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empresa indicada ha sembrado en el campo de la participación de la energía renovable en la matriz energética argentina.

IV) Conclusiones. Una política energética constitucional.

Entiendo que la Constitución socioeconómica reformada en el año 1994 ha trazado lineamientos que permiten modular los derechos en ella comprendidos con pautas referidas a intereses (y derechos) sobre la adecuada calidad de vida, el acceso a la energía y la tutela del ambiente.

También que los mecanismos de intervención del Estado en las actividades económicas (como la generación de energía) conforman pautas que deben ser direccionadas en pos de los derechos fundamentales reconocidos en el texto constitucional.

En este orden de ideas, el fomento de la generación de energía secundaria mediante fuentes renovables y no contaminantes se posiciona como una opción acorde al derecho a su acceso y al cuidado del ambiente y el desarrollo sustentable -en términos de ponderación proporcional- que la empresa YPF S.A. debería atender.

Ello debería ser uno de los fundamentos en los que se apoye la presencia del Estado en una empresa que lleva a cabo actividades económicas de semejante trascendencia social.

ASSISTED REPRODUCTION FAMILIES: AFFILIATION OF CHILDREN CONCEIVED BY ART TO SINGLE WOMEN IN THE REPUBLIC OF MACEDONIA AND IN THE EUROPEAN CONTEXT

Elena Ignovska

1. Introduction

> "Science enhances the moral value of life, because it furthers a love of truth and reverence – love of truth displaying itself in the constant endeavour to arrive at a more exact knowledge of the world of mind and matter around us, and reverence, because every advance in knowledge brings us face to face with the mystery of our own being".
>
> Max Planck, *Where is Science Going?*
> Translated by James Murphy (1932)

The enormous progress of science is eagerly welcomed with regard to the growing prosperity of humankind. On the road of unstoppable scientific progress, some intrinsic human values were endangered, thus facing humanity with manifold moral and legal dilemmas. The possibilities such as the assisted reproductive technologies teeter at the very verge of the ethical sensitivity regarding life and the application of science.

At the essence of the circle of existence of the human life is the reproduction as a process of continuing the human species, and therefore, endeavoring eternity. What was once a natural process following coitus, nowadays, more than ever before is a planned and conscious transformation of human's life when ready and willing to undertake the parental role.

The first test tube baby - Louise Brown, born in Great Britain in 1978 was probably the most famous baby in the world. Louise Brown was not only a product of conception by her parents, but also of a new and revolutionary concept in the reproductive medicine, thus starting a revolution in modern families all over the world. Until Louise was born, the ethical and legal aspects regarding the process of

giving birth and founding a family were focused around debates on contraception, abortion, sterilization and inevitably, woman's bodily integrity. The in vitro fertilization (IVF) breached the exclusivity of the woman's body in which until then, the conception, always took place. Woman's body, her womb, no longer held the primacy in the process of conception. IVF also breached the exclusivity of the modus of conceiving a child: coitus between man and a woman. From here on, the IVF created opportunities for modelling and even more, manipulating the act of human conception, arising from the new scientific developments in the bio-reproductive medicine. These newly emerged opportunities became a possibility for some parents to procreate genetically related offspring, while for others, it represented some kind of an experimental laboratory where the human race could be enhanced or children could be chosen according to the parents' specific preferences.

Therefore, the introduction of assisted reproductive technologies has led to an increased responsibility for the medical workers, as well as an increase of the demands on ethics, law and the society to reconcile with the benefits of science and the desirable practices, but without compromising the paradigms of human rights and freedoms, human dignity, the right to form a family, the freedom to decide over the number and the dynamics of child births, as well as the child's rights.

The reproductive rights and freedoms are in correlation with the obligations of the state, as being an essential factor in ensuring their implementation. If someone has a reproductive right, then the society and the clinics which practice bio-medically assisted fertilization would have the correlative obligation to provide suitable conditions for its realization. The margins in which the science and technology are allowed to enter a national family law are yet to a great degree dependent on the particular state policies regarding its interpretation on fundamental values to be protected. Therefore, on the grounds of particular historical, political, social, even religious perceptions, the state itself orchestrates the level on which reproductive rights will be enjoyed as exclusive prerogatives of the human beings. The *European Council* recognized the specific nature of the family regulation as "heavily influenced by the culture and tradition" and consequently, dependent on the nationally proclaimed values and principles as a reason for difficulties in the context of

harmonization[1]. A very thin line could particularly be drawn in the sphere of application of the assisted reproductive technologies and their impact on the gradual changing of the basic human functions such as reproduction, parenting and individual self-realization. Therefore, some boundaries regarding the implementation of the universal human rights principals on national levels are extensively interpreted and yet, some questions remain outside the universal human rights umbrella. For the reasons of appreciating conceptual differences, the *European Court of Human Rights (ECtHR)* developed the concept of *Margin of Appreciation* when considering whether a member state has breached the *European Convention on Human Rights (ECHR)*. This doctrine allows the court to take into consideration the fact that the *Convention* will be interpreted differently in different member states according to their cultural, historical and philosophical differences. On the other hand, in the family law domain, there are authors who promote unification and harmonization of family law in Europe questioning whether family law still remains so culturally specific[2]. Some fierce opponents on "cultural constraints argument"[3]consider that culturally-imbedded rules are construction that does not coincide with the modern notion of human rights[4], that tradition is not "holy" and should not be protected at any rate, that family laws are not an end in themselves but a mean for promoting human rights, even if they are imbedded in our culture[5], even more, that family is social construction made by humans but not necessarily intrinsic to human nature.

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[1] *Council Report on the need to approximate member states 'legislation in civil matters* of 16 November, 2011, 13017/01 justciv 129, p.114

[2]See Boele-Woelki K. (ed.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Antwerpen: Insentia (2003), Antokolskaia M., *Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millennia*, Antwerpen: Intersentia, (2006)

[3]"Cultural constrains argument" is considered as main objection to family law harmonization, see more Antokolskaia M., *Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millennia*, Antwerpen: Intersentia, (2006)

[4]De Groot, G.R., "Op wegnaareen Europees Personen-en familie recht?", 1995, p.29 cited in supra: Antokolskaia M., *Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millennia*(2006)

[5]Pintens, W., Vanwinckelen K., Casebook European Family Law, 2001, p.15 cited in supra: Antokolskaia M., *Harmonisation of Family Law in Europe: A Historical Perspective, A Tale of Two Millennia*(2006)

The right to reproduce and thus, to found a family is declared and protected as a human right in the *Universal Declaration of Human Rights* (art. 16[6]) and the *European Convention on Human Rights* (Art. 12[7]). Both international human rights cornerstone documents associate the right to found a family with marriage. These definitions do not correspond with the reality any longer, moreover, when the family is founded with the application of the new reproductive technologies. Some aspects of those articles are so vague that allow free interpretation from the national legislations depending on the political, legal, moral, religious and cultural background of the perception of family and privacy. Therefore, the margin of appreciation for the family law issues is wide, especially regarding the following questions: is marriage a prerequisite to found a family? To whom, the terms "men" and "women" refer: only to heterosexual or to homosexual partners too or maybe to single women and single men as well? Do men and women have to be at a certain age to conclude marriage or to found a family as well? Finally, is the foundation of family defined by law, custom or biology, and therefore, is the family a natural or a social construction?

