ESTABLISHING A FAMILY BY THE NEW TECHNOLOGIES FOR ARTIFICIAL REPRODUCTION ACCORDING TO THE POSITIVE LEGISLATION OF NORTH MACEDONIA IN THE LIGHT OF COMPARATIVE FAMILY LAW

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Abstract

The time in which humanity lives today, it has changed the conventional paradigms of the natural and biological parameters. As such, this time has given mankind today the courage to challenge, as well as change, some of the natural consequences of man's well-being as a social being - first and foremost as a biological being. Therefore, through theoretical dilemmas and scientific successes elsewhere, man well-builds his own future, which on one hand gives him knowledge of the power of rational knowledge, and on the other hand adds great responsibilities, perhaps even enigmatic and unseen before. It is about the consequences that man can have from inconsistent interventions in nature, and the alternation of social structure in this context. When it is known that for each intervention man pays the price, changing the same conventional cohesive structure within the family will give its own price in the near future. In this paper the authors present the facts based on the development and application of artificial reproduction technology (artificial insemination, in vitro fertilization, surrogate motherhood, post-mortem reproduction) are evidence for redefining the concept of family which in this respect undermines the principle of conceiving a child naturally. In this paper the authors emphasize that the plurality of forms for establishing parenthood, which became possible with the rapid development of medicine and biotechnology, allows the application of new reproductive technologies, expands the possibility of family planning on one hand, but on the other hand questions the genetic status of the child born through these methods. The authors have considered it reasonable that through this paper to give their recommendations for filling the legal gaps that exist in the family and biomedical legislation of the RNM. The authors place special emphasis on the urgent need to overcome legal contradictions which currently affect the best interest of the child born with any of the methods of artificial reproduction. In addition to the analysis of domestic legislation, the text also provides a comparative framework on the legal regulation of the status of members of family (children and parents) established by the methods of artificial reproduction.

Keywords: *artificial reproduction and family, legal parents, genetic lineage, best interests of the child*.

JEL Classification: K36

1. Introductory overview

We coexist in the period of rapid development of science which challenges the progress of humanity with innovations in technology. In line with this progress, many human values and concepts of family and parenting have changed. We are in a situation when we discuss advances in biomedical and family science, including new forms of family reproduction that differ from a natural process of childbearing, opportunities that in turn expand reproductive freedom. New technologies for family reproduction include several methods that differ from the inception of the child in biological (natural) ways, including: artificial insemination; in vitro fertilization; surrogate motherhood; the birth of a child by a woman with donated genetic material; post-mortem reproduction; "Three-parent baby" technique.[3] There are other forms that science offers, but are still considered forbidden processes: choosing the sex of the child, improving the physical and intellectual capacity of the future child, cloning, etc.

From another side, given the traditional and biological model of the family in our society, new reproductive forms are a very reserved topic in the family and biomedical spheres, which arises curiosity towards discussions on ethics, philosophy and legal regulation of the reproduction of the human being. The new forms of reproductive technology, in addition to the legal parents of the

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[3] For this technique see more at Laura Riley, *The 'three parents' misnomer: Mitochondrial DNA donation under the HFE Act,* p. 100.

child, also include third parties such as donors of genetic material or the woman who will carry another person's child during her pregnancy.

All these methods are subject to regulation of the provisions of the 2008 Law on Biomedical Assisted Fertilization (LBAF) of Republic of North Macedonia (RNM).[4] However, despite the legal regulation, there are problems of the nature of implementation of the law as well as harmonization with both national and international legislation. Therefore, in order to provide concrete recommendations for additions and changes in family and biomedical legislation, an overview on the legal regulation of technologies for artificial reproduction towards the establishment of the family must be provided in advance.

The authors first make a connection between bioethics and family law, highlighting in this regard the processes of artificial technology and the many dilemmas and problems that arise with the implementation of family and biomedical legislation. In addition, the authors place special emphasis on surrogate motherhood and posthuman reproduction as well as respecting the highest interest of children born through these methods. In this text, the authors raise numerous concerns about the legal contradictions regarding the parental status as well as the family status of children born through methods of artificial reproduction. The authors, through the analysis of legislation, contemporary family concepts and the analysis of cases presented before the European Court of Human Rights, promote the principle of respect for the best interests of children and the principle of reproductive freedom of all persons who cannot give birth to children through natural means.

2. Bioethics and family law

Bioethics[5] is a discipline, which integrates many fields in order to summarize, analyze, systematize and regulate many issues in the field of medicine, law, psychology, ethics, sociology, philosophy, and even religion in order to provide concrete solutions for all the questions that arise as a result of new challenges. Bioethics, overlapping with medical ethics, with a useful measure of consensus may be described as a field of study involving the application of moral philosophy to ethical problems in the life sciences.[6] Within bioethics, many topics are examined and analyzed, such as: conception and childbirth (artificial reproduction, contraception, sterilization); genetics; euthanasia, abortion, cloning, all human embryo issues (legal status of the embryo, embryo experiments), etc. The revolution in science and technology, and in particular in biomedicine and clinical medicine, are among the basic reasons for the introduction of bioethics. New technologies have enabled the acquisition of the power of life creation, the impact on the genetic potential of the individual, new methods for diagnosing and curing many diseases, new ways of longevity and preserving life; the birth of children artificially; cryopreservation of the body, organs, genetic material, embryo, as well as many new biomedical methods. The term "Bioethics" may also be understood as including the legal aspects of biomedical issues. When the term "bioethics" is so understood, it is a contradiction in terms to speak of "laws on bioethics" because what is ethical or unethical is not, and indeed cannot, be prescribed by law.[7] The distinction between these realms is extremely important, and in a field like bioethics, in which one may have the impression that they fuse, it should be carefully maintained. In this regard, it is noteworthy that, precisely in order to prevent any confusion between ethics and law, the Council of Europe has preferred to avoid the use of the word "bioethics" in the Convention on Human Rights and Biomedicine adopted in 1997. This is the reason why even the title of this instrument, which included the term "bioethics" in its draft version, was changed from "Convention on Human Rights and Bioethics" to "Convention on

[4] Emine Zendeli, Arta Selmani-Bakiu, Dejan Mickovik, Angel Ristov, *E drejta familjare*, p. 103.

