

## BIOMEDICAL ASSISTED FERTILIZATION IN MACEDONIA, SERBIA AND CROATIA: ETHICAL AND LEGAL ASPECTS

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### **Abstract**

In this paper the authors analyze the law on biomedical assisted fertilization (BAF) of the Republic of Macedonia, as well as the laws on biomedical assisted reproduction of the Republic of Serbia and the Republic of Croatia, as well as others legislations. The authors conclude that the Macedonian law on BAF, which was adopted in 2008, in many aspects is more liberal than the relevant laws of Serbia and Croatia. The authors also conclude that the development of new reproductive technologies is connected with complex legal, ethical, moral and religious dilemmas that are associated with the fundamental social and biological foundations of the human society. The rapid development of biotechnology and reproductive medicine and the application of these new technologies in the sphere of reproduction leads to fragmentation of the concept of motherhood and parentage, undermines family ties and threaten the rights of the children conceived through artificial means. In addition to comparative legal analysis of Macedonian, Serbian and Croatian laws, the authors point out some

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Schenner, J. G., Assisted Reproduction Practice in Europe: Legal and Ethical Aspects, Human Reproduction Update, Vol. 3, No. 2, 1997.

shortcomings in the Macedonian legislation and make proposals for legislative changes that will ensure better protection of all participants in the process of assisted reproduction, especially the children.

## Introduction

The rapid progress of science and technology in recent decades has led to prosperity and welfare for the larger part of humanity, but has also opened a number of philosophical, moral, ethical, religious and legal dilemmas. In the last thirty years revolutionary changes occurred in scientific areas like biotechnology and reproductive medicine that have led to dramatic changes in the concept of human reproduction. Intrauterine insemination, in vitro fertilization, surrogate motherhood and other reproductive technologies have enabled infertile couples to become parents. According to Schenner the rapid development of reproductive medicine allows biomedical assisted fertilization to become a "routine procedure of providing assistance to infertile couples in European countries."<sup>1</sup> The legal regulation of the complex and intricate issues related to the application of new reproductive technologies has led to major debates in scientific and professional circles, in parliaments, as well as among the general public in all European countries.<sup>2</sup>

Numerous dilemmas that need to be answered by the legislators are associated with issues such as protection of the anonymity of donors of reproductive cells, protection of the rights and the privacy of persons – beneficiaries of biomedical assisted fertilization, regulation of the legal status of children born through application of new reproductive technologies, protection of parental rights, resolution of the conflicts that arise between the child's right to know its biological parents and the right to the donor's anonymity, regulation of the opportunity of conducting scientific experiments with human embryos, the need of prevention against commercialization of the reproductive process etc.

All these issues are regulated in European countries, as well in the Republic of Macedonia, by enactment of the Law of Biomedical Assisted Fertilization (hereinafter Law of BAF) in March 2008.<sup>3</sup>

The adoption of the Macedonian Law on BAF should be acclaimed, because it is an attempt, systematically, in one legal text to regulate the complex issues associated with new reproductive technologies, which earlier in Macedonia were not regulated, unlike most European countries.

This article will cover the major issues that are subject of regulation of this law, but it will also analyze the laws that regulate biomedical assisted fertilization in Serbia and Croatia. Among other topics, the article will present an analysis of the issues that lead to different opinions and debates in the public, such as the possibility of a single woman to appear as a beneficiary of the procedure of biomedical assisted fertilization, the possibility that allows a sister to donate an egg cell to her sister, the question of anonymity of the donors of reproductive cells and the child's inability to find out who are his biological parents, legal regulation of posthumous insemination and the ability to conduct experiments with human embryos, as well as ban on surrogate motherhood, cloning of human beings, and buying and selling of reproductive cells and embryos.

1 Schenner, J. G., Assisted Reproduction Practice in Europe: Legal and Ethical Aspects, Human Reproduction Update, Vol. 3, No. 2, 1997.

2 Baladhur states that "the process of taking and using reproductive cells is inevitably emotional" See more: G. Baladhur, Death and Conception, Human Reproduction, Vol. 17, No. 10, 2002, p. 2769.

3 Official Gazette of the Republic of Macedonia no. 37, 19.03.2008.



The Macedonian Law on BAF provides that the procedure of biomedical assisted fertilization could be carried out if previous treatment was not successful or if there is a danger to transmit a difficult hereditary disease,<sup>4</sup> taking into consideration that preference is given to the use of a partner's or women's own reproductive cells or embryos (autologous reproduction).<sup>5</sup> The Law provides that it is allowed to use donated sperm, eggs or embryos from other people (allogeneic fertilization), only if it isn't possible for the beneficiaries to use their own reproductive cells or this is required in order to prevent transmission of severe hereditary disease.<sup>6</sup>

## 1. Beneficiaries of the Procedure of Biomedical Assisted Fertilization

Macedonian Law on BAF provides that beneficiaries of biomedical assisted fertilization may be adult and capable men and women who are able to exercise parental rights and duties and who are married or live in nonmarital community, as well as single women, only if previous "(in)fertility" treatment was not successful.<sup>7</sup>

In the frames of the legal formulation as to which persons may be beneficiaries of biomedical assisted fertilization, two problems have arisen. The Law on the Family of the Republic of Macedonia provides that the nonmarital community of a man and woman that lasted longer than one year is equated with marriage in terms of the right of mutual maintenance and the division of property that was acquired in the community. The problem in Macedonian legislation, and especially in court practice, is in proving the existence and the duration of cohabitation. In most European countries, the existence of the community is proven by a statement of both partners (that is usually given in front of a notary), but unfortunately in Macedonia that's not the case, and medical institutions that conduct biomedical assisted fertilization have no way to check whether nonmarital union between a man and woman applying for a procedure of biomedical assisted reproduction really exists.

