Chapter 9

Serbia: Assisted Reproductive Technologies – Liberal or Restrictive Approach

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Abstract

In this chapter, the author analyses Serbian legislation on Assisted Reproductive Technologies (ART) in comparison with the regulation of some European countries, especially where there are discrepancies in regulation. In particular, the following issues are presented: which institutions can perform ART and who covers the costs, which procedures are allowed and which are not, and who the beneficiaries (subjects) of ART are. Special attention is given to children's rights and interests in relation to ART (e.g. the child's right to know his/her biological origin, and the child's right/interest in having two parents).
The court practice on ART in Serbia and comparatively, as well as the court practice of the European Court for Human Rights, is presented.

Keywords: ART, child, rights, motherhood and fatherhood, origin

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1. Policies and Social Attitude Regarding Medical Help Through ART

In 2009, the Law on Treating Infertility by Biomedically Assisted Fertilisation Procedures[1] was adopted, followed by the adoption of the Law on Biomedically Assisted Fertilisation[2] in 2017. What is characteristic of both the 2009 law and the current one is that there was no 'public discussion on the issues raised by the application of biology and medicine, and the answers that should be given to them', as foreseen by the Convention on Human Rights and Biomedicine,[3] to which Serbia is a signatory. Given that these are sensitive issues that require education about the possibilities and benefits they offer, they also necessitate public awareness campaigns to prevent the stigmatisation and discrimination of children born through ART techniques.

In Serbia, certain issues in the field of assisted reproductive technology (ART) were initially regulated by the Family Act 2005.[4] In 2015, Serbia adopted the Draft Civil Code, which also includes provisions related to ART. The most important of these is the provision allowing for the possibility of surrogate motherhood.[5] This procedure would be permitted only if conception is not possible between the intended parents through natural means (sexual intercourse), or with the help of other biomedically assisted methods, or if natural conception or other assisted methods are not desirable due to the serious risk of transmitting a hereditary disease to the child.

Since the publication of the Draft, several public debates have been held, with the issue of surrogacy provoking the most controversy and diverging opinions. Some even argue that the failure to adopt the draft law was primarily due to the inclusion of surrogacy. In response to conflicting public reactions, an expert meeting on surrogacy, titled 'Surrogate Motherhood – Pro et Contra', was held in 2019, organised by the Ombudsman of the Province of Vojvodina.[6] The goal of the meeting was not to take sides in the debate but rather to provide a balanced overview of the key arguments for and against surrogacy. No concrete or final consensus on surrogacy emerged from the discussions.

1 *Zakon o lečenju neplodnosti postupcima biomedicinski potpomognutog oplođenja*, Official Gazette of the Republic of Serbia No. 72/2009.

2 *Zakon o biomedicinski potpomognutoj oplodnji*, Official Gazette of the Republic of Serbia No. 40/2017 and No. 113/2017.

3 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 (ETS No. 164).

4 Family Act, Official Gazette of the Republic of Serbia No. 18/2005, No. 72/2011, and No. 6/2015.

5 See Arts 2272–2281 of the Draft Civil Code, Government of the Republic of Serbia, Commission for Drafting the Civil Code, Belgrade, May 29, 2015.

6 Ombudsman of Autonomous Province of Vojvodina, 2019. The author of this report participated in the expert meeting.

This lack of clarity may not be surprising, considering that the Serbian public is not sufficiently familiar with certain ART-related issues. This conclusion is supported by a 2018 research study conducted in Serbia, which aimed to assess public attitudes toward basic issues related to various assisted reproductive techniques.[7]

A sample was drawn from the adult population of the Republic of Serbia that can be considered highly representative, both quantitatively and qualitatively. Specifically, the sample included more than one thousand respondents, reflecting the true and complete demographic picture of Serbian society across a range of sociodemographic criteria. The following section presents some of the results from this research.

To better understand the social reality surrounding the issue of surrogacy in Serbia, the information gathered in the research is particularly significant. About 42% of respondents support the introduction of this procedure, while 31% are opposed. However, 27% of respondents stated that they 'don't know exactly what it is'. This suggests that, before surrogacy is potentially introduced into the Serbian legal system, there would need to be broader public awareness campaigns to educate and familiarise the public with the issues surrounding surrogacy.

Among those who were unsure about what surrogacy entails, the majority were men, respondents over 60 years old, and those with only an elementary school education. Among citizens who are familiar with surrogate motherhood, 31% do not support its introduction in Serbia, while 42% are in favour of it. Support for the introduction of surrogacy is higher among women under 45 years of age, those with at least a high school diploma, and those living in urban areas.

Given the predominantly traditional views in Serbian society, where even the issue of infertility is often not openly discussed, the results regarding the use of donated materials are not surprising.

One of the questions addressed women's willingness to use donated eggs. Nearly half of the female respondents (49%) indicated they would use someone else's egg if no other method of conception were possible. A third of women (33%) stated that they would not use someone else's egg, while 18% of women were unsure on this matter.

In contrast, men expressed more divided opinions on the issue of using someone else's sperm if no other method of conception were possible. 34% of men said they would use someone else's sperm, 31% were undecided, and 35% of men answered negatively.

If a child were conceived using donated genetic material, a third of the respondents would not tell their child the truth about it. Interestingly, 41% of respondents stated that they would tell their child the truth about the method of conception.

A step further in communicating the truth about conception through the use of donated genetic material to the immediate environment (i.e. relatives and friends) is

7 The research was conducted for the purpose of the doctoral dissertation titled 'Child's Rights in the Field of Medically Assisted Reproduction', by candidate Sandra Samardžić. See Samardžić, 2019.

as follows. About 37% of respondents would not tell their friends and relatives that their child was conceived using donated genetic material. 35% of respondents would share this information with friends and relatives – with support being more common among respondents under 45 years of age. As the level of education increased, so did the percentage of respondents willing to share this information. 28% of respondents were unsure how to answer this question.

Given the relationship between the previous two questions – one concerning disclosure to the child and the other concerning disclosure to relatives and friends – it is important to compare the responses. The discrepancy between those willing to tell the child but not the wider social circle could create significant developmental challenges for the child. There is a noticeable difference, ranging from 5 to 7 percentage points (about 10–15% of the sample), indicating that people are more willing to share the truth with the child than with the broader social environment.

While the Serbian Law on Biomedically Assisted Fertilisation permits the use of donated genetic material, this form of assisted reproduction has only recently been implemented. The primary reason for this delay was the lack of a central bank for reproductive material; another important factor, which persists even today, is the shortage of donors. While it is difficult to accept that no individuals are willing to donate their genetic material, the issue largely stems from public ignorance about the existence of such a possibility in Serbia, in addition to insufficient technical infrastructure. Currently, Serbia imports most of its reproductive material from Spain.

The research also concluded that 31% of Serbian citizens believe it is unjustified for a woman without a partner to use donated genetic material to become pregnant. This opinion is more common among respondents over 60 years old. Just over half of respondents, however, believe that it is justified for a woman to use donated genetic material in such a case. This view is more common among women and respondents under 60 years of age.

Concerns that the ability to choose a child's gender could lead to gender discrimination are justified by the fact that, if given the option, parents may choose male children. Based on the survey data, these concerns appear to be valid. Specifically, 22% of respondents would choose the gender of their child if they could, with 8% preferring a boy and 14% preferring a girl. A more dramatic gender disparity appears when examining the responses of men versus women. As many as 20% of male respondents would choose a male child, while only 4.4% would prefer a girl. Among women, a significantly higher percentage (almost 12%) would choose a girl, compared to just 8.6% who would choose a boy. As shown, men are almost five times more likely to prefer a male child, while the difference for women is much less pronounced.

Finally, just over a fifth of respondents (21%) would choose specific characteristics for their child (e.g. hair colour, eye colour, IQ, etc.). 60% of respondents would not do this, while 19% of citizens were unsure how to answer this question.

2. Constitutional Provisions

One of the most important constitutional principles in connection with ART is the principle of free decision regarding childbirth. Art. 63 of the Serbian Constitution of 2006[8] stipulates: 'Everyone shall have the freedom to decide whether they shall procreate or not. The Republic of Serbia shall encourage the parents to decide to have children and assist them in this matter'.

The principle of free decision regarding childbirth encompasses the right to have children or not, the decision on the number of children, and the interval between births.

This principle was introduced for the first time by the 1974 Constitution of the Republic of Yugoslavia. Art. 191 provided for free decision regarding childbirth as a human right, which could be restricted only on the grounds of health protection.

