THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE OF CHILDREN BORN BY SINGLE MOTHERS BY CHOICE

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ABSTRACT

The right of single women to found families with assistance of sperm donations is legally placed in the juncture of international human rights and the predominantly national family policies and consequently, family law jurisdictions of each state. Nevertheless, controversies arise from the relational context of the woman's child wish, her reproductive choices and consequently her right to reproduce, and the child's right to personal history as well as right to family life with the father. The text looks at the common, general patterns of regulating children's conceptions by sperm donations to single women in Europe, through the prism of international documents and the practice of the European Court of Human Rights. Further on, the focus is placed on the legislation of the Republic of Macedonia in an attempt to answer why parental proceedings are excluded as a principle rule for children conceived by bio-medical assistance and adopted. The author suggests that uniform way for addressing legal parenthood should apply to all parents, irrelevant of their mutual relationship, and all children irrelevant of the modus of their conception.

KEY WORDS: *assisted reproduction, single women, sperm donors, children and paternal proceedings.*

1. INTRODUCTION

LOCATING LEGAL DISCREPANCIES

The lenses for the perception of reproduction in the Western and Eastern European countries are different, as show studies from the recent past (Van Balen & Inhorn, 2002). While in general the Western countries consider the project of having children as a matter of personal choice made by individuals or couples, in the Eastern countries, reproduction can also be perceived as a social obligation, providing continuity on a small scale of the family name (Sutton, 1997 pp. 415 and 429)[1], and on a large scale of the nation[2]. Therefore, in the Eastern European countries parenthood has deeper social roots that go along with more severe consequences of involuntary childlessness (Pennings, 2008, pp. 15-20). A pronatalist society usually has the justification for such policy in the wider nation-state ideology, instead of individual well-being and self-fulfilment[3]. This is consistent with Foucault's premises that

[1] Sutton, 1997 connects the local-level kinship practices with the significance they give to the name, in an attempt to explain the Greeks' "hysteria over history" in relation to the international controversy – the naming of the "Former Yugoslav Republic of Macedonia". The author reasons that a denial of accepting the right of choosing a name for one international subject is justified by the attempt of rationalizing the irrational naming practice by relating it to possessions (i.e. ownership through inheritance), and history (i.e. ownership through heritage). The case study suggests how anthropologists can use kinship to make a unique contribution to current studies of nationalism "from the bottom up". The relatedness between kinship and nationalism comes from their joint features - they are both culturally constructed ideologies with claims to natural, biological self-evidence, and they both need to be deconstructed and understood as powerful meaning-giving systems. In this sense, kinship and nationalism interpenetrate and overlap cultural domains with sometimes similar but also sometimes conflicting messages. Other authors also argue that it is important to analyze kinship as "one among a number of potential, interpenetrating classificatory systems (race, caste, ethnicity) that are part of the process of nation building". See also Williams B., "Classification Systems Revisited. Kinship, Caste, Race, and Nationality as the Flow of Blood and the Spread of Rights", Yanagisako S., Delaney C. (eds.), *Naturalizing Power: Essays in Feminist Cultural Analysis*, London, Routledge, 1995, pg. 206.

[2] *Ibid*. Sutton, 1997, pg. 416 arguing that interest in studies over kinship in the Western world was lost in the 1970s and 1980s due to the theoretical shift from concerns about the local societies to that of nation-states and global processes. Its significance in the study of modern nation-states has been underplayed because the absence of kinship turned out to be one of the defining characteristics of the Western view of itself. In this sense, kinship remained a mere metaphor, while nation-states now run on principles of so-called rational bureaucracy. Nevertheless, whether seen as practice or metaphor, they are still important for understanding both the national discourse and its local ramifications. See also in Herzfeld M., *The Social Production of Indifference. Exploring the Symbolic Roots of Western Bureaucracy*, New York, Berg, 1992, pg. 68.

[3] See, for instance, the speech of the prime minister of the Republic of Macedonia in which he emphasized that above all the greatest problem that the country is facing is the decreasing demography and depopulation, leading to recession of the nation. See more in the brief from the speech: "Груевски: наталитетот е особено загрижувачки", *Глас на ВМРО-ДПМНЕ*, 23.11.2013. See online: http://glas.mk/2012/10/gruevski-natalitetot-e-osobeno-zagrizuvacki/. For more see also http://daily.mk/cluster/efd1242f4a9db38755c37cb77418784d. He called upon the demographic statistics showing that only approximately 22,000 children were born in 2011 as opposed to 40,000 in 1980, a drop of almost 50%, while the population is rapidly aging, with a ratio of employed people to pensioners of 1.7 to 1, as opposed to 5 to 1 in 1980. He also stressed that the current fertility rate is 1.4 children per mother which is far below the minimum of 2.1 needed to maintain the population.
(For more accurate information on the national demography see the official State's statistics website: *Државен завод за статистика, население* http://www.stat.gov.mk/OblastOpsto.aspx?id=2). The prime minister concluded that the country is facing a demographic crisis that poses a greater existential threat than the global economic crisis. Consequently, soon after, other political parties came up with certain controversial solutions to the problem, one of which (greatly

reproductive sexuality has turned into a domain of collective anxiety and state intervention due to the fact that the future of our species and our nation depends on it (Foucault, 1990). The policy of prioritizing the greater public good over the individual is covered by linking a person's social and moral worth to reproduction (Ulrich & Weatherall, 2000, pp. 323-336).

Following this prenatal tendency, the Macedonian Law on Bio-Medically Assisted Fertilization is very liberal (giving green light to surrogate motherhood arrangements, posthumous assisted reproduction as well as sperm donations to single women) compared even to most of the countries in Europe and worldwide. Nevertheless, the liberal policy towards „making babies" is not adjusted to Family Law provisions that are still to a high level conservative. For instance, many countries, such as the UK, the Netherlands, Belgium etc. allow sperm donations, but they do not exclude access to lesbian couples. This is not the case in the Republic of Macedonia, where same-sex partnerships are not regulated, thus not recognized. Additionally, under the national legislation, only anonymous donations are allowed (as estimated that more beneficiaries will opt for them), which in turn jeopardizes the right of the child to know his/hers origins, as protected in article 7 of the *Convention on the Rights of the Child* (CRC), being very important reference for the Family Law itself.