The second problem is more significant, due to the fact that the Macedonian Law on BAF allows a single woman who is not married and doesn't have an extramarital partner to be a beneficiary of the procedure for biomedical assisted fertilization. As a consequence of this legal provision, the child that is going to be born will not have a known father, because the provisions of the Law on the Family of the Republic of Macedonia concerning establishment of paternity don't refer to biomedical assisted fertilization, where the donor is anonymous. This outcome, which ultimately creates the situation where a child conceived through biomedical assisted fertilization would not have a father, is inconsistent with the most important international document regulating and protecting the rights of children - the UN Convention on the Rights of the Child, which has been ratified by the Republic of Macedonia.<sup>8</sup>

There are different legal solutions in European countries in terms of the possibility for a single woman who is not married or does not live in a nonmarital union to be a beneficiary of the procedure for biomedical assisted fertilization. In some jurisdictions, for example in Great Britain, Belgium, Spain and Bulgaria, there are provisions that allow a single woman to become a beneficiary of the procedure of BAF. On the other hand, many jurisdictions provide that only couples may be beneficiaries of the procedure of BAF.

4 Article 3 of the Law on BAF.

5 Article 6 of the Law on BAF.

6 Article 7 of the Law on BAF.

7 Article 9 of the Law on BAF.

8 Article 5 of the UN Convention on the Rights of the Child stipulates that States must respect the rights, obligations and responsibilities of parents, and Article 11 stipulates that both parents have common responsibilities for upbringing and raising the child.

The French Law from 1994 provides that a child that was born with the application of biomedical assisted reproduction has the right to live in a family composed of two parents.<sup>9</sup> In Slovenia the issue of whether to allow a single woman to be artificially fertilized caused great debate in public, whereto a referendum was conducted in which more than 80% of voters accepted that only couples may be beneficiaries of the procedure for biomedical assisted fertilization.<sup>10</sup> Even in countries where single women are provided with the opportunity to be beneficiaries of the procedure of biomedical assisted fertilization, such as Great Britain, there is strong resistance among doctors to apply this procedure to a single women. A survey conducted in that country has shown that 65% of physicians dealing with biomedical assisted fertilization stated that they would not in any case artificially fertilize a woman who doesn't have a partner.<sup>11</sup>

In the Republic of Serbia, the Law on Treating Infertility through a procedure of Biomedical Assisted Fertilization provides that in principal, only couples have the right of treatment through a procedure of biomedical assisted fertilization<sup>12</sup>, and the right of a single woman to be a beneficiary of this procedure is provided only as an exception, in special situations regulated by the Law.<sup>13</sup> Due to this solution, a larger number of women from Serbia go to other countries, including Macedonia, where they have the right to be beneficiaries of the procedure of biomedical assisted fertilization<sup>14</sup>. Moreover, women from Serbia come to Macedonian medical facilities in order to carry out a procedure of BAF, because Serbian law, unlike the Law of BAF of the Republic of Macedonia, provides a ban for older women to use the procedure for biomedical assisted fertilization.<sup>15</sup> In Croatia, the new Law on medically assisted fertilization allows the right of a single woman to be a beneficiary of medically assisted fertilization if the treatment of the infertility was unsuccessful.<sup>16</sup>

The question whether a single woman should have the opportunity for biomedical assisted fertilization leads to serious debates, with basically two opposing arguments: the child's right to be guarded and raised by two parents on one side, and the reproductive freedom of the woman on the other side.<sup>17</sup> The standpoint that claims that a BAF procedure should be available only to couples (married or nonmarital couples) who can not have children arises from the fact that children living with both parents have far better conditions for proper development than children living

9 See more in: Les lois de bioéthique: cinq ans après, Étude adoptée par l'Assemblée générale du Conseil d'État le 25 novembre 1999, La Documentation française, Paris, 1999.

10 See more about this question in Gordon, K., van Houten, N., IFFS Surveillance 07, Fertility & Sterility, vol. 87, No. 4, Supp. 1, April 2007, p. 17-18.

11 Read more about physicians' attitude in Great Britain in regard to BAF of single women in: Storrow, R. F., The Bioethics of Prospective Parenthood: in Pursuit of the Proper Standard for Gatekeeping in infertility Clinics, Cardozo Law Review, Vol. 28, No. 5, 2007.

12 Article 26 of the Serbian Law on Infertility Treatment through a Procedure of Biomedical Assisted Fertilization.

13 Article 26 paragraph 3 from Law on Infertility Treatment through a Procedure of Biomedical Assisted Fertilization in Republic of Serbia prescribes that the right of treatment procedures of BAF has an adult and capable woman who lives alone and meets the requirements of paragraph 1 of this Article, with the consent of the Minister responsible for Health and the Minister responsible for Family Relationships, if there are justified reasons.

14 Available data from the Macedonian medical institutions that possess a license that allows them to implement a procedure of biomedical assisted fertilization show that in recent years a growing number of women from Serbia come to Macedonia to implement a procedure of biomedical assisted fertilization.

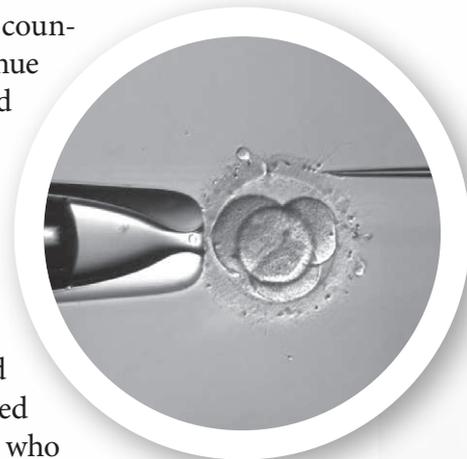
15 Article 26 paragraph 4 from from Law on Infertility Treatment through a Procedure of Biomedical Assisted Fertilization in Republic of Serbia prescribes that it is forbidden for an older women to be included in a BAF procedure, who according to her age and general health condition is not capable to give birth, or who is of an age that is not appropriate for giving birth.