The principle of free decision regarding childbirth in contemporary society is exercised in accordance with advancements in medicine and technology. In this regard, it is important to note that the Serbian Constitution explicitly stipulates one restriction on the use of biomedicine, which is the cloning of human beings.[9]

The principle of free decision regarding childbirth is also stipulated in the Family Act. Art. 5(1) states: 'The woman has the right to freely decide on birth'.

It should be noted, however, that this formulation encompasses only the woman's right, whereas other rights that constitute family planning are not stipulated. Men, as subjects of particular rights, are not mentioned (e.g. the right to medical treatment to cure infertility). Additionally, the rights of women and men which they exercise jointly, such as access to artificial reproduction technologies, are also not stipulated. Given the formulation accepted in the Constitution – 'everyone shall have the freedom to decide whether they shall procreate or not' – it is obvious that the provision in the Family Act is not sufficiently comprehensive. The provision is accurate only if the right to free decision regarding childbirth actually means free decision if the woman is already pregnant.

Another important principle is that every child has a right to know his/her origins.[10]

In comparative European law, the right to know one's biological origin is recognised as a constitutional category. For example, in Switzerland,[11] there is a provision which guarantees this right. In Germany, in a case concerning a child's right to contest parentage, the Constitutional Court expressed the opinion that children have the right to know who their parents are.[12]

8 The Constitution of the Republic of Serbia was adopted in 2006, Official Gazette of the Republic of Serbia No. 98/2006.
9 Art. 24(3). More on cloning in: Macintosh, 2005. p. 272.
10 Art. 64(2).
11 Guillod, 1993.
12 Frank, 1993.

The Serbian Constitution does not contain a provision on the right to respect for private and family life. Historically, during the period when the state was Serbia and Montenegro, the Constitution Charter on the State Union of Serbia and Montenegro, specifically the Charter on Human and Minority Rights and Civil Freedoms (which was part of the Constitution Charter), contained a provision on this right.[13] It is not clear why a similar provision was not stipulated in the 2006 Constitution of Serbia.

Nevertheless, the importance of the right to respect for family life is recognised in the Family Act. Art. 2(2) states: 'Everyone has a right to have his/her family life respected'.

The respect and protection of human dignity is stipulated in Art. 23 of the Constitution: 'Human dignity is inviolable and everyone shall be obliged to respect and protect it. Everyone shall have the right to free development of his personality if this does not violate the rights of others guaranteed by the Constitution'.

The prohibition of discrimination is stipulated in Art. 21 of the Constitution:

> All are equal before the Constitution and law.
>
> Everyone shall have the right to equal legal protection, without discrimination.
>
> All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.
>
> Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.

The inviolability of physical and mental integrity is stipulated in Art. 25 of the Constitution: 'Physical and mental integrity is inviolable. Nobody may be subjected to torture, inhuman or degrading treatment or punishment, nor subjected to medical and other experiments without their free consent'.

It is very important, with regard to the application of ART, that the Constitution forbids using medical experiments without the free consent of the individual who is the subject of medical experiments.

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, adopted by the Council of Europe (Oviedo Convention), was ratified in 1997. In Serbia, the Oviedo Convention has been in force since 2011. The purpose and object of the Convention are the protection of the dignity and identity of all human beings and the guarantee

13 Art. 24. Charter on Human and Minorities Rights and Civil Freedoms, Official Journal of Serbia and Montenegro No. 1/2003 and No. 6/2003.

of respect for their integrity and other rights and fundamental freedoms, without discrimination, in the context of biology and medicine.[14]

The Convention stipulates that the interests and welfare of the human being shall prevail over the sole interest of society or science.[15]

Parties to the Convention, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.[16]

Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards.[17]

Such interventions may only be carried out after the person concerned has given free and informed consent.[18]

This person shall be provided with appropriate information beforehand regarding the purpose and nature of the intervention, as well as its consequences and risks.[19]

3. Medical Regulation of ART

The Law on Biomedically Assisted Fertilisation from 2017 defines the health services authorised to perform ART. These include both state clinics and private clinics. Specifically, they comprise: a health institution from the Health Institutions Network Plan adopted by the Government that performs health activities in the field of gynaecology; a privately owned health institution that performs health activities in the field of gynaecology; and private practice clinics operating in this field.[20] Applications to perform ART shall be submitted by a health institution or private practice to the Directorate for Biomedicine. The Director of the Directorate for ART can revoke the licence if, among other situations, during continuous quality monitoring, it is determined that the quality of ART activities of the health institution or private practice is below the established national quality standards. The national quality standards are adopted by the Minister for Health, on the proposal of the Republic Expert Commission for ART.[21] The Centre for ART and the Bank must establish and manage a quality system according to the principles of good practice. The quality system must contain at least standard operating procedures, guidelines, a training

14 Art. 1 of the Convention.
15 Art. 2 of the Convention.
16 Art. 3 of the Convention.
17 Art. 4 of the Convention.
18 Art. 5(1) of the Convention.
19 Art. 5(2) of the Convention.
20 Art. 14, Law on Biomedically Assisted Fertilisation.
21 Art. 16(5), Law on Biomedically Assisted Fertilisation.

manual, reporting forms, donor records, and data on the final destination of reproductive cells, tissues, and embryos.[22]

Since 2020, procedures under the Law on Biomedically Assisted Fertilisation have become more widely available. Stimulation procedures are now free of charge without limitation, as are three embryo transfers for women until the age of 43 (now extended to 45).[23] For a second child, two stimulation procedures and one embryo transfer are free of charge.

3.1. Medical Technologies

The Law on Biomedically Assisted Fertilisation (2017) defines biomedically assisted fertilisation as a controlled procedure of female fertilisation, conducted in compliance with current medical science standards, and distinct from sexual intercourse.[24]

Assisted reproductive technologies (ART) include *in vivo* fertilisation and *in vitro* fertilisation with embryo transfer. There are two forms of insemination: with sperm from a husband or partner (homologous procedure) and with donor sperm (heterologous procedure).[25] Ova donation, embryo donation are permitted; surrogate motherhood is prohibited, and posthumous fertilisation is not regulated.

The Serbian Law on Biomedically Assisted Fertilisation stipulates which ART procedures are prohibited.[26] These include: the donation and use of reproductive cells or embryos without the written consent of the donor; creation of embryos via *in vitro* fertilisation for the purpose of conducting scientific research; generation or maintenance of an embryo in order to obtain genetic material, cells, tissues, and organs for therapeutic purposes and transfer into the human body; use of embryo parts obtained in ART procedures, except in cases when the law expressly permits this; the creation of embryos with identical genotypes, or embryos that are genetically identical to another living or dead individual (cloning); the creation of hybrids or chimeras with the aim of reproduction or transplantation into a human being or a living form of non-human origin; the transplantation of sperm, ova, embryos or foetuses of a non-human form into a human being, or vice versa; transplantation of nucleotide strings into the human genome; the use of a combination of sex cells from two or more donors (e.g. combining sperm from multiple men or using ova from more than one woman) during ART; ART procedures that involve the simultaneous use of donated egg and sperm cells; the creation of *in vitro* embryos for a purpose other than the creation of a human being; the creation of an embryo out of a cell or a cell fragment taken from embryos or foetuses, or transplanting such an embryo into

22 Art. 18, Law on Biomedically Assisted Fertilisation.
23 State Instructions for Conducting Biomedical Assisted Fertilisation, Official Gazette of Serbia No. 06/2020.
24 Art. 3(1).
25 Art. 13.
26 Art. 49.

a woman's body; merging of human gametes with cells not of human origin (except for the hamster test); the development of a human being outside the womb; inclusion of a woman intending to give the child to a third party, with or without receiving a fee or achieving any tangible or intangible benefits; or the offering of surrogacy services by a woman or other individual, with or without charges or other tangible or intangible benefits; implementation of preimplantation genetic diagnosis, or the selection or artificial alteration of the genetic structure of gametes or embryos for the purpose of selecting the child's sex; the creation of identical twins by artificially splitting early embryos; using sperm or ova from a donor who is closely related by blood to the woman being fertilised, regardless of the degree, including collateral relatives up to the fourth degree of consanguinity, in-laws, and adoptive relatives.

