czech Republic published under No 209/1992 Sb.). The Charter contains general rules stating, 'Parenthood and the family are under the protection of the law' (Article 32, Section 2, Charter). No established definitions exist for either parenthood or family.

Although the Civil Code guarantees the right of all individuals to freely choose their own way of life and to take charge of their own and their

[4] Radvanová, 2015, p. 1 ff.
[5] See Eliáš and Zuklínová, 2001 and 2005.
[6] See the Decree of the Ministry of the Interior No 174/2023 Sb., which amended the Decree implementing Act No 301/2000 Sb., on Civil Registers, Names and Surnames and on amendments to certain related acts, as amended.
[7] Previously in more detail Králíčková, 2021, p. 77 ff.

family's happiness, it provides increased protection for the family established by marriage. Systematically, the protection of marriage is enshrined at the beginning of "Book Two" – "Family Law". Let us stress that the Civil Code allows marriage to be solemnised only between a man and a woman (§ 655, CC).[8] "Gender-neutral marriage" was not even discussed during the preparation of the Civil Code despite recent developments in many European countries.[9] Nevertheless, a group of deputies lodged a pending draft in the Parliament of the Czech Republic in the last parliamentary term, which was in favour of "gender-neutral marriage".[10] The draft could be seen by some as progressive and modern; others would view it as a step undermining the traditional family values or "traditionally marriage-centric family laws with fixed perceptions of gender roles".[11] As this legislative proposal was not approved in the last legislature, a new legislative proposal submitted to the Parliament of the Czech Republic in the current legislature has built on its theses.[12] The question is whether it will be turned into law. Perhaps as a kind of "step forward" on the road to "gender-neutral marriage", the legislature recently passed a law amending the Civil Code (Act No 123/2004 Sb., effective since 1 January 2025). Thus, in addition to marriage, the Civil Code as amended will also regulate partnerships for same-sex couples. Recently, same-sex persons entering a partnership will have the same rights and obligations as spouses, including, for example, community property, family dwelling protection, etc. However, same-sex partners will not be allowed to become "common parents" of the child (see new § 3020, para 2, CC). Finally, this amendment to the Civil Code repealed key provisions of the Act on Registered Partnership adopted for same-sex couples after many vicissitudes and regulating only a few rights and obligations, for example the right to maintenance (Act No. 115/2006 Sb., on Registered Partnership, as amended).[13] The change means that registered same-sex partnerships under a separate law are preserved but can no longer be concluded. If these individuals registered under a special law want more rights, they can enter a

[8] Králíčková et al., 2020, p. 1 ff.
[9] Scherpe, 2016, p. 40 ff.; Sörgjerd, 2012, p. 167 ff.
[10] Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No 201/0.
[11] Scherpe, 2016, p. 133.
[12] Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. IX., Draft No 241/0.
[13] Holub, 2006, p. 313 ff.

partnership under the Civil Code, which can be concluded in the same way as a marriage. However, it will not be a marriage.

2.2. Motherhood, fatherhood or simply parenthood

The Czech Civil Code states that a child can only have one "legal mother" and one "legal father" in the case of parenthood. The "legal parenthood" should be, in principle, in harmony with the biological and social reality.[14] The Civil Code regulates the establishment of family ties by stating that 'Kinship is a relationship based on a blood tie or originated by adoption' (§ 771, CC).

Similar to most European countries, under Czech law, the mother of the child is the woman who gave birth to the child (§ 775, CC).[15] This has been clearly the case in the Czech Republic since 1998 as a result of a major amendment to the Act on the Family (cf. § 50a, Act No 94/1963 Sb., as amended).[16] This concept was also the basis for earlier legislation in the Czech territory. They were based on the "natural law school", on which the Austrian General Civil Code ("ABGB") of 1811 was built.[17] The latter

[14] Králíčková, 2008, p. 275 ff.

[15] Although the new maternity legislation is relatively simple, it is quite concise. It is expressed as a mandatory norm, which cannot be derogated from unilaterally (e.g., by so-called abandonment, failure to show interest, etc.) or contractually (whether in a pecuniary or non-pecuniary, altruistic way). Incidentally, even the older literature on this matter discusses the "absolute nature of parental rights" acting *erga omnes*. This is not a presumption, as in the case of paternity.

In particular, the Civil Code provides that arrangements which, *inter alia*, violate the law relating to the status of persons are prohibited (see § 1, para 2, CC). There can be no doubt that the provision governing maternity is a fundamental norm establishing the civil status of a person. The legal regulation of paternity by means of one of the three presumptions of paternity (see § 776 ff, CC) and the broader kinship relationship in general (§ 771 ff, CC) derives from this provision.

Violation of the prohibition on the status of persons is punishable by absolute nullity, which the court will consider *ex officio* (see § 580, para 1, CC, and § 588, CC). A person or his or her civil status may not, by its nature, be the subject of any contract. This must be the basis for answering many questions concerning surrogacy or the (in)validity of a surrogacy contract. Králíčková, 2022, p. 83 ff.

[16] Some foreign legislation expressly provides that agreements and contracts that contravene the mandatory norm that bases maternity on the legal fact of birth are null and void. See e.g., § 82 of the Slovak Act on the Family. For details, see Pavelková, 2013, p. 515 ff.

[17] With this significant action, the enlightened legislator reacted very strongly and categorically to the unfortunate previous practice of application, enshrined in the principles and regulations previously in force, according to which the mother of an illegitimate child

firmly upheld the ancient Roman legal doctrine of *mater semper certa est*, conceiving of maternity based on the child´s origin". According to this General Civil Code, the identity of the mother was unquestionable in the spirit of the philosophical basis of the General Civil Code. For its time, the General Civil Code was a progressive work compared with the French Code Civil, which was based not on the fact of birth but on the theory of the recognition of a child born out of wedlock by his or her parents.[18]

Surrogacy is not regulated or prohibited in the Czech Republic. However, the Civil Code "mentions" it in the context of adoption (§ 804, CC, for details, see below). In continental Europe, an explicit ban on surrogacy prevails. Surprisingly, the recent intention of the Ministry of Justice of the Czech Republic deals with this matter quite differently from European standards. The intention to explicitly regulate surrogacy by law has been made public, challenging the centuries-old principle that the mother of a child is determined by its birth (see below, part 4).

Many legal systems, including the Czech one, allow assisted reproduction both for a married woman and a woman from an "infertile unmarried couple" (Act No 373/2011 Sb., on Specific Health Services, as amended). There are relevant consequences for the legal regulation of parenthood as regulated by the Civil Code, especially because "new" situations require "innovative" solutions.[19] Donation of genetic material is fundamentally irrelevant, both in the case of the mother and the father of the child. Let us stress that surrogacy is not regulated as a "method of treatment for infertility", unlike several foreign laws. It should be added that some legislation provides for the possibility of dealing with "infertility" just through surrogate mothers. The approach of legislators to how the child's "intended mother" becomes a "legal mother" varies.[20] However, in line with the European Court of Human Rights case law and its other activities, adoption is the only legal way to become a "legal mother" in Czechia.[21]

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was not obliged to mark not only the name of the procreator but also her name when registering the child at birth.

[18] On the development of this question cf. Judgment of the Grand Chamber of the ECtHR in Odièvre v. France of 13 February 2003, Application No 42326/98.

[19] Králíčková, 2014, p. 71 ff.

[20] Scherpe, 2019.

[21] Advisory opinion of 10th April 2019 in Request No P16-2018-001. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-6380464-8364383%22]} (Accessed: 17 July 2024).