On a general level, the perception is that sperm and oocyte donation are more easily available in the Eastern European than in the Western European countries. This perception makes the Eastern European countries be considered favourable destinations for those seeking cross-border reproductive treatments (Shenfield et al., 2010). Some studies have recorded large numbers of patients from Austria, Italy, Germany and the UK travelling to more recently joined European Union Member States such as Czech Republic and Slovenia (2004) to seek medical care[4]. The reasons are associated with favourable legislative environment, accompanied with implemented EU Directives for quality and safety, as well as the lower prices for medical care. Another reason for putting Eastern European countries on the map for cross-border reproductive tourism for these authors is the firmly accepted anonymity of the donors (five countries allowing non-identifying information, while only three countries allow identifying information of the donors)[5]. For some other authors, the most common reasons for travelling for reproductive purposes is law evasion when the technique is either forbidden *per se* or when a particular group is excluded from treatment. There may also be some other access limitations, such as long waiting lists, poor quality or expensive treatments (Shenfield et al., 2001, pg. 1).

Even though generalizations are usually accompanied with stereotyping and prejudices (even more, in this particularly novel field where changing developments emerge as we speak), one argument holds as a fact - the regulation and practice of donations and the

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contested), was the introduction of an annual tax in the amount of one average monthly salary for unmarried males above 35 and for females above 30 years. While this proposal was firmly opposed, the Social Affairs Minister announced a new set of other measures to combat the decreasing birth rate including "activities in the educational system, migration and infrastructure policies, economic development and fight against poverty and social exclusion". Some local NGOs (e.g. "Coalition for Life") in the meantime organized marches aimed at "raising awareness amongst the youth about the importance of marriage and child birth". See more in Marusic S.J., "No Extra Tax for Macedonia's Bachelors, *BalkanInsight*, 05.11.2012, available online: http://www.balkaninsight.com/en/article/no-extra-tax-for-macedonia-s-bachelors.

[4]Ibid.

[5]Ibid.

disclosure of identifying information in Western and Eastern European countries are different (Jones et al., 2013, pp. 15 and 58). For some authors, this should be changed in the process of European integrations since the Eastern European health care facilities should prepare for the potential requests for donor identification in the future (Dostal, 2011). The change is justified by the psychological welfare of the child to know their personal identity and family belonging as being crucial for its own integrity and personality, and its increasing recognition by the *ECtHR* (Shenfield & Surreau, 2006). As such, it is considered that regulations paying attention only to the physical aspects of the ART procedure (for instance, transmitting viral or genetic disease, thus allowing non-identifying information only regarding the medical file of the donor), while not paying attention to the psychological welfare of the child do not appreciate the best interests of the child. These interests, though, are protected and integrated in the *European Commission Directives* (*European Commission Directives 2004/23/EC, 2006/17/EC and 2006/86/EC*).

The European Union is bound to respect children's rights from two perspectives: (1) as an integral part of the human rights, being subject to the *Millennium Development Goals*, the *European Convention on Human Rights and Fundamental Freedoms* as well as the *European Charter of Fundamental Rights* (especially in its *article 24*), and (2) as a self-standing set of concerns and not simply subsumed into wider efforts to mainstream human rights in general, being subject to the *Convention on the Rights of the Child* and its *Optional Protocols*. This is recognized as appropriate by the European Commission due to the fact that certain rights have an exclusive or particular application to children, such as the right to maintain relations with both parents (Communication from the Commission – *Towards an EU strategy on the rights of the child* SEC, 2006). The question of identity has also to a great extent been recognized as an important element of building children's protection mechanisms across Europe. On the agenda for the rights of the child is also reviewing legislation that will facilitate the recognition and enforcement of decisions on parental responsibilities. As indicated by the Euro-barometer surveys, 76% of children interviewed were not aware that they have rights and 79% did not know who to contact in case of need. Therefore one of the European actions highlighted for the period 2010-2015 for creating child-friendly justice under the *European Union Agenda for the Rights of the Child* is to turn the promises into practical reality mainly by evaluating and re-evaluating the EU and national legislation on, among others, enforcement of decisions on parental responsibilities (*Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions. An EU Agenda for the Rights of the Child,* 2011, pg. 4). Along this line, full recognition of the rights of the child means that children must be given a chance to voice their opinions and participate in the decision-making in matters that affect them. This is stipulated in *article 24(1)* of the Charter that requires the European Union to take children's views into consideration in accordance with their age and maturity. The Member States (of the Council of Europe) are also bound to respect on the one hand, the ratified universal international documents, and, on the other hand, the decisions of the *ECtHR* that regard the practice of the national courts[6].

[6]*Article 400* of the *Law on Litigation Procedure* (Закон за парнична постапка, *Службен весник на Република Македонија*. бр. 79/05, 21.09.2005. See the English unofficial translation: *Law on Litigation Procedure*, Consolidated text) of the Republic of Macedonia regulates the repetition of proceedings due to a final decision of the *ECtHR* as follows:

The legal tendency of the Republic of Macedonia is to follow the best practice regulations of the European Union Countries and to implement the Directives in order to harmonize the national legal system for the purposes of accession. Still, the level of discussions and flexibility to follow the development of the science in the field of assisted reproductive technologies (ART) and family life is considered to be more neglected in the Eastern in comparison to the Western European Countries (Dostal, 2007). It has also been acknowledged that setting forth a uniform practice of medically assisted technologies on an international level is impossible, due to the diversity of traditions, political situations and medical practices. Because of this, and being aware of this, most national legislation does not forbid reproductive tourism. An international consensus, at this time, can only reflect the lowest common denominator (Jones et al., 2007, pg. 67).