It is forbidden to fertilise an egg using a specially selected sperm sample to influence the child's sex, or to conduct a procedure designed to increase the possibility of obtaining an embryo of a particular sex and to determine the gender of the *in vitro* embryo, unless this can prevent a serious genetic disease that is related to the sex of the child.

The Serbian Law on Biomedically Assisted Fertilisation states that the Centre for Biomedically Assisted Fertilisation or the Bank may not give or distribute reproductive cells, tissues, or embryos to an institution or person contrary to the provisions of this law. Persons from whom the stored reproductive cells, tissues, or embryos originate can, for justified reasons, request their transfer to another centre in the territory of the Republic of Serbia, as well as to another institution outside the territory of the Republic of Serbia that is registered to perform biomedically assisted fertilisation procedures, for the purpose of their own treatment.[27]

Semen, ova, and early embryos are kept for no longer than 5 years, with the possibility of a 5-year extension on the request of the persons from whom the genetic material originates. After that, semen cells and egg cells should be destroyed, and early embryos should be spontaneously decomposed and destroyed. After the storage period, the donor should decide on the future of the reproductive material, with the option of donating it to others or consenting to its use in scientific research.[28]

However, the creation of human embryos for research purposes is prohibited under the Convention on Human Rights and Biomedicine.[29] Scholarly literature on research involving human embryos also emphasises the ethical justification of clinical trials in this area.[30]

Three criminal offences are defined in connection with ART in the Serbian Law on Biomedically Assisted Fertilisation. The punishment is from 2 to 10 years; if the consequences are more serious, the punishment is more stringent. If the consequence is death, then the punishment is at least 15 years. The first criminal offence

27 Art. 52 (4,5).
28 Art. 51. More in: Deech and Smajdor, 2007, p. 159.
29 Art. 18.
30 On ethical justification of clinical trials, more in: Živojinović, 2012, pp. 331–347.

is conducting commercial acts with reproductive cells or embryos.[31] The second includes performing ART without written agreement related to the use of reproductive cells or embryos.[32] The third is conducting surrogate motherhood.[33]

3.1.1. Surrogate Motherhood

The legislation of Serbia does not permit surrogate motherhood. The provisions on motherhood in the Family Act do not create the conditions necessary for the use of surrogate motherhood. In the Family Act, there is an explicit stipulation that the mother of a child conceived through biomedical assistance is the woman who has given birth to the child.[34] The Law on Biomedically Assisted Fertilisation prohibits surrogate motherhood.[35] Besides, it is a crime to include in the ART procedure a woman who has the intention of handing over the child to a third party after birth, or offers surrogate motherhood services, regardless of whether financial or any other kind of gain is involved. It is stipulated that the prison sentence is between 3 and 10 years.[36,37] If the criminal offence is committed against a minor, the perpetrator will be sentenced to three to twelve years in prison. If the consequence is serious physical injury to the donor of the reproductive cells, i.e. embryos, the perpetrator will be punished with imprisonment ranging between 5 and 15 years. If the consequence is the death of the donor of the reproductive cells, i.e. the embryo, the perpetrator will be punished by imprisonment for at least 15 years. If the act was committed by an organised group, the punishment is imprisonment for at least 10 years.[38] In comparison to the prior Law on Treating Infertility by Biomedically Assisted Fertilisation from 2007, the prison sentences are now higher.

There is a great difference between a sperm or egg donation and surrogate motherhood, because the latter includes carrying and giving birth to a child. Pregnancy and giving birth to a child lead to the creation of emotional ties between the mother and the child, which can be difficult to break. Problems that may appear, legal and existential, are extremely sensitive and complicated, and in extreme cases, are

31 Art. 64.
32 Art. 65.
33 Art. 66.
34 Art. 57.
35 Art. 49 (18).
36 Art. 66.
37 It further provides: 'If the act from point 1 of this Art. was done to an underaged person, the perpetrator will receive a prison sentence from three to twelve years. If the act from point 1 and 2 of this Art. caused a serious bodily injury to the donor of reproductive cells, i.e. the embryo, the perpetrator will receive a prison sentence for five to 15 years. If the act from point 1 and 2 of this Art. caused death of the donor of reproductive cells, i.e. the embryo, the perpetrator will receive a prison sentence of at least 15 years. The person who occupies him/herself with the criminal activities from points 1 and 2 of this Art., or the act was committed by an organised group, will receive a prison sentence of at least ten years', Art. 73 (2, 3, 4, 5).
38 Art. 66.

opposed to the principle of the child's best interest. Still, surrogate motherhood is, for some couples, the only possible way to have a biologically related child, which may constitute their most important goal in life. Surrogate motherhood could be permitted only in medically justified cases, where it is the sole means for an individual to have his/her own child. All other motives are unacceptable and prohibited, such as aesthetic reasons or professional obligations that make a woman unwilling to undergo pregnancy and delivery. In life, there are often different interests, and the law often has to decide which interests it wants to protect. Which interest will be protected depends on many circumstances, starting with ethical aspects, social acceptability and, in this case, the advancement of reproductive medicine. By permitting surrogate motherhood, we would be choosing to protect the interest of the infertile couple, i.e. the woman who cannot carry out a pregnancy and her husband/partner.

Negative consequences may arise for children born through international surrogacy, particularly if the child was born in a country that allows surrogate motherhood, but the commissioning parents reside in a country where it is prohibited. The most severe consequence in such cases is that the child may become parentless and stateless.

It is important to stress that allowing surrogate motherhood in Serbia might cause ethical problems. Keeping in mind that Serbian society faces significant economic challenges, financial need could become the primary motivation for women to act as surrogate mothers. In contrast, a woman's economic vulnerability might foster reproductive tourism in a negative sense, which could lead to the exploitation of women. If, *de lege ferenda*, the legislator decides to introduce surrogate motherhood into Serbian law, all these facts should be considered and mitigated. For instance, it may be necessary to permit surrogate motherhood only between women who have a strong connection to Serbia (e.g. through nationality, habitual residence, or domicile).

3.1.2. Posthumous Fertilisation[39]

Posthumous fertilisation refers to the situation where a woman wishes to be fertilised using her husband's/partner's sperm after his death, or to have a frozen embryo transferred into her body after the death of her husband/partner.[40]

Some countries have accepted the practice of posthumous fertilisation; on the other hand, some countries explicitly forbid it. There are countries that do not have explicit regulation, so it is not clear at first glance whether the practice is allowed or not. This procedure is allowed in, for instance, the United Kingdom, Spain, Belgium, Greece, and North Macedonia. However, it is forbidden in, for example, France, Italy, and the states of the region of former Yugoslavia (except North Macedonia).

39 Kovaček Stanić, 2019.
40 Ibid.

Serbian Law on Biomedically Assisted Fertilisation does not have explicit stipulations on whether posthumous fertilisation is allowed or forbidden. Thus, it is necessary to keep in mind relevant Arts that exist in this Act. One of the conditions for performing these procedures is that the couple must be cohabitating at the time the ART procedure is performed.[41] Another requirement is to obtain written consent from all persons who are involved in the procedure, especially before starting each procedure.[42] The consent may be withdrawn in writing until the sperm, unfertilised eggs, or early embryos are transplanted into the woman's body. Prior to inserting sperm, unfertilised eggs, or early embryos, the responsible physician should make sure to check whether there is consent or if it has been withdrawn.[43]

There is another provision that should be mentioned in the context of posthumous fertilisation. This provision states that in the ART process, it is permissible to use reproductive cells and embryos that belong to donors who are alive.[44] Although the Law refers to donors, it is difficult to understand why it is necessary for the donors to be alive – particularly since it is very difficult or sometimes impossible to find out whether the donor is still alive, especially if the donation occurred some time ago and the bank (possibly a foreign one) does not have up-to-date information. It is conceivable that the legislator had in mind the use of the husband's or partner's cells or embryos in posthumous fertilisation when drafting this provision.

One of the arguments against posthumous fertilisation is that the interest/right of the child to have two parents in this procedure is not respected. Under Serbian law, single women have access to AID. Thus, in both cases, the child will not have a father *de facto*, but will have only one parent – the mother. *De iure*, in the situation of posthumous fertilisation, the child will have a father – namely the mother's husband or partner. So, the argument that the child will not have a father to take care of him/her in the situation of posthumous fertilisation is not justifiable, as this is equally applicable in the situation of a single woman as the subject of the process. Considering that Serbian law allows single women to have access to assisted reproduction procedures, it could support a *de lege ferenda* argument in favour of permitting posthumous fertilisation.