Analyzing the reproductive rights from the perspective of universal human rights, and narrowing it down to the application of these principles in different national family law jurisdictions, introducing the issue from the context provided by the *Family Law of Republic of Macedonia* and moving comparatively through the practice of the *European Court of Human Rights,* will draw our attention on searching the answers of several questions of common interest. The **subsidiary questions** of the research are: is the assisted reproduction in function of realizing the reproductive right of the prospective parents or in function of protecting the best interest of the prospective children; how do the overlapping interests between the child and the other participants (the parents and donors) resolve in

[6](1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State

[7] Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

terms of protecting the right of the child to its genetic identity; and how does assisted reproduction affect the affiliation within the family? The answers to these questions should bring the research closer to **the central questions**: Is family a social or biological construct; and therefore, is parenthood a twofold concept: 1. *legal* when it comes to executing (carrying out) the parental role, rights and obligations in the relationship with the child, and 2. *Biological* when it comes to the genetic relatedness and what is the relation between both concepts? The answers to these questions should bring light to the main **hypothesis**: there is inconsistency with the legal proceedings for establishing parenthood since they exclude children conceived by ART in legal systems where ART is a possible modus of conceiving children. From here on, the **core questions** will be: is the current biological criterion for establishing the parenthood in accordance with the reality of the modern families; and therefore, is the current impossibility to launch a proceeding for establishing parenthood of children conceived by ART justified?

It remains clear that by changing the way we conceive our children, the definitions and concepts of family relationships between marital and extramarital partners, and parents and children have been radically altered. Although more than 30 years have passed since the birth of Louise Brown, the participants of the assisted reproduction – "the parents to be", the donors, third parties and children are still a part of an uncertain sociological experiment, scrutinizing, changing and creating the laws through new litigations, national and international regulations. In these terms, the concept of parenthood (once with an exclusive meaning) is undergoing fragmentation into biological/genetic, legal and social parent, depending mostly on the intention and the role the parent will have or already has in the child's life. Therefore, the overall goal of the research is to analyze the impact of the application of the assisted reproductive technologies in the changing family law, in particular, in affiliation law in Republic of Macedonia and on European level.

2. Single women's reproductive right: assisting single women to found fatherless families

With the advances in science and technology in a world where individual priorities for a personal self-realization predominate, the families undergo redefining. From the time of enacting the documents on human rights until the current moment the perception of the family unit has changed. Today, family is an extended concept as much as the national legal framework allows it to be. The reproductive right does not sprout out of the family anymore. On the contrary, it is considered as a genuine human right of each individual. The absolute and natural character of the reproductive right is however, deluded by the other participants holding interests in the same reproductive process: the other party that contributes with genetic material, and the resulting offspring. Even though the reproductive technologies were introduced with a purpose of overcoming couple's infertility, single women's right to reproduce using sperm/embryo donation is usually not related with fertility problems. Instead, it has to do with the women's desire to experience the motherhood without engaging in a sexual intercourse and without sharing the parental responsibility with a partner. Nevertheless, at least three persons are still participating in her "reproductive project".

An increasing number of mono-parental families and children who will grow up in absence of one parent emerge as a trend. The conception of a child by a single woman with a donation of genetic material but not a donation of a father, and the posthumous reproduction now promote the contemporary natal policy, but dilute the quality of parental relationship, depriving the child from having two parents as a desired and preferred context for its development, and as such, protected in the United *Nation's Convention on the Rights of the Child (CRC)*[8]. There is no universal model of family and family relationships any more. On the contrary, the definition of kinship, marriage and family differ in various state legislatures and each family becomes a model of its own. Changes in *the Family law* are encouraged by the prerogatives of each individual as a holder of the

[8]Article 18, paragraph 1 of the *Convention of the Rights of the Child* stipulates: "States shall make every effort to ensure the principle and both parents have common responsibilities for raising and development of the child."

right to reproduce and, consequently, found a family[9]. Given that *family* is a union compounded of parent/s and child/children, the focus is on reconciling the human rights of the progenitors with the human rights of the child conceived with medical assistance[10]. The focus will be narrowed even more, towards the specific right of such a child to know his/her genetic origin[11], on the path of examining the possibility of establishing his/her parenthood.

The *Convention on the Elimination of All Forms of Discrimination against Women* guarantees the reproductive right of women as part of the basic human rights and freedoms providing that every woman has the right to decide freely on the birth and number of children that she is going to bring up[12]. The *Ethics Committee of the American Society for Reproductive Medicine* holds that it is an ethical obligation to treat unmarried and single persons equally with those who are married, even more when it comes to application of bio-medically assisted reproduction[13]. In 2010 many European countries gave the possibility to single women to conceive through ART: Belgium, Bulgaria, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Montenegro, Russia, Spain, Great Britain, Belarus, Serbia, Ukraine and Macedonia[14]. Despite the current dominantly present liberalization in Europe, the possibility for a single woman to be a beneficiary of the right to assisted fertilization was and in many countries still is a controversial issue. The *French Code of Public Health* stipulates that only couples have the right to use ART[15] supporting that a child born with ART has the right to live in a family

[9] in the legal framework of Article 12 - the right to found a family, and to a lesser extent Article 8, the right to respect private and family life of the *European Convention on Human Rights (ECHR)*

[10] through the very same right of Article 8 (*ECHR*) to respect private and family life and its derivate - right to identity

[11] Article 7 of the UN *Convention on the Right of the Child* (CRC)

[12]Article 16, *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, 1979

[13]The Ethics Committee of the American Society for Reproductive Medicine "Access to Fertility by Gays, Lesbians and Unmarried Persons", *Fertility and Sterility*, Vol.92, No. 4 (2009)

[14]Howard W. Jones & all, International Society of Fertilities Sciences, *IFFS Surveillance*, pp. 22-23 (2010)

[15]ART L 2141-2, Code de la Santepublique, amendment LOI n 2011-814 du &juillet 2011 – art 33

composed of two parents[16]. Just as an illustration of the issue importance - in Slovenia the right was decided through a referendum in which 80% of the voters supported the exclusive possibility to conceive through assisted reproduction for couples only[17]. The *Croatian Medical Fertilization Act* also favors couples and excludes single women as beneficiaries of ART[18]. Republic of Serbia has chosen middle ground: while couples hold the possibility to exercise their reproductive right as a principle rule, single women's right to reproduce through ART is allowed as an exception, only if there are justified reasons for it and if there is consent from the Ministers responsible for Health and Family Relationships[19]. Due to the restrictions and conditioned exercise of the reproductive right based on fulfilling certain criteria (among others, women bellow certain reproductive age) the doors of "reproductive tourism" opened towards its neighbor – Republic of Macedonia. Nowadays, many women from Serbia come to Macedonia to carry out ART procedure[20]. Macedonian *Law on Bio-Medically Assisted Fertilization* allows realization of single women's reproductive right relating the execution of the right with certain conditions such as: having had previous treatment or treatment with other methods that was unsuccessful, accordance with women's age and general condition for capability of parenting[21].

[16]*Les lois de bioéthique: cinqansaprès,* Étude adoptee par l'Assamblée générale du Conseil d'État le 25 novembre 1999, La Documentation française, Paris, 1999 cited in Mickovikj D. Ristov A., "Biomedically Assisted Fertilization in Republic of Macedonia", (2012)

[17]Gordon, K., van Houten, N., IFFS Surveillance 07, *Fertility & Sterility*, Volume 87, Number. 4, Supp., pp. 7-18 (2007)

[18]Article 6, *Medical Fertilization Act*, 2009

[19]Article 26, Law on Infertility Treatment through a procedure of Bio-medically Assisted Fertilization, Republic of Serbia

[20]See supra: Mickovikj D., Ristov A., Bio-medically Assisted Fertilization in Republic of Macedonia, (2012)

[21]Article 9, *The Law on Bio-medically Assisted Fertilization*, Official Gazette of Republic of Macedonia, Number 37, 19.03.2008 stipulates as follows:"Adult man and woman having legal capacity, married or living in extra-marital relationship, as well as unmarried woman who is not in an extra-marital relationship shall have the right to use the assisted fertilization procedure, provided that the previous treatment or the treatment with other methods is unsuccessful, and who in accordance with their age and general condition are capable of parenting."