In the international academic arena there is a misconception that the regulation and application of ART in the Republic of Macedonia is almost non-existent (Dostal, 2011; *Reply by the Member States to the Questionnaire on Access to Medically Assisted Procreation (MAP) and on the Right to Know about Their Origin for Children Born after MAP*, Steering Committee of Bioethics, 2012). This is mainly due to a lack of scholarship that will conduct research and surveys, resulting in a deficiency of written material for the greater international audience. In contrast, national authors consider that the legislation and practice are in parallel with the scientific development, even more that the application of the bio-medically assisted technologies is more liberal than in the other surrounding Balkan countries, or in the wider European context[7]. The liberal nature of the topical law is associated with the fact that both homologous and heterologous donations of sperm and ova have been given the green light, as well as posthumous reproductions, surrogate arrangements and research on embryos under strict conditions. In this context, it still remains the concerns that will need to be addressed in due course i.e. the right of the child to know his/her origin.

This topic has been neglected previously, because the starting point for the regulations has always been confidentiality[8]. Consequently, the topical *Family Law* and the *Law on Bio-Medically Assisted Fertilization* are compromising the right of the child to know his/her genetic identity in prioritizing the interests of the donors and parents before the interests of the child, even though the former Yugoslavia and the Republic of Macedonia as a successor country, respectively, ratified the *CRC*[9]. Even more, children born with bio-medical assistance

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"1) When the European Court of Human Rights confirms violation of certain human right or of the fundamental freedoms anticipated in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its additional protocols, ratified by the Republic of Macedonia, the party can, in a period of 30 days as of the final verdict of the European Court of Human Rights, file a request to the court in the Republic of Macedonia, having tried in the first instance in the procedure wherefore the decision violating some human right or fundamental freedom is adopted, to amend the decision violating such right or fundamental freedom.
(2) The provisions on repeating the procedure shall accordingly apply to the procedure referred to in paragraph (1) of this Article.
(3) In the repeating of the procedure the courts shall be obliged to obey the legal opinions stated in the final verdict of the European Court of Human Rights confirming the violation of the fundamental human rights and freedoms".

[7]In terms of introducing liberal solutions in the first systematic *Law on Bio-medically Assisted Fertilization* from 2008 (Mickovikj & Ristov 2012).

[8]See, for instance, in the context of donations, *article 17* of the *Law on Bio-medically Assisted Fertilization*, and in the context of adoptions *article 123-a* of the *Family Law*.

[9]Adopted by the United Nations General Assembly on 20th November, 1989, and in force as of 2nd September, 1990. Former Yugoslavia signed the *CRC* on 26 January, 1990, and ratified it on 3 January, 1991. The reservation was made in *article 9, paragraph 1* of the *CRC*, stating that "the competent authority of the SFRY may under *Article 9*, *Paragraph, 1* make a decision to deprive parents of their right to raise their children and give them an upbringing without prior judicial determination in accordance with the internal legislation of the

(and adopted) are not allowed access to a judicial proceeding regarding their parental status on a equal level as other children, thus discriminated.

As a consequence, both laws will have to undergo changes in the field of affiliation in order to harmonize with the international documents, the practice of the *ECtHR*, as well as on a national legal level.

2. DISCUSSION

SUGGESTIONS ADDRESSING THE LEGAL DISCREPANCIES

The family law provisions for establishing fatherhood in the Republic of Macedonia do not apply in cases in which the conceptions occurred through assisted fertilization. This pattern of regulating legal affiliation 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 *CRC*). Under the current regulation, the procedural rules of the national law do not allow a child born with the assistance of reproductive technologies and capable of forming his/her own views to be heard in judicial and administrative proceedings affecting him/her (CRC, article 12). Paternal proceedings and access to information regarding genetic origins affect a child born with the assistance of reproductive technologies just as they affect a child born in marriage or a recognized child. It is an obligation of the State signatories of the Convention to respect and ensure the rights of each child within their jurisdiction without discrimination of any kind, irrespective of, among others, the child's birth or other status (CRC, article 2, paragraph 1). It is also an obligation of the State signatories to use their efforts to ensure recognition of the principle that both parents *have* (this could be interpreted also as at least *could have*) joint responsibilities for the upbringing of the child (CRC, article 18, paragraph, 1).

Consequently, 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, and

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Socialist Federal Republic of Yugoslavia". Subsequent to dissolution, the Government of the Republic of Macedonia deposited notification of succession with the Secretary-General, with effect from 17 September 1991, the date on which it assumed responsibility for its international relations. The official ratification of the *CRC* was 2 December, 1993. (see: http://treaties.un.org). See also the explanation of the *Law on Bio-medically Assisted Fertilization* explicitly stating that one of the aims of the law is to undertake necessary measures to keep the confidentiality of the information regarding the donor, including his identity and to prevent traceability to him or his family, the child and its family. See more in Влада на Република Македонија, *Предлог за донесување на Закон за биомедицинско потпомогнато оплодување со предлог на закон*, Скопје, јануари, 2008, стр. 29. Available online: http://www.sobranie.mk/default.asp?pSearch=%D0%B1%D1%80%D0%B0%D0%BA+&x=0&y=0. See also the *Criminal Code* that regulates the unauthorized disclosure of secret information in its *article 150*, stipulating that a lawyer, notary, barrister, doctor, delivery nurse, any other health care employee, psychologist, religious minister, social worker or any other person that within its job duties will reveal a secret (that should be regarded as confidential) without authorization will be fined or imprisoned. Criminal Code (Кривичен законик, *Службен весник на Република Македонија*, бр. 37/96, 80/99, 4/2002, 43/03, 19/04 и Одлука на Уставен суд: Службен весник 48/01 г.).

its biological/genetic origins, as a prerequisite for eliminating the fear that this information may endanger the legal parentage later on before the court. Once it is clear that finding out the genetic origins is not automatically connected with establishing affiliation links, there will be no legally sound reason to ban paternity proceedings for children conceived by medically assisted fertilization or adopted.