16 Article 10 paragraph 2 of the Croatian Law on medically assisted fertilization

17 Article 18 paragraph 1 of the UN Convention on the Rights of the Child stipulates that "States shall make every effort to ensure the principle and both parents have common responsibilities for raising and development of the child." In this sense, Kovachek - Stanic states that biomedical assisted fertilization should be reserved only for married couples and non-marital partners, and in this way, the interest of the child to have two parents would be protected. See more in: Gordana Kovaček-Stanić, Legislativa o ljudskoj reprodukciji uz biomedicinski pomoć, Novi Sad, 2008, p. 17. See more about this issue: Storrow, RF, op. cit., p. 176.

only with one parent.<sup>18</sup> On the other hand, the UN Convention on the Elimination of All Forms of Discrimination against Women provides that every woman has the right to decide freely on the birth of a child and the number of children that she is going to raise.<sup>19</sup> This Convention guarantees the reproductive right of women, which enters in the corpus of basic human rights and freedoms. Furthermore, in recent years there is a growing trend in many countries which tends to allow single woman to be a beneficiary of the procedure of BAF. In 2010, the following European countries have given the opportunity to a single woman to be beneficiary of the procedure of BAF: Belgium, Bulgaria, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Montenegro, Russia, Spain, Great Britain, Belarus, Serbia, Ukraine and Macedonia<sup>20</sup>.

From the above mentioned, it could be noticed that many European countries provide this opportunity, and it is expected that this trend will continue in future, ensuring the right of a single woman to be artificially fertilized in other European countries. This position is accepted by the Ethics Committee of the American Society for Reproductive Medicine, according to which: "Based on available data we do not think anyone can reasonably argue that people who are not married. . . . cause harm to their children by reproduction outside of heterosexual marriage." Due to this, the Ethics Committee of the American Society for Reproductive Medicine believes that when it comes to programs for biomedical assisted fertilization, there is an ethical obligation for persons who are not married or who do not live in a nonmarital union to be treated equally with those who are married.<sup>21</sup> Additionally, there is the possibility that a woman who has been fertilized within the procedure of BAF may enter into a relationship or become married after the birth of the child, so the child would have a "social" father who would take care for him and for his upbringing and education.



Beside that, whenever we raise the question of whether to entitle a woman who is neither married nor living in a nonmarital community to be fertilized using the procedure of BAF, we should take into account the transformation of marriage and family life in all European countries in recent decades. In all the countries, the same or similar transformations in the sphere of family life occur: the number of contracted marriages reduces, the number of divorced marriages dramatically increases, the number of single-parent families and recomposed families increases, the number of nonmarital communities and children born out of wedlock increases, the number of gay and lesbian communities grows, and the birth rate dramatically reduces. Statistically, the model of family consisting of a married couple (father and mother) and their children is constantly declining and no longer represents a single, legally recognized and protected family model. The pluralism of family forms is no longer just a social reality, but gradually is being accepted in the sphere of legal regulation of family.<sup>22</sup>

All this indicates that in the Republic Macedonia it is necessary to approach the question whether to prohibit or restrict the right of single women to appear as beneficiaries in procedures of BAF with great attention. It should be noted that it is already an "acquired right", given the fact that women have used this right in Macedonia in the past three and a half years. In the case of banning this right, this provision would be interpreted as a limitation in terms of reproductive rights of women.

18 See more at Schenner J. G., *op. cit.*, p. 176.

19 Article 16 of the UN Convention on the Elimination of All Forms of Discrimination against Women.

20 See more: Howard W. Jones & all, *International Society of Fertilities Sciences, IFFS Surveillance 2010*, p. 22-23.

21 See more: "Access to fertility by gays, lesbians and unmarried persons", *The Ethics Committee of the American Society for Reproductive Medicine, Fertility and Sterility*, Vol. 92, No. 4, October 2009.

22 Read more: Micković, D., *Family in Europe, XVI - XXI century*, Blesok, Skopje, 2008, p. 174-194. See also Spirović Trpenovska, Lj., Micković, D., and Ristov A., *Succession in Europe*, Blesok, Skopje, 2011, p. 66 - 77.

Furthermore, practical elements should be considered. If Macedonia changes the law and prohibits the right of single women to be beneficiaries of BAF, what would be the effect of that prohibition? With a great certainty we may expect that women from Macedonia would go to other countries in the region and beyond, so that we will face the familiar phenomenon of "reproductive tourism", where infertile couples or individuals from one country go abroad to implement the procedure of BAF as a result of legal restrictions in their countries. The ultimate effect of this legal modification would be the outflow of funds from Macedonia to other countries that have liberal laws on biomedical assisted fertilization. What should be done in Macedonia is to set an age limit (based on medical and scientific knowledge) until which women may be beneficiaries of the procedure of BAF. In this sense an interesting solution is provided in Serbia, according to which "It is prohibited to include in the procedure of BAF a woman who according her age or general medical condition is unable to give birth, or whose age is not convenient for giving birth"<sup>23</sup>. In Croatia, the Law on medically assisted fertilization provides that a single woman can be the beneficiary of the procedure of medically assisted fertilization if she is capable of performing parental responsibilities.<sup>24</sup>

## 2. Availability of data concerning donors' reproductive cells

One of the most controversial issues related to biomedical assisted fertilization is whether to allow the possibility for the child to find out who are his biological parents. Basically, there are three major concerns in the process of getting data on genetic origin: primarily it is a medical concern, then the psychological interest, and third is the interest in establishing ties with blood relatives<sup>25</sup>.

On the other hand, vis-a-vis a child's interest to know who are the biological parents, the legislator should take in consideration the donors' concern for anonymity. Most donors don't want to expose themselves to personal or property responsibilities that they haven't accepted at the time of donation of reproductive cells. Also, in deciding whether to allow the possibility for a child to know his biological parents, the law should protect the interest of the social parents to ensure protection of the stability and integrity of the family.