The *infertility* is defined as a failure to conceive following twelve months of unprotected intercourse[22]. Twelve months is the lowest reference limit for *time to pregnancy* by the *World Health Organization*[23].

The possibility for a single woman to conceive without a partner may prove problematic_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 definition on infertility since the single woman has not been engaged in unprotected intercourse during twelve 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 the previous treatment is unsuccessful or the treatment with other methods is also unsuccessful. This could be especially ethically disputable if a single fertile woman aged only 18 asks to exercise her reproductive right demanding a sperm donation[24].

Secondly, from a perspective of the rights of the child, it is arguable if it is in the child's best interest to be born intentionally without a father, neither biological/genetic nor legal.

According to Mickovikj, the assisted reproduction should cover 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[25]. He calls upon many studies in order to show that it is better for the psychological development of the child to be raised in a two-parent-family, instead of being raised by one parent only[26]. He furthermore, supports Storrow, who claims that the legal regulation of treatments for infertility should balance the reproductive autonomy of

[22] De Melo-Martin, I., "On Cloning Human Beings", *Bioethics*, Volume 16, Number 3, pp. 246-265, at 254 (2002)

[23] Cooper T.G., Noonan E. von Eckardstein S, *et al.*, "World Health Organization reference values for human semen characteristics", *Human Reproduction*, Update 16 (3), pp. 231-245 (2010)

[24] The term "fertile" is used instead of "healthy" woman, not to be confronted with the WHO definition on health as "a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity".

[25]Mickovikj, D., Dilemi vo vrska so Zakonot za Bio-medicinsko potpomognato oploduvanje, *Pravnik*(2008)

[26] Id. Mickovikj (2008) citing Schenner, J, G., Assisted Reproduction Practice in Europe: legal and ethical aspects, *Human Reproduction* Update, Volume 3, Number 2, pg. 176 (1997)

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[26] Id. Mickovikj (2008) citing Schenner, J, G., Assisted Reproduction Practice in Europe: legal and ethical aspects, *Human Reproduction* Update, Volume 3, Number 2, pg. 176 (1997)

the adults (in this case –the single woman), and the welfare of the children[27].

Very often the role of the father in the contemporary single women families is marginalized up to the level that it is placed at the very edge of disappearing. Many studies have been examining the psychological aspect of raising a child with the lack of the father figure as an increasing context in contemporary families. For the purposes of enriching the overall understanding of the single parent families in a time when the father figure is no longer what it once represented, and when sexuality and reproduction are human rights and very often even a duty, some concepts of psychoanalyzes should be used. Observing the modification of the concepts of motherhood and fatherhood in an era of re-constricted social interactions within the family through the lenses of psycho analysis should clear up the obscure picture on how "do women use the unconscious to find their way to femininity in a time when even the real has been touched"[28]. The purpose of the versatile observations is paving the terrain with better understanding on how this family model affects children towards analyzing if the current legal impossibility to launch a proceeding for establishing legal fatherhood should remain or should it be reconsidered.

The common feature of the national family legal regulations in Europe is that the provisions for establishing fatherhood do not apply in cases in which the conception occurred through assisted fertilization. Regulation of that kind compromises article 12, article 2 and article 18 of the *CRC*. Namely, under the current regulations, it is questionable if the procedural rules allow a child born with the assistance of the reproductive technologies and capable of forming his/her own views to be heard in judicial and administrative proceedings affecting his/her[29]. Certainly, any proceeding to determine the paternity or at least to get acquainted with the genetic father affects a child born with the assistance of the reproductive technologies just as it affects a child born in marriage or a recognized

[27]Id. Mickovikj (2008) citing Storrow, R. F., "The Bioethics of Prospective Parenthood": *in Pursuit of the Proper Standard for Gatekeeping in infertility Clinics*, Cardozo Law Review, Volume 28, Number 5, pg. 101 (2007)
[28]Taken from the poster for the Symposium "Culture/Clinic", *What Lacan Knew About Women*, University of Minnesota Press, 2013.
[29]Article 12, *Convention on the Rights of the Child*,

child. The different treatment of the children depending on their birth and status is considered as discrimination in the *CRC*. It is an obligation of the States signatories of the Convention to respect and ensure the rights to each child within their jurisdiction without discrimination of any kind, irrespective of, among others, the child's birth or other status[30]. It is also an obligation of the States signatories to use their efforts to ensure recognition of the principle that both parents have joint responsibilities for the upbringing of the child[31]. Even though the Convention does not determine the difference between the usages of the term parent (with its biologic/genetic, legal or social meaning) in the case of a conception of a child by a single woman, there is no other father apart from the donor.

The same issue regarding the right to know or establish paternal link with the progenitor is identified when sperm donation is used for inseminating women as couple. Nevertheless, the reasons why the scope of the research is limited to single women solely are twofold. *Firstly*, single women's families are manifestation of how assisted reproductive technologies are changing family law models in the contemporary society by making it achievable to conceive a child by realizing one's reproductive individual right without a partner. That leads to a responsibility of the legal system to manifest greater flexibility in adjusting family law provisions to the new circumstances created by introducing ART. *Secondly*, the issues are treated differently due to the different contexts surrounding both families: 1. context of absence (single mother families) and 2. context of presence of a father (couple families) in child's life. The child conceived in the second context will be raised by two parents, even though the father will be the child's social and legal but not the biological parent. The child conceived in the first context is destined to be fatherless from the beginning. Promoting or rejecting the right to know one's own genetic history and/or the right to a proceeding for establishing parenthood will however apply to both cases. Nevertheless, in most of the European countries two parents family law system is accepted, which means that the child cannot have more than one father.

Parental responsibilities for the beneficiaries of the bio-medically assisted fertilization usually derive from the informed

[30]Article 2 (paragraph 1), *Convention on the Rights of the Child*
[31]Article 18 (paragraph 1), *Convention on the Rights of the Child*

written consent at the beginning of the procedure with the possibility to be withdrawn before the implantation of the spermatozoids, the ova or the embryo in the woman's body. The given consent has legal significance of a statement for recognizing the parenthood after the child is born[32]. If the fatherhood was founded through legal means and that is content and intention to parent, it will be disproportional if is rebutted by not fitting to the biological identification with the child. However, this does not exclude the possibility for rebutting the fatherhood of the married man to whom the legal presumption applied that he is the legal father of his wife's child born during the marriage if the child was not his and if he never gave consent for adoption.