[5] The term bioethics was first used by Van Rensselaer Potter in 1970, who launched the beginning of a new dimension of critical attitude towards life and new challenges of science that shook life as we knew it until then. See more at Potter, V.R, *Bioethics, the Science of Survival*, pp. 127-153, 1970 and Potter V.R., *Bioethics: Bridge to the Future*, cited by Dejan Mickovik, Elena Ignovska, Angel Ristov, *Новите репродуктивни технологии и правото (New reproductive technologies and law)*, p. 12.

[6] Thomas Alured Faunce, Hitoshi Nasu, *Normative Foundations of Technology Transfer and Transnational Benefit Principles in the UNESCO Universal Declaration on Bioethics and Human Rights*, p. 305.

[7] Roberto Andorno, *Human Dignity and Human Rights as a Common Ground for a Global Bioethics*, p. 225.

Human Rights and Biomedicine." Article 1 of this Convention provided that ethical issues related to medicine, life sciences and associated technologies as applied to human beings, taking into account their social, legal and environmental dimension.[8]

One of the most interesting topics in family law in recent years, which is closely related to bioethics, is the establishment of the family through artificial reproduction technology. Reproduction of the family is no longer an issue which is beyond human control. Childbirth has gone beyond what is called natural, precisely because of the many biomedical methods available to individuals. What was once considered a natural process for the insemination of the child, in modern times, it represents a conscious and planned transformation in human life, exactly at the moment s/he decides to take on the role of parent. Therefore, all persons who want to have children, but due to some medical indications are prevented from becoming parents, biomedicine has enabled the application of artificial reproduction technology. Artificial insemination, in vitro fertilization, surrogate motherhood, posthuman reproduction and other methods of artificial reproduction have made it possible for infertile couples to become parents. Due to these and many other similar issues, there is a need for family law to deal with the analysis of the legal implications of artificial reproduction in parental relationships; concepts that are part of the study of bioethics.

Therefore, as a result of the application of these methods for the birth of children, there is a need in family law to redefine the legal notions of family and parenthood. For example, in the case of the birth of a child through any of the methods for artificial reproduction, the issue of genetic parenting is questioned, therefore the family law must provide an answer regarding the motherhood/ fatherhood of that child. We are all familiar with the fact that genetic parenting as a gene transfer to the child is the basis for blood relations. In the past, child insemination was only done biologically. The genetic link in this regard has been very important between parents and children. With the introduction and application of methods of artificial reproduction, the biological concept of childbirth is no longer unique and exceptional, therefore these methods impose the change of the traditional concept of parenthood by changing it depending on the way the child is conceived.

3. New reproductive technologies in family and biomedical law of RNM

The process of artificial reproduction of the family in the RNM dates back to 2008 when the Law on Biomedical Assisted Fertilization was adopted.[9]

When applying the BAF, the basic principle from which the Law on BAF starts is the respect of human rights and health standards. In this sense, it is envisaged that the implementation of the BAF procedure will be carried out in such a way as to ensure the protection of human rights, dignity and privacy of the persons on whom the medical procedure is performed as well as the donors of genetic materials and embryos. The main purpose for which BAF is performed is to achieve fertilization in accordance with scientific-technical progress, science and medical experience with special emphasis on respect for human rights. This law also regulates in detail the right to BAF, the conditions for exercising the right to BAF, the security of the donation, the provision, testing, processing, storage, distribution and use of cells during the performance of BAF, rights and obligations of the patient, health workers and health institutions; the conditions for the realization of the BAF as well as the supervision of the process (Article 1 of the LBAF).

According to Article 3 of the Law, the BAF procedure is performed if the previous treatment has been unsuccessful or the treatment with other methods is hopeless and in cases when the severe hereditary disease can be transmitted to the child. In implementing the BAF procedure, the legislator gives priority to the use of own genetic materials or embryos (autologous fertilization) of potential parents.[10] If in the BAF procedure the own genetic materials of the married or extramarital spouses is not possible to be used, namely, if they are not used in order to prevent the

[8] Universal Declaration on Bioethics and Human Rights, 2005, available online at: https://unesdoc.unesco.org/ark:/48223/pf0000 146180 (accessed on April 01, 2021).
[9] Law on Biomedical Assisted Fertilization, 2008.
[10] See Article 7 of the Law on Biomedical Assisted Fertilization.

transmission of a serious inherited disease to children, then donated genetic materials or embryos from other persons can be used (allogeneic fertilization).[11] The Law on BAF presupposes that adult and fully capable men and women who are capable of exercising parental rights, and who are married or living in an extramarital union, as well as single women, may appear as beneficiaries of biomedically assisted fertilization if previous treatment has not been successful (Article 9).