The crucial question that arises is which interest should be given priority. If a comparative analysis of European legislation is done, we might conclude that there is no single, universal approach regarding the regulation of a child's right to know who are the biological parents that appear as donors of reproductive cells. Sweden was the first country in Europe that in 1985 envisaged that a child, after reaching a certain age, has the right to find out who are his biological parents<sup>26</sup>. The Austrian Law on Reproductive Medicine adopted in 1992 provides that a child has a right to find out the identity of the donor at the age of 14, and the Dutch Law enacted in 2004 stip-



23 See Article 26 paragraph 4 in Law on Infertility Treatment through a Procedure of Biomedical Assisted Fertilization in Republic of Serbia, Official Gazette of the Republic of Serbia, no. 72/2009.

24 Article 10 paragraph 2 of the Croatian Law on assisted fertilization provides that a woman, bearing in mind her age and medical condition, should be able to perform parental responsibilities.

25 Medical interest is governed by the need of preventing the transmission of hereditary genetic disease at the time of creating the family. The psychological interest consists in the desire to obtain information for their own biological origins, and the interest in establishing blood ties consists of exercising the child's right to alimony and to inheritance in relation to its parents. See more in Gordana Kovaček-Stanić, op. cit., p. 19.

26 See more about the possibility of children conceived with biomedical assisted fertilization in Sweden to ascertain the identity of the donor: Shenfield, F., Gamete donation: Ethical implications for donors, Human Fertility, No. 2, 1999.

ulates that a child has a right to know the identity of the donor when he turns 16 years, but only if the donor has given written consent for disclosure of his identity. In the frames of the legal changes from 2006, Great Britain has also provided the opportunity for a child to find out the identity of the donor by the time of turning 18 years.

Contrary to the solutions provided in these laws, in most countries the anonymity of donors is being guaranteed, so a child has no legal occasion to find out who are his biological parents. Moreover, the UN Convention on the Rights of the Child does not stipulate that an absolute right of the child to know his biological parents exists<sup>27</sup>. In France, the Law enacted in 2004 provides protection of anonymity of donors. The main reasons listed in favor of this legal solution is the need to preserve the privacy of the child, the family, and the donor. Moreover, one of the main motives for protecting the anonymity of donors is the need to avoid a decrease in the number of donors, which is already happening in those countries that allow disclosure of the identity of donors<sup>28</sup>. The anonymity of donors is guaranteed in Greece, Denmark, Norway, Czech Republic, Slovenia, Israel, Latvia, and in other countries<sup>29</sup>.

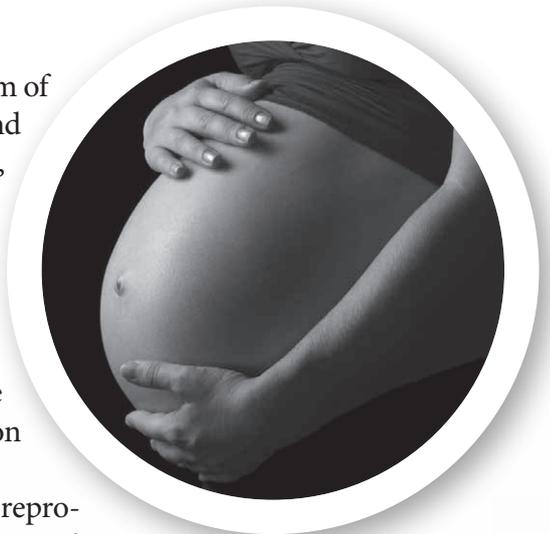
In Croatia, the Law on medically assisted fertilization, which was enacted in 2012, allows the possibility for a child to learn the identity of the donor.<sup>30</sup> In Serbia, it has been envisaged that the donor has no responsibility towards the child who was born with biomedical assisted fertilization<sup>31</sup>. Serbian Law envisages that a child can get information about the medical conditions of the donor, only in case of the presence of medically justified reasons<sup>32</sup>. A similar solution exists in the Macedonian Law on BAF, which provides an absolute protection of the identity of the donor<sup>33</sup>, but still there is a possibility, as in Serbia, due to medical justified reasons to obtain data on the health condition of the donor<sup>34</sup>. We consider that this approach towards the issue of anonymity of donors is justified and that it provides a proper balance between the conflicting interests of the involved parties. With this legal solution the protection of the anonymity of donors has been guaranteed, thus contributing towards increased donation of reproductive cells and embryos and allowing infertile couples to have children. Moreover, this solution provides protection of privacy and stability of the family, making it possible to obtain data on the health condition on donors (without revealing their identity) only if it is justified by medical reasons and by the need to protect the life and the health of the child and his descendants.

### 3. Financial compensation for reproductive cells and embryos

The number of infertile couples in Europe and worldwide is constantly increasing due to unhealthy lifestyles and stress inherent in contemporary society, as well as the postponed age of getting

- 27 Article 7 of the UN Convention stipulates that a child has a right to know his biological parents, if possible.
- 28 Find out more about the danger of reducing the number of donors of reproductive cells unless if there is no legal protection on their anonymity in: *Fertility and Sterility*, IFFS Surveillance 2007, Howard W. Jones & all (ed), Vol. 87 Sup 1. April 2007, p. 33.
- 29 *Ibid*, p. 34-35.
- 30 Article 15 paragraph 1 of the Croatian Law on medically assisted fertilization provides that a child can learn the identity of the donor when it is 18 years old.
- 31 Article 51 of the Law on Treating Infertility in the Procedure of Biomedical Assisted Fertilization.
- 32 See Article 64 of the Serbian Law on Treating Infertility.
- 33 Article 17 of the Law on BAF of Republic of Macedonia provides that the authorized medical institutions are obliged to ensure protection of personal, medical and genetic data of donor and recipient, and that they have an obligation not to disclose the identity of the donor's recipient and his family and vice versa.
- 34 Article 57 of the Law on BAF of Macedonia stipulates that a child born by using reproductive cells or embryos has right when he turns 18 to obtain data on the health condition of the donor from the National Registry for BAF, after prior approval of the State Commission for BAF, and only for legitimate medical reasons.

married<sup>35</sup>. Therefore, every country is confronted with a problem of providing sufficient donors of reproductive cells and embryos and enabling infertile couples to procreate offspring. In this sense, an extremely contentious issue is whether to allow payment of material compensation for a donors' donated reproductive cells or embryos in order to stimulate donations and increase the number of donors. The Council of Europe in 1996 adopted a Convention on Human Rights and Biomedicine, which prohibits payment of material compensation for human reproductive cells and embryos, and this solution is accepted in the legislation of most countries in Europe.