3. The Right of the Child Conceived by ART to Single Women

The *CRC* frames the family affiliation in terms of rights: the right of the child to know and be cared for by its parents, "as far as possible"[33] (Article 7); and the right of the child to preserve his or her identity, including family relations as recognized by law without unlawful interference (Article 8). Blauwhoff, proclaims the year of the introduction of the *CRC* as a year of progressive international and national recognition of individuals' interest in knowing the truth as a particular fundamental right[34], which is based on the right to "private life" and the "personality right", respectively[35]. He also documents

[32] Article 12, *The Law on Bio-medically Assisted Fertilization*, Official Gazette of Republic of Macedonia, Number 37, 19.03.2008

[33] The words "as far as possible" were incorporated in the Convention as insisted by the delegations of the United States and Germany in response to the original draft submitted by a few countries (Algeria, Egypt, Iraq, Jordan, Kuwait, Libyan, Arab Jamahiriya, Morocco, Oman, Pakistan and Tunisia). For a commentary on the CRC, see Detrick S., *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International (1999)

[34] Blauwhoff, J.R., "Tracing down the Historical Development of the Legal Concept of the Right to Know One's Origins. Has "To Know or Not To Know" ever been the Legal Question?", *Utrecht Law Review*, Volume 4, Issue 2, pp. 99 -116 (2008)

[35] Id. Blauwhoff (2008) As Blauwhoff claims, the "personality right" is protected in the German Federal Constitution or Basic Law under Art.1 I in conjunction with Art 2 I. The basis of the right to know one's origin as derived from the "right to informational self-determination" as an aspect of this right. "A personality right" is also considered as a basis of the right to know one's origin in The Netherlands (in the Dutch Constitution and in the Valkenhorst II case of the Dutch Cassation Court, 15 April 1994, NCJM-Bulletin no. 6, p.652), and in Portugal from which "a right to one's personal history" is derived).

that there has been a progressive recognition of this right under the case-law of *the European Court of Human Rights* in accordance with Articles 8 and 14 of the *ECHR*, even though, some contradictions and ambiguities are still present[36].

The right of the child to know his/her genetic origin and to be cared for by its parents (Article 7 *CRC*) as originating from the right to respect private and family life, and therefore, one's own identity (Article 8 *ECHR*) are the main pillar of the discussion. Most of the countries in Europe have either made reservations[37] or firmly hold on the "as far as possible" part of article 7 *CRC*. With regard to Article 7, *CRC* has objected to laws which do not allow adopted children to find out who their biological parents are[38]. Ziemele allows that the word *parent* used in Article 7 of the *CRC* is not very explicit, but that it could be interpreted in such a way to include the biological parents[39].From the *CRC Concluding Observation for Kazakhstan,* Ziemelle interprets that the limitation "as far as possible" presupposes that there could be circumstances that might limit the child's right to know, but an absolute prohibition on the right to know the biological parents is in contradiction with the *CRC*[40]. When it comes to Article 8, Hadgson points out that the issues of paternity and affiliation are not addressed expressly. The consideration is that there is an omission, bearing in mind the original proposal of the Article submitted by Argentine, concerning the protection of the child's genuine personal, legal and familial identity, consequently concerning the biological relationship of the natural parent and the child[41]. Article 12 of the

[36] Id. Blauwhoff (2008)

[37] To prevent the controversies that Article 7 may cause regarding anonymous donors or in the cases of adoption, several countries - The Czech Republic, Poland and Luxembourg - have entered reservation, see more in Detrick S., *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International, pg. 154 (1999)

[38] Ziemele I., *A Commentary on the United Nations Convention on the Rights of the Child. Article 7 – The Right to Birth Registration, Name and Nationality, and the right to Know and Be Cared for by Parents*, MartinusNijhoff Publishers, pg. 27 (2007) citing CRC Committee, *Concluding Observations: Kazakhstan (Un Doc. CRC/C/15Add.213, (2003), Estonia (UN Doc. CRC/C/15Add.196*, (2003)

[39] Id. Ziemele (2007) from the communication between CRC Committee and the States, as well from the CRC's aims.

[40] Id. Ziemele I. (2007)

[41] Detrick S., *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International, pg. 164 (1999) citing Hodgson D., "The International

CRC obliges the State Parties to ensure to the child who is capable of forming his or her own views the right to express it freely in all matters affecting the child, and to be given due weight in accordance with the age and maturity of the child. The wish of the child to know his/her genetic origin certainly affects the child's interest. Article 3 of the *CRC* promotes the best interest of the child as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Therefore, the *Convention* obliges the States Parties to take all appropriate legislative and administrative measures to ensure the protection of the child's best interest.

Article 2 of the *CRC* and Article 14 of the *ECHR* protect children from discrimination of any kind, irrespective of the child's or his/her parent's, among other things, birth or other status. It is questionable under the legislation that protects the donor's anonymity if all children (born with or without the assistance of the reproductive technology) are indeed equal regarding their birth and the right to know their origin.

There are conceptual problems in *the Conventions'* (both *CRC* and *ECHR)* and the national legislations' use of the terms "donor" and "parent". Concerning these terms, Dock posed the question: "Should the legal recognition of parenthood be based on a biological relationship or can it also be based on a psychological/social relationship, and should the concept of being a *parent* be the same under all circumstances?"[42] There are also conceptual divergences regarding the definition of "the right to know one's genetic origin" and its meaning. Does it represent: a moral claim of informational self-determination[43]; a right involving free moral choice and,

Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness", *International Journal of Law and the Family*, pp. 255-270 (1993)

[42]Doek E.J., "The Nuclear Family: Who are the Parents?" in: Eekelaar J., and Nhlapo T. (eds) *The Changing Family: International Perspectives on the Family and Family Law*, Oxford, Hart, pg. 546 (1998)

[43] Supra: Blauwhoff, J.R., "Tracing down the Historical Development of the Legal Concept of the Right to Know One's Origins. Has "To Know or Not To Know" ever been the Legal Question?", (2008), pg. 102

therefore, encompassing the "right not to know"[44]; a right to contact the genetic parent[45] or even other genetic relatives as an enforceable procedural right?

In the Republic of Macedonia, *The Law on Bio-medically Assisted Fertilization*[46] regulates the donation of sperm, ova and embryo on the basis of unconstrained written consent of the donors. The donation is voluntary and without financial compensation. Parental responsibilities for the beneficiaries of the bio-medically assisted fertilization are derived from the informed written consent at the beginning of the procedure with the possibility to be withdrawn before the implantation of the spermatozoids, the ova or the embryo in the woman's body[47]. The given consent has legal significance of a statement for recognizing the parenthood after the child is born.

As harmonized with the family law, the donors do not hold any parental responsibility, in terms of rights or obligations towards the conceived child. The authorized healthcare institutions are obliged to provide protection of all personal, medical and genetic data of the donors, as well as to undertake all necessary measures not to reveal the identity of the donor and his/her family and vice-versa[48]. All data regarding the donor's provenience, health biography and births resulting from the donation are to be kept with the outmost confidentiality in *the Register of donors* in the authorized healthcare institutions for 30 years as from the date of their entry[49]. 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 insight in the data regarding the health condition of the donor in *the State Register*

[44] Id. Blauwhoff (2008) in defense of a personal autonomy-based "right not to know" - Blauwhoff citing Pennings G., "The Right to Privacy and Access to Information about One's Genetic Origin's", *Medicine and Law*, pp. 1-16 (2001)

[45]The right to know one's parent does not encompass a right to meet them or to be with them... Besson S., "Enforcing the Child's Right to Know her Origins Contrasting Approaches Under the Convention on the Rights of the Child", *International Journal of Law, Policy and the Family*, pg. 145 (2007)

[46]The Law on Bio-medically Assisted Fertilization, *Official Gazette of Republic of Macedonia*, Number 37, 19.03.2008

[47] Id. The Law on Bio-medically Assisted Fertilization, Republic of Macedonia, article 12

[48] Id.The Law on Bio-medically Assisted Fertilization, Republic of Macedonia, Article 7

[49] Id. The Law on Bio-medically Assisted Fertilization, Republic of Macedonia, Article 47 and Article 48

of Bio-Medically Assisted Fertilization only due to a medically justified reason and with a previously obtained approval from the State Committee[50]. However, this provision does not collide with the provision that recognizes anonymity of the donor's identity, therefore, protecting donor's interests while neglecting the right of the child to know its genetic origin.

