

# What is Local and What is Global in the Legal Regulation on Human Reproduction?

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## ABSTRACT

Science evolves with new knowledge. Medically assisted procreation (MAP) is one of the scientific fields that has become a revolutionary aid for many couples enabling them to make their beautiful wish to have children come true and achieve the greatest happiness a human being can feel. However, as for any progress, progress of biotechnology and medicine is a relative value if detached from the humane objective. On the one hand, the role of law is to regulate existing relations, and on the other hand to steer social behavior toward a desired goal. When it comes to the MAP treatment, questions arise as to the benefit and harm for the participants in the procedure and third parties. Since law is a system that corresponds to certain categories of values, the question arises whether law regulates, in an acceptable way, everything that is permitted in the MAP procedure and not what is possible in this procedure. New achievements, or everything that MAP can achieve, are not always ethically acceptable. The seriousness of the topic of manipulation with human life, especially its beginning, is shyly and insufficiently recognized in some international documents of global character. Some national legislations, especially in the Member States of the Council of Europe and the European Union, seem to be on the final point of “being overstretched”. European judicature is already facing a major dilemma: Legal protection of the beginning of human life at conception or permissibility of trafficking in unborn children and embryos. The latest case law of the European Court of Human Rights (ECtHR) is not consistent with regard to the children's rights, it is directed toward a more relaxed attitude toward surrogate motherhood, legally the most questionable reproductive procedure, with a (temporarily) permissive attitude toward national legislation. However, one can discern a liberal approach on the horizon, which is already intriguing now and prompts reflection on the future child, his status, rights, benefits, and interests. Similarities and differences at a local level are a result of historical development, the influence of national cultures, and represent a treasure, and not impoverishment. Every future development of legal regulations and medical possibilities has a big question mark placed after the words “value” and “ethical”.

**Keywords:** European Court of Human Rights, Human dignity, Legal regulation, MAP, Surrogate motherhood.

*Donald School Journal of Ultrasound in Obstetrics and Gynecology* (2020): 10.5005/jp-journals-10009-1650

*When we wish to watch a torrent, the first thing to see to is that we are not swept away by it.*

*José Ortega y Gasset*

## EVOLUTION OF THE RELATIONSHIP BETWEEN LAW AND BIOMEDICINE

The postmodern age is full of challenges, doubts, and disagreements over a host of issues, in many fields.<sup>1</sup> These issues arise from a clash between the principles followed by individual scientific disciplines, and the rapid progress and development of various technologies that dictate the pace of development of human society and civilization, while at the same time, ethically and philosophically speaking may lead humanity to disaster. Technical science and, in addition to it, biomedical achievements in medicine have always been a few steps ahead of regulations. If we consider the statement true that law is *ars boni et aequi*,<sup>2</sup> then we have the answer that law is the science and skill that must direct human behavior, bearing in mind all the good and the evil that can ensue. Law should serve the public good, ensure morality, and define the limits that cannot be crossed.<sup>3</sup> Its role is to regulate conflicts of interests, recognize the majority position of the population, and direct human behavior in legal relations toward that which is desirable. In the field of human reproduction, law is called to strike a balance between the possibilities of medicine and the wish (not the right *sic!*) to parent, the requirement to protect patients' health, financial interests, and ethical judgments.<sup>5</sup> Consequently, the task of law is a challenging,

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**How to cite this article:** Hrabar D. What is Local and What is Global in the Legal Regulation on Human Reproduction? *Donald School J Ultrasound Obstet Gynecol* 2020;14(3):265–278.

**Source of support:** Nil

**Conflict of interest:** None

even difficult, but not mission impossible. Common sense and a human heart help create standards that must be the best, neutral, and ethical response to the challenges posed. Individual benefit must never be the objective of law.

Over the past four decades, we have witnessed progress in the fight against infertility through the development of medically assisted procreation (MAP).<sup>6</sup> However, when biomedicine and perinatology managed to deliver the first “test tube baby”<sup>7</sup> in 1978, law was silent in providing an answer to the question: Is this permitted and under what conditions? The race between two fields — biomedicine and law — became increasingly more apparent, the gap between them became deeper, the prospects for procreative success ever more certain, while ethical and legal dilemmas became more intense. A multitude of ethical and legal issues that are raised today could not even be imagined four

decades ago. Some steps were taken at the global level through international codification: A clash of world views (*Weltanschauung*) is visible at the European level — liberal and cautious,<sup>8</sup> and the European Court of Human Rights (ECtHR) developed a relatively rich case law in this field. There are different initiatives related especially to surrogate motherhood in the European Parliament. The Court of Justice of the European Union (EU) has also reached an interesting judgment on the beginning of human life. National systems respond differently, sometimes strange in their historical walk (e.g., Ireland), reflecting the different interests and goods they protect. The fact is that we witness a dynamic and evolutionary process. The question to which we have no answer is: Evolution until when?

## LEGAL ISSUES OF MEDICALLY ASSISTED PROCREATION

Legal challenges in the sense of the scope, objective, and reach of regulations refer to the so-called reproductive rights, and among them mostly to the issue of the right to abortion and the right to life of an unborn child, which is directly opposed to it. However, reproductive rights understood in the broadest sense raise the issue of medically assisted fertilization and, within this, legal and ethical issues, especially referring to the so-called heterologous fertilization, which in turn provokes further issues of rights of various participants and the destiny of the embryo. Within the framework of reproductive rights, surrogate motherhood is a domain which is especially intriguing from the aspect of the (nonexistent) right to parenting and individual rights of the child. Certainly, ethical and moral issues are at the basis of each judgment, but they are not the object of our attention.<sup>9</sup> It should be noted that the judgment on MAP includes disciplines other than medicine and law, namely culture, religion, society, and interested subjects, from the legislator and the physician, to organizations for the protection of human rights and representatives of women.<sup>10</sup> Surrogate motherhood gives rise to the greatest legal controversies. The Old Testament already addressed the issue of surrogate motherhood, admittedly in its infancy and without medical assistance.<sup>11</sup>

This paper will review the most important international sources concerning human reproduction. The basic starting point is the *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*<sup>12</sup> with two additional protocols<sup>13</sup> that prohibit the creation of embryos for research purposes (Art. 18), and the additional protocol to the convention prohibiting cloning (Art. 1).