In contrast, the United States has developed a market where reproductive cells and embryos could be the object of trade. Numerous authors, mostly from the U.S., consider that altruistic donation of reproductive cells and embryos (which is essentially based on solidarity that exists between donors and infertile couples) is unproductive and that the system of altruistic donation leads to decreasing the number of potential donors, which ultimately disables infertile couples to procreate offspring<sup>36</sup>. This view was embraced by the influential American Bar Association (ABA), which several years ago developed its Model Act for Regulating Biomedical Assisted Fertilization, in which this Association expressly approved payment of reasonable material compensation for the donation of reproductive cells.<sup>37</sup>

As John Roberts states, the ban of paying compensation for reproductive cells, which is accepted in most European jurisdictions, results in significantly fewer donations in Europe, particularly in egg cells than is the case in the United States. Due to the fact that altruistic donations of egg cells are extremely rare, there are many women in Europe who can not obtain a donated egg to become mothers. Moreover, most authors believe that in the U.S. material compensation does not apply to the egg cell, but it represents reasonable compensation for the effort, lost time and earnings, and the risks the woman who donates egg cells undertakes<sup>38</sup>.

Despite our opinion that it is unacceptable to apply market laws and to allow buying and selling of reproductive cells and embryos in the sphere of reproduction, an indisputable fact is that the altruistic donation of eggs is very rare, and thus creates huge problems for infertile women and prevents many couples from having children. In the end, providing certain compensation seems an acceptable solution for a woman who donates an egg cell, bearing in mind that it is a complex process of donation which is associated with physical and psychological examinations of the donor, hormonal stimulation and harvesting of the egg, processes that are associated with discomfort, pain and risk to the health of women. This whole procedure takes time, so a donor is faced with the costs and lost opportunity of earnings. We consider that there is a substantial difference between paying for the egg cell and giving compensation to the woman donor for her effort, lost time, inconvenience and risk to which she has exposed herself in the process of donating an egg.

35 In EU countries the average age at the conclusion of first marriage between 1980 and 2005 has increased from 26 to 31.2 years for men and from 23.3 to 29 years for women. See more Micković D., *op. cit.*, p. 223.

36 Read more about the arguments in favor of providing material compensation for reproductive cells and embryos in: Shenfield, F., *op. cit.*, p. 98.

37 About this suggestion of the American Bar Association find out more in: Kindregan, C., *Claryfying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, Family Law Quarterly, Summer, 2008.

38 About the differences that exist between Europe and the United States in terms of payment for donation of reproductive cells and embryos see more in: Roberts, J., *Commerce & Regulation in the Assisted Reproduction Industry*, Texas Law Review, Vol. 85, 2007.

The Law on BAF of the Republic of Macedonia, as well as a number of such laws in Europe, forbids payment of compensation for donated reproductive cells or embryos<sup>39</sup>. The ban for payment for reproductive cells is also envisaged in the Serbian law on Treating Infertility by Applying Biomedical Assisted Fertilization<sup>40</sup>, as well as in the Croatian Law on medically assisted fertilization<sup>41</sup>. The Macedonian Law on BAF allows payment exclusively for the financial expenses of a donor's transportation to the health facility<sup>42</sup>. Because of this legal solution, a woman who donated an egg cell does not receive any compensation for her lost time, suffered anxiety, discomfort and pain that is associated with the egg cell's donation. Consequently, practice shows that there are extremely rare cases of altruistic donation of eggs, except among close friends or relatives. In Macedonia, as a result of this situation, there is a real danger that a black market for eggs cell may appear.

In order to avoid this danger, and to provide an opportunity for infertile women to obtain a donated egg cell more easily and to give birth to a child with the help of biomedical assisted fertilization, we believe that the law should provide a reasonable compensation to a woman who donates an egg cell. It will not be considered as paying for the donated egg cell, but as compensation for the time, effort, fear, risk, pain and lost earning of the woman who donated the egg cell. This solution is provided in some European jurisdictions, including the legislation of the Republic of Serbia.<sup>43</sup>

The Macedonian Law on BAF provides a ban on publishing advertisements in public that are either seeking or offering reproductive cells or embryos,<sup>44</sup> and such a solution is provided in other European jurisdictions also, as well as in the Law of the Republic of Serbia.<sup>45</sup> We believe that this legal solution is appropriate, because otherwise in Macedonia and in other European countries would appear the situation that is now present in the U.S.A., where infertile couples, potential donors and intermediaries publish advertisements and require or offer donors with certain characteristics. For example, Egg Donation Inc. advertisements in the U.S.A. require egg cells donors who have a high IQ, attractive appearance, who are aged from 21 to 30 years and who have perfect health condition. The compensation for a donated egg cell is between \$3,500 and \$12,000 USD. Similar announcements are published by infertile women or couples, most often in student journals. In one such add, published in "Vassal College", \$25,000 dollars was offered for an egg cell from a "healthy and intelligent bachelor or postgraduate student, aged between 21 and 30 years, with blue eyes and blond or light brown hair"<sup>46</sup>. If public announcements on the offer and demand of reproductive cells and embryos were permitted, they would turn them into goods, which, like any other, are offered and sold in the market for a certain price. In this case, as can be seen from the abovementioned examples, the cost

39 In Article 18, paragraph 1 of the Law on BAF it is predicted that donating reproductive cells is voluntary and without compensation. In Article 18, paragraph 2 it is predicted that it is forbidden to give or receive any material or other compensation for donated reproductive cells or embryos. Article 18, paragraph 3 provides that a contract that determines the compensation of donated reproductive cells or embryos is invalid.