The law prohibits the use of the donated spermatozoids/ova for insemination with ova/spermatozoids from a blood-line related woman/man with whom the donor is not allowed to conclude a marriage. It is also prohibited to use the donated embryo for insemination of a woman to whom it is prohibited to conclude a marriage with the donor of the spermatozoids used to create the embryo, or for an insemination of a woman who is related in the first line with the woman whose ovum is used to create the embryo[51]. The prohibition on using donated cells due to blood relation is, however, incomplete. In other words, article 22 allows the woman to be inseminated with an embryo created from the ovum of woman who is related in the second line with her. That means that sisters, who are related in second line, could 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 for psychological trauma if the child finds out that his/her aunt is actually his/her mother, while his/her cousins are his/her brothers or sisters[52]. In most of the European countries (with exception of Germany, Finland and The Netherlands) it is forbidden for close relatives to donate genetic material to each other[53].

[50] Id. The Law on Bio-medically Assisted Fertilization, Republic of Macedonia, Article 57

[51] Id. The Law on Bio-medically Assisted Fertilization, Republic of Macedonia Article 22

[52] Supra: Mickovikj, D., Dilemi vo vrska so Zakonot za Bio-medicinsko potpomognato oploduvanje, (2008)

[53] Id. Mickovikj (2008), *citing* Schenner, J, G., "Assisted Reproduction Practice in Europe: legal and ethical aspects", *Human Reproduction*, Volume 3, Number. 2, pg. 176 (1997)

Mickovikj suggests that the paragraph 3 of article 22 should be changed in consideration of prohibiting the insemination of a woman who is related in the second line with the 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 may prove problematic if the child has the right to know his/her genetic origin and the consequences that might be caused if the child would find out that his/her biological aunt is in fact his/her biological mother. The current article would be even more problematic under the current context of "hidden truth", since the child will most probably be unaware of his/hers blood-line related relatives, and therefore, the legal prohibition for insemination between persons holding legal obstacles for concluding marriage will not apply on him/her in the future.

Callahan points out that a child who has donors intruded into its parentage will be cut off from its genetic heritage and part of its kinship[54]. Should a child born through donation of sperm/ovum/embryo have the right to know the identity of his/her genetic parents, or even more, his/her genetic relatives: brothers, sisters and other relatives? If the right should be granted, how could it be enforced, what are to be its conditions and limitations?

Sweden was the first country in the world which in 1985 gave the child conceived through the assistance of the reproductive technologies a legal right to know the identity of the sperm donor[55]. England had a similar regulation, allowing requests for both identifying and non-identifying information about the donors since the introduction of the *Human Fertilization and Embryology Act* in 1990[56], later amended in 2008[57]. More recently, other countries have adopted a similar regulation such as Germany[58], Austria[59],

[54] Callahan S. in Monagle E.J. and Thomasma C.D (eds), *Medical Ethics: A Guide for Health Care Professionals*, Aspen Publish (1987)

[55] Frith L., "Gamete Donation and Anonymity: The Ethical and Legal Debate", *Human Reproduction*, Volume 16, pp. 818-819 (2001)

[56] *Human Fertilization and Embryology Act*, 1990, UK, c.37

[57] *Human Fertilization and Embryology Act*, 2008, UK, c.22

[58] In 1989 the German Constitutional Court confirmed the right of an individual, protected by the German Constitution, to ascertain his/her parentage.

[59] In *The Act of Procreative Medicine* of 14 May 1992, Article I section 20

Switzerland[60], The Netherlands[61], Western Australia, Southern Australia and Victoria, Australia and New Zealand[62]. Countries which still hold firmly to the anonymity of the donors are, among others, France, Belgium, Spain, Israel[63]. Also, there are countries considering the adoption of similar regulations and countries that have taken the middle ground. In Canada, *the Assisted Human Reproduction Act*[64] regulates the creation of *the Personal Health Information Register* of health-related information about donors, donor-conceived people and parents of donor-conceived people. The registry is intended, on the one hand, to allow the offspring to have access to the important health, social or family history information about the donor while protecting the donor's right to privacy, if desired. But, on the other hand, the registry is also intended, to address the concerns of the offspring relating to inadvertent incest by allowing two persons to request information as to whether they may be genetic half or full siblings[65]. In the United States, currently there is no federal or state legislation that prohibits or enforces anonymous gamete donation[66]. Even though there is a constitutional right to privacy in reproductive choices, there are several states that have enacted legislation that allows the disclosure of identifying donor-insemination to a donor-conceived child "for good cause"[67].

[60] Accepted in a referendum on 17 May 1992 as a constitutional amendment allowing the Confederation to guarantee by law a person's access to data concerning his/her ancestry, including the identity of biological parents (applicable to both: assisted reproduction and adoption)

[61] *Bill 23 207*

[62] See more in Daniels, K.R., Grace V.M. and Gillett W.R., "Factors Associated with Parents' Decisions to Tell Their Adult Offspring about the Offspring's Donor Conception", *Human Reproduction*, Vo.26, No.10, pp. 2783 -2790 (2011)

[63] See more in Landau R., and Weissenberg R., "Disclosure of Donor Conception in Single-mother Families: Views and Concerns", *Human Reproduction*, Vol.25, No.4, pp. 942-948 (2010)

[64] *Assisted Human Reproduction Act*, S.C. 2004, c.2

[65] See more in Moyal D. and Shelly C., "Future Child's Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections", *Family Court Review*, Vol. 48 No. 3 pg. 438 (2010)

[66] See more in Dennison M., "Revealing Your Sources: The Case for Non-Anonymous Gamete Donation", *Journal of Law and Health*, Vol. 21 pp. 15-16 (2008)

[67] Id. citing J.R. v.L.H., [2002] O.J. No. 3998 (Ont.Sup.Ct)

4. Proceedings for establishing parenthood in different contexts. The discrepancies between the use of the biological/genetic, legal and social criterion

Parental responsibility **of the father is to be established** differently depending on the context in which the conception occurred: **1. without or 2. with the assistance of the reproductive technology.** Parental responsibility can also be established through adoption of an already born child, which for the purpose of the proposed discussion is of a different matter.

In the first case - conception without the assistance of the reproductive technology - the establishment of the parenthood depends on the marital/extramarital relationship of the parents. **If the child is born within a marital relationship** - the parenthood could be established 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"[68]. The presumption could be rebutted before the court by the husband, the mother or the child, under certain circumstances and within a certain time framework on the ground of biological/genetic relatedness[69]. However, the legislator did not mention the biological/genetic progenitor (if different from the husband) as an active party for initiating the court litigation for rebutting the paternity based on the ground of the presumption, and therefore, establishing his own fatherhood. The progenitor's fatherhood however, could be established only if the mother or the child initiates the court litigation and rebut the paternity of the married husband, after which the recognition of the biological/genetic parent might follow. The conclusion from this regulation is that the legislator is firstly protecting the institution of marriage, and, secondly, allowing exception only under the initiative of the child and the mother, therefore protecting their interests[70].

[68] Family Law, *Official Gazette of Republic of Macedonia* 80/92, 22.12.1992, Article 50

[69] Id. Family Law, Article 64-67

[70] Also in The Netherlands, a third party outside the married 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 begotten with a woman who is not his wife. In England, on the other hand, both cases are possible: a third party outside of the marriage to recognize the child, and a married man to recognize a child begotten with a woman that is not his wife. See Vonk, M., *Children*

On the other hand, if the child is born out of wedlock (not necessarily an extramarital relationship), his/her father will be the person who will recognize the child[71]. Such a recognition would form the legal grounds for establishing parenthood only if there is a consent of the mother, the guardian (if the mother is not alive or missing), and the child older than 16 years[72]. If the consent for the recognition is not provided, the person who claims the fatherhood could seek judicial recognition of his biological link with the child, which eventually will establish him as a father[73]. The same judicial recognition of fatherhood could be launched by the mother, the guardian of the child, or the child itself (from its maturity – 18 or 21 years old) if the biological father does not recognize the child himself[74]. The legal presumption for establishing fatherhood of a child born outside marital relationship supposes that the father of the child is the person with whom the mother had sexual intercourse in time framework of between 180 to 300 days before the child was born, unless the opposite is proven. Therefore, in deciding the paternity of the child, the court prioritizes medical proof for an existing biological/genetic link with the child, as well as the relationship and the mutual life between the mother and the defendant[75]. Nevertheless, the existing presumption does not apply to conception which has occurred as a result of assisted reproduction in extra-marital relationships, and therefore, for the ART children it is impossible to initiate a proceeding for establishing parenthood.