It has to be noted that succession law in Serbia does not recognize posthumously conceived children as descendants of their deceased biological parents.[45] If a child has the right to inherit from his biological parents, it is necessary for the legislator to take appropriate action to change the existing law in order to clarify whether

41 Art. 25(1).
42 Art. 27.
43 Art. 28.
44 Art. 41.
45 Art. 3 (2) of the Law on Inheritance of Serbia stipulates that a child can inherit the testator only if the child was already conceived at the time of his death and born alive. Zakon o nasleđivanju, Official Journal of the Republic of Serbia No. 46/1995.

such a child would inherit from the deceased parent and their relatives in the case of posthumous fertilisation.[46]

In Serbian court practice, two cases concerning posthumous fertilisation occurred in 2022. The first case concerned a couple named Marković, who wanted a second child using *in vitro* fertilisation. Five embryos were created, two of which were transferred to the uterus, where they did not survive, and three embryos were frozen. However, the husband died as a consequence of Covid 2019. The Primary Court (*Osnovni sud*) in Belgrade (P. 462/22) denied the wife's petition to retrieve the frozen embryos from the clinic. The wife claimed that she had a right to the embryos on the basis of an inheritance decision.

Later, the Higher Court in Belgrade overturned the judgment of the Primary Court and returned the case for retrial to the Primary Court. The Higher Court stated that the wife did not inherit ownership rights over the embryos in question, but rather the rights and obligations arising from the inheritance documents (Gž. 4356/23 Higher Court Belgrade). The Higher Court noted that nothing in the agreements indicated that the plaintiff's late husband had agreed that the plaintiff could independently use and dispose of the embryos, including transferring them to another institution. Thus, the Court was of the opinion that any disposition, use, and transfer of embryos from one institution to another would be contrary to the will of her husband and contrary to Art. 49(1)(1) of the Law on Biomedically Assisted Fertilisation, which prohibits the donation and use of embryos without the written consent of the donor. In addition, the Court was of the opinion that the inheritance decision cannot be used instead of the husband's consent. Besides, the Higher Court stated that an embryo as the result of the voluntary genetic contribution of two persons can be viewed as a 'thing' under civil law, over which a man and a woman have the right to a kind of co-ownership. However, the Court stated that the embryo represented a *sui generis* thing, i.e. a thing of a special kind, so it cannot be completely subsumed under the rules that regulate the legal status of things in civil law. The Higher Court expressed the opinion that the embryos cannot be in the actual possession of the potential parents or third parties, but only in the Laboratory for cryopreservation.

In a subsequent court procedure, the Primary Court (P. No. 4307/23) issued a new decision, which the Higher Court in Belgrade later amended (Judgment of 18/01/2024). In this decision, the Higher Court adopted the claim of the plaintiff and obliged the defendant, Jevremova Hospital, to hand over two frozen embryos to the plaintiff. This transfer was to be executed in such a way as to enable the Woman Health and IVF Centre, North Cyprus, to take over the embryos and store them in Cyprus. The Court expressed the opinion that the plaintiff had acquired the right to independently make decisions related to the disputed embryos. The Higher Court stated that she has the right to request a transfer to another institution registered for the ART procedure based on the fact that she was declared the heir to the rights

46 Kovaček Stanić, Vidić-Trninić and Samardžić. 2017.

and obligations from the Agreements by a final inheritance decision of the Notary Public.

Regarding the Court's opinion that the wife acquired the right to independently make decisions related to the disputed embryos, the question concerning the legal status of the will expressed in the Agreements should be raised. Does the will constitute some kind of right, and is it heritable or not? It has to be stressed that in inheritance law, only rights and obligations of a proprietary nature are considered heritable. On the contrary, consent is an expression of will, and not in itself a property right. In addition, inheritance law holds that only rights and objects existing at the time of death form part of the estate. It is therefore questionable whether embryos fall into the category of property, given their potential to become a human being. The potential of the embryo to become a human being should affect the legal status of an embryo as a 'thing' in law. In addition, it has to be noted that in inheritance law, there is a rule that legacy consists of all inheritable rights that belonged to the testator at the time of death.[47] If the will and embryo are not inheritable, they actually do not consist of the legacy of the testator. Keeping in mind inheritance law and its rules, it seems the argument on which the Higher Court based its decision is not valid.

The second case involved a married couple named Prizrenac.[48] They chose the ART procedure because the husband was diagnosed with testicular cancer. Ten healthy embryos were created, but the husband died in the meantime. The husband made a last will in which he bequeathed the use of the embryos to the wife. The legal process lasted for several years, and at the end, the Higher Court in Niš made a decision in September 2024, which stated that the frozen embryos belonged to the plaintiff (the wife) and that she would be able to use them in Serbia.

It must be said that it is a pity that Serbian courts in these two cases did not use the opportunity to analyse whether posthumous fertilisation is allowed in Serbia or not, but rather analysed whether the wife has the right to get the frozen embryos after the death of her husband.

3.1.3. Donorship of the Genetic Material

According to the Law on Biomedically Assisted Fertilisation, a donor's reproductive cells or embryos can be used restrictively. The single donor's reproductive cells (or embryos of one pair of spouses or extramarital partners) can be used for only one pair of spouses or extramarital partners, or one single woman. In cases where a child or children are born with donated reproductive cells, that is, embryos, the donor's remaining reproductive cells can only be used exclusively for repeated

47 Art. 1(2), Law on Inheritance.
48 More in: Barać, 2023, pp. 438–475.

ART procedures for the same spouses, that is, extramarital partners, or the same single woman.[49]

In Serbian law, the criteria for becoming a donor include being of optimal reproductive age (men up to 40, women between 21 to 34) and being in physical and mental health. The regulations concerning donors' health are very detailed. In addition, the donor cannot be: the owner of the health institution, the doctor who performs the procedure, the embryologist, or another employee of the institution where ART is performed.[50]

At this moment in Serbia, genetic material banks are not established, so genetic material has to be obtained from abroad (e.g. Spain).

There are examples of children being conceived by donated sperm obtained in licensed clinics, only for it to later be discovered that the medical condition of the donor was not fully investigated. One such case was that of 'Donor 9623'. This case concerned Angela Collins and her partner, who used reproductive material offered by a sperm bank in Georgia. The sperm bank described Donor 9623 as a 'man with an I.Q. of 160 who was healthy and working toward his Ph.D'. However, after seven years, Ms. Collins discovered the man's identity through a donor sibling group and found that the donor had a history of mental illness and a criminal record, and had exaggerated his educational accomplishments.[51] The data available to sperm banks can be incomplete and incorrect. Still, a dilemma remains: how can potentially harmful donor information be reliably verified, if at all? For some children born using donated genetic material, the entire procedure is seen only as a question of money: 'There is a huge monster of money and people desperate for children, who don't want me to make it harder for them to buy and sell children'.[52]

3.1.4. Legal Status of Genetic Material and Embryos

According to Serbian Law on Biomedically Assisted Fertilisation, in the ART procedure, all ova taken in the same procedure can be fertilised. The total number of early embryos that are introduced into the woman's body must not exceed the number that, in accordance with modern medical science, professional experience and practice, promises the success of the ART procedure and, as far as possible, limits the risk of multiple pregnancies. The remaining high-quality early embryos obtained in one procedure are stored and can later be introduced into the woman's body in a new ART procedure, in accordance with this law. The number of early embryos that are introduced into the woman's body requires the joint written consent of both spouses or extramarital partners.[53]

49 Art. 30.

50 Regulations on Detailed Conditions, Criteria and Methods of Selection, Testing and Assessment of Donors of Reproductive Cells and Embryos, Official Gazette of Serbia No. 27/2019 and No. 41/2021.