The concept of open identity in reproductive matters should be introduced in the Macedonian *Family Law* and in the *Law on Bio-Medically Assisted Fertilization*. The act of assisted reproduction should take a child-oriented perspective, promoting the best interests of the child before the interests and preferences of the parents and donors. The term *parent* should have a precise meaning in order to differentiate the diverse roles that a person might have in a child's life. Defining the difference between the biological and legal parent correlates with the reality of conception with donated genetic material. Once the difference is established, it should be less difficult to discover something as fundamental as one's origin. Persons have a vital interest in receiving the necessary information to know and understand their childhood and early development. This information can also prevent inbreeding, legal misunderstandings and vague disputes over paternity. Therefore the right to information about personal identity should not be covered up by the adults' stigmatization of the act of reproduction (Ignovska, 2012, pg. 228).

This encompasses an active obligation of the Member States 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 when a contributor to the records either is not available or improperly refuses consent (Gaskin v. the U.K., paragraph 49). Following the most recent developments in changing family laws according to the changes in society, the *Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities* supports a general right to access information concerning one's origin (article 4). Correspondingly, the concept of secrecy in the Macedonian legal system in both adoptions and gamete donations should be overruled. Since the right to know one's personal origins as derived from family history is increasingly regarded as a fundamental human right, the national legal context will have to take action to create conditions that promote human dignity on both individual and family level.

The protection safeguarded by *article 8* is conditional on the prerequisite of already established private and family life (Kleijkamp, 1999, pg. 28). Even though it is stimulated to legally establish and thus protect family life from the time of birth (the White Paper, pp. 6 and 7), it is not solely the legally recognized family life entrenched from infringement of respect for it or from interference by a public authority regarding its exercise. Family life could also be characterized as a bundle of behaviour, attitudes, emotions, rights and responsibilities that form the basis of a caring and loving relationship over time among genetically or not genetically related affiliates. The protection of *article 8*, as interpreted by the *ECtHR* also refers to this lived reality of family life that has to be evaluated based on the circumstances of each individual case[10]. Respect for family life requires that biological and social reality

[10] The Court has upheld several times that "the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties". See the cases of *Hokkanen v. Finland*, ECtHR, No. 19823/92, judgment of 22.10.1994, paragraphs *54* and *58*; *Brayer v. Germany*, ECtHR, No. 3545/04, judgment of 28.05.2009, *paragraph 30*; *Lebbink v. the Netherlands*, ECtHR, No. 45582/99,

prevail over a legal presumption[11]. In the dissenting opinion of the decision in the case of *Kroon v. the Netherlands*, judge Bonnici argued that family life cannot exist between parties who have intentionally excluded it[12]. This is related to the existence of intention to establish and maintain a relationship. As such, it could also refer to sperm donations where the participants have explicitly excluded any creation of family life.

In these terms, *article 8* of the *ECHR* encompasses obligations of the Member States associated with its negative aspect of refraining from interferences with private and family life, but also its affirmative aspect of taking action to create conditions that promote human dignity on both individual and family level (Conelly, 1986, pg. 572; Kleijkamp, 1999, pg. 44). Accepting the fact that circumstances in society change and that the domestic laws have to follow, and thus continuously evolve[13], both "illegitimate" as well as "legitimate" families should enjoy equal protection[14]. The difference between them, acknowledged as discrimination in the cases of *Marckx v. Belgium*, *Keegan v. Ireland*, and *Johnston and Others v. Ireland*[15] could by analogy be compared with the difference in treatment between "natural" and more contemporary "artificial" families to whom the laws still owe evolution. In legislation where the donor is not to be considered a legal father under any circumstances due to a ban on access to paternal proceedings exclusively for such cases, these "illegitimate" children (genetic but not legal) will be discriminated against in comparison to "legitimate" children (children with a possibility of being legal towards their genetic parent). The Commission (in its first case regarding ART) held the opinion that the donor in itself does not hold a right to respect for his family life with the child. Yet, it also accepted that the situation could have been different if contact over a longer period existed among them, supported by any contribution (financial or otherwise) to the child's upbringing[16]. Thus the Commission included close personal ties in addition to parenthood as relevant to qualifying for protection

judgment of 01.06.2004, *paragraph 36*; *K. and T. v. Finland*, ECtHR, No. 25702/94, judgment of 12.06.2001, *paragraph 150*.

[11] *Kroon v. the Netherlands*, ECtHR, No. 18535/91, judgment of 27.10.1994, *paragraph 40.*

[12] *Ibid. paragraph 3* of the *Dissenting opinion of judge Mifsud Bonnici* stating as follows: "'family life' necessarily implies 'living together as a family'. The exception to this refers to circumstances related to necessity, i.e. separations brought about by reasons of work, illness or other necessities of the family itself. Forced or coerced living apart, therefore, is clearly an accepted exception. But, equally clearly, this does not apply when the separation is completely voluntary. When it is voluntary, then clearly the member or members of the family who do so have opted against family life, and against living together as a family. And since these are the circumstances of the instant case where the first two applicants have voluntarily opted not to have a "family life", I cannot understand how they can call upon Netherlands law to respect something which they have wilfully opted against. The artificiality of this approach is in strident contradiction to the natural value of family life which the Convention guarantees. The judgment moreover fails to explain how 'a relationship [which] has sufficient constancy to create ... family ties' can be made equivalent to 'a relationship which has sufficient constancy to create family life', as manifestly these two propositions are by no means the same or equivalent.

[13] *Op. cit Marckx v. Belgium*, *paragraph 41* of the judgment.

[14] *Ibid*. stating as follows: "As regards Belgium itself, the statement stresses that the difference of treatment between Belgian citizens, depending on whether their affiliation is established in or out of wedlock, amounts to a "flagrant exception" to the fundamental principle of the equality of everyone before the law" (article 6 of the Constitution).

