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THE RIGHT TO ACCESS TO COURT IN PARENTAL PROCEEDINGS FOR CHILDREN OF "UNKNOWN ORIGIN" IN THE REPUBLIC OF NORTH MACEDONIA

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The Macedonian Family Law forbids (1) parental proceedings if the parental relationship has been established by adoption (*article 75*), (2) contestation of fatherhood if the mother has been inseminated by sperm donation following consent by her marital partner (*article 71*), and (3) establishment of fatherhood if the child has been conceived using artificial insemination (*article 62*). This is mostly because of the sole relevance of the blood ties for the national Courts, despite the growing importance of the factual family life by the European Court of Human Rights. Nevertheless, these domestic articles infringe the right to a fair trial as stipulated in *article 6(1)* in conjunction with the right to effective remedy (*article 13*), and restrict access to examination of the family life of children conceived by gamete donation or adopted (*article 8*), which in turn is discriminatory on grounds of birth (article 14) of the European Convention on Human Rights (ECHR).

The author tackles the national legal (in)consistency with the Convention on the Rights of the Child (CRC), the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights (ECtHR) in the field of recognition and realization of the right to access to identifying information about the genetic origin of adopted children and children conceived by gamete donation as a reason for the breach of their right to access to court in parental proceedings and the right to a fair trial.

Key words: parental proceedings, right to know the origins, fair trial, effective remedy, private and family life.

I. INTRODUCTION

The Constitution of the Republic of North Macedonia affords special protection to the family, children (with parents and even more, parentless) and motherhood[1]. It is a human right to decide freely on procreation, thus to decide on founding families[2]. The Republic undertakes the role of

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[1] *Articles 40* and *42*, the Constitution of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia*, No. 52, 22.11.1992.

[2] *Ibid., article 41, paragraph 1.*

leading human population policy in line with balanced economic and social development[3]. The right to respect and protect private life, as well as personal and family life, dignity and reputation is guaranteed[4]. Every citizen holds a right to submit inquiries and petitions to the state authorities and the other public services and to be responded to respectfully[5]. Every citizen also holds the right to ask for protection of the rights and freedoms as protected in the Constitution before the Constitutional Court[6].

The Macedonian Family Law forbids (1) parental proceedings if the parental relationship has been established by adoption (*article 75*), (2) contestation of fatherhood if the mother has been inseminated by sperm donation following consent by her marital partner (*article 71*), and (3) establishment of fatherhood if the child has been conceived using artificial insemination (*article 62*). This is mostly because of the sole relevance of the blood ties for the national Courts, despite the growing importance of the factual family life by the European Court of Human Rights. Therefore, these domestic articles infringe the right to a fair trial as stipulated in *article 6(1)* and restrict access to examination of the family life for children conceived by gamete donations or adopted (*article 8*), which in turn is discriminatory on grounds of birth. (article 14) of the European Convention on Human Rights.

On the one hand, the national Family Act dates back to 1992, was amended many times but was never harmonized as a whole and as a result it represents a clash between old and new principles. Such inconsistency reflects in the daily lives of many families. For instance, adopted children are refrained from access to any information about their genetic origins. Under such circumstances, they use alternative means to find any information or match with their biological parents, such as networking on different social media, trying their luck in tracking their roots, usually a very important part of their personal identity and private life[7].

On the other hand, the national legislation in the field of assisted reproductive technologies - ART (as regulated in the Law on Bio-medically Assisted Fertilization) is considered to be progressive in the European context. The progressive nature of the law is associated with the fact that both homologous and heterologous donations of sperm and ova are given green light, as well as posthumous reproductions and gestational pregnancies. Nevertheless, the concept of secrecy regarding genetic origins is following the tradition of the lethargic Family Law. Both laws intersect in the field of filiation. In this focus, one of the major concerns is the right of the child to know his/her origins, which is denied in both cases: gamete donations and adoptions.

This topic has been neglected previously, because the starting point of the regulations has always been confidentiality. The problem is the rigidness of the system that never recognized the necessity to change, even though the former Yugoslavia and the Republic of North Macedonia as a successor country ratified the ECHR and the CRC many years ago.

Two legal pillars will be used as a point of reference in the following part: (1) the *Family Law (Act)*, as being a basic legal source of the family life regulation and the relationship between parents and children[8], and (2) the *Law on Bio-medically Assisted Fertilization*, as regulating for

[3] *Ibid., article 41, paragraph 2.*
[4] *Ibid., article 25.*
[5] *Ibid., article 24.*
[6] *Ibid., article 50.*
[7] See for instance a Facebook group Biloski roditeli i deca.
[8] Family Act (FA), *Official Gazette Republic of Macedonia 80/1992* (consolidated text). This law continues the family law tradition of the former Yugoslavia with its own codification dating from 1992.

the first time in a systematic legal document the practice of ART, therefore also interrupting and influencing the legal affiliation[9].

II. THE FAMILY LAW

i. Family and the establishment of parental responsibilities

The law defines *family* as a living community of parents, children and other relatives if they live in a mutual household[10]. This definition represents only the extended family[11] aiming at the nuclear family, shedding no light on other family forms such as single-parent families, reconstructed families or families founded with an intervention of a third party as in the case of assisted donation of sperm/ovum or embryo.

A family can be founded by birth or adoption of a child; consequently, parenthood can be established by the fact of birth or adoption[12]. This means that as a principle rule the fact of birth creates consequences of parenthood for both the mother and the father from that moment on. If the birth happens out of wedlock, additional action of recognition or judicial proceedings will be retrograde with the legal consequences of parenthood as if they had started from the time of the birth of the child. The father has the possibility to recognize the child as his after as well as prior to birth, with legal effect only after the birth of the child[13]. Adoption is the only exception that follows a later fact (and not the birth itself) to constitute the family. This makes the foundation of families assisted by donations to follow the fact of birth, negotiated to exclude the genetic parent before the insemination even takes place. Accordingly, the consent for the treatment has a significance of recognition of the child not only before birth but even more, before insemination, with legal effect only after the birth of the child[14]. This could be interpreted as if the law allows other than biological facts to constitute families if at the time of birth parenthood was already negotiated via a contract of free wills expressing the intention to parent[15]. Contracts in the field of family law and reproduction are controversial in their nature[16]. The issue is related to the

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[9] Law on Bio-medically Assisted Fertilization, *Official Gazette Republic of Macedonia* No. 37, 19.03.2008 (consolidated text),

[10] *FA, article 2.*

[11] As a family that includes other relatives of the nuclear family if they live in one household. See more in Andersen, M. L. and Taylor H. F., *Sociology: Understanding a Diverse Society*, Thomson Wadsworth, 2008, pg. 396.