40 In Article 32 paragraph 1 of Serbian Law it is provided that offering or donating reproductive cells or embryos for the purpose of the obtaining material or any other benefit is banned. Moreover, Article 32, paragraph 2 of the Serbian Law prohibits reproductive cells or embryos trafficking, and their usage if they were provided by the means of trade.

41 Article 21 paragraph 1 of Croatian Law on medically assisted reproduction.

42 Article 18 paragraph 4 of the Law on BAF of the Republic of Macedonia stipulates that the material costs for transportation of the donor to the place of donation are not considered as compensation.

43 Article 28, paragraph 5 of Serbian Law provides that the prohibition of gaining benefit from the procedure of biomedical assisted fertilization does not refer to the compensation to the donor for his lost earnings or other income for the time spent in the facility or during the recovery, or compensation for other eligible costs which the donor had made for the procedure of taking reproductive cells (transport, accommodation, food expenses, etc..) This ban shall not apply to legitimate compensation in connection with the payment of health and other services in connection with intake of reproductive cells, as well as compensation for excessive damages incurred due to taking of reproductive cells.

44 Article 26 paragraph 2 of the Law on BAF.

45 Article 29 paragraph 1 of the Law on Treating Infertility by the Procedure of Biomedical Assisted Fertilization.

46 See more in: *Reproduction and Responsibility, the Regulation of New Biotechnologies, A Report of the President's Council on Bioethics*, Washington DC, 2004.

of reproductive cells will depend on certain "desirable" characteristics of the donors, such as race, health condition, age, color of hair and eyes, appearance, intelligence and level of education. This will undoubtedly lead to the conversion of reproductive cells into commercial goods, with far-reaching negative consequences for the process of human reproduction, on the equality of people and human dignity and fundamental human rights.

#### 4. Posthumous reproduction

In recent times, the issue of posthumous reproduction, which allows a woman to get pregnant and a child to be born after the death of his biological father, has become especially popular, causing fierce debates among the scientific and wider public. This extremely contentious issue is particularly important for Macedonia, because the Law on Biomedical Assisted Fertilization permits posthumous reproduction in Macedonia.<sup>47</sup> The question whether to allow fertilization of a woman after the death of her spouse or partner opens the deepest and most complex philosophical, ethical, moral, religious and legal dilemmas associated with the approach of a society towards love, death, reproductive freedom, the rights of children and the responsibility of parents and society for children's welfare.<sup>48</sup>

While analyzing whether the legislator should permit posthumous reproduction we should begin from two initial concepts that are incorporated in the foundations of modern legal systems: the concept of reproductive freedom and the concept of best interests of children. In this context, we should mention the article of MacKlin, who starts from the three basic principles of Western moral philosophy in his ethical analysis of human reproduction: the first is the principle of individual freedom, according to which individuals have the freedom of making decisions and action, unless it does not violate the rights of others. The second is the utilitarian principle, according to which morally correct actions or policies are those that lead to the greatest good or the welfare of most people. And the third principle is one of fairness, which preaches that all members of society deserve equal access to goods and services that meet basic human needs<sup>49</sup>. If we take into consideration these principles, it seems that posthumous reproduction should be permitted, because it provides respect towards the principle of individual freedom of the partners, but posthumous reproduction also fulfills the ideal of the utilitarian principle, because through the child's birth are not only accomplished the interests of the partners, but the interests of the child and the society as well.

The issue of reproductive rights was first seriously discussed and regulated internationally by the UN International Conference on Human Rights, held in Tehran in 1968. At this Conference was adopted the so called "Declaration of Tehran", which provides that parents have a basic human right

47 Article 33 paragraph 2 of the Macedonian Law on BAF provides that in case of a husband's /partner's death BAF could be realized posthumously if he has signed written consent for posthumous insemination of his wife or partner before his death. Posthumous fertilization may be conducted within one year after the death of the husband or the partner.

48 According to Bahadur "Taking and using of reproductive cells and embryos is inevitably emotional, and opens numerous and complex moral, ethical and legal problems." See more in Bahadur, G., *Death and Conception, Human reproduction*, Vol. 17, No.10, 2002, p. 2769. In this sense, Simpson said: "Posthumous fertilization opens up a whole series of complex ethical and social issues. The desire to procreate offspring after the death of the spouse or partner produces major implications in terms of notion of marriage, parenthood and succession." See more: Simpson, B., *Making "Bad" deaths "Good"*, *The Kinship Consequences of Posthumous Conception*, *Journal of Royal Anthropological Institute* Vol. 7, 2001, p. 1. Lewis points out that besides other issues, "The existence of posthumously conceived children has the potential to significantly affect the distribution of the inheritance of the decedent." According to him, the main dilemma is whether posthumously conceived child can enter into the definition "child" of the decedent. See more in: Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of after death Children*, *George Mason Law Review*, Vol. 16:2, 2009, p. 410. Benshushan and Schenker noted that recent significant technological innovations in reproductive medicine, such as cryopreservation of reproductive cells and embryos are associated with difficult and contentious legal, social, ethical and moral questions regarding the right of posthumous reproduction. See more in: Benshushan, A., Schenker, J., *Human Reproduction*, Vol. 13 No. 5, 1998, p. 1407

49 About this analysis on ethical aspects of human reproduction see more in: MacKlin, R., *Ethics and Human Reproduction, International Perspectives, Social Problems*, Vol. 37, No.1, 1990.