[15] *Johnson and Others v. Ireland,* ECtHR, No. 9697/82, judgment of 18.12.1986, *paragraph 75* stating that: "Examination of the third applicant's present legal situation, seen as a whole, reveals, however, that it differs considerably from that of a legitimate child; in addition, it has not been shown that there are any means available to her or her parents to eliminate or reduce the differences. Having regard to the particular circumstances of this case and notwithstanding the wide margin of appreciation enjoyed by Ireland in this area (…), the absence of an appropriate legal regime reflecting the third applicant's natural family ties amounts to a failure to respect her family life".

[16] *J.R.M. v. the Netherlands*, ECHR, No. 16944/90, decision of 08.02.1993, Decision and Reports 74, pg. 120.

under *article 8* of the *ECHR*. The affirmative aspect of States' obligations in the realm of family life, emphasized by the *ECtHR,* encompasses the necessity for their pro-active role in enabling family ties to develop normally[17], including also the ties between near relatives as they may play a considerable part in family life[18]. If this is not provided, the Court discerns "no objective and reasonable justification for the differences of treatment"[19]. Even though the Court accepted that the "support and encouragement of the traditional family is in itself legitimate and praiseworthy", it also affirmed that this should not be done in a manner to prejudice the "illegitimate" family from the guarantees of *article 8*[20]. Admittedly, it recognized that the "tranquility" of legitimate families may be disturbed from an "illegitimate" child, but this alone should not be a motive that justifies depriving the child of fundamental rights[21]. Even more, it considered that leaving the child's fundamental right to family life up to the parents' initiative to adopt him/her later on in life is a plain discrimination[22]. On the contrary, a uniform way of addressing legal parenthood should apply to all parents, irrespective of their mutual relationship[23], and all children irrespective of the modus of their conception.

Discrimination as stipulated in *article 14* of the *ECHR* exists if three premises can be proved in consecutive order : (1) there is a distinction or difference in treatment granted to different groups in the enjoyment of one of the rights guaranteed by the Convention, (2) the groups enjoying different treatment are in an analogous position, and (3) the distinction does not have an objective and reasonable justification, or is not proportionate to the aim meant to be achieved, irrespective of its legitimacy (Kleijkamp, 1999, pp. 53 and 54). If *article 14* is viewed as complementary to another substantive provision of the *ECHR* (in this case - *article 8*) this would mean that it should provide protection from discrimination only with regard to that particular right. Thus, even though one of the complementing rights has not been violated

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[17] *Op. cit. Marckx v. Belgium, paragraph 45* stating as follows: "'Respect' for a family life so understood implies an obligation for the State to act in a manner calculated to allow these ties to develop normally". See also the case of *Johnson and Others v. Ireland,* ECtHR, No. 9697/82, judgment of 18.12.1986, *paragraph 74* referring to the former case stating as follows: "the normal development of the natural family ties between the first and second applicants and their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child". *Paragraph 75* goes further: "the absence of an appropriate legal regime reflecting the applicant's natural family ties amounts to a failure to respect her family life".

[18] *Ibid.* stating as follows: "In the Court's opinion, "family life", within the meaning of article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life".

[19] *Ibid., paragraph 48.*

[20] *Ibid., paragraph 40.*

[21] *Ibid., paragraph 48.*

[22] *Ibid., paragraph 55.*

[23] As recognized in the cases of *Eriksson v. Sweden*, ECtHR, No. 11373/85, judgment of 22.06.1989, paragraphs *24* and *58*, *Keegan v. Ireland*, ECtHR, No. 16969/90, judgment of 26.05.1994, *paragraph 50* and *Kroon v. the Netherlands*, ECtHR, No. 18535/91, judgment of 27.10.1994, *paragraph 30*. The Court reiterated that family life as safeguarded in *article 8* of the *ECHR* does not only encompass marriage-based relationships but also other *de facto* family ties where the parties live out of wedlock (e.g. the case of *Keegan v. Ireland*) or do not live together but there are other factors that create *de facto* family ties (e.g. *Kroon v. the Netherlands*). Consequently, the child born in such a relationship should be part of that family merely by the fact of birth, even if the parents separate later on. Even more, it recalled that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life in concordance with *article 7* of the *CRC* affording to the child, as far as possible, the right to be cared for by his or her parents (see also *McMichael v. the United Kingdom,* ECtHR, No. 16424/90, judgment of 24.02.1995, *paragraph 86*, and *Johansen v. Norway*, ECtHR, No. 17383/90, judgment of 07/08/1996, *paragraph 52*. This view is also upheld in the *op. cit. White Paper*, *Principle 25, paragraph 1.*

separately, the facts may demonstrate breach of them together (in the case - *article 8* in conjunction with *article 14*). Following this formula for evaluating discrimination, the case of children conceived by sperm donation to single women seem to be eligible for claiming their case.

Firstly, there is an evident and notorious distinction or difference in the treatments granted to "naturally" and "artificially" conceived children in the enjoyment of their right to private and family life (taken alone or together with *articles 7* and *8* of the *CRC*), as barred from protection in a fair trial before the court (*article 6 (1)* of the *ECHR*).

Secondly, when the fundamental rights to be registered immediately after birth, to know and be cared for by both parents, as far as possible (*article 7, CRC*) and to preserve the child's own identity and family relations as recognized by law without unlawful interference (*article 8, paragraph 1, CRC*) as part of the child's own private and family life (*article 8, ECHR*) are barred from being realized or challenged either in a fair trial before the court or in administrative proceedings, it means that the State Party has failed to ensure the implementation of these rights (*article 7*, *paragraph 2 CRC*) or failed to provide appropriate assistance and protection for re-establishing speedily the identity of the "artificially" conceived child (*article 8, paragraph 2, CRC*). "Naturally" conceived children in an analogous situation normally have access to information regarding their origins (adoption is differently regulated in different countries, even though the trend of revealing information is increasing[24]) and have procedural rights to challenge or establish parenthood before the court as a last instance once the other ways (presumption or recognition) are exhausted (adoption again is not endangered from parental proceedings if it is clear that the social parenthood coincides with the legal parenthood due to the parties' intentions).