51 See Kovaček Stanić and Samardžić, 2019, pp. 235–250; Samardzic, 2017, pp. 295–312.

52 Alana, the child of a sperm donor and the activist behind Anonymous.

53 Art. 47.

Sperm, ova and early embryos can be cryopreserved and kept no longer than five years, with the possibility of a five-year extension upon request by the genetic material's originators. After that, sperm and ova should be destroyed, and early embryos should be spontaneously decomposed and destroyed. After this period, individuals must decide how to proceed – whether to donate their genetic material to others or to consent to its use in scientific research.[54] However, the creation of human embryos for research purposes is prohibited in Serbian Law on Biomedically Assisted Fertilisation,[55] as well as by the Convention on Human Rights and Biomedicine.[56] One of the important issues connected with research (including research on human embryos) is the ethical justification of clinical trials.[57]

Under Serbian Law on Biomedically Assisted Fertilisation, persons from whom the stored reproductive cells, tissues or embryos originate can, for justified reasons, request their transfer to another centre in the territory of the Republic of Serbia, as well as to another institution outside the territory of the Republic of Serbia that is registered to perform ART procedures, to be used for their own assisted reproduction.[58]

3.2. Beneficiaries (Subjects) of ART

Under Serbian law, married or extramarital (heterosexual) partners should be considered as subjects of medically assisted fertilisation procedures, since there is no regulation for same-sex partnerships in Serbia. It seems that the rights of homosexual partners should not start from reproductive rights. Exceptionally, the right to a biomedically assisted fertilisation procedure is granted to an adult and legally competent woman living alone, provided she is capable of performing parental duties in the best interests of the child.[59] In the case of donor insemination (AID) for single women, the resulting child will not have a father. This outcome is due to a legal rule that paternity cannot be established for the donor. From the family law aspect, the interest/right of the child to have both parents should be considered. If a single woman has access to AID, this interest/right of the child would not be respected. On the other hand, one can argue that a single woman has reproductive rights, including the right to AID. Whether a single woman would have the right to AID or not depends on which of these conflicting rights the legislator of a particular legislation considers more important: the interest/right of the child to have both parents, or the single woman's right to AID.

Serbian legislation stipulates conditions for beneficiaries: potential parents. These conditions are: majority and legal capacity, cohabitation between beneficiaries

54 Arts. 35(2), 51(6), 51.
55 Art. 49(1), item 2.
56 Art. 18.
57 On ethical justification of clinical trials, more in: Živojinović, 2012, pp. 331–347.
58 Art. 52(4), (5).
59 Law on Biomedically Assisted Fertilisation, Art. 25.

(potential parents), and the capacity to exercise parental rights.[60] The ability of a person to exercise parental rights is assessed by considering whether the person is in such a psychosocial state that it can be reasonably expected that he/she will be able to exercise parental rights, in accordance with the law, in the interest of the child.

There is no doubt that spouses/extramarital partners should meet the above conditions. A question arises, however: what will be the way to determine whether these conditions are met or not? It is extremely important that the persons who are authorised to check the fulfilment of the conditions are competent, and it should be ensured that the process does not burden the ART procedure.

In addition to these conditions, under the previous Law on Treating Infertility by Biomedically Assisted Fertilisation of Serbia from 2009, it was forbidden to include in the procedure of biomedical assisted fertilisation a woman who, due to her age and general state of health, was not capable of giving birth, if she was of an age unsuitable for childbearing.[61] The Law from 2017 does not stipulate this condition.

It can be questioned whether this condition was unjustifiably omitted from the current Law or not. Biomedicine is at such a scientific and technological level that it is possible to apply the procedures of biomedically assisted fertilisation to a woman who is not of an age suitable for childbearing, or rather, an age at which childbirth could not happen naturally. However, keeping in mind social circumstances at the present time and the child's best interests, it seems that the decision to perform ART for a woman who is of an unsuitable age for childbearing should be made very carefully. In the Serbian practice of ART, the official opinion of the Directorate on Biomedicine is that the age limit for a woman who uses donor reproductive cells is 50 years.[62]

3.2.1. Informed Consent to ART

In Serbian law, in order to perform ART, the written consent of all individuals involved in the procedure is required before it is started. Consent is given separately for each ART procedure.[63]

The subjects of ART (spouses, extramarital partners or single women) may withdraw their previously given statement of consent prior to inserting sperm, ova, or early embryos into the woman's body (continuing consent). After the withdrawal of consent, spouses, extramarital partners, or single women must give written consent regarding further procedures with reproductive cells, tissues, or embryos. Prior to inserting sperm, zygotes, or early embryos, the responsible physician should ensure that all parties still consent.[64]

60 Law on Biomedically Assisted Fertilisation, Art. 25(1).
61 Art. 26.
62 Information No. 450-310/23-1 from 6 February 2023.
63 Art. 27(1).
64 Art. 28.

In comparison, there are national laws that similarly stipulate that consent can be withdrawn at any time until the embryo is implanted in the woman's body (legislation of Denmark, France, Greece, Switzerland, the UK, by-laws of the Netherlands, clinical practice in Belgium, Germany, and Finland, etc.).

There are national laws that stipulate that a man can withdraw consent only until the moment of fertilisation, and after that, the woman decides for herself whether and when to continue the procedure, for example in Estonia and Italy. Before amendments, Austria permitted withdrawal of the man's consent only until fertilisation. Now, it is possible to withdraw consent until the implantation of the cells into the woman's body.[65] In Spain, a man can withdraw consent only if he is married to the woman undergoing treatment. The Israeli Supreme Court, in the *Nachmani* case, prohibits the withdrawal of a man's consent after egg fertilisation. In Hungary, a woman can continue fertility treatment even after her husband's death or divorce, unless the contrary was stated in previously given consent.

The case of Mrs. Blood is an important instance involving consent for performing the procedure. The facts of the case are as follows. The husband became ill (meningitis) and fell into a coma.[66] At the wife's request, the doctor took sperm from the husband's body. After the death of her husband, Mrs. Blood asked for his sperm to be given to her, with the desire to have his child. The hospital's response was that the sperm had been taken illegally, and the Human Fertilisation and Embryology Agency in the UK (HFEA) refused to allow its use because there was no written consent from the person it was taken from. In the end, after the media accused HFEA of being a bureaucratic institution, Mrs. Blood obtained the sperm and the insemination was carried out abroad. She now has two children. After this case, the law changed to require explicit consent.

Another famous UK case is *Evans v. UK*. The facts of the case are as follows:

> Ms. Evans decided to have some of her eggs removed prior to cancer treatment, and fertilised with her partner's sperm. The embryos were kept in storage while she underwent her treatment. However, the relationship broke down, and Ms. Evans' partner decided that he no longer wanted to have a family with her. He requested that the couple's embryos be destroyed. Ms. Evans embarked on a lengthy court battle to save her embryos and her right to implant them. At each successive turn, she was turned down, despite the sympathy that judges had with her case. In April 2007, her final appeal was rejected... For the man, the judgment was welcomed as an indication that fatherhood is taken as seriously as motherhood, and that reproductive technology is not to be allowed to reduce the role of men to that of mere fertilisation.[67]

65 *Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom* 04.09.2023.
66 Deech and Smajdor, 2007, pp. 101–106, 217.
67 Ibid., pp. 78–79.

The European Court of Human Rights rendered its decision with reference to the margin of appreciation, noting that the issues raised by the case were undoubtedly of a morally and ethically delicate nature. In addition, there was no uniform European approach in the field. Certain states had enacted primary or secondary legislation to control the use of in vitro fertilisation (IVF) treatment, whereas in others, that was a matter left to medical practice and guidelines. While the United Kingdom was not alone in permitting the storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices were applied elsewhere in Europe. It could not be said that there was any consensus as to the stage in IVF treatment when the gamete providers' consent became irrevocable. While the applicant contended that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entailed that her Art. 8 rights should take precedence over J.'s, it did not appear that there was any clear consensus on that point either. In conclusion, therefore, since the use of IVF treatment gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was no clear common ground among the Member States, the margin of appreciation afforded to the respondent State had to be a wide one. The margin extended, in principle, both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it laid down in order to achieve a balance between the competing public and private interests.[68]

4. Family Law Regulation of ART

4.1. Establishment of Motherhood and Fatherhood

For a long time in legal history, the question of who the mother of a child was raised rarely. The principle from ancient Roman law, *mater semper certa est etiam si vulgo conceperit*, was broadly accepted.[69] The mother was the woman who gave birth to the child. In contemporary family law, statutory provisions often establish or define motherhood. This is so in Serbian family law as well. Motherhood resulting from ART in Serbia is regulated in the Family Act.[70] There is an explicit stipulation that the mother of the child conceived with biomedical assistance is the woman who has given birth to the child.[71] The legislator has given primacy to the fact of carrying

68 *Evans v. The United Kingdom* (2007) 46 EHRR 34.
69 Corpus Juris Civilis, Dig. 2.4.5: '*quia semper certa est, etiam si vulgo conceperit*'.
70 More in: Kovaček Stanić, 2010, pp. 147–161.
71 Art. 57(1).

and delivering the child over genetic origin. Regardless of the fact that the child can be conceived with a donated ova (or embryo), the legal mother is the woman who has given birth to the child. That means that even if the child is not carrying her genetic characteristics, the woman who has given birth to the child is the legal mother. The other rule concerns the prohibition of establishing the motherhood of the woman who has donated the ova.[72] The purpose of donating genetic material is that the woman who wants the child, and whose ova cannot be fertilised, obtains an ova from another woman, which is then fertilised with the sperm of her partner. After the transfer of the embryo into the body of the woman who wants the child, she carries and gives birth to the child. In that case, the child carries the genetic characteristics of the woman donor and the partner of the woman who wants the child. Considering that the child will be raised by the woman who delivered the child, establishing the motherhood of the woman who donated the *ova* would not have any purpose. However, if there is a (covered up) case of surrogate motherhood, this stipulation has a much greater significance, because the very mother whose ova is fertilised wants to be the mother.