Czech paternity legislation provides that if a child is born to a married woman, her husband is considered the father (§ 776, CC). If the mother of the child is not married, the father of the child is to be the man whose paternity is established by the same declaration of the mother and this man (see § 779, CC) or the man who had sex with the mother of the child during the so-called decisive period and the court decided on his fatherhood (§ 783, CC).[22]

The status of paternity in several European countries is based on similar assumptions. The differences are mainly in the (non-)existence of denial periods, their nature, the active legitimacy of the child or the putative fathers to file a petition for the establishment of paternity or denial of paternity, and the consequences caused by assisted reproduction.[23]

As regards assisted reproduction in Czechia, the Czech Civil Code stipulates that if assisted reproduction has occurred, the gamete's donation is not decisive. The man from the "infertile couple", married or *de facto*, who consented to the process of assisted reproduction based on informed consent will be registered as the father of the child (see especially § 778, CC). This man can only deny his paternity if he proves that the child's mother became pregnant by "means other than assisted reproduction" (§ 787, CC). In practice, many problems can and do occur; for instance, subsequent marriage to a man other than the man from the "infertile couple". The Civil Code does not have special provisions for these situations. This means that, for instance, in the event of a subsequent marriage to another man, the mother's husband will be considered the father of her child, and it will be up to him (and her) whether he (or she) uses the legal possibility of denying his paternity. It should be added that the child has no right of denial, nor does the right of denial belong to any man apart from the child's "legal father".

Adoption is an alternative method of becoming a "legal parent" in Czechia. It is always a status change. In the case of a minor child, it is a full adoption. Hence, adoption of a minor child must be viewed as an emergency, subsidiary solution to the crisis of the child's family of origin.[24] If there are close relatives of the child who are willing and able to provide care for the child personally, preserving family bonds will always take precedence over adoption by a non-relative (§ 822, CC). The law has especially regulated the issue of the "adoptability" of the child and many

[22] Králíčková et al., 2022, p. 173 ff.
[23] In details, see Ignovska, 2015.
[24] Králíčková, 2022, pp. 83–100.

other conditions since 1998, particularly due to the international conventions.[25]

Perhaps surprisingly, the Civil Code lifts a ban on adoption among close relatives in the case of surrogacy, although close family ties used to be traditionally a disincentive for adoption. The lawmaker, being under quite a strong pressure, relinquished this natural, social, and legal ban. As stressed above, the main authors of the Civil Code did not intend to regulate surrogacy as such at all.[26] However, the Civil Code currently stipulates that adoption is excluded among persons who are relatives in the direct line and siblings, except for kinship based on surrogate motherhood (§ 804, CC). It should be noted that medical law has never regulated surrogate motherhood in Czechia or former Czechoslovakia.However, surrogacy is a reality today. As mentioned above, the child's mother is a woman who delivered the child (§ 775, CC). Hence, adoption is the only "legal way" intended parents can become "legal parents". Of course, if the "intended father" is a "biological father" of the child as well, he can become the "legal father" by using the second presumption of fathership based on the agreement with the child's mother described above (§ 779, CC). Unfortunately, it is sometimes misused in praxis.

It is important to note that in accordance with the Act on Registered Partnership, registered partners of the same sex are prohibited from adopting a minor child jointly (§ 800, CC) or becoming joint foster parents of minors, as only married couples of the opposite sex are allowed to do it (§ 964, CC).[27] However, according to the Civil Code's most recent innovation (Act No 123/2024 Sb., effective since 1 January 2025), which established a partnership for same-sex couples, a partner can also become the child's adoptive parent if the other partner is the child's parent (see § 800, para 1, CC, as amended).

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[25] Králíčková, 2003, p. 125 ff.

[26] Eliáš and Zuklínová, 2001 and 2005.

[27] The situation of same-sex couples in relation to children has historically been difficult in the Czech Republic. In 2016, some changes were done in this field. The Constitutional Court of the Czech Republic found that the provision that status registration of partners of the same sex (of itself) is an obstacle for the adoption of a minor child by one of the registered partners, is discriminatory. That is why, this provision that prohibited a single adoption by one of the partners during the registered partnership (§ 13, para 2, Act on Registered Partnership), was cancelled. See the Ruling of the Constitutional Court of the Czech Republic from 14 June 2016, No Pl. ÚS 7/15. It is available on http://nalus.usoud.cz/Search/Search.aspx (only in Czech). There were dissenting opinions.

2.3. On the recognition of the family status instruments issued abroad

Here we only briefly refer to selected provisions of the law governing the recognition of foreign status decisions, which is enshrined in the Czech Republic in the Private International Law Act (Act No 91/2012 Sb., as amended, hereinafter "PILA"). This act is a universal regulation (not only) for family law relations with an international (cross-border) element where the facts are not regulated by instruments of international law (international treaties) or directly applicable EU rules (regulations).[28] The provisions on the relationship between spouses, parents, and children; the determination of the applicable law and the recognition of foreign decisions on divorce of the marriage and connected issues, and the determination and denial of parenthood or adoption are also relatively traditional and conservative. It is for the Supreme Court of the Czech Republic to declare that decisions on divorce and parenthood are recognised if at least one of the parties to the proceedings is a citizen of the Czech Republic (§ 51, § 55, PILA). Regarding recognition of the decision of adoption (§ 60, PILA), it is up to the district courts (§ 16, PILA). Nevertheless, the apparent conflict with public policy is considered a key provision preventing the recognition of a foreign judgment in general (§ 15, para 1, e, PILA).[29]

3. Law in action: the Constitutional Court´s case law

As mentioned in the abstract, many states are now faced with requests from their citizens to register a foreign-born child, particularly through surrogacy. These often involve married homosexual couples, as assisted reproduction and its "new forms" present a challenge for all. Surrogacy is not just an academic controversy; it is also a matter of resolving the predicaments of specific people. There is no doubt that the subsequent decision of the Constitutional Court of the Czech Republic was quite crucial for the development of Czech family law, especially for the interpretation of the rights of a child conceived through assisted reproduction and born by a

[28] Králíčková, Kornel, 2024, p. 31 ff.

[29] The Ruling of the Supreme Court of the Czech Republic from 31 July 2024, No 24 Cdo 2157/2022. Available at: https://www.nsoud.cz/Judikatura/judikatura_ns.nsf/$$WebSearch1?SearchView&Query=%5Bspzn1%5D%20%3D%2024%20AND%20%5Bspzn2%5D%3DCdo%20AND%20%5Bspzn3%5D%3D2157%20AND%20%5Bspzn4%5D%3D2022&SearchMax=1000&SearchOrder=4&Start=0&Count=15&pohled=1 (only in Czech) (Accessed: 9 July 2024).

surrogate mother abroad. It is to the credit of the Constitutional Court of the Czech Republic that many of the abstract rules mentioned above on status law and recognition of foreign court decisions have been overcome in practice, in particular cases, in favour of minor children, in their best interest. Now, I present the details of a key decision rendered by the Constitutional Court of the Czech Republic that has influenced the practice or decision-making of the Supreme Court of the Czech Republic in the context of the best interest of the child. The facts of this decision are as follows:[30]