From the above cited provisions in *the Family law* follows the conclusion that if the child is not conceived through assisted fertilization or adopted, the father of the child will be the biological/genetic parent as a principal rule. An exception to this principle can happen in the case of marriage if the presumption for establishing the parenthood was never rebutted, even though the

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, pg. 65 (2007)

Under the Macedonian legislation, there is not a restriction that a married man cannot recognize another woman's child.

[71] Supra: Family Law, Republic of Macedonia, Article 51

[72] Id. Family Law, Article 56 and 57

[73] Id. Family Law, Article 58

[74] Id. Family Law, Article 60

[75] Id.Family Law, Article 61

husband of the mother is not the biological/genetic parent, or in the case of extramarital relationship if the child was recognized by a person other than his biological/genetic father.

When it comes to the establishment of the motherhood of a child conceived naturally and without the use of assisted reproduction, *the Family law* has accepted the *Roman law* principle *mater semper certa est*. Therefore, the mother of the child is the woman who gave birth to the child except in the case of adoption. The motherhood could also be rebutted but only if it is proven that the registered mother on the birth certificate is not the mother who gave birth to the child. Bearing in mind that the contestation of the motherhood could be invoked only if the child was conceived naturally or if the child was not adopted, once again, we could conclude that the biological/genetic mother will be the mother of the child as a principle rule.

The provisions for establishing and rebutting the parenthood analyzed above do not apply **when the child is conceived through assisted fertilization or when the child is adopted**. Namely, it is forbidden to claim or rebut paternity and maternity in front of the court if the child is conceived through artificial insemination[76].

The rationale behind this ban in the law lies in the accepted protection of the legal family of the child, but also on the primacy of the biological criterion for establishing the parenthood in front of the court, which in the case of conception with assisted reproduction are confronting, and therefore, problematic to investigate. The litigation for establishing parenthood based on exact medical proof regarding the biological/genetic relatedness with the child would threaten the anonymity of the donors or the biological/genetic parents in the case of assisted reproduction and adoption. However, by protecting the anonymity of the donors and the parents that gave the child up for adoption, the legislator infringes on the right of the child to know its biological/genetic origin as stipulated in article 7 of the *CRC*, and in article 8 of the *ECRH*.

[76] Id. Family Law, Article 62, 63 and 71. The term "artificial insemination" is wrongly used in the Law, and should be changed into "assisted reproduction", The reasons why the term "assisted reproduction" should be accepted are: 1. It corresponds better to the description of the process, 2.It is already accepted term in the Law on Bio-medically Assisted Fertilization, and even more, in the legislations of most of the European countries.

Parental responsibility should normally be executed mutually by both parents[77]. If the parents do not live together[78], or after the dissolution of the marriage or the termination of the extramarital relationship, the parental responsibility rests with both parents, but only one of them will hold the custody and will be fully entitled to live in a same household and care on a daily basis for the welfare and the upbringing of the child[79]. This means that there is not a shared responsibility of the parents in terms of executing their parental responsibilities fully as in most of the other European countries, and as stipulated in article 9 of the *CRC* that promotes the right of the child not to be separated from his or her parents against his/her will. There are numerous complaints before *the European Commission of Human Rights* and *the European Court of Human Rights* where applicants have alleged violations of the right to family life under Article 8 of the *ECHR* due to the denial of the right to custody or access after separation or divorce[80]. *The European Commission* and *the European Court* are clear that the breakdown of a couple's relationship does not destroy the right to family life either parent enjoys concerning the children born/adopted in that relationship[81]. Furthermore, any act by a State authority aimed at the removal of children from parental care leads to an interference with the exercise of the right to protect family life under Article 8 of the *ECHR*[82]. However, this does not exclude the possibility of the State's withdrawal of custody from one of the parents if it is in the best interest of the child, and if it is in accordance with the limitation clause in Article 8, paragraph 2 of the *ECHR*[83]. Nevertheless, in terms of Article 9 of the *CRC* and Article 8 of *ECHR*, the Macedonian legislator should consider the possibility of introducing the concept of

[77] Id. Family Law, Article 76

[78] Id. Family Law, Article 79 stipulates that the parents can agree among each other about the content of their relationship with the child, or the Center for social work can decide for them

[79] Id. Family Law, Article 80, decided by the court as a separate civil litigation regulated by articles 272-273

[80] See Cohen J., "Respect for Private and Family Life", in: MacDonald R.S.J. *et al* (eds), *The European System for the Protection of Human Rights*, pp. 405-444 (1993)

[81] See Gomien D. *et al.*, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, pp. 242-244 (1996).

[82] Id. Gomien D. *et al*(1996)Pg. 243

[83] Id. Gomien D. *et al*(1996)

shared parental responsibility after the dissolution of the relationship of the parents.

Kinship can also be established between the child and the step-parent following a (re)marriage of one of the parents (father or mother) of the child. The step-parent does not take over the parental responsibilities of the child's other parent, even though, in reality, he/she will have the role of the social parent. Nevertheless, the step-parent will have the responsibility of maintenance of a child who is a minor only if the child does not have any other relatives (not just parents) obliged by the law and capable to undertake the maintenance[84]. The step-parent can also assume parental responsibility for the child by adopting the child, if the child does not have other registered parent, and if the other criteria for adoption are fulfilled[85].

It is more than obvious that the impact of assisted reproduction on affiliation within *Family law* reflected and confused the biological/genetic, legal and social criteria for becoming parent.

The official criteria accepted as core principles on establishing parenthood, navigate the future research to focus on the competing biological/genetic, legal and social criteria for becoming a parent.

Machteld Vonk in her book *Children and their Parents* distinguishes four different types of mothers: 1. *Biological and genetic mother*, that is, the woman who supplies the ovum and gives birth to the child, 2. *Genetic mother*, that is, the woman who supplies the ovum, but does not give birth to the child, 3. *Gestational mother*, that is, the woman who gives birth, but does not supply the ovum, and 4. *Non-biological mother*, that is, the woman who raises the child but is not genetically related, nor has given birth to the child. On the other hand, there are only two kinds of fathers, thus creating a dichotomy between the: 1. *Bio-father*, that is, the man who supplies the sperm, and the 2. *Non-bio father*, that is, the man who raises the child but is not genetically related to the child[86]. In England and France there is even a terminological difference between the term "father" (*père*) - the person fulfilling the parental role, and the term "genitor" (*géniteur*), reserved for the biological parent.