In 2005, UNESCO adopted the *Universal Declaration on Bioethics and Human Rights* dealing with ethical issues. They pertain to medicine and biological-anthropological sciences and are related to the abrupt development of science and technology that has ethical implications, and in light of the respect for human dignity, human rights, and fundamental freedoms. The *Declaration* is “an instrument of bioethics”<sup>14</sup> aimed at raising awareness, the level of information, education and public debate, and respecting human dignity, human rights, and fundamental freedoms, whereby the interests and welfare of the individual come before the interests of science and society at large. The *Declaration* gives precedence to ethics and human dignity as the criteria for the application of scientific and technological achievements, development of science, and freedom of scientific research. This means that, in a way, it relativizes or restricts the exponential growth of science that could run counter to the welfare of individuals, families, groups,

communities, and humanity as a whole, based on the recognition of the dignity of the human being and general respect for human rights and fundamental freedoms.

At the national level, reasons for adopting regulations are ambiguous. In a small number of countries, MAP is a response to a population decline,<sup>15</sup> as well as to social and economic factors that reduce the fertility rate.<sup>16</sup> Most people support the existence of MAP; however, their views differ with regard to the reach and the scope of the procedure. The influence of religious institutions is not negligible (especially the Roman Catholic Church in Europe). The second group of countries regulates MAP as a new category of medical services that modern society can, and therefore, must offer. In some national systems, legislation on MAP, as do most other regulations, provokes reactions of the population and the profession. Different responses to MAP depend on the fact whether the population was (or was not) involved in MAP. The persons who are interested or were personally involved in this medical procedure have differing views, and finally medical practitioners have extremely positive views about it (especially those in gynecology, obstetrics, and embryology).

With regard to MAP, national regulations differ according to their approach to this issue being restrictive or liberal. Certainly, there are mixed systems as well; however, all of them reflect value systems both at the general and at the individual level, and depend on the profile of the ruling majority in Parliament<sup>17</sup> that adopts the regulation. Undoubtedly, since the content of regulations on MAP is profoundly ethical, the question that always arises is whether they reflect public policy<sup>18</sup> or are only about to shape it.<sup>19</sup>

The following questions may be used to assess whether the approach to MAP at the local and the comparative levels is conservative or liberal: Marital or extramarital status of the woman and the man in the procedure; fertilization of a couple or a single person; fertilization of a woman in a lesbian couple; permitting or prohibiting surrogate motherhood; permitting or prohibiting gay men from being party to the procedure of surrogate motherhood; the minimum and the maximum age of the woman in the procedure; is only homologous fertilization permitted or heterologous fertilization as well; the need to obtain consent from the husband/partner to heterologous fertilization; is donating ova and/or semen cells and embryos permitted; donating reproductive cells with remuneration or for free; restricted or unrestricted number of embryos that are created; permissibility of sex selection and reasons for it; number of embryos implanted in the uterus; restricting the number of germ cells of the same donor used for the birth of a minimum or an unrestricted number of children;<sup>20</sup> destruction and preservation of surplus embryos; payment for the services of MAP by the users or reimbursement by health insurance funds; the performance of MAP in strictly licensed medical institutions; the issue of mediation in MAP (advertising, matching, and charging of fees), the status (“ownership”) and disposal of reproductive cells and embryos after the decease of the person they stem from<sup>21</sup> (including the possibility of retrieving reproductive cells from a dead person); how to protect the best interests of the child and his rights (especially the right to know about his origin); anonymity of the donor; whether the state of the woman’s health will have an impact on her undergoing the procedure of MAP; the informed consent of participants; import and/or export of reproductive cells and embryos; ethics in the sense of eugenics; research on embryos. Responses to each of these questions will determine the overall impression of an act on the MAP.

It is important to note that the procedure of MAP involves different participants with their respective wishes and status. However, additional attention should be paid to the health of the woman undergoing the procedure as well as to the fundamental rights of the child<sup>22</sup> born as a result of MAP. Issues pertaining to surplus embryos are very delicate and belong primarily to the domain of ethics and religion.<sup>23</sup> An interesting remark should be added: Through MAP, the risk of incest<sup>24</sup> rises substantially, especially in countries with a smaller population.