In 2013, a child was born through a surrogate mother under a contract with two married men as "intended parents" in the USA. The embryo was created through assisted reproduction, with the egg being from an anonymous donor and the sperm of "intended parents". As the child was conceived through assisted reproduction, neither of the men knew how things were going and were not going to find out. However, by the nature of things, only one of the men was also the "biological or genetic father" of the child. If "legal parentage" is involved, before the birth of the child, the Superior Court of the State of California for Los Angeles County has declared that pursuant to the surrogacy agreement between "intended parents" and the surrogate mother, the surrogate mother is not the "legal parent" of the then-unborn child, and that these two men are "legal parents". It further ruled that these men would be listed as "legal parents" on the child´s birth certificate when the child was born. Consequently, after the birth of the child, the birth certificate issued by the State of California listed one man in the "father/parent box", and the other man was listed in the "mother/parent box". Because one of the men was a Czech state citizen[31] who regularly visited the Czech Republic with his husband and the child and was interested in maintaining contact with "his country", he sought to register the child in the Czech Republic as well. It was not only a matter of registering both "legal parents" of the child in the Czech registry office and issuing a birth certificate to the child in accordance with the American birth certificate but also ensuring that the child acquired Czech citizenship. However, the registry office in Prague refused to register the child and advised the parents to appeal to the Supreme Court of the Czech Republic to

[30] The Ruling of the Constitutional Court of the Czech Republic from 29 June 2017, No I. ÚS 3226/16. Available at: http://nalus.usoud.cz/Search/Search.aspx (only in Czech) (Accessed: 7 July 2024).
[31] The other one was a citizen of Denmark.

uphold the California court's decision in harmony with the rules settled by the Private International Law Act (see above for details, 2.3.).

In 2015, the Supreme Court of the Czech Republic partially recognised the judgment of the California court on parenthood only in relation to "one father". According to the Supreme Court, it was not contrary to public policy if the child was conceived through surrogacy (sic!). However, from the court's reasoning, it was reported that the parenthood of the "second father" was not recognised as manifestly contrary to public order and thus in breach of law (§ 15, para 1, e, PILA). Granting the application with respect to the recognition of the "second father", parenthood would effectively set up a situation corresponding to the joint adoption of a child by two persons of the same sex, which the Czech status law did not accept (see § 800, CC). The child was subsequently issued a birth certificate with only one "legal father" listed, and the "mother's box" was left blank.

Subsequently, in 2017, based on a constitutional complaint, the Constitutional Court of the Czech Republic overruled the judgment of the Supreme Court of the Czech Republic. The Constitutional Court of the Czech Republic declared a violation of the right of the child to take his or her best interests as a primary consideration in decision-making. Status rights of the child to continuity of the civil status established abroad were stressed, as well as the best interest of the child in the right to family life established on the "legal basis". According to the Constitutional Court's ruling, a foreign judgment establishing the parenthood of a child of two persons of the same sex should be recognised in a situation where the family relation and bounds have already been established between them *de facto* and *de jure* on the basis of surrogacy. It was concluded that 'If family life between persons, established on a legal basis, already exists, all public authorities must act so that this relationship can develop, and the legal safeguards that protect the relationship between the child and his or her parent must be respected'.[32]

It should be added that the Supreme Court of the Czech Republic currently recognises foreign decisions on the "legal parenthood" of two men or two women, following the decision of the Constitutional Court of the Czech Republic just analysed. Furthermore, in connection with the case law of the Constitutional Court of the Czech Republic on the recognition of "same-sex parenthood" towards a child born through a surrogate mother

[32] Ibid. Paragraph No 55, Conclusion.

established abroad, the public law regulations have been amended. The new decree established the possibility of registering same-sex parents in the birth register where the child is registered. It is now possible for a child to have the "gender-neutral parents" in the birth register and birth certificate: "father/parent" and "mother/parent" instead of "mother" and "father".[33]

However, regarding the adoption of the child by same-sex parents, it should be noted that the Constitutional Court of the Czech Republic has consistently ruled the non-recognition of a foreign adoption judgment as constitutional if the adoption would not be permissible under the substantive provisions of the Czech Civil Code. If parenthood is established via adoption (even after surrogacy), it is not recognised in the Czech Republic because foreign adoption decisions must be scrutinised from the perspective of the rule that a common adoption of a child is possible only by spouses (§ 800, CC). As mentioned above, only a man and a woman may enter marriage in the Czech Republic (§ 655, CC).

4. For and against surrogacy

As the Civil Code explicitly "mentions" surrogacy in relation to adoption (§ 804, CC), a Pandora's box is gradually opening. Private clinics, particularly, offer surrogacy without any legal regulation. Numerous problems arise from the Czech Republic's emergence as a "promised land" for surrogacy, even for many women from countries where surrogacy is explicitly prohibited and criminalised. It should be reiterated that the main creators of the draft Civil Code, as well as the professional public, have favoured the preservation of the traditional concept of status rights of the child in the Czech Republic.[34] However, near the conclusion of the legislative process, a provision "mentioning" surrogacy was inserted in the legislative draft of the Civil Code. As stated above, the aim was to break the ban on adoption between close relatives, that is, all relatives in the direct line and between siblings. The justification provided was that "in practice it happens", and it needs to be "legally treated".

It should also be recalled that surrogacy has never been regulated or prohibited in the territory of the present-day Czech Republic. Nor has it ever

[33] Decree of the Ministry of the Interior No 174/2023 Sb., which amended the Decree implementing Act No 301/2000 Sb., on Civil Registers, Names and Surnames and on amendments to certain related acts, as amended.
[34] See Eliáš and Zuklínová, 2001 and 2005.

been anchored as a "method of treatment for infertility" by health regulations. However, it must be noted that the courts in the Czech Republic have addressed the problems associated with surrogacy, which has been extensively critiqued in the literature.[35]

In the context of the European reality,[36] that is, legal regulations mostly prohibiting surrogacy, the Czech legislator is also trying to regulate this "burning issue".[37]

In 2023, a proposal to amend the Civil Code and the Criminal Code was filed by a group of MPs.[38] According to the authors, the bill's objective is to prevent surrogacy as a specific form of human trafficking, both of women who are used as surrogate mothers and of the children they give birth to. As far as the Civil Code is concerned, a proposal was made to abrogate the provision allowing adoption between relatives if surrogacy was used (see § 804, CC). It is surprising that a few entities, such as the Supreme Court of the Czech Republic and the Ministry of Justice of the Czech Republic, supported the proposal. Other bodies had negative opinions. Subsequently, the government of the Czech Republic discussed and considered the draft law and finally adopted a dissenting stance. A report indicated that a ban on surrogacy may not lead to the desired goal; that is, surrogacy will not be implemented, as intended parents will be able to undergo surrogacy abroad, often in countries that have very benevolent or no regulation of surrogacy. Such "reproductive tourism" then entails additional difficulties and legal uncertainty not only for the "intended parents" and the surrogate mother but above all for the child born through surrogacy. In this connection, it was further pointed out that, when considering an application for the recognition of parenthood established abroad, the Czech Republic is bound by the *advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, issued by the Grand Chamber of the European Court of

[35] For details critically Haderka, 1986, pp. 917–934.
[36] Garayová, 2022, p. 65 ff.
[37] For more see Valc, 2024, pp. 24–40.
[38] Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. IX., Draft No. 424. For the original text see https://odok.cz/portal/veklep/material/ALBSCR7AXEQM/ (Accessed: 12 August 2024).