[84] Supra: Family Law, Republic of Macedonia, Article 182

[85] Id. Family Law, Articles 95-134

[86] 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, pp. 26-27, (2007)

Furthermore, Vonk illustrates three legal dimensions of the parent-child relationship: 1. Biological/genetic parenthood; 2. Legal parenthood; and 3. Parental responsibility[87]. According to her, there can only be two biologic or genetic parents, which does not mean that they will be the legal parents or will exercise the parental responsibilities (e.g. when they are sperm/egg/embryo donor/s). Legal parenthood could also be granted only to two parents and it may lead to full parental status if the holder also has parental responsibility. Parental responsibility though, could be granted to more than two persons (in England), but if it is obtained without the legal parenthood, the parental status is not full (e.g. when under certain circumstances the social parent – i.e. the step-parent – acquires parental responsibility by court order). Even more, Vonk suggests the possibility that the legislator may abandon the concept that a child may only have two legal parents, since legal parents are not necessarily biological parents, or at least the possibility for a jurisdiction to recognize the three–partite legal parenthood of a child from a foreign jurisdiction[88].

The book *Bio-reproductive Ethics and Law* elaborates the criteria for establishing the legal parental responsibility in the Republic of Macedonia. These criteria could be summarized into three categories: *biological/genetic criterion* (by the fact of biological/genetic relationship with the child), *legal criterion* (by the fact of additional legal action), and *social criterion* (by the fact of mutual life with the child). Even though the biological criterion is taken as a core prerogative for establishing/rebutting the parental role, the legal criterion is an exception of the biological criterion only when it comes to adoption and assisted fertilization[89]. Moreover, the legal criterion has greater power since it does not allow to be rebutted by the biological argument due to the guaranteed anonymity of the parents who gave their child for adoption, or the donors in artificial insemination. On the other hand, outside adoption and artificial insemination, the social criterion is not a valid argument for establishing the parental responsibility. In accordance with these terms, the status of a step-parent is received after the marriage with the

[87]Id. Vonk (2007) pg. 7
[88]Id. Vonk (2007)
[89]Ignovska, E., *Bio- reproduktivna etika I pravo. Novite reproduktivni tehnologii I roditelskoto pravo,* Biggos (2010)

parent of the child, but this status does not contain the parental responsibility *per se*. However, the step-parent has maintenance obligation towards the step-child, but only if the step-child does not have any other relative obliged to provide this maintenance[90].

The only possibility of having legal parental capacity granted to the step-parent is through adoption, which can happen only if the child does not have a registered parent in the birth certificate.

Is it possible for the application of the assisted reproduction in the context of the family law in Macedonia to cause fragmentation of the parenthood so that it affects more than one woman/man? Bearing in mind that surrogacy is forbidden, a woman could not be a gestational mother solely, without being at the same time a legal mother. Apart from that, different women/men could participate with different roles in the reproduction: 1. the woman/man who donates the ovum/sperm (genetic parents); 2. The woman/man for which the ovum/sperm is donated. The second category could be named differently according to different criteria: a) *non-genetic parent(s)* – according to the genetic participation; b) *intended parent(s)* – according to the purpose of the donation; c) *social parent*(s) – according to the factual situation (e.g. mutual life with the child); or, d) *legal parent(s)* – according to the legal attribution of parental responsibility. However, *the Family Law* recognizes only two parents – one mother and one father. In the case of assisted reproduction, the second category – beneficiaries of the donation – will be the parents of the child, while the genetic man/woman will only be donors, but never (legally recognized) parents. Since article 7 of *the Convention on the Rights of the Child* claims the right of the child to know his/her genetic parents, differentiation between the terms *genetic* and *legal parent* will give greater clarity.

From here on, we navigate to the core question: is there a ground for granting the child conceived by sperm/embryo donation to a single woman a right to launch a proceeding for establishing fatherhood? Should the biological criterion for establishing the parent-child relationship (which is the current obstacle for allowing the proceedings) be replaced with the criterion "intention to parent", claiming that the parenthood is more a legal (socially constructed) than a biological concept?

[90] Supra: Family Law, Republic of Macedonia, Article 182

5. State policies in the sphere of family life and the relationships between parents and children

The proceedings for establishing fatherhood of ART conceived children are immediately related with the right to access the data on child's genetic origin.

If genes play an important part in the physical and intellectual characteristics of a person[91] and identity is considered as a complex construct that operates on psychological, political, personal and social levels that takes shape by contemplating difference and sameness[92] than the denial of knowledge of a genetic parent can have psychological implications for the donor's offspring who may feel deprived of information they need to develop a full sense of identity[93]. Also, a potential risk of not knowing the genetic family is the possibility of transmission of genetic disorders, as well as the possibility of incest through a relationship between siblings unaware of their genetic connection[94]. To have the right to access the genetic data, does not exclude the right not to access the genetic data. Nevertheless, if the possibility of a choice is given to those who are affected the most by this decision; might that fact lead to introducing the legal system towards proceedings for establishing parenthood of children conceived by ART? In cases when there is a donor insemination, is it justified to introduce an action solely designed to ascertain genetic parentage without creating any legal relationship? In cases where there is no donor insemination (conception through sexual intercourse), is it justified to force the establishment of the paternity on biological grounds through DNA tests, and therefore, create a legal relationship?

The division of parenthood into biological/genetic, social and legal might be useful in determining the limits of the actions towards

[91]See more in Landau R., and Weissenberg R., "Disclosure of Donor Conception in Single-mother Families: Views and Concerns", *Human Reproduction*, Vol.25, No.4, pp. 942-948 (2010)

[92] Richards B., "What is Identity?" In GaberI., Aldridge J., *(eds)*., *The Best Interests of the Child, Culture, Identity, and Transracial Adoption*, Free Association Books (1994)

[93]Baran A., Pannor R., *Lethal Secrecies: the Psychology of Donor Insemination, Problem and Solution*. Cambridge: Amistead Press (1993)

[94] Morton M., Irving M.A. "Common Questions that Arise in Adoption": In: Turnpenny P. *(ed).Secrets in the Genes: Adoption, Inheritance and Genetic Disease*. London: British Agencies for adoption and fostering (1995)

establishing parenthood. Biological and legal parent could overlap in one person, but, especially in cases of donor's insemination, they usually do not. That is a reason more why should be terminologically distinguished. It should be clear that "biology" is only one "fundament", there is also the "intention", to base legal parentage upon[95]. When it comes to the "forced" establishment of legal paternity based on biology that brings along parental responsibilities and rights, the cornerstone case in front of *the European Court of Human Rights* was the case *Mikulic v. Croatia*[96]. Blauwhoff considers that the case provoked two important conclusions. Firstly, from the perspective of the realization of the informational interest, it recognized that the determination of parentage is important for the individual's identity, and it affirmed the child's right to have obtained personal identity without unnecessary delay. Secondly, from the perspective of the State's obligation to devise an equitable parentage law system, it stressed that certain procedural and temporal safeguards should be secured, and therefore restricted the discretion of the State in paternity proceedings[97]. In Germany, however, persons may be obliged to comply with a court order to undergo parentage testing[98]. Therefore, from a comparative perspective, Germany has a unique position. While nearly all legal systems rank bodily integrity higher on a scale of values than biological truth, German law gives greater importance to biology[99]. Even more, since 2003 under the German law, paternity may be denied (among others cases) also by the man who claims under oath that he had sexual intercourse with the mother during the conception period[100]. The consequences of these proceedings are broader than merely finding out the biological truth in terms of the identity of the progenitor and go on to establish his parental responsibilities. The idea of a solely informational procedure (without

[95] Supra: Vonk., *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* (2007), pg. 267

[96]Mikulic v. Croatia, EctHR, Appl.no. 53176/99, 7 February 2002.