## EMBRYO—FUTURE CHILD/UNBORN CHILD AND HIS DIGNITY

Legal deliberations on MAP should be focused on the legal and the ontological issues of the status of subjects and their rights. The central “figure” of MAP and its objective is the birth of a child. However, to achieve this, one still needs a woman, luckily, who will undergo a pregnancy, and the genetic material from which such a being will develop. Consequently, the issue here is one of the relations between the rights of different subjects.<sup>25</sup>

Lately, in addition to bioethical criticism, some interesting theoretical legal analyzes of different interests of two “subjects” have come up: Of the future, conceived child as well as of the *nonexistent entity* since it has not been conceived yet.<sup>26</sup> Legal doctrine has thoroughly considered compensation for damages because of the so-called *wrongful life*,<sup>27</sup> and the starting point has always been that the birth of a conceived child has been intended and expected; however, due to *malpractice* mainly on the part of the physician, there has been damage to or death of an unborn child. Novelties in the area of judging the legal status refer to the issue whether the interests of an unconceived child should be protected and thereby his legal subjectivity recognized. The main interest of such a “subject”, i.e., of the future child, may be not to be born.<sup>28</sup> The legal protection of such rights is visible through legal restrictions of MAP, for example, in relation to “restrictions on the use of assisted reproductive technologies (ARTs) and access to fertility treatments, or the criteria for embryo selection”.<sup>29</sup> The fact is that MAP influences procreation by determining the subjects of this medical procedure, and consequently decides on the procreative rights of the persons. It also determines which embryos will be selected for implantation and thereby which child will be born. We would like to add that it is doubtful whether MAP should be permitted, for example, to a woman who has been stripped of her right to parental care due to child abuse, or to a man who committed a savage murder. The interpretation of the principle of the future child’s best interest is an issue yet to be raised and would require a thorough analysis and recommendations,<sup>30</sup> and in doing so one should, e.g., indicate non-medical factors that may influence the status of the future child.<sup>31</sup>

An approach to this problem requires criticism and not only approval, and it is claimed that “nonexistent entities are not able to have interests”, and that the anticipation of the future child by law by means of the so-called welfare principle is “unjust, disingenuous and incoherent”.<sup>32</sup> Legal theory speaks of insufficient legal vocabulary and terminology that would refer to the non-existing entity that simultaneously has and does not have subjectivity.

Legal analysis is expanded to the interpretation of Art. 8 of the European Convention on Human Rights (ECHR) that protects the right to family life and privacy in the sense whether legal bans concerning individual procedures of MAP influence these rights.<sup>33</sup> Basically, legislations that wish to protect the future child born as

a result of heterologous insemination by preventing heterologous insemination specify that it is to prevent violation of the child’s psychosocial welfare and of non-acceptable types of parenting, such as homosexual couples.<sup>34</sup>

The Dutch Embryos Act<sup>35</sup> refers to human dignity before human birth, however not clearly enough, since it does not differentiate between dignity for the human species in general or for a concrete person, and also states that in case of “use of artificial reproduction technologies requires that the interests of the future child need to be taken into consideration”.<sup>36</sup>

Irrespective of the possibilities of biomedicine, we are inclined to deliberate on the status of the future child through a metaphysical and moral understanding which in this case implies the perspective of dignity according to which all human beings immanently possess human dignity “an inherent value that resides in the condition of being human”.<sup>37</sup> To abandon dignity means to venture into dangerous and inhumane waters, which humanity has experienced throughout history (e.g., the Holocaust, communist gulags, and similar) and which deny equality and the dignity of human beings.<sup>38</sup> It seems that the postmodern age requires a full renaissance, i.e., rebirth of human dignity and its respect and protection. “The strong focus on the interests (or rights) of the future child is understandable. The rhetoric of individual rights and interests fits into the vocabulary of the liberal society, and attempts to distance the regulation from eugenic programs of the past, which are the reason for our aversion towards selection in the first place”.<sup>39</sup> Let us not forget that our own liberties and proper rights are limited by the liberties and rights of others.

## SIMILARITIES AND DIFFERENCES IN THE REGULATION OF MEDICALLY ASSISTED PROCREATION IN EUROPEAN STATES

Europe, namely the EU, is a community of vast differences and of similarities.<sup>40</sup> This mosaic, although stemming from the same source,<sup>41</sup> is reflected in 27 different, autonomous legal systems. In terms of MAP, the common feature is an increase<sup>42</sup> in the number of people who are (were) undergoing the procedure of MAP.

Biomedical possibilities of manipulation with the human DNA and germ cells often clash with the interests of the child, more precisely — they are contrary to the child’s best interests,<sup>43</sup> the most important principle in the treatment of children. It is interesting that the notion of the child’s best interests is an obligation of public and private institutions, state authorities and individuals, and the child’s protection through the application of this principle is in the jurisdiction of states that have to act in accordance with the established standards, especially in the healthcare field.<sup>44</sup> Regulations governing MAP often make the child as the most important person take second place, favoring persons in the procedure and their so-called reproductive rights, as well as scientific-practical challenges of the medical and the pharmaceutical professions.

An insight into European national legislations in the field of MAP reflects a diverse, inharmonious approach. Some authors ascribe this diversity to the objectives pursued or protected; sometimes, the objective is protection of the child and his rights, sometimes protection of rights and freedoms of citizens, and at times prevention of manipulating the human genome.<sup>45</sup> Some authors refer to the existence of “general tendency of many states to limit, as much as possible, the techniques that suppress genetic maternity and the principle ‘*mater semper certa est*’”<sup>46</sup> alluding thus to the donations of eggs and surrogate motherhood; however, as it

will be seen below, there is significant opposition to this, especially to the latter.

Considering all of the 28, respectively, 27 Member States of the EU,<sup>47</sup> we are facing a huge diversity in legislation,<sup>48</sup> some extremely prohibitive (Italy, Germany, Latvia, Austria), some cautious (Denmark, Sweden, France), some liberal (UK, Estonia, Greece, and the Netherlands). Three countries (Cyprus, Ireland, and Poland) do not have a special act on MAP, but have guidance or ethical indications, and two have not got even this (Luxembourg, Malta).