Human Rights.[39] The conclusions of this opinion imply that the state is obliged to consider the best interests of the child as a primary consideration when deciding on the legal recognition of an existing relationship between the "intended parent" and the child. A general and absolute prohibition on the legal recognition of the "intended parents' parenthood" is incompatible with the best interests of the child, which requires that each situation be examined considering the individual circumstances of the case.[40]

Subsequently, in 2024, the Ministry of Justice of the Czech Republic announced on its website that the Minister of Justice had submitted a plan for comprehensive legal regulation of surrogacy called "Analysis of the Institute of Surrogacy" to the Government of the Czech Republic. According to the press information, 'The aim of this initiative is to create a clear and legally secure framework for surrogacy, which still lacks explicit legal regulation in the Czech Republic'.[41] It was stressed that 'surrogacy represents an important alternative for couples who cannot have a child naturally to become parents'. It was admitted that 'the Czech legal order does not prohibit surrogacy, but the lack of explicit legal regulation means that surrogacy is implemented in practice in a kind of legal vacuum. This then has a negative impact on the intended parents, the surrogate mother, other entities involved in the implementation of surrogacy (especially health service providers) and, above all, on the interests of the child born from surrogacy'.[42] The Minister of Justice added that 'We have prepared material which contains not only a detailed analysis of the current legal situation in the Czech Republic but also a proposal for a solution suitable for the Czech environment, taking into account the case law of the European Court of Human Rights'. He underlined that the material was reviewed by the working group, with experts from the Ministry of Health, the Ministry of Labour and Social Affairs, the Ministry of the Interior, and with the

[39] Advisory opinion of 10 April 2019, in Request No. P16-2018-001. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-6380464-8364383%22]} (Accessed: 17 July 2024).

[40] For more https://odok.cz/portal/veklep/material/ALBSCR7AXEQM/ (Accessed: 12 August 2024).

[41] The Government discussed the material on Wednesday, 21 August 2024. For more see https://justice.cz/web/msp/rozcestnik/-/clanek/pavel-bla%C5%BEek-p%C5%99edlo%C5%BEil-vl%C3%A1d%C4%9B-z%C3%A1m%C4%9Br-pr%C3%A1vn%C3%AD-%C3%BApravy-n%C3%A1hradn%C3%ADho-mate%C5%99stv%C3%AD (Accessed: 18 September 2024).

[42] Ibid.

representatives of the coalition political parties, experts, and representatives of health service providers in the field of assisted reproduction.[43]

Regarding details, the proposed legislation on surrogate motherhood is based on the following principles:

- altruism, which means that surrogacy will only be possible on a non-commercial basis, with no financial remuneration for the surrogate mother, except for reimbursement of costs associated with pregnancy and childbirth;
- infertility, or adverse health conditions, or health indications or health obstacles on the part of the "intended mother";
- strict medical and other conditions for the surrogate mother, including age, and the rule that the surrogate mother's own eggs must not be used to fertilise the surrogate mother;
- genetic link to the "intended parents", which means that the germ cells of at least one of the "intended parents" must be used;
- the prior court approval of surrogacy, which means that the "intended parents" will be legally recognised as the child's parents from the moment of the birth, and the surrogate mother will not have a "legal parental relationship" to the child.

The press release concluded with the statement that 'The adoption of a legal framework for the implementation of surrogacy in the Czech Republic will ensure a uniform approach to the use of this alternative way of becoming a parent. In particular, by setting out the conditions for intended parents in accessing surrogacy and the requirements for a woman to become a surrogate mother. Positive legal regulation of surrogacy will not only provide adequate protection for the rights of all persons concerned but will also ensure legal certainty in their legal position'.[44]

Unfortunately, it was not possible to find more details or specific provisions that would regulate the issue, which should be incorporated into the Civil Code and the Act on Specific Health Services, or into procedural regulations, on the official website. We can only add that this "new approach" of establishing motherhood, or parenthood, will completely change the concept of status law in the Czech Republic as regulated traditionally in the Civil Code. In particular, the fact that the "intended mother" of the child will become the "legal mother" of the child directly on

[43] Ibid.
[44] Ibid.

the basis of a court decision will contradict the concept of legal regulation of status rights not only under the Czech legal system but also with the concepts of legal regulations of neighbouring states, European standards, and finally with the abovementioned advisory opinion of the European Court of Human Rights calling for adoption as the only "legal way" to become "legal parents".[45]

5. Conclusion

As has already been said, nothing is immutable, not even the forms of family life. It is a question of how the legal order should respond to social changes, people's needs, and wishes. Assisted reproduction carried out in accordance with legal rules or legal limits undoubtedly helps to address human infertility and the desire for a child. However, the limits must be reasonable.[46] If they are too strict, they are circumvented. This does no good, especially for children, whose best interests must be a primary consideration. Moreover, when there are no or few limits, more legal problems could arise. It is generally a matter of balancing competing subjective rights proportionally.[47] Wholly *de facto* conceptual changes to status law as proposed by the Ministry of Justice of the Czech Republic in relation to the legalisation of surrogacy are more likely to cause uncertainty and raise many questions that will be very difficult to answer. The best interests of the child are "side-lined", as only the desire of "infertile couples" for a child is considered.

However, as highlighted above, the Constitutional Court's decision on the recognition of foreign decisions based on legal process, social reality, or family life should be upheld.[48] A child has the right to a continuous civil status if it was acquired through "legal means", albeit through surrogacy

[45] Advisory opinion of 10 April 2019, in Request No. P16-2018-001. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-6380464-8364383%22]} (Accessed: 17 July 2024).

[46] Available at: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (Accessed: 1 June 2024).

[47] Králíčková, 2010.

[48] See also the Proposal for a Council of Europe Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood. Document 52022PC069. COM/2022/695. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0695 (Accessed: 15 September 2024).

implemented abroad.[49] The registration of two men or two women as parents of the child in a vital register in Czechia is a sensible solution.[50] Furthermore, as the Constitutional Court of the Czech Republic has ruled, abstract regulations, especially public policy, must "give way" in this case to the rights of the child and his or her best interests.

[49] Králíčková, Kornel, 2024, p. 31 ff.
[50] Králíčková, Nový, 2017, p. 524 ff.

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PAWEŁ SOBCZYK*

When the Polish Constitution is silent: axiological and constitutional basis for the application of ART**

ABSTRACT: The Constitution of the Republic of Poland of 2 April 1997 does not contain a provision referring explicitly to "assisted reproductive technologies" (ART). However, this does not imply the "silence of the Constitution". In contrast, the recognition of inherent human dignity as the source of freedoms and rights and of freedom and equality as fundamental values and principles underpinning an individual's status in the state obliges public authorities to respect and protect individuals and citizens when assisted reproductive technologies (ARTs) are applied. In addition to these values and principles, constitutional provisions regarding the protection of human life (Article 38), privacy (Article 47), and health (Article 68) are significant in the context of ART. These provisions establish a framework and point of reference for the legislature and public authorities that apply the law in the context of ART.

KEYWORDS: assisted reproductive technology (ART), constitution, embryo, human rights, and life protection.