Regarding this provision, the legislator when it comes to the users of technologies for artificial reproduction makes a differentiation in terms of marital status and gender and allows artificial insemination and in vitro fertilization for both married, extramarital spouses as well as for single women, and on the other hand, it restricts surrogate motherhood exclusively to the benefit of the marital spouses. In this regard, the law is very restrictive and discriminates against single persons who want to be fulfilled as parents, which means that through artificial insemination and in vitro fertilization, a single woman can establish a family, but not a single man. A single man can exercise this right only if he is in a marital or extramarital union. With such discrimination, many questions arise: why only women have the right to establish a single-parent family, are women considered more worthy of parenthood than men, is motherhood superior to fatherhood, and many other questions. As mentioned above, families through surrogate motherhood can only be established by married spouses. It should be taken into account that situations in life may arise which dictate that a single woman wants to have a child but due to medical indications in the womb cannot realize her dream, so according to LBAF she has no right to start a family by engaging a surrogate mother who would carry the fertilized baby with her egg cell and donated genetic material. This right is also not granted to single men to establish single-parent families through the surrogate mother. According to the LBAF, this right of a man is limited even in the case of posthumous reproduction, a method that is explained in more detail in the following text.

A very important issue that is regulated by the Law on BAF is the donation of genetic materials and all the rules set out around this procedure. According to the Law on BAF, donors of genetic material (eggs and sperm) can only be adults and able-bodied persons, who agree to donate their genetic material. The sperm donor is the male whose sperm, with his consent, are used for fertilization of the female, who is not his wife or his extramarital partner, while the donor of the egg cell is the female whose egg cells, with her consent, are used for carrying out the fertilization procedure of the other woman. Embryo donors are males and females who have given up the use of the embryo created by them, in which case they have agreed that their embryo be used by a married or extramarital partners or by a single woman (Article 13 of the LBAF). Donors are obliged to provide information about their personal identification, data related to their health status and history of previous diseases to the institution where they donate their genetic material. The donor must be informed of the purpose and nature of the supply, consequences and risks, analytical tests, donor data protection, medical confidentiality, therapeutic purpose and potential benefit, information on donor protection measures, eligibility for obtaining clarified results from analytical tests, legal consequences from the use of genetic materials or donated embryos and information on the written statement regarding the consent for the donation of genetic materials/embryo. Donors of genetic materials and embryos have no parental rights and obligations towards the newborn child. Donors can donate their genetic materials or embryos only to one of the authorized health institutions for the implementation of the procedure for biomedical assisted fertilization, which in North Macedonia are several, such as: Specialized Hospital for Gynecology and Obstetrics "Pllodnost" in Bitola; Giniko Medika in Skopje; Polyclinic Dr. Organxhiski in Shtip; Remedika in Skopje; Ultramedics in Skopje; Sante Plus in Skopje; Acibadem Sistina in Skopje; Innana Sistem in Skopje.[12] The LBAF provides some prohibitions regarding the use of genetic material in blood-relationship situations. Pursuant to Article 22 of the LBAF, it is prohibited for donated sperm to be used for fertilization, if the donor and the woman on whom the allogeneic fertilization is performed are of blood relationship, respectively between whom marriage is not allowed. It is forbidden for donated egg cells to be fertilized with sperm of a man who, due to his blood relationship, is not

[11] Ibid, Article 8.

[12] Available online at: http://www.fzo.org.mk/default.asp?section=dogovori&tipDog=11 (accessed on April 01, 2021).

allowed to have a marriage with a donor. It is forbidden for the donated embryo to be used for the fertilization of a woman, who due to her blood relationship cannot have a marriage with the donor of the sperm from which the embryo was created, nor for the fertilization of a woman who is in a straight lineage with the female from whose egg cell the embryo was created.

3.1. Families created by the methods of assisted reproductive technologies-legal status of parents

Biomedical assisted fertilization is a medical procedure by which the union of female and male genetic material is achieved in order to achieve pregnancy which differs from pregnancy through intimate intercourse. It is important to note that the Law on BAF regulates most processes of artificial reproduction technology, including: artificial insemination, in vitro fertilization, surrogate motherhood; the birth of a child by a woman with donated genetic material; post-mortem reproduction, and in this line is considered a very contemporary and liberal law. In the BAF procedure, the genetic material of potential parents can be used, while if it is not possible to use the own genetic material of the married or extramarital couple, sperm, egg cells or embryos donated by third parties can be used. Within these two types of fertilization it must be distinguish: In vivo fertilization (*In vivo*) - the insertion of sperm into the female genitals/the insertion of eggs or egg cells together with the sperm into the female genitals and in vitro fertilization (*In vitro*) - the union of eggs and sperm outside a woman's body and the insertion into a woman's genitals/the insertion of an embryo into a woman's genitals.

It is important to note that one of the basic principles of family law is the principle of family planning within which the reproductive function is realized. The reproductive function derives from the natural law for the continuation of the human race as a result of the intimate relations between man and woman. This function is important not only for the family but also for society, as the birth of children renews the population.[13] The right to reproduction includes the negative right to reproduction, which means the human right to control reproduction expressed through abortion, the right not to have children, contraceptives, sterilization. On the other hand, the positive right of reproduction is expressed by the right of both sexes and their desire to give birth to their descendants. This right represents the right of potential parents to decide on the time of birth of children naturally or artificially, to decide whether they will overcome eventual infertility, whether they want children with certain genetic characteristics or will use their reproductive capacity to create embryos that will be used for scientific purposes. In modern times, the family is no longer the only community in which children are born. Intimate relations between persons who are not related in marriage and persons who have same-sex partnerships, also represent very important relations, in which the reproductive function is realized. As a result of the development of medicine and technology, the reproductive function can be realized even outside intimate relations through any of the methods of artificial reproduction technology.[14]

In connection with the above, the data related to the legal status of parents who establish families through methods of artificial reproduction should be presented. The BAF procedure is performed at the request of the spouses or extramarital spouses or the wife who is not in a marriage or extramarital union (Article 9) if they have been notified in advance of the BAF procedure if for such a procedure they have given a written statement. Giving a written statement for the implementation of BAF procedures, has legal significance as the statement for recognizing paternity or maternity after the birth of a child. It should be noted that the wife and/or husband may withdraw their consent and withdraw from the BAF procedure until the sperm, egg cells or embryo have been placed in the wife's body. In this regard, family law is interested in who will be considered the parent of the child if his/her conception was made with donated genetic material and which connection will be given priority, genetic/biological or legal? In this case, regarding the concept of