Countries differ with regard to eligibility criteria for access to MAP. Some permit MAP of *married couples only* (Cyprus, Czech Republic), some of *married or stable couples* (France, Croatia, Germany, Italy, Portugal, Romania, Slovakia, Slovenia, Sweden), and some of *couples/single women* (Bulgaria, Croatia, Denmark, Estonia, Finland, Greece, Hungary, Latvia, UK). In some countries, there are *no restrictions* (Belgium and Spain), in some there are *undefined criteria* (Lithuania, Luxembourg, Malta, the Netherlands, Poland). Countries differ in terms of formality (such as notarized consent and/or written consent).

*Homologous fertilization* is in use in all countries.<sup>49</sup> *Heterologous fertilization* is allowed in all countries<sup>50</sup> except in Austria<sup>51</sup> and Portugal.<sup>52</sup>

*Surrogacy arrangements* are not allowed in any of the 28 countries except in the UK and Portugal.<sup>53</sup>

*Preimplantation genetic diagnosis (PGD)* is allowed in half of the countries, mostly to avoid genetic diseases, whereas it is undefined in the other half. In Italy, it is forbidden.

*Sex selection* is allowed in 15 countries in order to avoid sex-linked diseases, undefined in 12 countries and forbidden in Italy.

The *donation* of ova and semen is forbidden in Austria, allowed in 17 countries and undefined in 9 countries.

*Cryopreservation* is allowed in 18 countries without limits or up to 5 years or undefined.

*Postmortem fertilization* is forbidden in most countries (except in Belgium, Greece, and Spain and differs in the period of use after the donor's death).

*Research on surplus embryos* is allowed in 16 countries, forbidden in 4 and undefined in 8 countries.

As to potential recipients of MAP, while talking about lesbian women, in Austria the "[s]perm donation is forbidden for single women or lesbian couples, only those couples where the male is sterile may have access, but not in association with IVF".<sup>54</sup> In Denmark, it is possible for single women to have access to MAP.<sup>55</sup> In Hungary<sup>56</sup> like in Croatia, lesbians, if declared as single women, may have access to MAP. In Cyprus, the National Bioethics Committee of Cyprus (CNBC) rejects the use of medically assisted reproduction procedures for homosexual couples and single parents.<sup>57</sup> In the UK, the law has been changed by the Human Fertilisation and Embryology Act (2008)<sup>58</sup> and extended the right to apply for a parental order to unmarried and homosexual couples.

It is obvious that these are quite divergent solutions and intentions — from prohibitive, over cautious to liberal ones. It cannot be stated that there is one uniform European view on MAP, on the management of surplus embryos and their destiny (cryopreservation, destruction, or donation), on the number of embryos that should be acquired in order to achieve pregnancy, on the limitation of the number of embryos transferred to the uterus, and on the research on human embryos (distinction between the production of embryos for research purposes and research on existing embryos, or research on existing embryos not suitable

for implantation,<sup>59</sup>) etc. Differences exist in the scope of interest of different European bodies regulating this field and some authors<sup>60</sup> are inclined to the idea of changing the restrictive approach by harmonizing all European legal systems, although in a liberal direction. In our view, this is impossible in the area of family law because of different cultural, religious, and legal characteristics of each European country. The imposition of uniform European law should scare free-thinking scholars.

Finally, it is interesting to underline that, according to the judgment of the ECtHR in the case *S.H. and Others v. Austria*, the Court considers this area "in which law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law", and therefore the contracting states should not disregard this.

The differences should be seen as advantages and riches and not as a stimulus for unification that would indeed run counter to the motto "united in diversity" and would result in single-mindedness.

## CROATIAN LEGISLATION

The field of MAP was first regulated in 2009 by the Artificial Insemination Act (2009) that "helped to resolve a large number of outstanding issues and conflicts, which, on a theoretical level, had been building up over the last three decades, ever since new bio-medical opportunities had transcended the (outdated) legal regulations. This regulation has resolved in great detail many different legal issues, which would certainly not qualify it as a conservative law".<sup>61</sup> After a few years, the new Medically Assisted Procreation Act (MAPA) was adopted (2012)<sup>62</sup> as a result of recent biomedical possibilities, as well as the need to regulate legal aspects of MAP.

The MAPA governs the conditions, rights, duties, and obligations of all the participants in the procedure. It is based on the protection of dignity and privacy, and is applicable only in cases of infertility resulting from unsuccessful treatment or treatment without prospects for success, and to prevent the transmission of hereditary diseases. Which of the medical procedures will be used depends on the autonomous will of the recipient of the procedure as well as the recommendations of a specialist. The MAPA obliges the Croatian Medical Chamber to issue guidelines for the treatment of infertility, so that the profession could determine the parameters taking into account protection of the woman's health. Participants in the procedure of MAP (woman and man) must give their consent to each technique of applied MAP. This refers to homologous insemination, which the Act prefers, and to heterologous insemination. The Act instructs controlled stimulation of ovulation to obtain up to 12 ova that undergo insemination. By prescribing a limited number of ova, the legislator obviously protects the woman's health in the future. Following insemination, a maximum of two embryos are implanted in the uterus, which again demonstrates the legislator's concern for the health of the woman and the future children. Exceptionally, it is permitted to implant three embryos if the woman is over 38 years of age and consents to it. In this case, we recognize the profession's caution clearly indicating a decrease in the woman's fertility in her later age. The second exception refers to respecting the woman's wish to inseminate up to two ova, so as not to create a surplus (and also frozen) embryos, which respects religious views<sup>63</sup> regarding the embryo as a human being. The legislator has a relatively positive view on the understanding and treatment of embryos. Thus, frozen embryos are preserved for 5 years at the cost of the State and after



that at the cost of the married couple or unmarried partners. In the Republic of Croatia,<sup>64</sup> it is possible to donate embryos for somebody else's fertilization (pregnancy), but there is no legislation as to what to do should there be no consent. Surplus ova, which are ethically not questionable in this part, are preserved for 5 years at the cost of the State. Upon expiry of this period, they are destroyed if the woman does not want to donate them.