1. Introduction

The Constitution of the Republic of Poland of 2 April 1997[1] does not include a provision that directly addresses assisted reproduction technologies. [2] There are several reasons for this, two of which must be considered as being key. First, work on the new Polish fundamental law formally began after the first partially free parliamentary elections were held

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[1] The Constitution of the Republic of Poland of April 2, 1997, Dz. U. z 1997 r. Nr 78, poz. 483, z 2001 r. Nr 28, poz. 319, z 2006 r. Nr 200, poz. 1471, z 2009 r., Nr 114, poz. 946.
[2] Królikowski et. al., 2007.

on 4 June 1989[3] and concluded with adopting the Constitution of the Republic of Poland only eight years later. Mentioning these dates is not incidental, as in the 1990s, assisted reproduction technologies (except in vitro fertilisation) were not a subject of public debate, and, consequently, were not part of constitutional work.[4] Second, because of the substantive scope of the Constitution as the supreme law in a given state and the level of generality characteristic of such a high-ranking normative act, it is difficult to regard assisted reproduction as a constitutional matter, even though there are exceptions in this regard, particularly after 2000.[5]

Should the absence of constitutional provisions directly addressing assisted reproduction technologies be equated with "silence of the Constitution"? Yes and no. Yes, because while reading the Constitution of the Republic of Poland, where the term "assisted reproduction technologies"[6] does not appear, one can, through a literal interpretation, conclude that the "Constitution is silent" on this matter. No, because by applying a teleological and functional interpretation of constitutional provisions, particularly those concerning human dignity – which is the source of freedoms and rights – as well as selected guarantees related to the individual's status within the state, and considering the place and role of the Constitution within the legal system, one can argue that "the Constitution does not remain silent."[7]

Recognising inherent human dignity as the source of freedoms and rights, as well as a subjective right (Article 30 of the Constitution), serves as the starting point for analyses of provisions related to Assisted Reproductive Technologies (ART). This is because the obligation to respect human dignity pertains, among other things, to one's biological identity, which is only marginally addressed in provisions concerning the protection of human

[3] The 10th-term Sejm, elected in the elections of 4 June 1989, established its Constitutional Commission, while the 1st-term Senate created its own commission. The work of both commissions resulted in the development of two different draft constitutions by the end of their shortened term, i.e., by 1991. These drafts played a limited role in the further constitutional work. For more on this subject, refer to studies on constitutional work in Poland, especially those authored by W. Osiatyński, such as Chruściak and Osiatyński, 2001.

[4] Abortion was a significantly more frequent subject of dispute in the Polish public debate of the 1990s.

[5] By way of example, one can refer to the Constitution of Serbia.

[6] Smyczyński, 1996.

[7] Bosek, 2009, pp. 37–61.

life (Article 38 of the Constitution),[8] private and family life (Article 47 of the Constitution), and health (Article 68 of the Constitution). Indirectly, the axiological and constitutional foundations for applying assisted reproduction technologies can also be inferred from the principles of freedom (Article 31 of the Constitution) and equality, along with the prohibition of discrimination associated with it (Article 32 of the Constitution).

Therefore, despite the understandable "silence of the Constitution" on the issue of assisted reproduction technologies, the Polish fundamental law – as confirmed by the jurisprudence, particularly of the Constitutional Tribunal, and legal doctrine – contains significant provisions related to the issue at hand.[9]

Given the above, this study decodes selected constitutional provisions which, while not explicitly addressing assisted reproduction technologies, are relevant because of the axiological and normative significance of constitutional principles, freedoms, and rights. These provisions play a critical role in the drafting of sub-constitutional regulations and their application.

2. Legal Definition of "Assisted Reproductive Technologies"

At the outset, it should be noted that the use of assisted reproductive technologies in Poland is regulated at the sub-constitutional level, primarily by the Act of 25 June 2015 on Infertility Treatment.[10] This law addresses both the medical and legal aspects of assisted reproduction by specifying who can access them, which procedures are permitted, and how these procedures are performed.[11]

Polish law employs the term "medically assisted procreation procedure", which, according to Article 2(1) point (21) of the Act, is defined as "activities aimed at obtaining and applying reproductive cells or embryos intra- or extracorporeally in a recipient for procreation; it includes direct and

[8] Garlicki, 2016, pp. 42–43.
[9] Kuczyński, 2009, pp. 251–258.
[10] Dz. U. 2015 poz. 1087 (t.j. Dz. U. 2020 poz. 442). It is worth noting that in Poland, a discussion has been ongoing for many years regarding whether assisted reproductive technologies, such as the commonly used in vitro fertilisation, can be considered an infertility treatment. From both a linguistic and logical standpoint, the use of such technologies does not cure infertility but rather helps achieve the goal of fertilisation and, as a result, the birth of a child.
[11] Haberko, 2016.

indirect use of reproductive cells and embryos". In other words, ARTs are medical actions designed to achieve pregnancy in cases of diagnosed infertility using specialised methods and technologies.

The statutory definition, as per Article 9, in conjunction with Article 5(1) point (5) of the Act, encompasses several procedures, including in vitro fertilisation, intrauterine insemination, and micro-manipulative technologies.[12] The first procedure, in vitro fertilisation (IVF), is a technique in which an egg is fertilised outside a woman's body and the resulting embryo is then transferred to the uterus. In contrast, intrauterine insemination (IUI) involves the introduction of sperm into the uterine cavity to increase the chances of fertilisation during the natural menstrual cycle or after hormonal stimulation. Micro-manipulative technologies, such as intracytoplasmic sperm injection (ICSI), involve the direct injection of a sperm cell into an egg. In the Polish legal system, assisted reproductive technologies can only be used in cases of infertility diagnosed in heterosexual couples who meet specific legal and medical criteria.[13]

According to the Position of the Polish Gynaecological Society[14] on ARTs in infertility treatment, 'Assisted reproductive technologies are various therapeutic methods aimed at achieving pregnancy in a woman through medical intervention in the natural process of procreation. This intervention involves bypassing or modifying one or more stages of reproduction.'[15] ART methods include IUI, poly-ovulation achieved through controlled hormonal hyperstimulation followed by follicular puncture and egg retrieval, gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), classical IVF, and variations of IVF with micro-insemination (artificial extracorporeal fertilisation).[16]

As noted in the literature on the subject, ARTs can exist in two forms: one that preserves the genetic bond between the parents and the child, and the other that alters the genetic bond between them. In the version that preserves the genetic bond, the female and male gametes used in the medical procedure come from individuals who raise offspring resulting from the procedure. In this case, biological parenthood was identical to social

[12] Woźniak, 2017, pp. 66–83; Łukasiewicz, 2021, pp. 226–241.
[13] Boratyńska, 2017, pp. 168–182.
[14] Currently: The Polish Society of Gynaecologists and Obstetricians.
[15] Quoted from: A. Dowbór-Dzwonka, B. Cegła, M. Filanowicz, E. Szymkiewicz, *Techniki wspomaganego rozwoju a naprotechnologia*, "Zdrowie Publiczne" 3(122) 2021, s. 323 [322-328].
[16] Smyczyński, 1996; Radwan, 2003.

parenthood. In the version that alters the genetic bond, the genetic connection between the offspring and at least one parent changes.[17]

3. Constitutional Principles Relating to ARTs

3.1. The Principle of Dignity

Human dignity, as referred to in Article 30 of the Constitution, represents a fundamental value and principle within the Polish constitutional and legal order, playing a key role in the context of ARTs. The constitutional framers defined dignity as inherent, inalienable, and inviolable, and obligated public authorities to respect and protect it.[18] Moreover, human dignity has been recognised as the source of freedom and rights for individuals and citizens, including those not explicitly articulated in the Constitution of Poland. This means that even if the Constitution does not specify a particular right or freedom in a given field, the necessity to respect and protect human dignity persists and can be implemented directly under Article 30.[19]

Such an approach to human dignity, rooted in the Constitution's provisions, has led legal scholars, including Piotr Tuleja, to treat dignity as a "complementary category."[20] This category recognises human dignity as an independent individual right with a standalone legal significance. Setting aside doctrinal disputes over whether human dignity can be treated as a subjective right based on constitutional work and the language of the Polish Constitution, constitutional jurisprudence and parts of legal doctrine regard dignity as a right with a subjective nature.[21]

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[17] Dowbór-Dzwonka et. al., 2021, pp. 322–328.

[18] Article 30 of the Constitution of the Republic of Poland: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

[19] Cf. The Judgment of the Constitutional Tribunal of 25.02.2002, SK 29/01, The Judgment of the Constitutional Tribunal of 05.032003, K 7/01.

[20] Tuleja, 2003, pp. 112–126.