[12] *FA., article 7*. See also the *Law on Inheritance, article 122* that stipulates the capacity to inherit, stating that a heir can only be a person that is alive at the time of the death of the deceased (when the inheritance is open) – *paragraphs 1* and *2*. If the child is conceived but not born yet at that moment, he/she would qualify as a heir only if born alive – *paragraph 3*.

[13] *Article 53* of the *Family Law*. The father also has a possibility to recognize the child as his during the paternal proceedings against him initiated by the other legitimate parties before the court. In that case, the proceedings stops and it is considered as if he has recognized the child as his. See the case before the Supreme Court – Пресуда на Врховниот суд на Република Македонија, Рев. Бр. 957/98, 25.06.1998.

[14] *Article 12*, *paragraph 2* of the *Law on Bio-medically Assisted Fertilization*.

[15] For some authors the consent is at the heart of any valid contract, including in the field of reproduction. If conceptions are intentional and the goal is to increase the voluntariness of the decision, then attention should be paid to the parties' negotiations before conception. This is how they can exercise their freedom of choice (by expressing intentions before conception) with respect to the individual's reproductive capacity. See in Shanlev C., Birth Power: *The Case for Surrogacy*, Yale University Press, 1989, pp. 11, 12, 96 and 103.

[16] They are also controversial under the Macedonian legal system. The later text will refer to provisions from the *Law on Obligations* (Закон за облигационите односи, *Службен весник на Република Македонија*, бр. 18, 05.03.2001) and the *Law on Ownership and Other Real Rights* (*Law on Ownership and Other Real Rights* - Закон

status that the law attributes to parts or products of the human body. If they are considered property, then the person owning and possessing them could easily dispose of them for a reasonable financial or other contribution in the exchange[17]. If they are not considered property, then they are considered to be outside the commercial market (*res extra commercium*), and

за сопственост и други стварни права, *Службен весник на Република Македонија*, бр. 18, 05.03.2001) to relate the reproductive arrangements to the concept of contracts. Nevertheless, they (gamete donations, more specifically - sperm donations for the reproductive purposes of other parties) are legally derived from the "free written consent" in the form of a "written statement" verified by a notary (*article 15, paragraphs 1* and *2* of the *op. cit. Law on Bio-Medically Assisted Fertilization*). The consent refers to, firstly, donation of the donor's sperm, and secondly, to withdrawing of his eventual parental responsibilities (*article 15*, *paragraph 4*). Consequently, the donor holds obligations from the given consent: firstly, an active obligation - to donate (*dare*), and secondly, a passive obligation - to restrain from parental responsibilities (*non-facere*). These obligations correspond to the rights of the commissioning parents which also give "free written consent" with a significance of a statement for accepting fatherhood (or motherhood) after the child is born, as transferred from the donor. In this light, analogy with contracts could be at least considered. The considerations derive from the importance we attribute to the embodiment in our understandings of the 'self' and its freedom, as well as the tension between promoting freedom to dispose of it through contracts and the preservation of non-contractual human relationships. For Shanley, the contractarian theories that ignore the limits to the freely willed self run the risk of confusing broadly conceived human freedom and dignity with a narrow notion of freedom of contract (Shanley M.L., "'Surrogate Mothering' and Women's Freedom: A Critique of Contracts for Human Reproduction", *Signs*, Vol. 18, No. 3, 1993, 618-639, pp. 619 and 635). This author distinguishes three poles of authors that elaborate the contracts in the field of surrogacies as a service for others: (1) those who support contract pregnancies because women should have the right to enter a contractual arrangement to bear a child and receive money for the service (the opposite would be an infringement of their autonomy and self-determination); (2) those who focus on the desire for a child for the commissioning parents, arguing that a prohibition on pregnancy contracts violates their right to procreate; and (3) those who oppose pregnancy contracts, particularly if the surrogate woman enters into obligations out of direct economic needs or is forced to fulfil the contract against her will (see more on pg. 618). Nevertheless, some authors have argued that "at some point contracts must be embedded in social relations that are non-contractual" (Held V., "No-Contractual Society: A Feminist View", *Canadian Journal of Philosophy*, Suppl. Vol. 13, *Science, Morality & Feminist Theory*, 1987, pp. 124 and 125). For some others, contracts in the field of reproduction are usually vague. Even if they are clear, their validity and enforceability is a matter of controversy since the legal rules on parentage usually cannot be overruled by private arrangements. See more in Antokolskaia M., "Legal Embedding Planned Lesbian Parentage. Pouring New Wine into Old Wineskins", *Familie & Recht*, February, 2014, pg. 5. Yet, the Dutch Supreme Court applied tort law and contract law principles of justice and equity in family law matters - protecting functional parent-child relationships, for instance, when it comes to the "consent to acknowledgment" cases. See more in Kleijkamp G.A., *Family Life and Family Interests, A Comparative Study on the Influence of the European Convention of Human Rights on Dutch Family Law and the Influence of the United States Constitution on American Family Law*, Kluwer Law International, 1999, pp. 365 and 366. In the U.S.A. the support of firm, strict written agreements that set out the rights and expectations of the parties in reproductive arrangements is higher. See, for instance, Garcia M.A., "In with New Families, Out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements", *Duke Journal of Gender Law & Policy*, Vol. 21, 2014, pg. 221 and 224. In some provinces of Canada, despite the controversies, strict contracts are practised. An example of a clearly articulated contract in writing is the one in the Canadian case of *W.W. v X.X. and Y.Y.*, ONSC 879, 2013 where the sperm donor explicitly signed over any and all parental rights to any children created with the use of his donated sperm. He stated that he withdrew from any rights to see, visit, claim, request custody of any children or even to share information regarding the conception with them, having in return no responsibilities to pay support of any kind. In addition to this, it was also stated that the legally binding contract could not be changed or revoked without the consent and agreement of the mother and the other adoptive parent. Despite all the strictly regulated aspects of the relationship, the donor tried to rebut the validity of the contract by claiming, later on, that he signed it under duress. This is an example of how contracts in the field of family law are rather tricky to be evaluated later on, especially the part that is related to children, as it may be considered contrary to public policy. See more Kelly F., "Equal Parents, Equal Children: Reforming Canada's Parentage Laws to Recognize the Completeness of Women-led Families", *University of New Brunswick Law Journal*, Vol. 64, 2013, pp. 263, 264, and 265.