Thirdly, the distinction in treatment for the pursuit of the aim to keep the donors' identity unrevealed or to maintain the unity of the created "artificial" families for the sake of legal certainty is not proportional to the harm done to children and their fundamental rights[25]. On the contrary, children are taken as means employed to satisfy single women's (or other women in a family) needs to have children, while not violating their other subsidiary instrumental means – the donor (if he consents to donate solely under conditions of secrecy). If legal proceedings that challenge parenthood do not have an intention to hide the truth over the act of conception, while also balance the "natural" (genetics) over "artificial" (social) facts of parenthood, it would not be necessary to compromise children's rights by the rights of the adults. "Artificially" conceived children should also on the same grounds as "naturally" conceived children be able to challenge parenthood before the court. 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 afforded 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

[24] In the case of the Republic of Macedonia, adoptions too are in the "secrecy zone" regarding the information related to the genetic origins of the child. The proposed suggestions should also address adoptions.

[25] Some authors argue the opposite: children conceived by sperm donation to single women or to lesbian couples are discriminated against because their family stability and security are not the same as of those conceived to heterosexual couples, if the possibility of the donor to claim parental rights in judicial proceedings is left up to the discretion of the judges. This only comes as a further reaction from the Canadian system (some not all provinces, including Quebec, Alberta, British Columbia, Prince Edward Island and Manitoba) that is already steps ahead in terms of allowing known donors to compete for parental responsibilities as in comparison to the European context. See more Kelly, 2013, pp. 253 and 254.

deprived of their fundamental rights guaranteed in the Convention. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background. One of the relevant factors is also the European consensus among the Member States[26]. Since the legal solutions over the issue are very diverse in different European countries, it will be difficult to extrapolate a common ground for harmonizing the laws. Nevertheless, the increasing trend shows that in most countries the identity of donors unveils for the purposes of appreciating children's right to a narrative regarding their origins. This is also accompanied by a sensitive approach regarding access and administration of such cases before the courts[27]. The *ECtHR* has already formed an opinion rejecting access to national authorities when a person considers that his/her rights have been violated and is considered as a violation of *article 13* of the *ECHR* (J.R.M. v. the Netherlands).

Otherwise, children's role is evidently instrumental in the adults' reproductive projects (since they were never asked if they agreed to be born under conditions that restrict them from certain procedural rights). The *ECtHR* has not yet dealt with a case that prohibits access to paternal proceedings in relation to a child conceived by sperm donation to a single woman. Cases like this or related to the meritum of the Court's decision are present in the Canadian legal system[28]. Nevertheless, the proportionality between the means employed and the aims sought to be achieved in the realm of *articles 8* and *6(1)* for purposes of investigating discrimination has been measured in a number of cases[29].

The Court's decision can be constitutional (constituting status) as well as not constitutional (confirming the situation as it is and not granting parental status). If the aim of the parental proceedings is to constitute status and there is an existent factual family life between the child

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[26] See, for instance, *Rasmussen v. Denmark*, ECtHR, No. 8777/79, judgment of 28.11.1984, *paragraph* 40.

[27] *J.R.M. v. the Netherlands*, ECHR, No. 16944/90, Decision of 08.02.1993. In this case, the application of the sperm donor to the *Dutch Juvenile Court* and later on, the *Court of Appeal* and the *Supreme Court* was considered admissible, but was rejected because the Dutch Courts reasoned that "family life" requires, apart from biological fatherhood, the existence of additional circumstances. As the case was brought before the *European Commission of Human Rights*, the Commission considered that "the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child". The Commission went on further: "With regards to the applicant's complains under article 13 in conjunction with article 6 paragraph. 1 and article 8 (Art. 13+6-1+8) of the Convention that the Dutch courts refused to declare his request to have access to the child admissible, the Commission recalls that an applicant who has an arguable claim that his rights guaranteed by the Convention have been violated must have an effective remedy before a national authority for that claim. The word "remedy" in this sense does not mean that the applicant's claim must be vindicated and that the applicant must "win". He must have an opportunity to have his claim examined by a national authority conforming to the requirements of article 13, which is able to examine the merits of his complaint (No. 10496/83, Dec.14.5.84, D.R. 38 p. 189)". With regard to the complaints of the applicant related to *article 14* and the alleged discrimination in comparison to that against a legitimate father, the Commission did not find the two situations comparable and analogous, and therefore rejected the possibility of discrimination.

[28] For instance, on the one hand, cases of lesbian couples assisted by sperm donors in Quebec: *S.G. v. L.C.*, RJQ 1685 (QCCS) [SG], 2004; *L.O. v. S.J.*, QCSC 302, 2006; *A. v. B, C and X*, QCCA 361, 2007; cases in Ontario: *M.A.C. v. M.K.*, ONCJ 18, 2009; A.A. v. B.B., ONCA 2 [A.A.], 2007; W.W. v. X.X. and Y.Y., ONSC 879, 2013. On the other hand, cases of single mothers by choice conflicting known donors: *Johnson-Steeves v. Lee*, 6 WWR 608 (ABQB), 1997; *Caufield v. Wong*, ABQB 732, 2007; *L.B. & E.B. c. G.N.*, QCCS 348 [L.B], 2011. Out of these cases a clear trend has emerged: known donors have been declared parents in almost all applications, while judges held uniformly their position that it is in the child's best interests to have access to his or her biological father, independent of the circumstances or structure of the child's family (Kelly F., 2013, pg. 257).