[13] Emine Zendeli, Arta Selmani-Bakiu, Dejan Mickovik, Angel Ristov, *E drejta familjare*, p. 103.
[14] Ibid, p. 104.

motherhood Machteld Vonk[15] distinguishes: 1. biological and genetic mother (the woman who provides the egg cell and gives birth to the child); 2. genetic mother (the woman who provides the egg cell but does not give birth to the child); 3. the gestational mother (the woman who gives birth to the child but does not make the egg cell available); 4. non-biological/legal mother (the woman who takes care of the child, but is not genetically related or has given birth to the child). In her qualification Vonk distinguishes only two categories of fathers: 1) biological father (person who is a donor or makes available genetic material) and 2) non-biological father (person who cares for the child but has no genetic connection to the child). Therefore, in this regard the criteria for proving legal parental responsibility can be summarized in three categories: (1) biological/genetic criteria (determined by the fact of biological/genetic relationship with the child), (2) legal criteria (determined by the fact of additional legal measures taken to become a parent); and (3) factual criteria (determined by the fact of joint family life with the child).[16] According to Professor Ignovska, although biological criteria are taken as the basic presumption in the procedure for determining and disputing the parental role, legal interventions regarding intentional consent, accompanied by other administrative mechanisms in case of adoption and BAF have stronger legal power in the procedures for determining paternity.[17] Therefore, our family legislation gives primary importance to the biological connection, while the parental care component is of secondary importance.[18] The theory of guardianship according to family legislation is expressed in situations of full adoption and the establishment of the parental relationship with artificial reproduction. Therefore, according to our legislation, the concept of legal parent is equal to the concept of biological parent.

3.2. National and comparative legal aspects of surrogate motherhood

Surrogate motherhood represents an agreement by which a surrogate mother, after being artificially inseminated with the sperm of the biological father or after the embryo from donors has been implanted, carries and gives birth to the child, relinquishes parental rights and gives the child to the intended parents, usually for a certain remuneration.[19] Surrogacy raises serious concerns because it questioned the two main pillars of the civilization - family and motherhood. Surrogacy is connected with the fragmentation of parenthood into genetic, social and gestational parenthood.[20] Through the surrogate maternity contract, the gestational woman waives the parental right, is artificially fertilized, carries and gives birth to the child for the other and gives the child to the "legal parents" for a certain compensation (commercial surrogate motherhood),[21] or without compensation (altruistic surrogate motherhood which is known in RNM). In fact, surrogate motherhood enables married couples who cannot have children biologically, but who, for medical reasons, cannot use any of the methods of artificial insemination, to have their own child, which they will keep and give birth by another woman. Depending on the possibility of fertilization with the genetic material of the parents, the born child is genetically related to one, both parents or

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[15] Machteld 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*, p. 26-27 from Dejan Mickovik, Elena Ignovska, Angel Ristov, *Новите репродуктивни технологии и правото (New reproductive technologies and law)*, p. 52.

[16] Elena Ignovska, *Био-репродуктивна етика и право. Новите репродуктивни технологии и родителското право*, (*Bio-reproductive ethics and law. New reproductive technologies and parenting law*), p. 59-66.

[17] Ibid.

[18] Legal presumption - The father of the child is considered the mother's spouse if the child was born during the marriage or was born within 300 days after the dissolution of the marriage (Article 50 of Family Law Act). Failure of the legal presumption - if the mother's spouse disputes the paternity for the reasons why he considers that he is not the father of the child. The father of the child, born out of wedlock, will be considered the person who had an intimate relationship with the mother of the child in the period at least 180 to 300 days before the birth of the child, unless proven otherwise (Article 61 paragraph 1 of Family Law Act).

[19] See Dejan Mickovik and Aleksandra Deanoska, *Surrogacy in the West: Giving Birth in the Shadow of the Law*, p. 5 cited by *American Law Reports*, Validity and Construction of Surrogate Parenting Agreement, 77 A.L.R. 4th 70. (1989).

[20] Ibid, See also John, A Robertson, *Surrogate Mothers: Not so Novel After All, Ethical issues in the new reproductive technologies*, p. 167.

[21] Russia, Ukraina, India, Thailand, Georgia, Mexico, etc, available online at: https://www.bbc.com/news/world-28679020, (accessed on June 10, 2021), some USA states, available online at: https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/ (accessed on June 10, 2021).

neither of the parents.

Although artificial insemination is considered a modern innovation, some cultures, from the beginning of the third century, were aware that a woman could become pregnant without having sexual intercourse.[22] The first recorded AI of a woman occurred over two centuries ago in 1785, when noted Scottish anatomist and surgeon Dr. John Hunter reported that he had successfully inseminated a London woman using her husband's sperm. One hundred years later, Dr. William Pancoast performed the first artificial insemination on a woman using donor sperm in 1884. Artificial insemination did not begin to become widely accepted, however, until the 1940s when a desire to repopulate after World War II, advances in birth control, and a "liberalization of social norms" helped increase the popularity of the procedure.[23]