Serbian legislation does not permit surrogate motherhood. The relevant acts are the Family Act of Serbia and the Law on Biomedically Assisted Fertilisation. The Family Act has not created conditions for the use of surrogate motherhood, as it is stated that the mother is the woman who gave birth to the child. The Law on Biomedically Assisted Fertilisation explicitly prohibits this practice.[73]

The previous law regulating ART in Serbia – the Law on Treating Infertility by Biomedically Assisted Fertilisation – had a provision that stipulated that the woman who gave birth to the child was to be considered as the child's mother.[74] This Law also forbade the establishment of the donor's maternity.[75] In addition, this Law explicitly established who the mother of the foetus was, stating that the mother was the woman who was carrying the foetus, or was carrying the foetus as the result of an implantation of the embryo or sperm or ova in her body/womb in the process of a biomedical assisted conception.[76] It might be said that this kind of solution is unusual in comparative law. The reason for incorporating this provision in the Law by the Serbian legislator is questionable, as it seems unnecessary and legally inexplicable. In addition, the Law forbade contesting motherhood in situations where the ova of the same woman (or early embryo) was used, if she gave consent to this procedure.[77] This provision seems unnecessary because if the ova from the same woman was used for the conception, this woman was the mother, both genetic and gestational, and she did not have any interest in contesting maternity. It would be logical to forbid contesting maternity if the ova of another woman (donor) was used, so if the woman

72 Art. 5(2).
73 Art. 49(18).
74 Art. 65(2).
75 Art. 65(4).
76 Art. 65(1).
77 Art. 65(3).

who gave birth to the child consented to the use of donor ova, she should not have a right to contest biological (genetic) motherhood. The Serbian legislator failed to regulate this situation, however.

In comparative law, the Human Fertilisation and Embryology Act of 1990 of the UK specifically regulates maternity in relation to ova and embryo donation. It is stipulated that a woman who carries or has carried a child born as a result of placing an embryo or sperm and ova cells in her body, and no other woman (27.1), is considered a mother. The bio-ethical laws of France allow and regulate the donation of gametes – both male and female – and embryos. The gamete donation procedure includes giving consent in the presence of a notary or a judge, who informs the parties about the consequences related to the parenthood of the future child.[78] If the embryo of another couple is used, the written consent of all persons is required, and in addition, the judge decides on the use of the embryo, basing the decision on the interests of the future child.[79] Gamete donors (woman or man) must live in a heterosexual union and have children within that union, and consent must also be given by the other member of the couple.[80]

Swedish law, starting in 2005, allows heterologous artificial insemination and in vitro fertilisation for lesbian partners, in addition to partners of different sex. In that case, the woman who gives birth to the child is the child's mother, and the other woman gets the status of parent. The condition is that the procedure is carried out in a state hospital. Consent to the procedure – given either in a registered or de facto partnership – leads to legal parenthood for the consenting woman, equivalent to that of the birth mother. The parenthood of a woman who has given consent must be established in a special way, based on her written acknowledgment with the presence of witnesses or on the basis of a court decision, if there is no acknowledgment. Recognition can be given even before the birth of the child and must be confirmed by the council for social care and the mother who gave birth to the child.[81]

The most recent procedure of ova donation is a donation of only a part of an ova – mitochondrial DNA. In this case, there are three genetic parents of the child: two genetic mothers and a father. Legally, the child has one mother (the woman who delivers the child) and a father. One of the potential outcomes of the recent research is the ability to create a human embryo without any male genetic contribution – by transferring the nucleus of a somatic cell from one woman into an enucleated ovum of another. In that case, the child would not have a genetic father at all.

Marital fatherhood is established based on the legal presumption that the mother's husband is the father of the child (*pater is est quem nuptiae demonstrat*),

78 Art. L152-5.

79 Ibid.

80 Art. L673-2.

81 Provisions of the Children and Parents Code (1949:381) (Föräldrabalken), in particular Section 1, Part 9 as amended by the Act (SFS 2005:434), and the Insemination Act (1984:1140) (amended SFS 2005:443) and the Law (1988:711) on Fertilization Outside the Body (amended SFS 2005:445); Jänterä-Jareborg, 2005.

while non-marital fatherhood is established with acknowledgment or through court proceedings. In other words, according to Serbian law, marital fatherhood is established *ex lege*, while non-marital fatherhood must be established with the acknowledgment of the father or through court proceedings.

The Serbian Family Act regulates the fatherhood of the child conceived through biomedical assistance as well, stating that the mother's husband (or the mother's partner) is to be considered the father of a child conceived through biomedical assistance, provided he has granted written consent to the procedure of biomedical assisted fertilisation.[82] That means, if the mother's husband has not granted written consent to the procedure of biomedical assisted fertilisation with donated sperm, he can contest his fatherhood. If the mother's partner has not granted written consent to the procedure of biomedical assisted fertilisation, he will not be considered as father, as there is no legal presumption that the mother's partner is the father of the child born in non-marital cohabitation.

The fatherhood of the man considered to be the child's father may not be contested, except if the child was not conceived through the procedure of biomedical assisted fertilisation. If a child is conceived through biomedical assistance by donated semen, the fatherhood of the man who donated the semen may not be established.[83] A man considered to be the father of a child conceived through biomedical assistance may initiate action to contest his fatherhood within one year from the day of learning that the child was not conceived through a procedure of biomedical assisted fertilisation, and no later than ten years from the birth of the child.[84]

The ground for establishing legal fatherhood in a case of using the donor's semen (or donated embryo) is consent of the husband/partner to AID (or using embryo donation). The genetic link does not have any impact on establishing fatherhood.

The previous law regulating ART in Serbia – the Law on Treating Infertility by Biomedically Assisted Fertilisation – had stipulated that the father of the child conceived by biomedical assisted fertilisation is the mother's husband or partner if he has consented in writing to the procedure in which his sperm be used. In addition, this Law forbade establishing the paternity of the donor if the donor's sperm was used in the procedure.[85] This Law forbade contesting paternity in the situation of using sperm of the mother's husband or partner, unless there was reasonable doubt that he was not the father, as his sperm was not used in the procedure.[86] This Law, though, omitted to regulate situations where the mother's husband or partner consented in writing to the procedure in which donor's sperm would be used. There is no provision that would forbid contesting paternity in this situation. This omission enables the mother's husband or partner to change his mind regarding AID and initiate

82 Art. 58(1, 2).
83 Art. 58(3, 4, 5).
84 Art. 252(5)
85 Art. 66(1, 3).
86 Art. 66(2).

court proceedings to contest his paternity, leaving the child fatherless, as the Law forbids establishing the donor's fatherhood. Unfortunately, Serbian legislators show a lack of understanding of family law relations that might arise from AID. It is a kind of relief that the existing Law abandoned such controversial solutions on parenthood using ART, as some of them were not just theoretically inconsistent, but contrary to the best interest of a child.

5. Rights of the Child and ART

The use of artificial reproductive technologies for the conception of a child leads to situations where it is necessary to review the traditional postulates of family law. One such rule originates from Roman law, and it concerns protecting the interests of a conceived but unborn child: '*Infans conceptus pro iam nato habetur quoties de commodo eius agitur*'.[87]

In the context of ART, the question arises whether it is possible to consider the protection of the interests of a child who has not even been conceived yet. Should society take into account the interests of the future child, considering the fact that conception occurs through the use of ART, which is regulated by law?

In family law literature, the best interest of the future child is considered in terms of assessing the suitability of future parents; thus, the conditions that future parents should meet are prescribed by national laws. These conditions enable future parents to access ART.