[29] See, for instance, in the cases of *Marckx v. Belgium*, ECtHR, No. 6833/74, judgment of 13.06.1979, *paragraphs 31, 33, 34 and 43*; *Rasmussen v. Denmark*, ECtHR, No. 8777/79, judgment of 28.11.1984, *paragraphs 38 and 39*; *McMichael v. the United Kingdom,* ECtHR, No. 16424/90, judgment of 24.02.1995, *paragraph*s 95, 97, 98 and 99.

and the known donor, there is also a possibility for the donor to recognize the child as another means to achieve the same goal. This would signify that there is an intention among them, accompanied by the fact of genetics overlapping social reality. Nevertheless, the recognition may be obstructed by the mother's consent for which the initial intention to be a sole mother (or at least not to parent together with the donor) remains[30]. If recognition is a sufficient instrument for establishing relationships between parent and child, judicial parental proceedings would have never been introduced. On the contrary, complicated situations may arise among the concerned parties in both contexts of conceptions – "natural" and "artificial". Therefore the availability of the Court to judge cases of conflicting interests among parties should be afforded on the same grounds to everyone on the same subject matter.

In recent years, the notion of family life has been viewed in a more sociological and functional than moralistic light, with the main emphasis placed on the protection of children's interests (Kleijkamp, 1999, pg. 140). The *ECtHR* through its decisions reflects the spirit of the existing family laws: equality and pedo-centrism (Almeida, pg. 25). The fundamental principle of affiliation law has always been legal certainty and the protection of already established families. This is especially evident in proceedings that impose time limits for challenging parenthood. The predominantly biological criterion as the determent for establishing parent-child relationships is losing ground next to the social mandate for the determination of what constitutes a legal family life (Almeida, pg. 298). For these reasons, the time limits for challenging parenthood tend to legally secure the position of the already established parent who "does" the parenting when confronted with the person who merely "is" a genetic contributor. The same applies when a person recognizes as his a child born out of wedlock for which solely the consent of the mother is required and not necessarily proof of his genetic contribution. The Dutch solution of the matter depicts exactly the significance of such recognition by replacing the word "acknowledgment" with "acceptance" of fatherhood, stressing the fact that the man intends to father the child and not necessarily to acknowledge his biological fatherhood, making it clear that acknowledgment is a legal act and not necessarily an act of biological truth (Almeida, pg. 171).

Therefore not only children conceived with gamete donations can be parented by a person who is not genetically related to them. On the contrary, "naturally" conceived children can also have a social and legal parent that does not coincide with their genetic parent and they also may have an interest in knowing their origins. This, however, does not mean that they will necessarily have to establish legal bonds with them. The affiliation law's developments manifest an obvious paradox: on the one hand, there is an increasing emphasis on biological truth (Almeida, pp. 364 and 365), while on the other hand parental rights and responsibilities are increasingly granted to persons other than the biological parents (Almeida, pg. 299; Shofman v. Russia). These conflicts between genetic and social reality could apparently exist in both contexts of conceptions. What is employed in the context of "natural" conceptions for purposes of safeguarding legal certainty is the time limit that restricts the genetic parent from coming back into the child's life whenever he/she wants and therefore interrupts the already created social family unit. A problem may appear, though, if the genetic father is never informed of the birth of his child or he is informed/finds out only after the expiry of the

[30] On the issue whether the mother's consent to the father's acknowledgment of the child as his is necessary or not in cases where the man is a biological father while also having established links that can qualify as "family life", see the Decision of the Dutch Supreme Court HR 8 April 1988, *NJ* 1989, 170, r.o. 3.3; HR 18 May 1990, *NJ* 1991, 374 and 375; HR 8 November 1991, *NJ* 1992, 440 (Kleijkamp 1999, pp. 165 and 170).

restricted time limit. If birth registers in "natural" conceptions prescribe the genetic link between the parent and the child as from the time of birth, as far as possible (if the mother can identify the genetic father), that would mean that mothers' responsibility to identify the father should increase. If birth registers in "artificial" conceptions prescribe the genetic reality of the parents as from the time of birth, as far as possible (if the donor is not anonymous), this would mean that the donor will have to withdraw from his parental responsibilities as in concordance with his consent given prior to conception. This would equalize all children in relation to their chances of knowing their genetic origins and all parents regarding their chances of establishing legal family ties with their children. The only difference would be the presumed affirmative consent of the natural father (*procreator* – "verwekker" as in the Dutch legal system) to parent his child born as a result of sexual intercourse, as opposed to the explicit negative consent of the donor not to parent his genetically related child conceived with the assistance of medicine[31]. This would additionally equalize the positions between the genders (the genetic mother and father) in terms of equal opportunities for establishing the parenthood of their genetically related child. If it is accepted that parents are persons genetically related to the child and become so only after the child is born, i.e. physically separated from the mother's body (not prior to or after conception), then it will follow that they will be able to withdraw from their parental responsibilities only once they become parents[32]. On the one hand, for the natural father it should be more difficult to withdraw from parental responsibilities or only with the mother's consent[33]. On the other hand, for the donor, it should be mandatory to follow the obligations undertaken with the prior consent to withdraw from parental responsibilities[34]. Inevitably, parental links exist through genetics and this fact should not be hidden. Next to it, parenthood is a legal concept that develops throughout time

[31] An exception of *presumed affirmative consent* of the genetic father who procreated via sexual intercourse or *presumed negative consent* of the donor is the regulation in Quebec in cases of "parental projects" (which include transfer of genetic material of one person for the purpose of another party/parties' reproductive project). The *Civil Code of Quebec* (SQ c. 64, *article 538.2*, 1992) stipulates that if the genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following birth, between the contributor and the child. Nevertheless, if there is no "parental project" among the parties, the situation falls under the rules of blood filiation. The case of *L.B. & E.B. c. G.N.* QCCS 348 [L.B.], 2011 before the court in Quebec considered that a "parental project" can also exist even if conception occurs via sexual intercourse. Nevertheless, the Court found that there was no sufficient interest from the donor to prove that he intended to be more than that in the first year after the birth of the child.

[32] *Keegan v. Ireland*, European Court of Human Rights, No. 16969/90, judgment of 26.05.1994, *paragraph 44*, holding that the relationship between parents and their children constitutes family life starting from the moment of birth and by the very fact of it, it is irrelevant whether the child was born in or out of wedlock.