[17] This is regulated in *Section I*, *Part I*: *Contracts* of the Macedonian (*op. cit.*) *Law on Obligations*.

therefore impossible to be disposed of[18]. There is a difference between the American (more market driven), and the European (less market driven and more driven by altruistic reasons) approach regarding this issue. The European approach[19] promotes altruistic donations, in relation to which sole contribution to the expenses (in terms of efforts, time spent, costs and lost salary) is supported. This in reality is a bit more than just "fair expenses" or "pocket money", since if it was otherwise, the interest of the donors would have been drastically reduced. A line should be drawn to differentiate between donations of organs, tissues and cells[20], and gametes that can be used for reproductive purposes[21]. While the first ones save lives and are extrapolated from one's already created body, and therefore are related to one's bodily integrity, the second ones create lives, are not part of one's body, but products of it. The donations are regulated with expression of free will in the form of consent[22], which as such could fall under the domain of contracts that

[18] This is regulated in the *op. cit. Law on Ownership and Other Real Rights*. See, especially, *articles 9* and *12.* The first regulates the general restrictions on ownership stipulating that the owner gains the right of ownership depending on the nature and the purpose for using the thing, as well as the general interest prescribed by law. It is forbidden to exercise the right of ownership contrary to the purpose recognized by law, the morals of society or for purposes of causing harm to another person, or restricting another person from exercising his own rights. The second regulates the subject of the right to property, excluding things that according to their nature or the law hold restrictions in their exercise. *Article 43* of the *Law on Obligations* regulates the allowed grounds (if they are consistent with the Constitution, the law, and the good customs) for contractual rights and obligations. The objects of a contractual pledge have to fulfil two conditions: (1) to be owned by the pledge debtor, and (2) the object to be in the legal traffic. If the second condition is not satisfied, then the ownership cannot be transferred from one person to another. Despite this, it is not certain how the fruits of the *res extra commercium* are to be treated. According to some authors, regardless of the fact that the object is not dispensable and therefore outside the rules of the legal market, the fruit of the object may fall under the domain of a contractual pledge after its separation. It is another issue if products (fruits) of the human body can be considered as objects. See more in Przeska T., "Things that May be Object of Contractual Pledge in the Legal System of Republic of Macedonia*", Iustinianus Primus Law Review*, Vol. 1, No. 1. pg. 1., 2010. See also Gavella N., Stvarno Pravo, Svezak 2, Narodne Novine, 2007, pg. 180. Along this line, other authors also argue that: "our bodies are factories: they produce things like blood, skin, hair... Self ownership gives us the title to these, and protects our liberty to dispose of them." See Steiner, H., *An Essay on Rights*, Oxford Blackwell, 1994, pg. 233. Other authors, in an attempt to investigate the "investment of genetic material" of the progenitors, and consequently their share in the "joint creation", have distinguished two conceptual components with which the progenitors participate in the newly formed embryo: (1) physical, made out of tissue samples, cells, DNA and the atoms that make the nucleic acid molecules that hold genetic code as unique genes, and (2) informational- the code itself, the particular arrangement of atoms that make the DNA sequence that forms the individual genome. According to them, physical components might be a subject of property rights and from here on, they support the "property-based approach" as an answer to the question "what rights over embryos arise from property in genetic material?". See more in Chan S., Quigley M., 2007.

[19] As envisaged in the *Oviedo Convention (The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine), article 21* stipulating that "the human body and its parts shall not, as such, give rise to financial gain".

[20] In the Republic of Macedonia regulated by the *Law on Extracting and Transplanting Human Body Parts for Medical Treatment*, (Закон за земање и пресадување на делови од човечкото тело заради лекување, *Службен весник на Република Македонија*, бр. 47, 08.04.2011. *Article 2, paragraph 2* of the Law makes it clear-cut, stipulating that "the provisions of this law will not apply on reproductive organs and tissues, organs and tissues of embryos or fetuses, blood and blood derivatives". For more on this law, see Deanoska-Trendafilova A., Cadikovski V., "Legal and Medical Issues Concerning the Transplantation of Human Body Parts for Treatment in the Republic of Macedonia", Jansen B.C.S., Ignovska E.(eds.), *Law, Public Health Care System and Society.Macedonia – Social Policy, Legislation, Biomedicine and Ethics of Organ Transplantation, Fertilization and ART*, AVM, München, Academische Verlagsgemeinschaft, 2012, pp. 27-81.

[21] In the Republic of North Macedonia regulated by the *op. cit. Law on Bio-Medically Assisted Fertilization*.

[22] *Article 15* of the *op. cit. Law on Bio-Medically Assisted Fertilizations* and *article 20* of the *op. cit. Law on Obligations.*

consequently produce rights and obligations for the contracting parties[23]. In the case of sperm donation, the obligation of the donor is beyond giving up of the possession of his sperm. He also gives up the consequent progeny and parental responsibilities that follow. His obligation correlates with the right of the commissioning parents. On the contrary, his rights are related to the material satisfaction of his expenses, and the preservation of his privacy (if he is anonymous), or disclosure of his identity and/or contact with the progeny (if he is not anonymous – this is not an option in the Republic of North Macedonia). These premises are usually regulated in the mutual contract that follows the free disposition of the contracting parties[24]. The contracts in the field of reproduction, though, have been much more elaborated in the domain of surrogacies. There, the role of the surrogate mother is exhausted to her role of "renting" her uterus for the commissioning parents, making her just biologically (due to the gestation) and not necessarily also genetically related to the child she will give birth to.