Recipients of MAP may be married couples, unmarried couples,<sup>65</sup> or single women. The latter is in contrast to the basic condition for access to MAP, namely unsuccessful treatment of infertility<sup>66</sup> (according to Art. 4 of the MAPA). Certainly, a woman who is a lesbian but has not registered her partnership<sup>67</sup> could receive the MAP service, but her partner would not be able to adopt the child.<sup>68</sup> Interested parties must be of full age and have legal capacity, in exceptional cases they may be partially deprived of their legal capacity, they need to be in an age and state of health that enables them to be good parents. As a rule, MAP procedures are performed on women up to the age of 42 years at the cost of the State. The MAPA permits the storage of procreative cells of a person of full age and of minor age<sup>69</sup> for later use if there is a risk of infertility that is exclusively related to health reasons. Recipients must attend information sessions and mandatory counseling.<sup>70</sup> The MAPA does not protect the anonymity of the donor since it grants the child the right of insight into the register of conception data and in the data on his biological origin after he becomes of age. This means that he will be able to find out about the donor and his identity, his possible siblings, without the possibility of establishing any kind of legal relationship with them. In compliance with Art. 7 of the Convention on the Rights of the Child, parents are obliged to tell the child that he was conceived with medical assistance before his 18th year, but failure to comply with this requirement is not sanctioned.

Donors of germ cells must be persons of full age, have legal capacity,<sup>71</sup> and be healthy persons who give their consent. A female donor may be a woman who herself undergoes the procedure of MAP and has a surplus of stored ova, as well as a woman who would donate ova, without undergoing the procedure of MAP herself, but this is highly unlikely in practice. Men can donate their semen cells for fertilization of women they do not know and they are informed of the right of the child to know about his origin.

The MAPA prohibits: Cloning, surrogate motherhood, advertising, promoting, and trading in procreative cells and embryos, extracorporeal development of embryos older than 6 days, creation of chimeras, implantation of animal procreative cells in the woman's body and vice versa, use of a mixture of procreative cells, sex selection (except to avoid sex-related diseases), research on embryos and their creation for scientific purposes, export and import of procreative cells. All such prohibited contracts would be null and void and would have no legal consequences. Within the framework of these prohibitions, one notes a restrictive approach to MAP, which is expanded to relationships that are under impediments arising from family law (e.g., fertilization between blood relatives and in-laws and in cases when marriage is prohibited). Reasons for this are to avoid ethically and morally impermissible and eugenically unacceptable embryos or future children. It is also prohibited to create embryos for (somebody else's) MAP, and after the birth of a maximum of three children with donated procreative cells or embryos (in one family or more), procreative cells are destroyed; however, the Act does not govern the destiny of the embryos. The Act prohibits sex selection and *postmortem* fertilization. If the donor of procreative cells dies, their

cells are destroyed, and in the case of the death of one or both persons to whom the embryos belong, they are donated. However, it is apparent that in one case there was an attempt to save the embryos from destruction (due to the approach that the embryo is a living being), and can be donated, although it is questionable whether this practice would pass the test of the ECtHR,<sup>72</sup> especially from the perspective of the fact that the consent of the surviving spouse or unmarried partner is not sought for the donation. On the contrary, there is no legal provision and their destiny is uncertain under the cloak of avoiding incest. We reach the conclusion that the creation of surplus embryos is amoral both from the aspect of respect for their humanity and dignity as future children, and from the aspect of dangerous manipulations that consider embryos to be objects whose destiny is not important or essential.

The Croatian MAPA protects the embryo since it is prohibited: To enable extracorporeal development of an embryo older than 6 days, fertilization of ova with the semen cells of any other species but the semen cells of man, or animal ova with human semen cells, changing embryos by transplanting other human or animal embryos, implantation of human procreative cells or human embryos in animals, of animal procreative cells or animal embryos in the woman. It is forbidden to create embryos for scientific or research purposes as well as scientific or research work on the embryo.

The Republic of Croatia has especially prescribed criminal accountability for trafficking in parts of the human body and human embryos.<sup>73</sup>

## INTERNATIONAL DOCUMENTS AND THE RIGHT TO PRIVACY DURING THE PROCEDURE OF MEDICALLY ASSISTED PROCREATION IN THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

While reflecting on international regulations concerning MAP, two directions are imposed: First, general regulation of the procedure and recipients of MAP, especially donation of procreative cells and embryos, and second, surrogate motherhood as a procedure giving rise to major legal and ethical disputes, which is in medical terms performed as heterologous insemination.

As for the first direction, it should be stated that existing documents do not represent a general global or European position on the (un)acceptability of MAP in relation to types of procedures, recipients, and their rights. What is unique is the attitude toward some ethically unacceptable procedures, which are the object of the *Council of Europe Convention on Human Rights and Biomedicine* (1997). At the level of the EU, there are just some arrangements (through individual directives,<sup>74</sup>) which deal with the technical aspect of MAP.