The Institute of Surrogacy in RNM, in the science of family law and in biomedicine dates from the end of 2014. Surrogacy motherhood, as a possibility through a biomedical method that allows solving the problem of infertility, was strictly prohibited by the LBAF from 2008, but in October 2014 a Law on Amendments to the Law on Biomedically Assisted Fertilization was adopted.[24] The Law on Amendments to the LBAF prescribes in detail the entire process of surrogacy, starting from: the initiation of the procedure until the birth of the child; the conditions to be met by the stakeholders (married couple and surrogate mother); formal conditions-from the request of the married couple until the conclusion of a notarized contract; the scope of work of the legal counseling commission, the commission for psychological counseling before the implementation of the BAF procedure, the parental rights of the married couple and the status of the surrogate mother, the rights and duties of the surrogate mother. According to Article 12-a of this Law, only a man and a woman who are married and are citizens of the Republic of North Macedonia have the right to conduct a BAF procedure through a surrogate mother (gestational carrier). Persons in an extramarital union or in any other form of partnership cannot initiate a BAF procedure with a gestational carrier. So, marital status is very important in terms of implementing this method for establishing parenthood. It is also important to note that this method can be used by married spouses only if there are medical indications which are also defined in Article 12 of the Law on supplements and amendments to the Law on BAF. Besides form, many social, ethical and moral dilemmas that arise in terms of the implementation of this method, there is also the issue of parental rights and obligations to the child who will be born to a surrogate mother. The law foresees the registration of the ordering parents as biological parents of the child in the birth register, in which case the custodial mother has no parental rights and obligations towards the child. The declaration given for consent for the implementation of the BAF procedure has legal significance of the declaration for renunciation of the recognition of motherhood after the birth of the child (Article 12-v, paragraph 1), i.e., the custodial mother has no right to initiate a procedure for proving maternity or exercising parental rights in accordance with the provisions of the Law on Family. However, if the child born in a BAF procedure is left without parental care by the married couple with unknown residence, for more than a year or regardless of the reasons temporarily or permanently does not perform their parental rights and duties, as well as when the husband and wife of the married couple have been deprived of legal capacity or deprived of the exercise of parental rights, the woman who is a gestational carrier has the right to be registered as the mother of the child, if she meets the conditions for adoption determined by the regulations in the field of family law. If the woman who is a gestational carrier is not registered as the mother of the child, in order to protect the rights and interests of the child, i.e. the children, a procedure is conducted in accordance with the regulations in the field of family law (Article 12-v, paragraph 2).

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[22] Story of Talmudik (220 b.c).

[23] Lauren Gill, *Who's your daddy? Defining paternity rights in the context of free, private sperm donation,* p. 1720.

[24] Arta Selmani-Bakiu, *Стекнување на родителското право преку сурогат мајка- посебен осврт на Законот за изменување и дополнување на законот за биомедициснко потпомогнато оплодување (Acquisition of parental rights through a surrogate mother - special reference to the Law on Amendments to the Law on Biomedically Assisted Fertilization),* p. 136.

Several surrogate maternity procedures have been performed in the RNM[25] but despite the fact that there is a very liberal law in this regard, there are many dilemmas in the implementation process and the process of harmonization of the Law on BAF, Family Law Act and international conventions. The numerous legal contradictions that arise violate the principle of the best interest of the child[26] in terms of recognizing his genetic origin. The data on the gestational carrier and the manner in which that child was conceived and born can be communicated to the child born by a BAF procedure with a gestational carrier after reaching the age of five (Article 12-v, paragraph 5). The contradiction in the law itself is that: Information about the origin of genetic material donors is considered a classified secret, contrary to Article 7 of the CRC, which guarantees the child the right to know his or her genetic origin and identity, as well as article 8 of the European Convention on Human Rights (ECHR) in terms of respect for private and family life. Regarding this issue, the LF and former and the amended Law on BAF additionally do not agree. Namely, in the amendments to the LBAF, on the one hand, it is allowed to be informed about the data on the gestational carrier and the manner of conception and birth of the child after reaching the age of five (Article 12-c), while, on the other hand, the authorized health facilities are obliged to "...provide protection of all personal, medical and genetic data on the gestational carrier, the married couple and the child". Also, in European area, as the use of evidence obtained from DNA analysis to determine the genetic origin of the child conceived through biomedical methods, two main documents are known: Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[27] and Principles Concerning the Establishment and Legal Consequences of Parentage - "The White Paper"[28]. According to Professor Ignovska, "the current legal provisions are more than conceptually confusing, especially given the long legal tradition of "keeping secrets" in the field of "artificial insemination" and adoption in RNM, which in itself deserves criticism. In this regard, one of the most famous sperm banks in the world - Danish "Cryos" (from which most countries in Europe import, including here RNM), cautiously announces on its official website: "We have an agreement with the parties (donors and those who want to be parents), but we have not reached an agreement with the future children and we cannot influence their behavior, their demands and needs". The inability to conducting court proceedings to this category of cases is an aggravating circumstance for the legislation that allows, given that in other countries where surrogate motherhood is allowed, many cases have already been brought before national courts.[29] In order to have an overview of what solutions judicial practice offers for disputes arising out of surrogate motherhood, as examples are always taken many court cases before the European Court of Human Rights. Therefore, in this regard are analyzed cases such as: Menasson vs. France[30], Labassee vs France[31], Labories and

[25] Ministry of Health of the Republic of North Macedonia, available online at: http://zdravstvo.gov.mk/upatstvo-za-koristenje-na-mehanizmite-na-biomedicinsko-potpomognato-oploduvanje-surogat-majchinstvo/, (accessed on March 05, 2021), See also https://ako.mk/51 (accessed on March 05, 2021).