If on the one hand it is accepted that contracts can constitute families before birth, and before conceptions or inseminations, it becomes absurd to claim exclusivity of the relevance of accurate DNA tests proving biological ties in parental proceedings in cases of conflict later on[25]. The main reason why the law has opted not to challenge parental inquiries in civil proceedings is due to its inconsistency in accepting both the biological but also the social reality of family lives. If gamete donation is treated as a second exception next to adoption, then the donor would be considered a parent at the time of the birth[26]. Accordingly, he would be obliged by a pre-contract to reject the parental responsibilities and to transfer them to the commissioning parents at a later stage (similar to surrogacy contracts)[27]. This way the parenthood would start at the time of birth

[23] If sperm donations are considered altruistic and not tradable for financial or other gain, then they would be considered gifts. Again, gifts in law are related to property and possessions of things (*article 555* of the *Law on Obligations* stipulates that the contract for gift envisages an obligation of the giver (donor) to give (donate) to the receiver (recipient) a certain object, or to transfer a certain right, cease to exist certain debt or to take over a debt without contribution.

[24] *Op. cit. Law on Obligations*. A*rticle 3* regards the freedom of regulating mutual obligations in concordance with the Constitution, the law and good customs, and *article 14* regulates the dispositive character of the law.

[25] The scientific proofs of matching genetic links between the parent and the child are stipulated in *article 61* of the *Family Law* that stipulates that a father of the child born out of wedlock will be the mother's sexual partner in a time period of 180 to 300 days before the birth of the child, unless the opposite is proven. For this purpose, the Court is entitled to take into account also the mutual relationship between and habitat of the mother and the defendant before and after birth, as well as the medical and other proofs that do not exclude the defendant as a father.

[26] For instance, in Quebec, Canada a new chapter on "Filiation of Children Born of Assisted Procreation" was incorporated into Title Two – "Filiation" of the *Civil Code* of Quebec. This was interpreted by some authors as a third distinctive model of affiliation next to blood and adoption. *Article 538* of the Civil Code defines the parental project as a project involving assisted procreation from the time that a person or a couple decides, in order to have a child, to resort to the genetic material of a person who is not party to the parental project. This could include any kind of assistance from medical to "friendly" for purposes of assisting others to have a child. *Article 538.2, paragraph 1* allows the donor, who agreed to assist reproduction by sexual intercourse, to establish his paternity within one year after the birth of the child. This bars the partner of the birth mother from claiming own filiation on grounds of factual family life or *possession d'etat* with the child during that period of time. See more in Leckey R., '"Where the Parents Are of the Same Sex': Quebec Reforms to Filiation", *International Journal for Law, Policy and the Family*, Vol. 23, 2009, pp. 66 and 75.

[27] A pre-contract in the *Law on Obligations* (*article 37, paragraph 1*) is defined as a contract to undertake an obligation to conclude another, later, main contract. The pre-contract is binding if it integrates the substantial parts of the main contract (*article 37*, *paragraph, 2*). The court may order the obliged party to act upon the obligation and conclude the main contract upon the request of the interested party within a particular time frame (*article 37*, *paragraph 4*). The pre-agreement loses its obligatory nature if the circumstances surrounding its conclusion change to the extent that the pre-contract would have never been concluded had they existed at the time of its conclusion

for both genetic parents, but the family would be constituted later on through additional legal action. Nevertheless, the wide- spread practice in this field is that donors are not to be considered as parents neither at the time of birth nor later. In sperm donations this is in line with the marital presumption that usually is in favour of someone else for the role of the father or the child is inscribed in the birth certificate solely with his/hers' mother's name. In egg donations, the mother may coincide with the one giving birth, or in cases of gestational pregnancies with the mother for which the egg is donated.

On the other side of the spectrum of mixing genetic and social facts in composing families are the newly parental contracts for co-parenting among known mothers and fathers that match each other solely for reproductive purposes of having a mutual child[28]. This resembles sperm donation by a known donor, with an exception of the fact that it does not treat him as a donor but as a father. In these terms, the interests of all parties are satisfied (normally without conflicts): (1) the single woman and her child-wish, but also a father, while not necessarily a partner; (2) the man and his child-wish together with a mother, but not necessarily a partner; and (3) the child and his/her interests in having both a mother and a father. Since these arrangements are rather new and unexplored in practice, the applicable law will be the positive law of the national state that refers to children conceived out of wedlock. The parental contract does not even have to be concluded, nor does the practice have to be performed in a licensed clinic since the parental responsibilities will follow according to the law, by additional recognition or judicial proceedings. One of the concerns is that they will suspend families as we know/knew them and will introduce parental contracts without parental relationships. The positive aspect of it (protecting the right of the child to know and be taken care of by both parents) is that the conflicts between the parents will be solved on a rational basis without the emotional disturbances that go along with the eventual breakdown of the parents' relationship. Since this is a rather new phenomenon, other future research could possibly analyze the future consequences of arrangements of such kind.

Parental proceedings are special civil proceedings under the Jurisdiction of the *Law on Litigation Procedure,* integrated in the *Family Act*. Their peculiarity is reflected in the fact that the court has authority (unlike in the other civil law disputes) to question the facts upon which the parties rely in their petition if they refer to their mutual juvenile children, even if they are not contested among themselves. The nature of their peculiarity is related to the priority of protection of the child's interests, even when they are in conflict with their parents' interests.

The rationale behind the restricted access to Court in parental proceedings derives from the accepted protection of the legal family of the child, but also from the attributed primacy of the biological criterion for establishing parenthood in front of the court. The litigation for establishing parenthood based on DNA evidence regarding the genetic relatedness to the child would threaten the accepted concept of anonymity, thus the secrecy surrounding genetic parents in cases of assisted reproduction and adoption. Nevertheless, this pattern of regulating legal filiation places children in categories on grounds of birth and offers different treatments, and accordingly discriminates among them (confronting *articles 12*, *2* and *18* of the *Convention on the Rights of the Child*). It is an obligation of the States signatories of both Conventions to

(*article 37*, *paragraph 6*). Nevertheless, it should be noted that contracts and pre-contracts, as stipulated in the law, are related to the obligations *dare*, *facere*, *non-facere*, and *pati*, that should be possible, allowed, determined or determinable (*article 38* of the Law).