[21] As noted by L. Garlicki, the following arguments support this position: '1) the linguistic formulation of Article 30, particularly the directive to 'respect and protect dignity'; 2) the systematic structure of the Constitution, as if dignity were intended to be treated solely as a constitutional principle, it would have been included in Chapter I rather than Chapter II […]; 3) the wording of Article 233(1), which lists human dignity as one of the freedoms and rights of individuals […]; 4) the need to ensure proper protection of dignity—this is possible only if dignity imposes specific obligations on its addressees, and every individual is entitled to legal measures to enforce those obligations. […].' Garlicki, 2016, p. 41.

The doctrine considers the subject of the right to dignity to guarantee every person the opportunity to autonomously realise their personality, while also ensuring that they are not reduced to an object of others' actions or merely an instrument for achieving others' goals. Due to the high level of abstraction inherent in this understanding of dignity, constitutional practice often applies the concept of human dignity "in connection with" or "in the context of" specific freedoms or rights. This approach to dignity as a subjective right has allowed the identification of several relationships between dignity and human freedoms or rights. However, given the highly detailed regulations on human freedom, rights, and obligations in the Polish Constitution, this approach can only be applied to exceptional cases. "Textbook examples" include issues, such as the protection of human life, human biological identity, physical integrity, intellectual integrity, privacy, and material living conditions.[22]

Concerning these ARTs, the necessity to respect and protect human dignity is emphasised at the legal, ethical (bioethical), and medical levels, as it encompasses respect for the integrity and autonomy of individuals undergoing ART procedures, the protection of embryos, and the ethical aspects of the procreation process.[23]

Given this, the key aspects of respecting and protecting human dignity in the use of assisted reproductive technologies should include autonomy and the right to make decisions regarding the use of these technologies, the protection of embryos, the prohibition of surrogacy, the prohibition of commercialisation of assisted reproductive technologies, and the equal treatment of children conceived through ART (which is related to the principle of equality and non-discrimination, as discussed later).[24]

The protection of human dignity requires respect for patients' autonomy in choosing treatment methods.[25] Every individual utilising ARTs must ensure the ability to provide informed consent for procedures and receive full information about the potential consequences. Autonomy is also an expression of human dignity as it allows patients to consciously plan their personal, marital, and familial lives.[26] In this context, the wording of Article 18 of the Constitution is particularly significant, as it states:

[22] Among others, more on this topic was written by Bałandynowicz, 2024.
[23] Niżnik-Mucha, 2021, pp. 31–52.
[24] Rylski, 2020, pp. 123–162.
[25] Article 30 of the Constitution of the Republic of Poland.
[26] Gałązka, 2010, pp. 98–109.

'Marriage as a union between a man and a woman, family, motherhood, and parenthood are under the protection and care of the Republic of Poland.'[27]

The aspect of respecting and protecting human dignity in the application of ARTs is linked to another constitutional principle, freedom, as mentioned in Article 31 of the Constitution. The freedom of the mother, father, and parents to decide on the use of ARTs should be respected, but it must also consider the dignity of the child conceived through such methods and their best interests, which will be discussed in the next section.

Embryo protection is the second aspect of respecting and protecting human dignity in the application of ARTs.[28] The Act on Infertility Treatment stipulates that embryos should be protected from destruction and unethical use, reflecting the protection of human dignity from the earliest stages of development. Polish regulations include, among other provisions, limitations on the number of embryos created and a prohibition on selection based on non-medical characteristics to respect potential human life.[29]

The bans on surrogacy and commercialisation of assisted reproductive technologies are two additional (negative) aspects of respecting and protecting human dignity in this context. In Poland, surrogacy is prohibited, reflecting the belief that this practice may lead to the objectification of a woman's body and the child.[30] This reasoning is based on the conviction that hiring a woman's body to bear a child for a third party could violate the dignity of both the woman and the child. The Polish Act on Infertility Treatment mandates that processes related to the donation of reproductive cells and storage of embryos must be conducted ethically and without material gain. The commercialisation of assisted reproduction is viewed as a potential threat to human dignity, because it may lead to the treatment of human cells and embryos as commodities.[31] Therefore, Article 28(1) of the Act states, 'The sale, purchase, or intermediation in the paid sale or purchase of reproductive cells or embryos is prohibited.' Furthermore, Article 28(2) specifies that 'no payment, financial benefit, or personal gain may be requested or accepted for reproductive cells donated by a donor or for the embryos used.'[32]

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[27] Article 18 of the Constitution of the Republic of Poland.
[28] Nawrot, 2014, pp. 647–662.
[29] Czajecka, 2016, pp. 20–32.
[30] Witczak-Bruś, 2021.
[31] Rylski, 2020, pp. 123–162.
[32] Wilejczyk, 2017, pp. 69–80.

Respecting and protecting human dignity through the application of assisted reproductive technologies also requires the equal treatment of children conceived through such methods. Human dignity and equality obligate public authorities to ensure that children conceived via ART are granted the same legal and social status as naturally conceived children. This primarily means that lawmakers are obligated to shape the content of regulations to prevent the stigmatisation of children born through IVF or other medical methods.[33]

3.2. The Principle of Freedom

The second constitutional principle underpinning the status of an individual in the state is the principle of freedom, expressed primarily in Article 31 of the Constitution.[34] According to the assumptions adopted by Polish constitutional frameworks, the principle of freedom can be analysed considering its positive and negative aspects.[35]

Freedom encompasses an individual's right to decide whether to have a child. In situations where natural conception is not possible, the realisation of this right may entail the need to use ARTs to exercise it. As mentioned above, respecting and protecting human dignity requires respecting the autonomy of patients in choosing their treatment methods, including the freedom to decide on the use of ARTs.[36]

Considering the negative aspects of freedom, one must consider the limitations of exercising freedom provided by the Polish constitutional framers in Article 31(3) of the Constitution.[37] In this context, particular importance is placed on restrictions on the freedom necessary to protect other constitutional values, such as the protection of life, public order (public interest), and principles of public morality.[38] Consequently, legal

[33] Szymanek, 2021, pp. 9–28.
[34] It follows from this provision that: '1. Freedom of the person shall receive legal protection. 2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law. 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.'
[35] Wiśniewski, 1997, p. 53.
[36] Kobińska, 2009, pp. 118–132.
[37] Piechowiak, 2009, pp. 55–78.
[38] Haberko and Załucki, 2023, pp. 33–57.

regulations have been implemented to protect embryos. In Poland, as in many other countries, the number of embryos created or stored is legally regulated, as are the issues related to the donation of reproductive cells. Thus, individual freedom in the use of ARTs is subject to legal limitations owing to the value of human life. Moreover, individual freedom in utilising assisted reproductive technologies may be restricted to protect the public interest, such as through regulations on gamete donation or measures to counteract commercial practices.[39]

3.3. The Principle of Equality

The constitutional status of individuals in Poland is based on a triad of values/principles, including dignity, freedom, and equality.[40] As mentioned above, Article 32 of the Constitution ensures equality before the law and prohibits discrimination.[41] Therefore, it can be argued that the lack of access to ARTs for individuals affected by infertility could be considered a form of discrimination in accessing healthcare services.[42]

Ensuring equality under and before the law in the context of ARTs relates to both access to these methods and equal treatment of children conceived through such procedures.[43]

Article 20 of the Act on Infertility Treatment of 25 June 2015 specifies, among other things, who may use assisted reproductive methods.[44] These include heterosexual couples in marital or partnership relationships, and individuals with medically confirmed infertility.[45] The restricted access to same-sex couples and single individuals raises controversy in the context of the principle of equality. Polish law stipulates that only heterosexual couples can access IVF, implying that other social groups are excluded from the use of these technologies to treat infertility. For some, this constitutes a violation of the principles of equality and