5.1. The Child's Right/Interest to Have Two Parents

When it comes to the interests of a future child conceived through the use of ART, a question can be raised as to whether it is in the interest of the child to have the parental care of two parents. This question is raised in the context of the situation of a woman without a partner using ART. A child born in this way will have only one parent – the mother, both in terms of legal and factual parenthood. In the Law on Biomedically Assisted Fertilisation of Serbia from 2017, as already mentioned, it is stipulated that a woman who lives alone has the right to these procedures, even though this possibility is only exceptional.[88] The law, however, does not specify which cases should be considered exceptional, nor does it state the reasons that would justify exceptionality.

87 Stojčević and Romac, 1980, p. 199.
88 Art. 25(2).

There are examples of legislation that take into account the child's interest in having two parents and provide solutions for its realisation.[89]

The child's psychological interest in having two parents, in the sense of identification with the parents, and developmental interest, in the sense of being brought up by two different people, can be satisfied by the solution that exists in the law of the UK.

This solution is 'supportive parenting'. Single women have to meet the requirement of supportive parenting to have access to ART.[90] To implement this requirement, UK guidelines state:

> Where the child will have no legal father, the centre should assess the prospective mother's ability to meet the child's/children's needs and the ability of other persons within the family or social circle willing to share responsibility for those needs.

Supportive parenting seems like a good solution that enables two persons to be involved in raising the child, and in that way, to respect the interest/right of the child to have both parents.

In Serbian society, family relations are very important for family members and very well developed. Thus, it would not be difficult for a single woman to find a relative who would be able to help her in raising a child. In Serbia, social relations are developed as well. Thus, friends of a single woman would help her. This is the reason why I would suggest introducing the supportive parenting solution in Serbian law *de lege ferenda*.

The material interest of the child to have two parents is reflected in the right to maintenance and the right to inheritance. The right to maintenance is taken into account in German practice. In Germany, this is regulated by professional guidelines issued by the medical boards of provinces (*Landesärztekammern*), which refer to the Model Guidelines on Assisted Reproduction issued by the Federal Medical Council of Germany (*Bundesärztekammer*) in 2006, revised significantly in 2017.[91] According to Art. 3.1.1., assisted reproduction is generally reserved for married couples. A woman without a spouse can be allowed access to ART techniques, but only if the doctor is assured that the woman has a permanent male partner who is willing to acknowledge the paternity of the child to be born.[92] The practice, however, differs significantly from the current regulations. Thus, in Germany, there are clinics that allow access to ART to women who do not have a partner, and the usual practice is

89 More in: Kovaček Stanić, 2020, pp. 121–135.

90 Section 14 (2) (b) of the Code of Practice developed under the HFEA.

91 Richtlinie zur Durchführung der Assistierten Reproduktion of February 17, 2006, para. 3.

92 It is interesting that same-sex partners in Germany have the right to conclude a marriage and to adopt children. Single persons have the right to adopt children as well. However, neither same-sex partners nor single parents have access to adoption under Art. (§ 1741 II 1 BGB).

that medical assistance is conditional on the woman specifying a person who agrees to pay child maintenance; very often, it is the woman's parents.[93]

In some countries, there is a strong opinion that the child's interest in having two parents through the application of ART does exist. As a consequence, a woman without a partner is not allowed access to these procedures (for example, in France and Austria).[94]

In some countries, access to ART is allowed for persons in a same-sex union, bearing in mind the fact that in those cases, the child will have two parents (albeit of the same sex). If it is about two women, the child will have a mother and a second parent, and if it is about two men, the child will have a father and a second parent. Such is the situation, for example, in Sweden and Austria. Swedish law has allowed heterologous artificial insemination and *in vitro* fertilisation for lesbian partners since 2005.[95] In contrast, a woman without a partner did not have the right to access ART until 2016.[96]

The Austrian Constitutional Court, while considering the solution of the Austrian law on which persons have access to ART, made a decision enabling access to *in vitro* fertilisation for women who are in a same-sex union, through donated sperm cells. However, that possibility was not provided to women without a partner (decision of the Constitutional Court from January 2015).[97]

As far as posthumous fertilisation is concerned, one of the arguments against it is the fact that the child would not have a *de facto* father. *De iure*, the father is the mother's husband or partner. So, the interest of the child to have two parents who will take care of him/her is the reason why some countries do not allow posthumous fertilisation. One of the arguments in favour of posthumous fertilisation is the respect of the reproductive right of a woman to have a child, regardless of the fact that her husband/partner is not alive.

As said before, in Serbian law, apart from married or heterosexual partners who are considered as subjects of medically assisted fertilisation procedures, exceptionally, an adult and legally capable woman living alone who is able to perform parental duties in the best interest of the child is entitled to the right to a biomedical assisted fertilisation procedure.[98] Donor insemination (AID) for a single woman results in a child who legally has no father, as paternity of the donor cannot be established. The child thus has only one legal parent – the mother. From the family law aspect,

93 Lettmaier, 2019, p. 30.

94 Kovaček Stanić, 2018.

95 *Föräldrabalken* (1949:381), Chapter 1, Part 9 (SFS 2005:434); Law on insemination (1984:1140) (amended SFS 2005:443); and Law on Fertilisation Outside the Body (1988:711) (amended SFS 2005:445); *Jänterä-Jareborg*, 2006.

96 Assisted Pregnancy for Single Women, Parliamentary Committee Report, 2015/16, SoU3. 22.01.2012.

97 *Fortpflanzungsmedizingesetz* § 14: Donor sperm cells can be used for ART for at most three married couples or couples in unions similar to marriage.

98 Art. 25.

the interest/right of the child to have both parents should be considered. If the single woman has access to AID, this interest/right of the child would not be respected. On the other hand, one can argue that a single woman has reproductive rights, including the right to AID. This situation has some similarities with posthumous fertilisation. In both cases, the child will not have a father *de facto*, he/she will have only one parent – the mother. *De iure*, in the situation of posthumous fertilisation, the child will have the father as the father is the mother's husband or partner. So, the argument that the child will not have a father to take care of him/her in the situation of posthumous fertilisation is not justifiable, as this is the same in the situation of a single woman as a subject of the process. Bearing in mind that Serbian law allows a single woman to have access to assisted reproduction procedures, it could be argued that posthumous fertilisation in Serbian law should be allowed *de lege ferenda*.

In the case of posthumous conception of the female partner with the fertilised cells of the deceased spouse/partner, the father of the child is to be considered the man whose sperm cells were used for fertilisation, and who is also the biological father of the child, provided that he agreed to this type of fertilisation.[99] However, succession law in Serbia does not recognize posthumously conceived children as descendants of their deceased biological parents.[100] Arguing that the child should have the right to inherit from biological parents, we consider it necessary for the legislator to take appropriate action to change the existing law in order to guarantee the right of the child to inherit from his deceased parent and his relatives if posthumous fertilisation in Serbian law *de lege ferenda* would be allowed.[101]

5.2. The Child's Right/Interest to Know His/Her Biological Origin

There are three basic interests of an individual in knowing his or her genetic origin: a psychological need for identity, a desire to know medical history, and an interest connected to the bloodline, which is material rather than psychological. The psychological interest is expressed in the desire and need to know one's parentage. This interest is most pronounced during adolescence, when the person's identity is formed. The medical interest is essential in starting a family, because of the potential genetic defect that may be inherited by the future child of a particular person. This interest gains importance with the realisation that, if a way of life is adopted according to the potential risk of hereditary diseases running in certain families, the occurrence of disease may either be prevented or delayed, or the disease may occur in a less aggravated form. Information on the course of the disease and the results of its treatment, provided to the relatives of the deceased can be of great use to doctors.

99 Kovaček Stanić 1997, Kovaček Stanić, 2010; Kovaček Stanić, 2021.

100 Art. 3, para. 2 of the Law on Inheritance of Serbia stipulates that a child can inherit the testator only if the child was already conceived at the time of his death and born alive. Law on Inheritance, Official Journal of Serbia No. 46/1995.

101 Kovaček Stanić and Samardžić, 2019.

The third, material interest is expressed in the right of the child to receive maintenance and inherit property from the parents and other relatives. It may be said that the medical and material interests are by nature rational, while the psychological interest is predominantly irrational.

The provisions of the Convention guarantee the right of the child to identity formation[102] and preservation.[103] Art. 7(1) states:

> 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.