[28] Al Jazeera English, "Family on Your Own Terms", *The Stream*, 24.02.2014. See online: http://stream.aljazeera.com/story/201402242305-0023501.

respect and ensure the rights of each child without discrimination of any kind, irrespective of, among others, the child's birth or other status.

ii. Marriage and the establishment of parental responsibilities

Marriage is defined as a legally regulated union between a man and a woman in which the interests of the marital partners, the family and society are established[29]. The previous *Law on Prevention and Protection from Discrimination* referred to, *inter alia*, gender, belonging to a marginalized group, personal and social status, family and marital status and any other ground stipulated in the law or an internationally ratified document as discriminatory treatment[30]. The law defined equality as a principle according to which everyone should be treated equally in terms of rights and obligations, encompassing also differences that should also be afforded equal treatment[31].

Nevertheless, it also explicitly accepted the same definition of marriage as in the *Family Law*[32]. There were attempt to include this definition in the Constitution, making a statement that same-sex partnerships are not favoured, and are a threat to the family and to the proper development of children[33]. Therefore the initiatives for changes in the Constitution aimed to strengthen and safeguard the exclusive position of marriage as a heterosexual nest, even though the same provisions already exist in the positive national regulation under the *Family Law*[34].

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[29] *Op. cit. Family Law, article 6*.

[30] Law on Prevention and Protection from Discrimination (Закон за спречување и заштита од дискриминација), *Official Gazette of the Republic of Macedonia*, No. 50, 13.04.2010. *article 3*.

[31] *Ibid*., *article 5*, *paragraph 6*.

[32] *Ibid*., *article 5*, *paragraph 5*.

[33] See more in the notes of the Parliamentary debate over the proposal for changes in the Constitution of the Republic of Macedonia: *Стенографски белешки од 72-та седница на Собранието на Република Македонија*, одржана на 23 септември, 2013, стр. 4. Available online: http://www.sobranie.mk/default.asp?pSearch=%D0%B1%D1%80%D0%B0%D0%BA+&x=0&y=0. Similar behaviour was noticed in Croatia, which is worthwhile mentioning for purposes of comparing patterns of countries that share the same legal heritage from the past (as part of former Yugoslavia). Namely, in Croatia the issue of defining marriage as a union between a man and a woman in the Constitution was decided by a referendum (the third in the country, after the decisions on the issues of independence and EU accession). The initiative was taken by the organization *U ime obitelji* (*In the name of the family*) that collected signatures necessary for a referendum (more than 740,000). The results were also overwhelming since a large majority of the population (more than 65%) voted for the exclusivity of marriage to heterosexual couples. See online news: http://www.slobodnaevropa.org/content/u-hrvatskoj-referendum-o-ustavnoj-definiciji-braka/25185749.html;http://www.tportal.hr/vijesti/hrvatska/302015/Ovo-su-ekstemni-rezultati-referenduma.html.

[34] The rationale was that if the exclusivity of heterosexual marital community is given at a constitutional level, not just at a level of law, it will be more difficult for the left oriented opposition when it gains a majority in Parliament to change the law and introduce same-sex partnerships in the future. The idea was to make it as difficult as possible for the future to recognize family life for same-sex partners as marriage as well as other sorts of partnerships (see more in *op. cit. Стенографски белешки од 72-та седница на Собранието на Република Македонија*, pg 5). This is in contrast to what happened in Croatia. Namely, several days after the referendum that defined marriage as an exclusively heterosexual community, an initiative to ensure protection of the right to family life to unions that are not marriage arose. Amendments in the Constitution are meant to introduce a balance and eliminate a feeling of inequality among gay couples because of the new definition of marriage. See more in New Indian Express, "Croatia's Government Proposes Law on Gay Partnership", 12.12. 2013, http://www.newindianexpress.com/world/Croatias-government-proposes-law-on-gay-partnership/2013/12/12/article1942238.ece#.UvuTYxA1CiU.

The current *Law on Prevention and Protection from Discrimination*[35] refers to *inter alia*, also sex and sexual orientation, gender and gender identity. Yet, same-sex partnerships/unions/cohabitations are regulated neither in the *Family Law* nor in any other law in the Republic of North Macedonia, thus making the climate not same-sex-friendly and significantly different from other legislation in Western Europe. Therefore the provisions on affiliation in the *Family Law* do not trigger the parenthood of same-sex couples (even though such situations may exist, for instance if same-sex women live with a child conceived by sperm donation to one of them. The law does not have a solution how will regulate the other (than the woman who gives birth) parental responsibilities, thus they will be non-existent.

The establishment of paternal responsibilities if the child is born within a marital relationship is on the ground of the legal presumption: "the husband of the mother is the father of the child born during the marriage or 300 days after the dissolution of the marriage"[36]. The presumption can be rebutted before the court by the husband, the mother or the child under certain circumstances and within certain time limits on grounds of biological/genetic relatedness[37]. The law omits to include the genetic progenitor (if different from the husband) as an active party able to initiate court litigation to rebut paternity based on the ground of presumption (as a first step towards establishing his own fatherhood). The progenitor's legal affiliation can only be established if the mother or the child initiate court litigation and rebut the paternity of the married husband, after which the recognition of the genetic parent may follow. This means that the law favours protection of family life as constituted in marital cohesion over genetic bonds.[38] The rationale is derived from two premises: (1) marriage has been perceived as a preferable medium for founding and raising families throughout history and even nowadays, (2) it promotes legal protection of already established familial links and therefore legal certainty[39].

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[35] Law on Prevention and Protection from Discrimination (Закон за спречување и заштита од дискриминација), *Official Gazette of the Republic of Macedonia*, No. 258, 30.10.2020, *article 5*.

[36] *Op. cit. Family Act*, *article 50*.