An *ad hoc* Committee of Experts on Progress in the Biomedical Sciences (CAHBI), the expert body within the Council of Europe preceding the present Steering Committee on Bioethics (CDBI), stated as follows: "In principle, *in vitro* fertilization shall be effected using gametes of the members of the couple. The same rule shall apply to any other procedure that involves ova or *in vitro* or embryos *in vitro*. However, in exceptional cases defined by the member states, the use of gametes of donors may be permitted".<sup>75</sup>

The aforementioned *Council of Europe Convention on Human Rights and Biomedicine* does not deal with the question of donation of gametes, but forbids the use of techniques of MAP to choose the sex of a future child. According to Article 14, there are several

issues (techniques of MAP) not allowed, such as choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.<sup>76</sup>

It should be noted that none of the EU regulations provides mandatory guidelines related to the methods and the recipients of MAP. Consequently, it has been left over to the States to develop this procedure as they wish, at their discretion, and according to their possibilities. In this sense, it is noteworthy that there have been sporadic judgments by the ECtHR in cases of the alleged violation of the right to private life as protected under Article 8 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, in the judgment *S.H. and Others v. Austria* of 3 November 2011,<sup>77</sup> the Court ruled<sup>78</sup> that the Member States have the right and freedom to regulate, within their discretionary assessment, which methods of medically assisted reproduction they will use,<sup>79</sup> since there are seven different artificial procreation techniques<sup>80</sup> in the European area. In the aforementioned case and judgment against Austria, it became clear that in Europe there are States with liberal and conservative attitudes especially with regard to heterologous insemination and donation of ova, and there is development of law by expanding possibilities.<sup>81</sup> However, States have a so-called margin of appreciation<sup>82</sup> regarding sensitive moral and ethical issues,<sup>83</sup> and the so-called positive obligation of Member States to provide for MAP techniques does not exist. But even assuming that the State interfered with the rights under Art. 8 of the Convention by refusing to allow heterologous in vitro fertilization (IVF) treatment, such interference was proportional. Consequently, the Court ruled that preventing individual or all methods of MAP in an individual Member State does not constitute a breach of Art. 8 of the Convention.

Briefly, although the use of MAP belongs to the scope of Art. 8 of the ECHR as an expression of private and family life,<sup>84</sup> this provision does not guarantee the right to start a family or the right to adopt a child.<sup>85</sup> On several occasions, the Court voiced concern over the moral considerations and social attitude toward the unacceptability of MAP, not advocating "a complete ban on specific artificial procreation techniques such as ovum donation; notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner allowing the different legitimate interests involved to be adequately taken into account".<sup>86</sup> The Court has heard different cases related to possible violations of Art. 8 and maintained a relatively cautious attitude toward MAP.<sup>87</sup> There is an increasing number of cases involving surrogate motherhood, in light of a possible violation of rights guaranteed by Art. 8 of the ECHR. It seems that for the time being the Court pays more attention to the legal status of children and that it "does not require that States legalize surrogacy and, furthermore, States may demand proof of parentage for children born to surrogates before issuing the child's identity papers".<sup>88</sup>

The European Court rendered a number of judgments related to reproductive rights,<sup>89</sup> which most frequently fall under the protection of the right to private life, comprising also the decision on becoming or not becoming a parent.<sup>90</sup> The concept of "private life" is very broad, and presents a sort of connection.<sup>91</sup>

The couple's decision to conceive a child by means of MAP<sup>92</sup> or to use preimplantation diagnostics<sup>93</sup> also represents a form of expressing private and family life protected under Art. 8.

The Strasbourg Court protects the family life that existed, but was for some reason interrupted. Consequently, family life

protected under Art. 8 of the ECHR must exist in order to be legally protected.

The case *Paradiso and Campanelli v. Italy*<sup>94</sup> is specific with regard to all the others preceding it related to violation of Art. 8 of the ECHR in cases referring to MAP, since it involves surrogate motherhood. Acting beyond the limits of any standard adoption procedure, the applicants brought a child to Italy from abroad. The child had no biological connection to any of the clients (a married couple) and was conceived — according to the claims of domestic courts — by means of techniques of MAP that were not regular in Italy. The Court established that there is no family life between the applicants and the child. The Court protected the public interest (of the Republic of Italy not permitting surrogate motherhood), while not giving significance to the applicants' idea for the "personal development of the relationship between the applicants and the child".<sup>95</sup>

The case *Parillo v. Italy*<sup>96</sup> is interesting for the topic of MAP, most specifically for the attitude of the Court<sup>97</sup> toward the destiny of the embryo. The Court established that the applicant's ability to exercise a conscious and pondered choice regarding the fate of her embryos concerned an intimate aspect of her personal life, her right to self-determination, and thus to her private life.<sup>98</sup> However, the margin of appreciation of the Member State in this issue is wide, since there is no consensus in Europe, therefore the Court considered that the legal prohibition of donation of cryopreserved embryos for research, created after *in vitro* insemination of the applicant, is not considered a violation of the applicant's right to private life.<sup>99</sup>

From the aspect of European judicature and judiciary, attention should be drawn to the judgment of the Court of Justice of the European Union in Luxembourg in the case *Oliver Brüstle v. Greenpeace*<sup>100</sup> (C-34/10) of 18 October 2011, which in Para. 35 of the judgment emphasizes: "Any human ovum must, as soon as fertilized, be regarded as a 'human embryo' within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive", which provides that inventions concerning the use of human embryos for industrial and commercial purposes cannot be patented since their commercial exploitation would be contrary to *ordre public* and morality, since fertilization is what starts the process of development of human life. The judgment is interesting since for the first time it links the beginning of human life<sup>101</sup> to fertilization/conception and to *ordre public* and morality, two categories of legal judgment neglected in the postmodern age. Certainly, as concerns the topic of this paper, the judgment is interesting in relation to surplus embryos and their destruction, donation, and cryopreservation.