[33] This comes from the dissenting opinions and arguments regarding the necessity for the consent of the mother and the child, since it may also be considered as a burden for establishing fatherhood. See more in *op. cit.* the *White Paper*, pg. 13. The fear of overpowering mothers to hold exclusivity over parental responsibilities by consenting to the biological fatherhood of the assumed father is neutralized by the possibility of civil proceedings. On the other hand, empowering mothers to consent regarding who they are going to share the parental responsibilities with is in concordance with the notion of intentional parenthood. The *Draft Recommendation* (*article 14*, *paragraph 3*) has a novelty in this field allowing voluntary recognition during the mother's pregnancy which has effect from birth. This means a possibility for children conceived out of wedlock to have their fatherhood established as from the time of their birth.

[34] A case making a distinction when parental responsibilities of the father can or cannot be withdrawn was judged by the New Jersey Superior Court in 2011 (E.E. v. O.M.G.R., 420 N.J. Super. 283, 285-86 (N.J. Super. Ct. Ch. Div. 2011)). The Court drew a difference between sperm donation by a friend of a single woman executed at home and a sperm donation in a licensed clinic. After not allowing the man to relinquish his parental rights and responsibilities and as such him being proclaimed the child's parent against the initial will of both mother and father, the Superior Court reaffirmed the decision starting from the premise that "a child has the right to the security of two parents at the time of birth" (at 286). This followed the rationale that parties cannot contract to terminate parental rights. For a critique of this decision, see Garcia, 2014, pp. 207, 208 and 209.

among persons who have the intention to share life together. Even if a known donor who has withdrawn from parental responsibilities establishes family links with his child with the cooperation and consent of the mother, he could recognize the child as his later on and thus establish legal family links.

Parenthood is initially a genetic and only afterwards a social relation between parent and child. If these facts are integrated in the concept of parenthood in practice, parental responsibilities should start from childbirth. The same should also apply in cases of medically assisted conceptions.

Firstly, donors should be informed of the birth of their genetically related children.

Secondly, they should be asked to withdraw from their parental responsibilities (according to the previously expressed intention). Only afterwards, the transfer of the parental responsibilities should be made possible (to another father, if there is any for the role). While the *White Paper* acknowledges that nowadays the only legal form of change of parentage is adoption, it also recognizes the potentiality of the development of new forms of change of parentage, having account of the inventiveness of the legal profession in regard to the new social, medical and legal changes when it comes to the establishment of parenthood[35]. If parental responsibilities start for both women and men at the time of birth, and the idea is to equalize "natural" and "artificial" conceptions as far as possible, then they should also start at the same moment for sperm donors. If they are just *sperm donors*, then they will have to withdraw or resign from being *parents*, and firmly acknowledge their status after childbirth. In these terms, donors' parental responsibilities will be terminated and available to be transmitted to the commissioning parents. This is how donors will be notified that their progeny are born and from there on, they can explicitly reject paternity, leaving no vacuum or place for further contestations or paternal conflicts. This is also how donations will legally come closer not only to adoptions, but also to surrogacies (in countries that regulate them), making the legal system more harmonized as a whole. In this way, the approach towards donations will be taken with a decent dose of procreational responsibility, making donors aware that they do not give an object as a gift to somebody else, but procreate a child who may wish to know their identity in the future. Therefore there should be another way to terminate parental responsibilities, with explicit reference to sperm donors[36].

Parental proceedings should be available for every parent and child under equal conditions. Once the case is considered admissible, the merits of the claim should be evaluated based on the interaction between three facts: (1) biology/genes, (2) social and factual family life, and

[35] *Op. cit.* the *White Paper*, pg. 23. For this purpose, *Principle 17* was drafted, stipulating: "any new form of change of parentage shall take place under the control of the competent authority in procedures which have due regard to the best interests of the child. Any such form should be subjected to the same safeguards as adoption". From the explanation of the principle, it can be concluded that it was drafted with the primary reason to cover surrogacies (along these lines, the identification with adoption would mean that still, the principle *mater semper certa est* is obeyed, as it is, for instance, in the U.K.). Nevertheless, other possible forms of change of parentage are not excluded.

[36] For instance, *Principle 3:30* of the *Principles of European Family Law regarding Parental Responsibilities* regulates the termination of parental responsibilities in cases when the child: (1) reaches majority, (2) enters into marriage or registered partnership, (3) is adopted, or (4) is dying. Next to these, the case of withdrawal of the parental responsibilities of the sperm donor has to be (as suggested by the author) explicitly added.

(3) intention of the parties, as additionally perceived through the prism of the best interest of the child in each particular case.

Children should enjoy two aspects of private and family life.

Firstly, they should enjoy the informational aspect envisaged in the right to know their family origins.

Secondly, they should enjoy the legal and functional aspect of having parental care as established on grounds of intention (expressed prior to the conception as a presumption in the cases of "natural" conceptions via coitus or explicitly expressed in written consent in cases of gamete donations). These intentions should be additionally confirmed or rebutted after birth (if they do not match in cases of "natural" conceptions, and are transferred to other parents, it should be considered that the legal parental responsibilities are established via adoption).

If these facts are accepted and integrated into the legal system, there will be no reason to ban parental proceedings for a group of misfortunate children born after gamete donation without their choice. Additionally, the national legal systems will not compromise the accessibility to justice and the internationally accepted conventions, and thus, will be more coherent.

The application of the assisted reproductive technologies remains to be controversial in changing family laws and affiliations. The suggested solution for equalizing the positions of families irrespective of the relationship between parents or modus of conception of children is just one aspect of it. Future research will have to elaborate profoundly the experiences of families created in one way or the other. In the context of the Republic of Macedonia, the suggestion for regulating surrogate motherhood has already opened a new terrain for elaborating the further possible fragmentations of parenthood, and the technical aspects of performing it in practice. Nevertheless, the suggested concepts in this work, strive for universal application. Moreover, once the ramifications of parenthood become even more apparent than they already are, the necessity for strengthening legal certainty and protection of the interests of the most vulnerable ones – children – should be of paramount importance.

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