[37] *Op. cit. Family Act.*, articles *64-67.* The time limits for the husband to launch proceedings to rebut his fatherhood are rather restrictive – 3 months after he receives the information regarding the fact of the birth of the child (*article 64*, *paragraph 1*). Nevertheless, he is allowed to request from the *Supreme court* an extension of the time period and new validity date for his petition (up to the time of the child gaining majority) if he has revealed new facts and proof that deny his genetic paternity (*article 65*). In this context, the Supreme Court made a decision explicitly stating that the suspicious mind and accordingly, the psychological and health-related consequences are not *per se* a sufficient ground to accept the petition and extend the due date. See more in the Decree of the Supreme Court – Решение на Врховниот суд на Република Македонија, бр. 38/98, 16.12.1999. The purpose of the restrictive terms for challenging the genetic relatedness that derive from the marital presumption can be explained by the fact that the law firstly prioritizes genes as important in the relation, and, only secondly protects the already established family link with the child.

[38] Ignovska E., *Sperm Donation, Single Women and Filiation*, Intersentia, 2015.

[39] Other European legislation is also familiar with this legal solution. For instance, in the Netherlands, a third party (apart from the marital partners) cannot dispute the legal fatherhood of the mother's husband, even if the third party can prove that he (not the husband) is the child's biological father. Furthermore, under the Dutch law, a married man can only under very strict circumstances, recognize a child as his begotten with a woman who is not his wife. In England, on the other hand, both cases are possible: a third party outside the marriage may recognize the child as his, and a married man may recognize a child as his begotten with a woman who is not his wife. See more in Vonk, M., *Children and their Parents, A Comparative Study of the Legal Position of Children with Regard to their Intentional and Biological Parents in English and Dutch Law,* Intersentia, 2007, pg. 65. Under the national Macedonian legislation, there is no prohibition on a married man recognizing another woman's child as his.

iii. Extra-marital relationships and the establishment of parental responsibilities

Extra-marital relationship is a legal term that generates legal consequences. It is defined as a community of mutual life between a man and a woman with a continuity of more than one year[40]. Its constitution is related to the mere fact of joint habitation and not with any formal requirement to be registered. The non-registration status creates problems in proving its existence in practice, supported by the legal vacuum when it comes to the legal obstacles for initiating the relationship[41], and the mutual inheritance[42]. One of the legal impediments is close affiliation (either by blood or by the fact of family life)[43]. While the second is evident, the first is not, especially in systems that practise anonymous gamete donations. Consequently, the law omits to regulate on equal grounds the legal obstacles for establishing marital and extra-marital relationships, while the problem of legalizing inbreeding for both relationships when the partners are blood related without (under rules of anonymous donations) or with (under rules of known donations) the knowledge of that fact remaining. Nevertheless, the extra-marital relationship has the same legal regime as the marriage itself when it comes to the right of mutual maintenance, and the division of mutual property[44]. The once established rights and responsibilities of parents and other relatives towards their children and *vice versa* are equal regardless of the marital/extra-marital relationship of their parents[45]. However, the establishment of parental rights and responsibilities is not the same. In marriage, the marital presumption assumes fatherhood automatically, while in extra-marital relationships the parental status of the father has to be additionally acquired (by acknowledgment, if it is not contested, or otherwise - in court litigation). The *Draft Recommendation* and *White Paper* suggest application of the marital presumption in both scenarios[46]. Replacement of the term "marital presumption" with "paternal presumption" is more adequate in the sense of appreciating the fact that the marriage is not the

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[40] *Op. cit. Family Act*, *article 13*.

[41] By analogy to marriage, legal obstacles for concluding a valid marriage are: (1) existence of another marital community of one/both of the partners (*article 17* of the *Family law*); even more bigamy is treated also as a criminal offence (*article 195* of the *Criminal law* stipulates that a person who concludes a marriage while being in a marriage already, and/or a person who concludes a marriage while being aware of the fact that the other person is already in a marriage will be punished with imprisonment of three months up to three years), (2) legal incapacity to reason (*article 18* of the *Family Law*), (3) the validity of the consent - given under threat or misconception (*article 19* of the *Family Law*), as well as (4) the affiliation ties, i.e. (a) by blood including all relatives in *linea recta*, and up until the second degree of blood relatedness in *linea lateralis (article 20, paragraph 1* of the *Family Law*, while *article 194* of the *Criminal law* criminalizes the action with imprisonment of the perpetrator from three months up to three years), and (b) by shared family life including affiliation by adoption (*article 20, paragraph 1* of the *Family Law*), affiliation by belonging to the same extended family (here approved exceptions under justified reasons by the court in extra-procedural proceedings are allowed – *article 21* of the *Family Law*), and affiliation from extra-marital relationships (*article 22* of the *Family law*).

[42] It is not explicit if the partners from the extra-marital relationship will inherit from each other in the Law on Inheritance, even though the *Family law* (article 13) explicitly stipulates that the legal consequences of the extra-marital relationship are the same as those of the marital relationship in the domain of mutual maintenance and joint property. Intentionally or not dropping the issue of inheritance in both laws is widely interpreted as if they cannot inherit each other and the practice is coherent when it comes to this matter.

[43] *Ibid.*

[44] *Op. cit*. *Family Law*, *article 13*.

[45] *Ibid*., *article 9*.

[46] See more in Appendix IV *Draft Recommendations on the Rights and Legal Status of Children and Parental Responsibilities, Explanatory Memorandum*, CJ-FA (2011) RAP 5 prov. and *Report on Principles Concerning the Establishment and Legal Consequences of Parentage – "The White Paper"*, Committee of Experts on Family Law, 2006: http://www.coe.int/t/dghl/standardsetting/family/CJFA_2006_4e%20Revised%20White%20Paper.pdf.

only place where families can be founded, while considering the automatic attribution of fatherhood after birth as a preferable scenario for children.

III. THE LAW ON BIO-MEDICALLY ASSISTED FERTILIZATION

i. Beneficiaries of bio-medically assisted fertilization and the establishment of parental responsibilities

The Law on Bio-medically Assisted Fertilization in its *article 9* sets the scene for the beneficiaries of the right to assisted fertilization: the adult man and woman having legal capacity, married or living in an extra-marital relationship, as well as the unmarried woman who is not in an extra-marital relationship shall have the right to use the assisted fertilization procedure, provided that previous treatment or treatment with other methods is unsuccessful, and who in accordance with their age and general condition are capable of parenting.