[26] The interest of the child is the most important consideration in evaluating the ethics of surrogate parenting. The child is not a party to the agreement but is profoundly affected by it. Unable to protect his own interests, the child must look to others for protection. From the child's perspective, the benefits of surrogate motherhood clearly outweigh any potential harms. In the first place, surrogate motherhood, as commonly practiced, poses no greater physical risk to the child than those risks presented by an ordinary pregnancy. In terms of physiological development, surrogate motherhood is only a variation of AID (Artificial Insemination by donor). AID has long been considered to present an ethically acceptable level of risk. Psychological risks to the child must be considered as well. Most of the purported dangers stem from the separation of genetic and gestational parenting from social parenting. The concern is that the child may suffer from a feeling of genetic rootlessness when he learns of his origins. This feeling may be aggravated by the knowledge that his genetic and gestational mother purposefully conceived him for money with the clear intention of "giving him away." See at Thomas A. Eaton, *Comparative Responses to Surrogate Motherhood*, p. 708.

[27] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997), available online at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164 (accessed on March 05, 2021).

[28] Principles Concerning the Establishment and Legal Consequences of Parentage – "The White Paper" (1997), available online at: https://rm.coe.int/16807004c6 (accessed on March 06, 2021).

[29] Elena Ignovska, Interview*, Правно-етичките дилеми за новите репродуктивни технологии како начин на настанување на семејството (Legal-ethical dilemmas for new reproductive technologies as a way of creating a family).*

[30]Available online at: http://hudoc.echr.coe.int/eng#{'display':['0'],'appno':['65192/11'],'documentcollectionid2':[CHAMBER'], 'itemid':['001-145389']} (accessed on May 15, 2021).

others vs France[32], Foulon vs France[33], D. and others vs Belgium[34], Bouvet vs France[35], Paradiso & Campanelli vs Italy[36]. The authors share the common opinion that the interest of children should take precedence over the interest of adults to become parents through surrogate motherhood, therefore in this regard it should be borne in mind that in situations of fertilization of the child with donated genetic material and carriage and birth by another woman, legal solutions must be found on how these situations are to be regulated be being summoned to respect the best interests of the child. Another problematic issue related to artificial reproduction technologies and especially related to surrogate motherhood is the issue of fragmentation[37] of the institute of motherhood and the avoidance of the Roman maxim "Mater semper certa es". In the case of surrogate motherhood, three mothers can appear: the woman who carries and gives birth to the child, the woman who donates the egg cell, the woman who enters into an agreement with the surrogate mother - the legal mother who will take her and take care of the child. When it comes to traditional surrogate motherhood, the surrogate mother is also a genetic mother, in which case it can be calculated that the child has two mothers: the legal mother and the surrogate mother who has "invested" her genetic material. Meanwhile, in the case of surrogate gestational motherhood (in RNM), in the process of childbirth it is possible for three women to participate: the woman who donated the egg cell (genetic mother), the woman who carries the pregnancy and gives birth to the child (surrogate mother), and the woman who will take care of the child (legal mother). However, based on comparative family law, the legal systems of all countries foresee that only one mother can be presented as a holder of parental rights, so in the case of surrogate motherhood, the woman who will take care of the child and who will be registered as the mother of the child in the Birth Register book.

3.3. Posthuman reproduction and its legal perspective

Technological developments provide the opportunity for the child not only to be born, but also to be conceived after the death of one of the partners. The purpose of posthuman reproduction relates to the opportunity given to individuals to freeze their genetic material in order to use it for posthumous reproduction. So, posthuman reproduction is a biomedical method which enables the child not only to be born, but also to be conceived post mortem: after the death of the father (most frequent cases); after the death of the mother (the father has to hire a surrogate mother); after the death of both parents (the embryo is placed in the uterus of a surrogate mother). Implementing posthuman reproduction can be done in three possible situations. This first method is only possible if the husband freezes the sperm during his life, but also in cases where the wife or a close family member request that the sperm be taken after the husband's death (during the 24 hours after death, by the process of electro-ejaculation, semen can be frozen and used *postmortem*).[38]

The second situation of posthumous reproductive application is the freezing of the egg cells by a woman suffering from a disease, after whose death the frozen and then fertilized egg with her husband's sperm will be implanted in the womb of the woman carrying the baby (the surrogate mother).[39]

The third situation is that of the freezing of the embryo and implantation of it in the womb

[31]Available online at: http://hudoc.echr.coe.int/eng#{'fulltext':['Labassee'],'documentcollectionid2':['GRANDCHAMBER','CHAMBER'],'itemid':['001-145180']} (accessed on May 15, 2021).
[32] Available online at: http://hudoc.echr.coe.int/eng?i=001-151104#{'itemid':['001-151104']} (accessed on May 15, 2021).
[33] Available online at: http://hudoc.echr.coe.int/eng?i=001-151103#{'itemid':['001-151103']} (accessed on May 20, 2021).
[34] Available online at: http://hudoc.echr.coe.int/eng-press?i=003-4865500-5943678#{'itemid':['003-4865500-5943678']} (accessed on May 20, 2021).
[35]Available online at: http://hudoc.echr.coe.int/eng?i=001-151102#{'itemid':ë'001-151102']} (accessed on May 20, 2021).
[36]Available online at: http://hudoc.echr.coe.int/eng#{'fulltext':['campanelli'],'documentcollectionid2':['GRANDCHAMBER','CHAMBER'],'itemid':['001-151056']} (accessed on May 20, 2021).
[37] For the fragmentation of parentage by assisted reproduction, See more at Richard F Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parenthood*, p. 602.
[38] Arta Selmani-Bakiu, *Posthumous Reproduction: Legal Status of the Child and Contradictions of Legal Norms in the National Legislation of RNM*, p. 616.
[39] Ibid.

of another woman who will bear and give birth to the child after the death of the genetic parents. With regard to freezing or subsequent use of eggs, this procedure is relatively rare, given the reduced quality of eggs after unfreezing, as well as due to the possible abuse that may occur, namely the risk of exploitation of women, but also due to the small number of children born in this way, so it cannot be said with certainty, as it is possible with the use of frozen semen or embryos, whether the use of such eggs may affect the health of the child born through this method.[40] Cryopreservation of reproductive cells can be done even when the husband and wife are not planning to have children in the near future.