[39] Boratyńska, 2017, pp. 168–182.
[40] This refers to Articles 30, 31, and 32 of the Constitution of the Republic of Poland.
[41] Article 18 of the Constitution of the Republic of Poland: '1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.'
[42] Pawlikowski, 2019, pp. 41–82.
[43] Boratyńska, 2017, pp. 168–182.
[44] Szymańska vel. Sęk, 2017, pp. 93–103; Nauka, 2016, pp. 98–121.
[45] Szymańska vel Szymanek, 2017, pp. 93–103.

discrimination in access to healthcare.[46] Advocates of this perspective argue that the prohibition of discrimination requires every individual who qualifies medically for ARTs to have equal access to these methods.[47]

The constitutional principle of equality also implies equal treatment of children conceived naturally and those conceived through ARTs. In the Polish legal system, children conceived through ART are guaranteed the same rights as those conceived naturally. Similarly, parents who have undergone assisted reproductive technologies are legally obliged to care for their children in the same way as those whose children were conceived without these methods. This aspect of equality is crucial for counteracting any form of discrimination against children based on their conceptions. These children are entitled to the same inheritance, legal protection, and family rights as all other citizens, ensuring full respect for their dignity and equality before the law.[48]

The prohibition of discrimination based on the method of infertility treatment includes a ban on stigmatisation by public or private institutions against couples or individuals who choose IVF. It also protects against discrimination in workplaces, educational institutions, and other areas of public life, ensuring that individuals using such technologies are treated equally with those who have chosen other treatment methods or have not used these technologies.[49]

A separate and highly controversial legal and social issue that is difficult to implement in practice ensures equality in financial support and public programmes related to ART.[50] Poland's legal situation depends on the political decisions of the parliamentary majority. Polish regulations provide financial support only for selected groups, which in practice may limit the equality of access to ARTs. Government or local programmes do not always cover everyone interested in using these methods, potentially resulting in situations in which only individuals with higher incomes can afford such treatments. This raises concerns regarding economic inequality in access to healthcare.[51]

[46] Kobińska, 2009, pp. 118–132.
[47] Bączyk-Rozwadowska, 2017, pp. 10–36.
[48] Zieliński, 1992, pp. 3–11; Mendecka, 2023, pp. 82–96.
[49] Czajecka, 2016, pp. 20–32.
[50] Boratyńska, 2017, pp. 168–182.
[51] Haberko, 2016.

In conclusion, the prohibition of discrimination against individuals using ARTs is not only a matter of equal rights but also a necessity of protection from stigmatisation and inequality in access to treatment. Although Polish law guarantees equal rights to children conceived through these methods, restrictions on access to procedures for certain groups and economic barriers pose challenges that may violate the principles of equality.

4. Constitutional Freedoms and Rights Relating to ARTs

4.1. Legal Protection of Life

Article 38 of the Constitution guarantees legal protection of life for everyone.[52] Since the debate on the content of the Constitution (especially between 1993 and 1997), this provision has sparked discussion and controversies, primarily because of the undefined temporal scope of the protection of human life.[53] The framers did not specify whether the Republic of Poland ensured the legal protection of life from the moment of conception to natural death. This ambiguity has implications not only for abortion but also for the permissibility and principles of using ARTs[54]. Such technologies in Poland are closely tied to the legal protection of life, particularly human life, in its earliest stages of development. The Polish legal system, based on the Constitution and the 2015 Act on Infertility Treatment, considers the protection of life to be of fundamental value, influencing the regulations governing procedures such as IVF and IUI.[55] These regulations aim to ensure respect for the dignity of human life, including that of embryos, and to set limits on the creation and storage of embryos.[56]

Constitutional frameworks did not aim to precisely define guarantees regarding legal protection of human life in relation to ART. The key aspects of legal life protection in the context of assisted reproductive technologies are specified in the aforementioned act, as referenced in Article 4.[57] For instance, the 2015 Act on Infertility Treatment introduced limitations on the

[52] Article 38 of the Constitution of the Republic of Poland: "The Republic of Poland shall ensure the legal protection of the life of every human being."
[53] Piotrowski, 2021, pp. 62–80.
[54] Soniewicka, 2021, pp. 6–23.
[55] Rylski, 2020, pp. 123–162.
[56] Łakomiec, 2014, pp. 54–64.
[57] Domańska and Rojszczak, 2021, pp. 132–150.

number of embryos that can be created using in vitro procedures.[58] As a rule, no more than six embryos may be created in one IVF cycle, although this number may be higher in exceptional cases, as justified by medical circumstances. This regulation seeks to reduce the risk of surplus embryos that might otherwise be destroyed or left unused, which is considered contrary to the legal protection of life in Poland.[59] Surplus embryos that are not immediately used after fertilisation must be stored in embryo banks, where they can be frozen for up to 20 years. This storage method also reflects the legal protection of life, as it allows for the future use of embryos without destroying them. If parents choose not to reuse embryos, they may decide to donate them for prenatal adoption by other couples, which aligns with the principle of life protection.

Current regulations prohibit the selection of embryos based on characteristics, such as sex or other genetic traits, except in cases where there is a high risk of transmission of a genetic disease. This ban on eugenic selection protects embryos from being treated as objects and prevents their destruction based on preferences regarding their traits, contradicting the principle of life protection. The purpose of this regulation was to avoid a selective approach that could undermine the dignity and legal protection of every embryo.[60]

Constitutional guarantees of human life protection also prohibit the destruction of embryos and treat them as a form of human life subject to protection. Embryos that are not used in a given treatment cycle may be stored for future use; however, their destruction is considered unacceptable under the life protection principles. These regulations are based on recognising embryos at an early stage of human development and aim to ensure protection at every stage of existence.[61]

Another consequence of respecting and protecting human dignity (as discussed earlier) and protecting life is the prohibition of surrogacy, that is, the renting of a woman to bear a child for another couple or individual. In this context, the legal protection of life encompasses safeguarding against the potential commercialisation of embryos and prenatal life, which could compromise their dignity and treat them as intangible goods.[62]

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[58] Niżnik-Mucha, 2021, pp. 31–52.
[59] Nawrot, 2014, pp. 647–662.
[60] Woźniak, 2017, pp. 66-83; Bączyk-Rozwadowska, 2017, pp. 10–36.
[61] Gałęska-Śliwka, 2021, pp. 78–114.
[62] Mostowik 2019.

In conclusion, the human embryo, as an early form of human life, deserves legal protection under Article 38 of the Constitution. Restrictions on the number of embryos, prohibition of their destruction, and storage in banks aim to ensure that ARTs align with the constitutional principles of life protection.

4.2. The Right to Protection of Private Life

According to Article 47 of the Constitution, everyone is guaranteed the right to protect their private and family life, honour, reputation, and the right to make decisions about their personal lives.[63] In the context of ARTs, the legal protection of privacy, linked to the constitutional principle of freedom, manifests in the right of parents to decide on having children as well as in the right of parents facing difficulties with natural conceptions to decide on the use of ARTs. The conscious decision to have children is undoubtedly an element of both personal and family lives.[64]

It is worth noting that Polish constitutional standards for the right to privacy are modelled on international legal standards, primarily the European Convention on Human Rights.[65] The right to privacy encompasses various issues related to the application of ARTs, including the rights of patients, children conceived using ART, and entities involved in these methods (infertility treatment centres).