to decide freely and responsibly about the number of their children. This right was reaffirmed by the UN General Assembly in 1974, when the Declaration on Social Progress and Development was adopted by which the provisions of the Declaration in Tehran were reaffirmed. Provisions of this Declaration are incorporated in all European legislations. The Macedonian Family Law provides that "In exercising the right of free and responsible parenthood, parents are obliged to provide optimal conditions for healthy growth and development of their child in the family and society".<sup>50</sup>

The question of posthumous reproduction has led to numerous lawsuits in many countries, although the United States of America possess especially extensive court practice associated with such cases. In the case of *Skinner v. Oklahoma*,<sup>51</sup> the U.S. Supreme Court found that the Law on Compulsory Sterilization of Oklahoma, which provided forced sterilization of certain categories of prisoners, was contrary to Amendment 14 of the U.S. Constitution, because this Law violates the fundamental right of procreating offspring. The Court stated that birth has "fundamental importance for the existence and survival of human race" and that having children is "a basic human right". Similar as in this case, in *Meyer v. Nebraska*<sup>52</sup>, the Supreme Court brought a decision claiming that the right "to get married, to found a household and to have children" is a fundamental human right, guaranteed by the U.S. Constitution<sup>53</sup>. The most explicit and obvious judicial decision which determines the fundamental character of reproductive freedom is a Supreme Court decision in the case *Eisenstadt v. Baird*, which says: "If the right of privacy means anything, then it is the right of every individual, whether married or single, to be free from arbitrary governmental interference in matters which so deeply affect the individual, as whether it is right to conceive and give birth to a child"<sup>54</sup>. In all above mentioned cases the Supreme Court stands on a ground that the right of giving birth to a child by applying reproductive technology is a fundamental human right.<sup>55</sup>

The first famous court case in which posthumous reproduction was discussed and which caused huge debates in public not only in France but worldwide, is *Parpalaix c. CECOS* (Centre d'Etude et de Conservation de Sperme). In 1981, only two years before his death, Alain Parpalaix, who had been diagnosed with testicular cancer, immediately before commencing chemotherapy treatments decided to deposit semen in the Bank for conservation of sperm CECOS, but he had not determined specific instructions concerning the terms of use of his sperm. After this began the first judicial case that dealt with the issue to whom belongs the right over cryopreserved reproductive cells after the death of the donor. The French Court did not consent to apply the rules of contract law in this particular case, emphasizing that sperm is "the semen of life...accompanied with the fundamental freedom of the human creature to conceive a child". The Court stood on a position that the resolution of this case should embrace the real intention of the donor of the sperm. Upon this basis, the Court awarded the right of use of the semen to Mrs. Parpalaix, as a result of its assurance that the true intention of the donor was that his sperm be used for insemination of his wife.<sup>56</sup>

50 Article 5, paragraph 2 of the Law on the Family of Republic of Macedonia.

51 See 316 U.S. 535 (1942).

52 See 262 U.S. 390 (1923).

53 See Doucettperry, M., To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military, The Army Lawyer, Department of the Army Pamphlet 27-50-420, May 2008, p. 3.

54 More details in: Scharman, C., A., Not Without My Father: The Legal Status of the Posthumously Conceived Child, *Vanderbilt Law Review*, Vol. 55, 2002, p. 1033-1035. According to this author the US Supreme Court decision in the case *Hecht v. Superior Court of Los Angeles* should be taken into consideration. In this case William Kane's partner, Ellen Hecht (William in his will left his frozen semen to his partner, so she could conceive and give birth to a child after his death), required the frozen semen to be given to her. The court had decided to give the semen to Kane's partner despite the objections of the two children of Kane. This means that the Court, in a sense, appreciates the intention of the deceased, his semen to be used for posthumous fertilization of his partner.

55 *Ibidem*, p.3

56 For more details, look at: *Parpalaix c. CECOS* in Scharman, C., A., *op. cit.*, p. 1014.

The question whether to permit posthumous insemination has been discussed in legal theory and by the legislators in numerous countries. According to the UN Convention on the Rights of the Child, the child has the right to be guarded and brought up by both parents which is not possible in case of posthumous reproduction, because the biological father is already dead even before child's conception. Some authors fiercely criticize the possibility of permitting posthumous insemination.<sup>57</sup> Besides all, many authors think that the basic interest of the child in such case is to be born, to come into this world, to exist. If posthumous reproduction is banned, then the child is not going to be born, and that it won't be able to appear as a subject of rights. Under this interpretation, it is in the child's best interest to be born, even in a single-parent family living only with one parent, while the other parent died before it was born, rather than not being born at all.<sup>58</sup>

In European countries there are different solutions in terms of legal regulation of posthumous reproduction. In the Republic of Macedonia, posthumous reproduction is permitted only if there is a written consent signed by the husband or partner, and this procedure could be carried out within one year after the death of the spouse or partner. We believe that this legal term is too short. Immediately after the husband's death the woman finds herself in a specific emotional state and at this time she is not in a condition to make such an important decision as to conceive and to bear a child that would not have a father, and for whom she is supposed to take care of by herself.<sup>59</sup> Contrary to Macedonian BAF, where posthumous reproduction is permitted to both spouses and nonmarital partners, comparative legal analysis of the legal solutions in European countries and in the United States shows that in most of the cases in order to permit posthumous fertilization, a man and woman are supposed to be married.