The possibility for a single woman to be a beneficiary of the right to assisted fertilization is problematic under the current legal context from several points of view.

Firstly, infertility is not the rationale behind a single woman's attempt to conceive using assisted reproduction. From a general point of view, it is not possible to apply the World Health Organization's definition on infertility since the single woman has not been engaged in unprotected intercourse during 12 months for the purpose of reproduction. It is also arguable how to apply the provision in the law that she has the right to use assisted fertilization if previous treatment is unsuccessful or treatment with other methods is also unsuccessful. Even more, the validity of the provision that relies on infertility while depicting the right to access ART is not just outdated, but also wrong taking into account that an infertile woman would not be able to use sperm donations to conceive a child anyhow.

Secondly, from a perspective of the rights of the child, it is arguable if under the current anonymous context of donations it is in the child's best interests to be born intentionally without a father, neither biological/genetic nor legal, and even more, without knowing the facts surrounding the conception.

According to Mickovikj, under the circumstances when the Law was brought (in 2008), assisted reproduction in the Republic of Macedonia should have covered only couples. Even though the reproductive right of the woman should be guaranteed, it should not compromise the right of the child to have two parents[47]. This author's rationale is driven from the premises that it is better for the psychological development of the child to be raised in a family, instead of being raised by one parent only, supported by the argument that the legal regulation of treatments for infertility should balance the reproductive autonomy of the adults (in this case – single women) and the welfare of the children[48]. Nevertheless, if there is an effort for a balance to be achieved, it can be seen in the attempt of allowing single women to conceive children to whom they will give fair prospects of eventually getting to know their genetic father.

The law prohibits the use of donated spermatozoids/ova for insemination with ova/spermatozoids from a bloodline-related woman/man with whom the donor is not allowed to conclude a marriage. It is also prohibited to use a donated embryo for insemination of a woman with whom

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[47] Мицковиќ, Д., „Дилеми во врска со Законот за Биомедицинско потпомогнато оплодување", *Правник*, 2008.

[48] Storrow, R. F., "The Bioethics of Prospective Parenthood.In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics", *Cardozo Law Review*, Vol. 28, No. 5, 2007.
pg. 101.

it is prohibited for the donor of the spermatozoids used to create the embryo to conclude a marriage, or for insemination of a woman who is related in the first line with the woman whose ovum is used to create the embryo[49]. The prohibition on using donated cells due to blood relation is, however, incomplete. Namely, *article 22* stipulates that implantation of an embryo created from the ovum of a woman who is related in the second line with the woman in whom the embryo is implanted. This means that sisters related in second line, can donate ova to each other. This practice will eventually lead to a situation where the sister of the mother (the aunt of the child) will be the child's biological/genetic parent. Therefore the first cousins of the child will actually be his/her *consanguinei uterini* – brothers or sisters by the same mother. The complex kinship of that kind should not be allowed. Mickovikj also considers that sisters should not donate ova to each other. He anticipates the presupposed risk of psychological trauma of such complex affiliation if the child finds out that his/her aunt is actually his/her genetic mother, while his/her cousins are his/her brothers or sisters[50].

P*aragraph 3* of *article 22* should be changed in view of prohibiting the insemination of a woman who is related in the second line with a woman whose ovum is used to create the embryo. One reason is the complicated affiliation and disturbances of the accepted Roman law system of *consanguinity* in the continental law and in the Macedonian law on succession. The current article is problematic under the current context of "hidden truth", since the child will most probably not know the bloodline-related relatives and therefore the legal prohibition of insemination between persons subject to legal obstacles to concluding marriage will not apply to him/her in the future[51].

The current article will also be problematic if the child gains (in the future) the right to know his/her genetic origins and the consequences that might be caused if the child finds out that his/her biological aunt is his/her biological mother.

Another controversial issue from the above elaborated provisions is the donation of the embryo. Since no single beneficiary of the assisted reproduction will be genetically related to the child, the donation of an embryo resembles adoption of the embryo. The only biological difference to an adoption is the gestational role, and the fact of giving birth by the "mother to be". This is similar to the role of the surrogate mother in the child's life only without the intention of "the mother to be". Mickovikj also holds the opinion that the legal provisions about embryo donation should be reconsidered and furthermore elaborated considering their problematic nature[52].

Gestational pregnancies were introduced in the Law on Bio-medically Assisted Reproduction in 2014[53]. Here again the Law is not consistent with the Family Act even thought it refers to it. Namely, art. 12-v stipulates that the consent for the surrogate "project" given prior to its beginning has a legal significance of a statement for renunciation of acknowledgment of the motherhood after birth. The inconsistency lies in the fact the Family Act has provisions for acknowledgment of fatherhood solely (art. 51-59), while provisions for acknowledgment of

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[49] *Article 22*, *CRC*.

[50] *Op. cit.* Mickovikj D. 2008.

[51] Ignovska E., "The Impact of Assisted Reproduction on Affiliation within the Family Law of the Republic of Macedonia", Jansen B.C.S., Ignovska E.,(eds.),*Law, Public Health Care System and Society.Macedonia – Social Policy, Legislation, Biomedicine and Ethics of Organ Transplantation, Fertilization and ART*, AVM, München, Academische Verlagsgemeinschaft, 2012, pg. 206.

[52] *Op. cit*. Mickovikj D., 2008.