Posthuman reproduction is also regulated by the BAF Law. RNM is one of the few countries in Europe where posthumous reproduction is allowed and regulated by the Law on BAF, adopted in March 2008.[41] According to article 33 of this law "*A husband and wife who according to medical indications or experiences in medical science are at risk of infertility for health reasons, within an authorized health institution and with their written statement may preserve their sperm, egg cells, or tissue from the ovary or testicles, for personal use. In the event of the death of the husband, assisted posthumous biomedical fertilization is permitted with his prior written consent, not later than one year after his death."* The law stipulates that posthumous fertilization is allowed with the consent of the sperm donor in writing form. The law does not provide a more precise explanation of the type and nature of the written consent, so that it can be drawn up personally by the donor, without the presence of other persons or the presence of a state body. Given the great importance and consequences that such a statement may cause, it must be in the form of a notarized statement, in order to ensure greater legal certainty and to prevent situations when some persons (possibly other children of the testator) will dispute the validity of this statement. In addition, its content and form must be accurately predicted so that there is no doubt in the sperm donor's true, free and conscious will to become a father after his death.[42]

Even in the case of the implementation of posthuman reproduction, certain legal contradictions arise. If posthuman reproduction is applied and the child is born after the death of the father for a period longer than 300 days, then that child will have the status of illegitimate child (according to current family legislation) due to the fact that the marriage has ended with the actual death of one by spouses. The same situation is when spouses are not married. In this situation, in order to prove paternity, the procedure provided by the Law on Family must be developed. The paternity of a child born out of wedlock (in posthuman reproduction) can be accepted before the birth of the child. Proof of paternity is of particular importance for the identity of the child and for establishing the legal connection between the child and the gender relatives of the deceased father.

The other problem lies in the legal-hereditary status of the child born postmortem. According to Article 122 of the Law on Inheritance, heirs can only be a person who was born alive at the time of the testator's death or who was conceived during the testator's lifetime (*nasciturus pro iam nato*). Due to the fact that in posthuman reproduction, the child is conceived after the death of the testator, he/she cannot be considered heir. The authors recommend that this legal choice be changed and the hereditary right of children engaged in posthuman reproduction be recognized so that they can inherit according to the same rules as married and illegitimate children. Discrimination of children according to the moment of conception is not acceptable. These children are born without one parent, in most cases without the father, which means that they will live in a single-parent family (until the mother does not enter into a new marriage), without the care, love of the father,[43] hence the denial of paternity will cause not only legal problems for proving the same but also psychosocial problems and problems of family identity in the child.

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[40] G. Pennings, G. de Wert, F. Shenfield, J. Cohen, P. Devroey and B. Tarlatzis, *Task Force on Ethics and Law 11: Posthumous assisted reproduction*, pp. 3050-3053 cited by Arta Selmani-Bakiu, *Posthumous Reproduction: Legal Status of the Child and Contradictions of Legal Norms in the National Legislation of RNM*, p. 616.

[41] Dejan Mickovik, Elena Ignovska, Angel Ristov, *Новите репродуктивни технологии и правото (New reproductive technologies and law)*, p. 387.

[42] Ibid, p. 389.

[43] See more at: Dejan Mickovik, *Posthumnata reprodukcija i naslednoto pravo*, 2010.

4. International documents and current legal position of the best interest of children born through artificial reproduction

The right to procreation in the function of founding a family is a guaranteed and protected right as a fundamental human right with all international documents, including the Universal Declaration of Human Rights and the ECHR. On the other hand, the strong need of potential parents to have their genetical children is expressed in terms of the concepts of reproductive freedom and human rights. Another issue to be discussed is the reproductive freedom against the best interests of children. The question that arises is whether one has an absolute right to become a parent? Does this human right extend only to natural reproduction or encompass all sorts of biomedical methods for conceiving a child?[44]

The principle of the best interests of the child is not a fundamental principle in the Law on Family in the RNM. Problems related to genetic identity are expressed in cases of incompatibility of legal and biological parenting 1) when the child is conceived with biomedical methods, especially when his conception is made with donated genetic material; 2) cases of adoption; and 3) illegitimate children whose motherhood/fatherhood is unknown. So, in these situations the biological status of the child does not match his legal status, and this is because the child is not genetically related to his legal parents. Therefore, in this regard, the issue of the right to recognition of genetic identity is raised. The right to know genetic origin is an important element in determining the identity of a person who has the right to receive information to verify the truth about his or her biological parents. An important aspect is to know the facts about the biological origin, but in addition to this the medical aspect is also important, to learn the medical history of the family as well as the essential information that has to do with the genetics of the donors. Understanding genetic origin is also of particular importance in preventing incest relationships between gender relatives.

Law on family foresees the concealment of the truth of biological origin. The Law on family prohibits children engaged in biomedical methods[45] and adopted children[46] from having the right to initiate a procedure for proving paternity/maternity. These legal provisions, however, deserve criticism, mainly for the fact that they are contrary to Article 7 paragraph 1[47] and 8[48] of the UN Convention on the Rights of the Child which guarantees the right of the child to have information on his genetic origin and his identity, as well as in contradiction with article 8 paragraph 1[49] of the Convention for the Protection of Human Rights and Fundamental Freedoms which guarantees the right to respect for private and family life. The child's right to recognition of his or her origin is also guaranteed by other international documents such as: The Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry,[50] European Convention on the Adoption of

[44] See more at: Arta Selmani-Bakiu, *Posthumous Reproduction: Legal Status of the Child and Contradictions of Legal Norms in the National Legislation of RNM*, p. 622.

[45] See article 62 of the Family Law Act, Determining the paternity of a child conceived by artificial insemination is not allowed.