According to the Macedonian Succession Law, a posthumously conceived child has no right of inheritance. Namely, in Article 122 of the Succession Law it is provided that a successor may only be a person who has been alive at the time of death of the decedent or was conceived during the life of the decedent. When it comes to posthumous fertilization, the child is conceived after the death of the decedent, so the child could not appear as a successor. This legal solution should be modified in order to recognize the right of posthumously conceived children to inherit under the same conditions as other marital or nonmarital children<sup>60</sup>

## 5. Bans envisaged in the Law on Biomedical Assisted Fertilization

The Macedonian Law on BAF, as in most European laws regulating biomedical assisted fertilization, prohibits choosing the sex of the child<sup>61</sup>, as well as interference of male or female reproductive cells arising from the reproductive cells of two or more men or women.<sup>62</sup> Furthermore, the Mace-

57 According to Živojnović, the basic problem is that the child is destined to live in a single parent family, deprived of the attention, care and love from both parents. By her opinion, the child might suffer emotional shock when it is going to find out that it was conceived posthumously, after the death of the parent, and this might make it feel as less important. Živojnović also states that the child might be exposed to danger in terms of healthy psychological development if the living parent perceives the child as a "commemorative child or as a substitute for a deceased partner". See more in: Živojnović D., Inheritance rights of posthumously conceived children, *Pravni Život*, no.10, 2005, p. 710.

58 About arguments in favor of posthumous reproduction read more in: Micković, D., Legal regulation of posthumous fertilization, *Zbornik Pravnog fakulteta u Zagrebu*, Vol 61. No. 2. 2011.

59 The same standpoint is accepted by Greenfield, J., *op. cit.*, p. 292.

60 In Macedonian legal system, nonmarital children possess the same inheritance rights as children born in marriage. Article 4 of the Law on Succession predicts that in regard to succession nonmarital kinship is equated with marital kinship.

61 Article 24 of the Law on BAF prohibits conducting a procedure of BAF in order to choose the sex of the child, unless it is necessary for preventing severe hereditary disease associate with gender.

62 Article 25 of the Law on BAF.

donian Law prohibits reproductive cloning,<sup>63</sup> as well as surrogacy motherhood.<sup>64</sup> Similar bans are prescribed in Serbian and Croatian Laws on assisted fertilization. Reproductive cloning is prohibited in all legislations. The report of the Council on Bioethics, established by the U.S. President, noted that "human dignity is threatened by the possibility of cloning, because asexual reproduction alter the essential features of what the human being means".<sup>65</sup> Regarding the possibility of reproductive cloning, the European Parliament has taken a position that "cloning should not be permitted, because it is opposed to the principle of equality of human beings, because it allows eugenical and racial selection of the human race and is a violation of human dignity."<sup>66</sup>

Unlike the unique approach of all legislations that without exception prohibit reproductive cloning, there are major differences in the legal regulation of surrogate motherhood. Surrogate motherhood represents an agreement by which a surrogate mother, after being artificially fertilized with the sperm of the natural father or a donor, bears and gives birth to the child, then give up her parental rights and passes the child to his "social parents" for a certain compensation.<sup>67</sup> Advocates of contracts on surrogate motherhood believe that these agreements should be allowed because they express the freedom of contracting and they also represent the free expression of personal autonomy. They believe that the state should not prohibit these contracts, because in this way it violates individual rights without justified reason.<sup>68</sup>

Despite such liberal views on surrogate motherhood, most authors consider that it should not be accepted and that surrogate motherhood should not produce any legal effects. According to these authors, children should not be treated as goods which can be bought and sold. Moreover, according to them, parental rights are inalienable, and they can not be sold or "ceded" to others.<sup>69</sup> The most important argument against surrogate motherhood is the so called theory of "commodification", under which commercial contracts on surrogate motherhood introduce market elements in the process of reproduction, so women and children are turned into objects that are bought and sold, which violates their human dignity and must not be accepted in a democratic society.<sup>70</sup>

Opponents of such commodification of the reproductive process believe that there is a profound contradiction between close, intimate social relationships (primarily the relationship between mother and child) and financial transfers. Any contact between these two spheres leads to



63 Article 28 of the Law on BAF prohibits any action aimed at creating a human being who would be genetically identical to another human being, alive or dead.

64 Article 27, paragraph 1 of the Law on BAF prohibits arranging or conducting a procedure of BAF for third parties. In Article 27, paragraph 2 it is provided that contracts arranging giving birth of a child for another person are considered null and void as well as passing the child after birth, with or without material compensation.

65 About the threats and problems associated with reproductive cloning see more in: Human Cloning and Human Dignity, The President's Council on Bioethics, Washington DC., July 2002.

66 More on the the arguments against reproductive cloning can be found in: C.B. Cohen, The Ethics of Human Reproductive Cloning: When Worlds Views Collide, Accountability in Research, Policies and Quality Assurances, Vol. 12, No. 3, 2003.

67 American Law Reports, Validity and Construction of Surrogate Parenting Agreement, 77 A.L.R. 4th 70. (1989).

68 See more about the arguments in favor of accepting contracts on surrogate motherhood in: Hatzis, A., N., "Just the Owen" A Law & Economics Approach to Gestational Surrogacy Contracts, Perspectives for the Unification and Harmonization of Family Law in Europe, Katharina Boele-Woelki (ed) Intersentia, 2003.

69 See more about the criticism of surrogate motherhood and the inadequacy of the the contracts under which mothers are giving up on parental rights in Reilly, D.,R., Surrogate pregnancy: a guide for Canadian prenatal health care providers, Canadian Medical Association Journal, February 2007, 176 (4), p. 483.

70 See more Banarjee, S., Gestational Surrogacy Contracts: Altruistic or Commercial? A Contract Theoretic Approach, Gokhale Institut of Politics and Economics, May 2006, Pune, India, p. 2.

"moral contamination" and threatens fundamental human rights<sup>71</sup>. In this sense, Sandel says that it is unacceptable to introduce market principles into reproduction through contracts on surrogate motherhood. According to the author "it's wrong to treat children as goods which are subject to contract because in this manner the children are degraded and converted into instruments of profit, instead of being people worthy of love and care."<sup>72</sup> Due to all these arguments, we believe that the existing legal solution under which surrogate motherhood in Macedonia is prohibited shall be preserved.

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