The Convention was ratified by former Yugoslavia in 1990 and is in force today in the Republic of Serbia.

The Act on Insemination of Sweden, back in 1984, introduced the right of a child whose conception was the result of artificial insemination by donor sperm to know the identity of the donor. That was a departure from the principle of donor anonymity, and such a solution may be called revolutionary in its approach to ART. In Sweden, the donation of ova was introduced in 2002, and the child also had the right to know the identity of the donor of the ova. A number of countries have also introduced the right of a child to know the identity of the donor. For instance: the UK, Austria, the Netherlands, and Switzerland.

Sweden stipulated that a child obtains the right to get information on donor identity when he/she reaches the necessary level of maturity. Other countries have also introduced this law, with ages varying: from the age of 14 in Austria, 16 in the Netherlands, and at 18 without any conditions – or at another age if material interest is proved – in Switzerland. The data on the donor should be kept for up to 80 years from the birth of the child in the Netherlands and Switzerland.

There are a number of countries that have retained the principle of secrecy regarding information on donors. For example, Serbia, Russia, and France. In Russia, under the Federal Law on the Basic Health Protection of the Citizens in the Russian Federation, it is stipulated that in the usage of donor reproductive cells and embryos, citizens have the right to obtain information on the medical, medical-genetic examination of the donor, his race, nationality, and outward appearance, according to Art. 55(8).

In Serbia, the 2006 Constitution stipulates that every child has the right to know his/her origins.[104] However, according to the Law on Biomedically Assisted Fertilisation of Serbia, the child has the right to obtain only medical data of the donor. In the Law,[105] it is stipulated:

102 Art. 7.
103 Art. 8.
104 Art. 64(2).
105 Art. 57.

The child conceived by biomedically assisted fertilisation (ART) with reproductive cells of the donor has a right to ask for medical reasons to get data on donor from the Board of Directors for Biomedicine kept in the State Registry. This right the child obtains when reaches 15 years of age if is able to reason.

These data are not on personal nature of the donor, but only the data of medical importance for the child, his future spouse or partner, or their future offspring.

Legal representative or guardian of the child may ask for these data form the Board of Directors for Biomedicine on the permission from the court in extra civil procedure given if justifiable medical reasons exist.

The medical doctor of the child may ask, for medical reasons, information from the State registry to prevent risk to child's health…

5.3. The Interest of the Ill Child: Preimplantation Genetic Diagnosis and Saviour Siblings

There are specific cases of using medically assisted reproduction that pose moral and ethical concerns, which result in diametrically opposite views. One of them is the use of preimplantation genetic diagnosis[106] to obtain a perfectly matching donor for an already born child who is ill – saviour siblings.

However, pre-implantation genetic diagnosis (PGD) is primarily used in conjunction with IVF to reduce the risk of passing on inherited conditions. For couples that have a history of genetic diseases, this procedure could be lifesaving, as they will use only healthy genetic material that is free from any condition. It was not until recently that states began to regulate this technique and allow it only in cases when there is a strong likelihood that parents will pass on a genetic disease. However, this possibility served as an option for parents who have a child with a condition that requires donation of bone marrow or stem cells, but neither the parents nor anyone else in the family is a matching donor. With the use of PGD, they can choose only embryos that have been found to be perfect donors.

Two cases concerning saviour siblings have become very well known: the *Hashimi case* and the *Whitaker case*. In the first case, the child Zain was born with a blood disorder known as Thalassemia Major. His condition could be cured by stem cells from a compatible donor. The probability of having a child who would be an adequate donor was one in four, and Mrs. Hashimi decided to give birth to another child, given that existing siblings could not be donors to little Zain. However, as the pregnancy revealed that the baby was also a carrier of the disease, Mrs. Hashimi decided to terminate the pregnancy. As a result of the next pregnancy, a healthy boy was born,

106 Pre-implantation genetic diagnosis (PGD or PIGD) is the genetic profiling of embryos prior to implantation (as a form of embryo profiling), and sometimes even of oocytes prior to fertilisation.

but he was not a compatible donor. Subsequently, Mr. and Mrs. Hashimi managed to obtain embryos through the IVF procedure, but only two embryos were found not to be carriers of the disease and suitable to be donors to Zains. However, although one embryo was implanted, the pregnancy was not successful. In the second case, a boy named Charlie Whitaker suffered from a rare form of anaemia, which was the result of a genetic mutation, and that was the decisive fact for the court. Namely, their request was rejected by the Human Fertilisation and Embryology Authority in the UK, on the basis that, unlike the Hashimi case, Charlie's disease was not hereditary but caused by a spontaneous genetic mutation. This means that the chances of Mr. and Mrs. Whitaker having another child with the same form of anaemia were negligible. This, however, raises the question of whether it is morally justified to conceive and give birth to a child for that purpose only. Of course, those parents claim that they will love the other child the same way as the previous one, and that the specific conditions under which the child will be born will have no effect on the child's future life. Very often, parents and judges are prone to view this issue as a conflict between a sick child and an embryo and to conclude that academic principles are not enough to forbid the only possible solution for treatment. In addition, they see that embryo as enormously advantaged by the intervention, since it would never have been selected or born if this procedure had not occurred.[107] However, indeed 'you have got to have a very powerful reason to resist the means by which [a child's] life can be saved'.[108]

In Serbia, it is explicitly stated that the PGD procedure is permitted, but only when there is a risk of passing on inherited conditions, for the diagnosis of chromosomal and genetic diseases, or if it is necessary due to a repeated unsuccessful ART procedure.[109]

6. Concluding Remarks

It is not easy to establish whether Serbian legislation follows a liberal or restrictive approach regarding ART. It could be said that whether the approach is defined as liberal or restrictive depends on the following main issues: which institutions can perform ART and who covers the costs, which procedures are allowed and which are not, and who are the beneficiaries (subjects) of ART.

Regarding health services that perform the activity of ART in Serbia, the approach is liberal, as both state clinics and private clinics are able to perform ART.

107 Foster, 2009, p. 58.
108 Doctor plans 'designer baby' clinic. See BBC News, 2001.
109 Art. 47 (1), Law on Biomedically Assisted Fertilisation.

The license for the performance of ART is issued by the Directorate for Biomedicine (Law on Biomedically Assisted Fertilisation 2017).

ART has been more widely available since 2020, as the procedures for stimulation are free of charge without limitations, and three embryo transfers for women until the age of 45 are also free of charge. For the second child, two procedures for stimulation and one embryo transfer are free of charge (State Instructions for Conducting Biomedical Assisted Fertilisation 06/2020). In this sense, the approach to ART is liberal.

The Serbian Law on Biomedically Assisted Fertilisation 2017 regulates *in vivo* fertilisation and *in vitro* fertilisation with embryo transfer, insemination by husband/partner, insemination by donor sperm (heterologous procedure – AID), and procedures involving ova and embryo donation. Surrogate motherhood is not allowed, and posthumous fertilisation is not regulated. It could be concluded that the approach is more liberal than restrictive. The only explicit restriction is that surrogate motherhood is forbidden. One of the arguments against posthumous fertilisation is that the interest/right of the child to have two parents in this procedure is not respected. Under Serbian law, single women have access to AID, so the interest/right of the child to have two parents is not respected. Thus, in both cases, the child will not have a father *de facto*; he/she will have only one parent – the mother. *De iure*, in the situation of posthumous fertilisation, the child will have a father, as the father is the mother's husband or partner. So, the argument that the child will not have a father to take care of him/her in the situation of posthumous fertilisation is not justifiable, as this is the same in the situation of a single woman as the subject of the process. It should be noted that the law is not coherent in the regulation of these two procedures, so this is an issue for *de lege ferenda* to solve.

Beneficiaries (subjects) of ART in Serbia are married persons, heterosexual extramarital partners, and single women. Same-sex partners do not have access to ART, as there are no regulations for same-sex partnerships in Serbia. It could be concluded that the approach is more liberal than restrictive, as heterosexual extramarital partners and single women are considered eligible for ART.

Serbian law is restrictive regarding donor ART, as a single donor's reproductive cells or embryos of one pair of spouses or extramarital partners can be used for only one pair of spouses or extramarital partners, or one single woman. In cases where a child or children are born with donated reproductive cells, that is, embryos, the donor's remaining reproductive cells can be used exclusively for the repeated ART procedure in the same couple of spouses, that is, cohabiting partners, as well as the same single woman.

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