[97] Supra: Blauwhoff, J.R., "Tracing down the Historical Development of the Legal Concept of the Right to Know One's Origins. Has "To Know or Not To Know" ever been the Legal Question?", (2008) pg. 107

[98] Id. Blauwhoff,(2008) pg. 112, citing Art 372a German Civil Procedural Code

[99] Id. Blauwhoff, (2008) citing Frank R., "Compulsory Physical Examinations for Establishing Parentage", *International Journal of Law and the Family*, pg. 21 (1996)

[100] Id. Blauwhoff, (2008) pg. 112, citing Art 1600 (1) German Civil Code

claiming any status) was launched with a debate on the desirability and legal feasibility of the so-called "isolated procedure" through a court case in 1990[101]. As of the 1st April 2008, *the German Civil Code* affords the right for determining the biological parentage to the mother, the father and the child. If any of the family members refuses laboratory testing to determine the biological link, consent may be replaced by the family court, only if the test does not violate the best interests of the child[102].

Many authors questioned how a practice of revealing the donor's identity will affect future donations in terms of the possibility of decreasing the number of donors willing to donate. According to Doek, the risk of fewer donors should be dismissed as irrelevant to the child's rights[103].

In the Netherlands, to balance the initial different opinions on the issue, a dual system was introduced, giving parents choice between: 1. Anonymous semen donors (A-donors), and donors that could be traced if the child, at a later date, requested information regarding the identity of the donor (B-donors)[104]. Nevertheless, studies show that the number of donors dropped during the last 15-year-period of the debate on the removal of donor anonymity[105]. Between 1990 and 1997 a number of semen banks closed, mostly due to shortage of donors[106]. Even though a shortage of donors was initially the reality faced by most of the countries which recognized the right of the child to open information, they later experienced a reversal of this trend as donor recruitment targeted men who were willing to be identified[107]. Much data suggests that despite of the apparent threat of

[101] Id. Blauwhoff, (2008), pg. 113, is citing High Regional Court, Oldenburg, 17 July 1990, 1991 Fam. RZ. Pp. 351-352

[102]Id. Blauwhoff, (2008), pg. 107

[103]See Doek E.J., "The Nuclear Family: Who are the Parents?" in: Eekelaar J., and Nhlapo T. (eds) *The Changing Family: International Perspectives on the Family and Family Law*, Oxford, Hart, pg. 546 (1998). According to Doek, the risk of fewer donors should be dismissed as irrelevant to the child's rights

[104]Janssens P.M.W., Simons A.H.M., Kooij R.J., Blokzijl E., and Dunselman G.A.J. "A New Dutch Law Regulating Provision of Identifying Information of Donors to Offspring: Background, Content and Impact", *Human Reproduction*, Volume 21, Noumber4 pg. 854 (2006), pg. 853 citing De Bruyn, (1997)

[105] Id. Jansen and all (1997), pg. 854

[106] Id. Jansen and all (1997) pg. 854 citing De Bruyn (1998)

[107] Blyth. E, Frith L., Farrand A.," Is it Possible to Recruit Gamete Donors who are both Altruistic and Identifiable?" *Fertility and Sterility*: 84 (Suppl. I) pg. 521 (2005)

donor shortage, recruitment of donors in a non-anonymity system is feasible[108].

According to Dock, the debates caused by the assisted reproduction are a "struggle to find a balance between biological and emotional reality". He states that by acknowledging the genuine desire of couples who want to realize their wish for a child the society should not restrain from revealing the biological truth to a child who requests the identifying data. He suggests developing legislation which would respect the genetic origin of the child but which, at the same time, would recognize the social reality of parenthood[109].

Macedonian family law context was used as a starting point for locating the problem. The national regulation was taken as a ground for explaining and exposing the research interest, from which the analysis crossed over to a broader European level. The Macedonian legal context was selected because of several triggering reasons. Firstly, the consequences of the relatively new regulation on application of ART (dating from 2008) on the parents-child relationship are evident and appealing in practice couple of years later, in currents time. Secondly, the Macedonian family law is relatively traditional in comparison to some other Western European family law regulations (homosexual unions/partnerships/marriages are not recognized and therefore, treated as non-existent, which in turn has an effect on the issue itself – single women's reproductive right), and on the other hand, relatively liberal in the context of the application of ART on the Balkans, and even more, in Europe. The contrasting evaluation paths of both laws that in one way or another tackle family (the *Family Law* and the *Law on Bio-Medically Assisted Fertilization*) is an interesting phenomenon to be investigated in direction of answering why is family law reluctant to changes, even when the

[108]Fortescue E, "Gamete Donation – Where is the Evidence that there are Benefits in Removing the Anonymity of Donors? A Patient's Viewpoint" *Reprod Biomed Online* 7, pp. 139-144 (2003)
Lalos A., Daniels K., Gottlieb C and Lalos O., "Recruitment and Motivation of Semen Providers in Sweden", *Human Reproduction* Volume 18, pp. 212-216 (2003)
Daniels K, Blyth E., Crawshaw M. and Curson R, "Previous Semen Donors and their Views regarding the Sharing of Information with Offspring", *Human Reproduction* Volume 20, pg. 1670 (2005)

[109] Supra: Doek E.J., "The Nuclear Family: Who are the Parents?" in: Eekelaar J., and Nhlapo T. (eds) *The Changing Family: International Perspectives on the Family and Family Law*(1998), pg. 550

changes are already real facts in social life, made possible among other factors, also by the more open acceptance of bio-reproductive technologies in the legal system. Allowing single women donor's insemination has already created fecund grounds for reproductive tourism especially coming from the neighboring countries. On the other hand, the affiliation of ART conceived child is also an open problem in European context. Namely, none of the European countries allow legal proceedings for establishing fatherhood of child conceived by sperm donation to single women. On this level, the accuracy of the issue and the necessity for investigating the possibilities is out of broader and mutual importance[110].

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[110] The paper is an introduction of the research doctoral project: *Affiliation of Children Conceived by ART to Single Women: The (Im)possibility to Establish Fatherhood in Republic of Macedonia and Comparatively through the Practice of European Court of Human Rights.* Therefore, the problem, the research questions and objectives are open and exposed but yet not given final answers in form of conclusions.

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CONSIDERACIONES JURÍDICAS Y BIOÉTICAS SOBRE LA EUTANASIA

Marcel Augusto Torres Potenza[1]

Introducción

La eutanasia no se refiere a un hecho de nuestra propia sociedad, pero se está formando un nuevo espacio frente a los problemas causados por las acciones derivadas de los conocimientos del hombre, que en la euforia de los descubrimientos que se han producido en el siglo XX se desprendió de algunos aspectos fundamentales para la evolución de una sociedad más humana.

La vida y la muerte son fenómenos naturales que se convierten en hechos jurídicos, cuando se origina la incidencia de la norma. De estas provienen los derechos, facultades, deberes, obligaciones y responsabilidades para con las personas.

Según Savigny, Los hechos son legales cuando son "acontecimientos en virtud de los cuales las relaciones jurídicas surgen, se modifican y se extinguen".

La relación jurídica es el vínculo que se establece entre personas en relación con determinados bienes de la vida y debido a los acontecimientos, tienen el poder y el deber recíproco, es decir, una respecto a la otra.

Una persona física es aquella que tiene personalidad jurídica, es decir, la posibilidad de contraer derechos y adquirir obligaciones dentro del ordenamiento jurídico, es decir, poderes y deberes. De modo que la personalidad jurídica surge con el nacimiento y se extingue en vivo con la muerte, según lo dispuesto en los artículos 1 a 21 del Código Civil Brasileño.

Por lo tanto, el niño no nacido tiene la expectativa de derechos desde la concepción y el fallecido tiene asegurado el reconocimiento a su memoria a través de la protección del honor, el nombre, la imagen y el respeto de sus despojos con la inviolabilidad y el respeto de las disposiciones de la voluntad, que son manifiesta en la vida, sin embargo válidas incluso después de su muerte.

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