## SURROGATE MOTHERHOOD

Surrogate motherhood is burdened with a host of legal and ethical challenges that we have not encountered until recently. Its technical execution is as simple as any other procedure of MAP. Legal and ethical problems exist both in national systems and emphatically in cases of international/cross-border surrogate motherhood.<sup>102</sup> Nonexistent or deficient<sup>103</sup> regulations of surrogate motherhood often result in serious threats to the rights of the persons involved in the process, especially children in the sense of their abuse, such as trafficking in and sale of children.<sup>104</sup>

Until recently, the irrefutable presumption of *mater semper certa est* held true, whereby the woman giving birth to a child is his mother. However, this indisputable fact came under attack of "the choices and decisions of the various participants that are

arranging procreation by contracts".<sup>105</sup> Not only has the "strong foothold of motherhood" been called into question, but due to such arrangements, it is possible today that the biological father of a child may be the husband of the woman who has not given birth to the child.<sup>106</sup>

*Ordre public* (public policy) and morality are a significant burden for many legislations that evade surrogate motherhood or prohibit it, invoking over-values with which practice and laws need to be aligned. A good example of this is the opinion of a constitutional court claiming: "*The life and health of a person and of the conceived child, but not yet born, cannot be objects to transactions*" and "*all legal subjects have a constitutional obligation to protect these [moral] values*".<sup>107</sup>

Challenges and doubts are primarily the result of disharmony between "possible" and "permissible" expressed in the Latin saying *non omne quod licet honestum est*. We cannot and must not justify, ethically and legally, everything that can be performed, however, technically perfect this might be. A human being is not a being of technology, but a moral being, a being of the universe, a being of relationships. At the global level, jurisprudence and national legislations differ on the issue of acceptability of surrogate motherhood. Reasons may vary: A matter of one's world view — from a traditional to a liberal world view and view on the family; a matter of principle — in the sense of protecting the woman's dignity (surrogate mother) or peculiar (financial interests of the surrogate mother, physician, pharmacist, intermediary, agency, etc.). Unfortunately, the child's welfare is rarely referred to and scientists with more conservative views are more inclined to this. The child's welfare is extremely threatened by such procedures as well as the enforcement of his right to know who his parents are (according to Art. 7 of the Convention on the Rights of the Child).

Clients of surrogate motherhood are persons who cannot conceive a child naturally and who sometimes, although rarely, do not want a pregnancy and birth. Surrogate motherhood is expanded to contracts between homosexual couples and surrogate mothers who give birth to children for them.

With respect to children born by means of a surrogacy arrangement, it is considered that this procedure breaches Art. 7 of the Convention on the Rights of the Child guaranteeing the child the right to know who his parents are and to be cared for by his parents. The child is entitled to access to information about his biological origin; however, it is to be believed that in most cases this right is not respected.<sup>108</sup> The child's best interest is the criterion and the principle that should come before all adults' wishes, including the wish (but not the nonexistent right) to become parents.

There are two types of arrangements on surrogate motherhood: Genetic — in which the surrogate mother is at the same time the donor of ovum, and gestational in which the surrogate mother simply carries out a pregnancy, whereas the ovum derives from the client (usually from the commissioning couple) or a third anonymous woman. In both cases, it is possible that several women are interested in being the mother, and if possible requests for establishing paternity are added to this, then the number of interested persons is much larger. The child could have been conceived with the semen of the client (from the commissioning couple) or of an anonymous donor, and it is not excluded that the surrogate mother's husband could have conceived (after artificial insemination, which was obviously not successful, by natural insemination).

Legally speaking, the problem arises from the conflict between legal systems with some systems prohibiting, and others permitting surrogate motherhood. Thus, interested subjects evade domestic legislation and enter into the procedure in a country that permits surrogate motherhood (moreover, some countries even promote it for economic reasons). Certainly, this conflict produces two adverse effects: On the one hand, the client's state that prohibits surrogate motherhood does not allow the client to legally become a parent, while on the other hand, the child born out of an arrangement on surrogate motherhood remains deprived of different rights that are guaranteed to him in international documents: The right to identity, parenting, family environment, health, and nationality.<sup>109</sup>

Legal theoreticians highlight many problems that may arise as a result of surrogate motherhood, especially in relation to such children, who should be at the center, and their interests should be most important. Thus, Claire I. Achmad emphasizes the statelessness of children, children as "contested objects" or children who are not wanted by any of the participants (especially if they are born with some defects/diseases), children designed according to the clients' wishes (thanks to preimplantation methods), reduction of the number of children available for adoption.<sup>110</sup>

Although the child's best interests as promoted and protected by the Convention on the Rights of the Child (CRC) should always be first and at the center, the fact remains that surrogate motherhood still first favors the clients to become parents using a service from somebody else (with or without remuneration), then the surrogate mother (due to a financial reward), and the child is only a consequence of such an arrangement and is often actually the object<sup>111</sup> of a legal transaction.