[53] Закон за изменување и дополнување на Законот за Биомедицинско потпомогнатио оплодување, *Службен весник на Република Македонија*, бр. 149, 13.10.2014.

motherhood are not included (since the law considers the mother the one who gives birth). Additionally, it is stipulated that the gestational mother does not have a right to initiate a litigation for establishing her motherhood under the family law provisions.
The national regulation of posthumous insemination is one of the most liberal in Europe. A man and a woman, who, based on medical acknowledgments or experience of medical science, are threatened with infertility due to health reasons can preserve their spermatozoids, ova and ovum or testis tissue for the purpose of their own usage. In the case of the death of the man and with his previous written consent posthumous insemination is allowed to be performed one year after the day of his death, at the utmost[54]. The law regulates the consent of the man as the only requirement for posthumous insemination of the woman for which he gave the consent, without stating explicitly whether this consent refers to fertilization of his married wife, extra-marital partner or any other woman. The resulting child will be considered as conceived after the death of his father, therefore not able to be a heir under the exception of the main rule (a heir is to be only an alive person) for *nasciturus*, which is discriminatory on grounds of birth when compared to the other extra-marital children

ii. The right of the child to know his/her genetic origins

As harmonized with the *Family Law*, donors do not hold any parental responsibilities, in terms of rights or obligations in relation to the conceived child. The authorized healthcare institutions are obliged to provide protection of all personal, medical and genetic data of donors, as well as to undertake all necessary measures not to reveal the identity of the donor and his/her family and vice versa[55]. All data regarding the donor's provenience, health biography and births resulting from the donation are to be kept in the utmost confidentiality in the *Register of Donors* in the authorized healthcare institutions for 30 years as from the date of their entry[56]. A child born by insemination with donated genital cells or embryos, 18 years of age and able to form an opinion on his/her own, can request sight of the data regarding the health condition of the donor in the *State Register of Bio-Medically Assisted Fertilization* only due to a medically justified reason and with a previously obtained approval from the State Committee[57]. However, this provision does not confront the accepted anonymity of the donor's identity which only protects donors' interests and neglects the right of the child to know his/her genetic origins.
In the context of legally prescribed anonymity in the Republic of North Macedonia, the definition of the conflict can be framed in terms of priority of rights: those of the child to know his/her origin and those of the donor and legal parents of respect for their privacy. The right of the child to know his/her origins cannot be exhausted by the right to information about his/her conception without revealing the identity of the donor. The right to information about the circumstances of the conception, on the one hand, will not necessarily infringe the right of the donor to privacy, but on the other hand, will not satisfy the child's right to know his/her genetic origins. Therefore recent trends regarding genetic material donations promote donors' open identity access and protection of children's right to information about their genetic origins. This would mean that, for instance, a single woman's reproductive right to conceive without a partner should be guaranteed only if the child has the right to know the circumstances of the conception,

[54] *Op. cit. Law on Bio-medically Assisted Fertilization,*, *article 33*.
[55] *Article 7*, *CRC*.
[56] *Articles 47* and *48*, *CRC*.
[57] *Article 57*, *CRC*.

and its genetic origins. Because of this reason (among others) France for instance, disputed allowance for single women by choice to procreate by sperm donation and finally accepted it under such conditions only in 2021. This however, does not mean establishing legal parental bonds since legal family life integrates biology/genes, factual family life as well as intention to parent a child. Once it is clear that finding out the genetic origins is not automatically connected with establishing filiation links, there should not be legally sound reasons to ban paternity proceedings for children conceived by medically assisted fertilization or adopted.

IV. CONCLUSION

According to the topical *Family Act*, a father of a child will be the genetic parent as a principal rule if the child is not conceived through assisted fertilization or adopted. An exception to this principle is envisaged in two cases: (1) the existent marital presumption was never rebutted, while the husband of the mother was not the genetic parent, and (2) the child of an extra-marital relationship was recognized by a person other than his genetic father. In the first exception belongs a recent case that publicly revealed the struggle of a young man with the legal and administrative authorities to recognize his existence and inscribe him in the birth certificate[58]. He died trying, yet nothing changed – the marital presumption is still considered an obstacle for gaining legal status when both the genetic, but also the factual reality are different. When it comes to the establishment of motherhood, the *Family Act* has accepted the *Roman law* principle - *mater semper certa est*– meaning the mother is always certain – i.e. the woman who gives birth. This is not consistent with the Law on Bio-medically Assisted Fertilization and its later introduced provisions on surrogacies who oblige the gestational mother not to recognize the child as hers after birth.

The concept of open identity in reproductive matters should be introduced in the national *Family Law* and in the *Law on Bio-Medically Assisted Fertilization*. The act of assisted reproduction (or adoption) should take a child-oriented perspective, promoting the best interests of the child before the interests and preferences of parents and donors. This information can also prevent inbreeding, legal misunderstandings and vague disputes over paternity.

This encompasses an active obligation of the Member States of the Council of Europe to create a system in which the interests of the individual seeking access to records relating to his/her private and family life must be secured (discussed by the ECtHR for instance in the adoption cases Godeli v.Italy or Odievre v. France). Even sperm banks have changed their policies and promote non-anonymous donations on their web-sites lately[59]. The most recent developments in changing national family laws according to the changes in society, suggest that the right to know one's personal origins as derived from family history is increasingly regarded as a fundamental human right.

The distinction in treatment for the pursuit of the aim to keep the donors' identity unrevealed or to maintain the unity of the created families for the sake of legal certainty is not proportional to

[58] Delevska S.K., SDK text regarding the case of T.S.: https://sdk.mk/index.php/neraskazhani-prikazni/pochina-19-godishnoto-momche-shto-drzhavata-go-ostavi-bez-izvod-i-zdravstvena-knishka-edinstven-dokaz-deka-postoel-se-petkite-vo-svidetelstvata/#.YLDVJjY84gt.facebook. For more see in Ignovska E. „Marital Presumption as a Legal Obstacle for Gaining Legal Status of Children Lost in Administrative and Judicial Labyrinths in North Macedonia and in the European Court of Human Rights' Case-law", *Iustinianus Primus Law Review*, Vol. 13, Issue 1, 2022.

[59] See for instance on the web-site of the international sperm bank Cryos - https://www.cryosinternational.com/en-gb/dk-shop/private/.

the harm done to children and their fundamental rights. On the contrary, children are taken as means employed to satisfy single women's or couple's needs to have children. If legal proceedings that challenge parenthood do not have an intention to hide the truth over the act of conception, while also balance the biological over social facts of parenthood, it would not be necessary to compromise children's rights by the rights of the adults. It is the State's task to allow access to justice for everyone and adapt family laws to the evolutive path of medicine and society. This provided, it is the national Court's task to weigh up the proportionality of genetics and factual family life facts, given the priority to the best interests of the child on an individual case basis. Consequently, the aim could be achieved through an open judicial system that accepts both realities and judges them accordingly, where no one feels deprived of their fundamental rights.

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