[46] See article 75 of the Family Law Act, it is not allowed to establish or dispute motherhood and paternity in the case when the parental relationship was established by adoption.

[47] The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents. Convention on the Rights of the Child, 1989, available online at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed on May 25, 2021).

[48] States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his/her identity. Convention on the Rights of the Child, 1989, available online at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx (accessed on May 25, 2021).

[49] Everyone has the right to respect for his private and family life, his home and his correspondence. European Convention on Human Rights, 1950, available online at: https://www.echr.coe.int/documents/convention_eng.pdf.

[50] See article 30 of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry, 1993, The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved. They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State, available online at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=69.

Children.[51] The right of the child to know his or her origin is introduced as one of the principles set out in the White Book. According to Article 28 of the White Book, the interest of the child to know his biological origin should always be considered. In fact, many cases have been brought before the European Court of Human Rights precisely because of the violation of this right by the signatory states of this convention.[52]

The interest of the child is also not respected in the case of posthuman reproduction. As mentioned above, children born post mortem are discriminated against according to the moment of conception. The current legal choices need to be changed and the right of children conceived in posthumous reproduction to be presented as heirs and to be able to inherit according to the same rules as married and illegitimate children, as well as the statement given in the case of freezing genetic material to be taken as a legal basis for the fatherhood/motherhood of the child after their birth. Equal treatment of children is imperative for the realization of the rights and interests of children, a principle which should be incorporated in the Law on Family and the Law on Inheritance of the RNM.

5. Conclusions

New reproductive technologies disprove the legal-historical theory that the child can be born only through the biological process as a result of the intimate relationship between a man and a woman and that the child can have only one mother and father. The serious dilemmas that bioethics imposes on us and about which legislators must find answers to the dilemmas and legal regulation are as follow: issues of respect for the right to anonymity of genetic material donors, the rights of users of biomedically assisted fertilization, legal status of children born through these methods, parental rights, conflicts arising from the child's right to know his biological parents and the right of donor's anonymity, regulation of the possibility of conducting scientific experiments with human embryos, preventing the commercialization of the reproductive process, redefining the concept of family and parenting, as well as a number of other issues.[53] These are just some of the family-law aspects that link bioethics to family law. Therefore, in legal terms, bioethics must provide answers to the questions which impose the rapid developments of science and technology, but which ethics blocks. The right must establish a balance between what is permissible in favor of improving human life and what is forbidden in terms of destroying the natural aspect of the continuity of life, always considering human ambitions, potential and energy regarding the implementation of scientific and technological achievements.

As mentioned above, new reproductive technologies, especially surrogate motherhood, in contemporary societies have influenced the "fragmentation" of the concept of motherhood and the emergence of many psychological, ethical, philosophical, moral and legal dilemmas, the answers to which should not affect the best interest of children born through these methods but also of users who establish families through these methods. Therefore, as a result of the application of these methods for the birth of children, in family law there is a need to redefine the legal concepts of family and parenthood. For example, in the case of the birth of a child through any of the methods for artificial reproduction, the issue of genetic parenting is questioned, therefore the family law must provide an answer regarding the motherhood/fatherhood of that child. It has been proven that with the application of artificial reproduction methods, the biological concept of childbirth is no

[51] See article 22 of the European Convention on the Adoption of Children (Revised), 2008, available online at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680084823 (accessed on May 27, 2021).

[52] The cases submitted to the ECHR for the protection of the right to personal identity refer precisely to the provisions of Article 8 of the ECHR. Namely, many cases related to establishing or disputing paternity through DNA testing have been reviewed before the ECHR, in order to establish the biological connection of the father with the child, all in order to find out the origin. For example, the case of Mikulić vs. Croatia, similar to the case of Mizzi vs. Malta, the case of Shofman vs. Russia, or the interesting case of Jäggi vs. Switzerland - in which case the plaintiff states that he was not allowed to perform *post mortem* testing- DNA tissue testing of the deceased he believed to be his father to determine the biological link. See more at Arta Selmani- Bakiu, Emine Zendeli, *Право на детето да го знае своето потекло (The child's right to know his or her origin)*, p. 243.

[53] Emine Zendeli, Arta Selmani-Bakiu, Dejan Mickovik, Angel Ristov, *E drejta familjare*, p.100.

longer unique, therefore these methods impose the change of the traditional concept of parenthood.

Through the analysis of national legislation (family and biomedical) the authors are of the opinion that the Law on family of the RNM has a lot of space to be reformed and leaves opportunities for a serious initiative about its changes and additions, in terms of including the principle of the best interest of the child also in family and parental relations. The principle of respect for the best interests of the child also includes the right of the child to have access to information concerning his or her biological parents or his or her genetic background. This right should be raised to the level of fundamental rights, so that if the child wants and has interest and need, to be given access to information about his/her origin, while when it comes to biomedical fertilization, regardless of the right for the anonymity of the donor, the child has the right to access information of a genetic nature. Advocates of the idea of preserving privacy, make a horizontal extension of the right to privacy of parents and the right to anonymity of donors of genetic materials. However, by not ignoring the rights of anyone and not based on moral and ethical prejudices, the authors give priority to the rights of children over the rights of third parties, always in favor of the realization of the principle of the best interest of the child. These changes and additions that are constantly proposed by experts dealing with the science of family law, should ensure a harmonization of family and biomedical legislation with international conventions ratified by the RNM. Also, the standards set in the national legislation should be carefully applied in combination with the principle of respecting the best interests of the child in situations when it comes to the application of new reproductive technologies.

Another issue raised by the authors in this text and which they also justified is the liberalization of the Law on BAF in terms of gender equality and marital status of users of rights by BAF for all methods of artificial reproduction technology.

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