First, the right to privacy applies to individuals who decide to use ARTs. As an element of private and family life, this decision should receive special legal protection. Patients using assisted reproductive methods have the right to protect their personal data, particularly sensitive information related to their reproductive health.[66] Medical documentation, test results, and all information regarding ART procedures must be kept confidential and cannot be disclosed to third parties without the explicit consent of the patients.[67] The law also protects against unauthorised access to patient data

[63] Article 47 of the Constitution of the Republic of Poland: "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."
[64] Domańska and Rojszczak, 2021, pp. 132–150.
[65] The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5, and 8, and supplemented by Protocol No. 2, published in the Journal of Laws of 1993, No. 61, item 284. This primarily refers to Article 8 of the Convention.
[66] Łuków and Wrześniewska-Wal, 2008, pp. 5–25.
[67] Łakomiec, 2014, pp. 54–64.

by third parties, which, in practice, means that medical personnel are obliged to maintain patient confidentiality.

Constitutionally guaranteed privacy rights protect the anonymity of gamete donors and recipients. In the Polish legal system, gamete donations (eggs and sperm) are conducted anonymously to safeguard the privacy of both donors and recipients. This means that donors cannot learn the recipient of their reproductive cells, and recipients cannot obtain information about the donor's identity. A more complex ethical and legal issue arises concerning the relationship between the donor's right to privacy and the child's right to identity,[68] which includes information about the donor's origins. Currently, Polish law appears to prioritise the donor's right to privacy at the expense of the child's rights.[69]

The right to privacy also applies to children conceived through ARTs. This means that the manner of their conception should not be publicly disclosed or used as a basis for stigmatisation, aligning with the previously discussed respect and protection of human dignity and equality. Official documents and other registries cannot contain information indicating that a child was conceived using ARTs, aiming to protect their right to privacy and prevent any form of discrimination.[70]

The third group, relevant to privacy rights, includes infertility treatment centres. These entities are required to store patient data following data protection regulations (including General Data Protection Regulations, GDPR).[71] This means that patients must consent to the processing of their data and medical centres must ensure adequate data security. Patients also have the right to access their medical data and request deletion or restriction of processing after the completion of the procedure. In this regard, it is evident that the right to personal data protection, constitutionally affirmed in Article 51 of the Polish Constitution, is an extension of the right to privacy.[72]

[68] Bieszczad 2019.
[69] Łakomiec, 2014, pp. 54–64.
[70] Domańska and Rojszczak, 2021, pp. 132–150.
[71] Domańska and Rojszczak, 2021, pp. 132–150.
[72] Sarnecki, 2016.

4.3. The Right to Health Protection

Article 68(1) of the Constitution of the Republic of Poland guarantees everyone the right to health protection.[73] Article 68(3) states that public authorities are obligated to provide special healthcare to children, pregnant women, and persons with disabilities.[74] Although the Polish constitutional framework does not explicitly mention infertility or ARTs, it can be argued that the use of such technologies is one way to realise the right to health protection, particularly in the context of treating infertility.[75] Analysing the constitutional provision that establishes the right to health protection highlights several aspects of this right that are significant for the application of ARTs in Poland.

Access to ARTs can be considered an element of the right to health protection.[76] According to the 2015 Act on Infertility Treatment, heterosexual couples diagnosed with infertility can undergo methods such as IVF, insemination, and other medical procedures. This right includes access to the most advanced treatment methods and reflects the right to protect reproductive health. Consequently, individuals struggling with infertility have the right to support and treat themselves using the best available medical technologies.[77] As part of the right to health protection, patients have the right to receive comprehensive information about available infertility treatment methods, the risks associated with the procedures, and their effectiveness. Clinics specialising in ARTs are obligated to provide patients with all necessary information to enable them to make informed treatment decisions. Informed consent based on comprehensive medical and

[73] Article 68 of the Constitution of the Republic of Poland: '1. Everyone shall have the right to have his health protected. 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute. 3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age. 4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment. 5. Public authorities shall support the development of physical culture, particularly amongst children and young persons.'

[74] Wołoszyn-Cichocka, 2017, pp. 225–242.

[75] It should be noted, however, that the extent to which assisted reproductive technologies, such as in vitro fertilisation, "treat" infertility is a matter of debate. This issue goes beyond the scope of this study.

[76] Gałązka, 2000, pp. 63–74.

[77] Boratyńska 2017, pp. 168–182

psychological knowledge is the foundation of ethical and lawful treatment, which is consistent with the right to health protection.[78]

The right to health protection also requires all assisted reproductive procedures to be performed per the highest medical standards. In Poland, clinics specialising in infertility treatment must meet stringent requirements to ensure the safety and effectiveness of the procedures. The application of such standards is designed to protect the physical and mental health of patients, minimise the risk of complications, and maximise the efficiency of procedures.[79]

The constitutional provision (Article 68(3)) obligates public authorities to provide special healthcare, including for children. For children conceived using assisted reproductive technologies, this refers to the right to appropriate health support at every stage of life. This provision requires the provision of healthcare, regardless of the method of conception, in line with the principle of equality in access to medical services and the prohibition of discrimination.[80]

A particularly delicate and controversial issue from ethical and legal perspectives is the role of public authorities in supporting and financing ARTs using public funding. The right to health protection is also tied to ART's economic accessibility. These procedures are expensive and their reimbursement depends on the decisions of the political majority. The lack of state funding limits the availability of these methods to individuals with lower incomes, which can be viewed as a restriction on their right to health protection, particularly in the area of reproductive health.[81]

In conclusion, the constitutionally guaranteed right to health protection in relation to ARTs ensures access to modern infertility treatment methods, medical safety, and equal treatment of children conceived using these methods. However, restrictions on access to certain social groups and the lack of systematic reimbursement for in vitro procedures can limit the full realisation of the right to health protection in reproductive health.

[78] Domańska and Rojszczak, 2021, pp. 132–150.
[79] Wołoszyn-Cichocka, 2017, pp. 225–242.
[80] Stych, 2023, pp. 7–20.
[81] Czajecka, 2016, pp. 20–32.

5. Summary

It can be considered a truism to claim that ‘the importance of constitutional provisions related to assisted reproductive technologies is difficult to overstate.’ This is primarily because of the place and significance of the Constitution in the hierarchically structured legal system and its role in setting standards for sub-constitutional legislation. This was confirmed by the provisions of the Act of 25 June 2015 on Infertility Treatment, which are frequently referenced in this academic article.

The apparent "silence of the Constitution" regarding assisted reproductive technologies is understandable for the reasons outlined in the introduction. Provisions that indirectly address this issue regulate it almost comprehensively. The analyses led to the conclusion that, although the Polish Constitution was drafted in the last decade of the 20th century, it remains remarkably relevant to the rapidly evolving field of new technologies, including ART. While the term "living instrument" is informally reserved for the European Convention on Human Rights of 1950, it seems entirely justified to apply it to the Constitution of the Republic of Poland of 2 April 1997, at least in the context discussed here.

The two elements of constitutional regulations related to assisted reproductive technologies deserve positive recognition. The first element comprises the constitutional principles of dignity, freedom, and equality. The principle of inherent human dignity, which serves as a source of freedom and rights, while also being a subjective right of the individual, is of fundamental importance in this regard. Public authorities must respect and protect them. The second element of the system concerning the application of ART includes rights related to the use of these methods, namely the legal protection of life, right to privacy, and right to health protection.

One potential issue related to ART is the interpretation of constitutional provisions by legislative and judicial authorities. Unfortunately, the provisions of the Constitution are increasingly being interpreted contrary to the principles of legal logic and interpretation, a problem that regrettably extends beyond the application of assisted reproductive technologies.

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