The woman who gives birth to a child is entered as the child's mother in the birth register of most of the EU countries, even when it is a matter of surrogate motherhood (such as in Ireland and England), even if she only carried out the pregnancy and the child stems from the client who commissioned surrogate motherhood.<sup>112</sup>

The example of Ireland demonstrates an attempt at "putting order" in contracts on surrogate motherhood, certainly because Ireland permits surrogate motherhood with the theoretical explanation that "modern society"<sup>113</sup> demands it. The 2017 Assisted Reproduction Bill requires that contracts on surrogate motherhood must be authorized by the Assisted Human Reproduction Regulatory Authority before they are concluded. The Bill permits specific types of contracts, exclusively as domestic, gestational, and non-commercial (in any sense, except for the reimbursement of "reasonable costs"), the surrogate mother must not be genetically connected to the child. With regard to the surrogate mother, it is additionally required that she has domicile in Ireland, that she has already given birth, that she is between 25 years and 47 years of age, and that she has been approved (by a registered physician or counselor) to be a surrogate mother. The clients (the so-called intended parents) must be at least 21 years old, and one of them younger than 47, with domicile in Ireland, and that at least one of them has donated gametes for the child's conception. If a single woman commissions the child's birth, she must be incapable of carrying out a pregnancy or of conceiving the child for medical reasons, or there must be a danger that she might not survive the pregnancy or giving birth. If the clients are a couple, the aforementioned factors must exist for both of them. They need to undergo the process of counseling in three stages (before the conclusion of the contract, after the

child's birth and before the child's surrender, and at the moment of "transfer of parentage"). However, in spite of these relatively clear and firm conditions on both sides, Irish case law has recorded cases of reluctance and unpreparedness of the surrogate mother and her husband to surrender "parentage", while at the same time not wishing to care for the child.<sup>114</sup> In theory, there are objections to this "delayed model of parentage" because "the child is put in a vulnerable position" since the intended parents do not acquire parentage automatically.<sup>115</sup>

On account of MAP, there has been a separation of genetic, social, and legal parenthood, which was formerly united through the traditional system of the parent-child relationship. Surrogate motherhood additionally aggravates the problem in all situations that are legally and judicially contentious, and the child (at least for a while) legally has no parents, and consequently cannot enforce his guaranteed right to be raised by parents to whom the Convention on the Rights of the Child gives primary right to raise a child and the so-called parental responsibility.<sup>116</sup>

With regard to surrogate motherhood, one should first figure out what its objective is. It seems that unlike the adoption of an already existing child, here the being that will fulfil the wishes of the commissioning couple is only about to be created. The objective is, therefore, to realize parenthood, although this is not a right, and no international document envisages it as such (either as the right to a child or the right to be a parent or the right to parenthood). The reason is obvious, since every guaranteed right should enjoy its corresponding protection (most of all judicial), and claiming an unenforced right in such a case would be preposterous, since every person who as a single or as a couple has no children, could ask for the protection and could neither receive nor enforce it. The problem multiplies in cases of cross-border surrogate motherhood. Not only has the child a legal mother (surrogate mother), but potentially two mothers (the donor of the ovum<sup>117</sup> and the client), three possible fathers (the surrogate mother's husband, the client's husband, and an anonymous donor), but also the child, due to regulations, could be legally left without parents. Cross-border surrogate motherhood appeared as a problem before the ECtHR especially with regard to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and Art. 7 of the Charter of the Fundamental Rights of the EU.<sup>118</sup> Legal theory indicates that the views and judgments of the ECtHR exceed the limits of its authority<sup>119</sup> in relation to domestic legislations which prohibit surrogate motherhood (even cross-border), and it is worrisome that every Court decision against one State has an impact on the national law of other States. States have resorted to systems of preventing the recognition of surrogacy arrangements used by the client to avoid the application of domestic law<sup>120</sup> prohibiting such arrangements. There are two systems: The so-called *travel restriction mechanism* and protection of *ordre public* (public policy).

In the first case, a child born in a cross-border surrogacy arrangement cannot obtain a passport since there is no biological relation with the commissioning client couple, and consequently the child cannot obtain citizenship, a passport or a visa and thus arrive in the client's country. Countries including Germany, France, Italy, Austria, Croatia, New Zealand, and Norway resort to such a system. The judgment in the case *D. and Others v. Belgium*<sup>121</sup> rejected the applicants and recognized the right of the domestic authorities to use the *travel restriction mechanism* while at the same time requiring proof of a genetic connection between the child and the client.<sup>122</sup> There are legitimate warnings that the application of this

system, as soon as the biological link between the child and the man from the commissioning couple is proven, represents bypassing domestic *ordre public* and the rule *mater semper certa est*.<sup>123</sup>

The invocation of public policy as a second way of bypassing the recognition of surrogacy arrangements reflects the need to subject domestic citizens to public policy, part of which is the aforementioned presumption *mater semper certa est*, or a strict rule that the child's mother is considered to be or is the woman who has given birth to the child. On top of that, Art. 35 of the Convention on the Rights of the Child prohibits the sale of children, and Art. 2 Para. 1 (f) of the *UN Convention on the Elimination of All Forms of Discrimination against Women* obliges State Parties to take all measures against discrimination against women. It is beyond any doubt, and the academic community<sup>124</sup> also draws attention to this, that surrogacy arrangements exploit women (i.e., surrogate mothers) especially in developing countries.

In cases heard by the ECtHR *Mannesson v. France and Labasse v. France*<sup>125</sup> in which France invoked the protection of *ordre public*, the registration of the child born in the USA in the French register of births, marriages, and deaths was prohibited with the explanation that, although the child genetically originates from the father in the commissioning couple, he was not given birth by the female client, and that this would mean bypassing *ordre public* and the presumption that the child's mother is the woman who gave birth to him. Although the Court rejected the applicants as to an alleged violation of the right to family life,<sup>126</sup> it concluded that the child's right to privacy was breached since the child was in the situation of "legal uncertainty" and could not acquire the clients' citizenship, be their heir, etc., all of which belongs to the child's identity, which is part of the right to private life and represents a violation of the child's best interests under Art. 3 of the CRC and Art. 24 of the Charter. The Court concluded that France overstepped the margin of appreciation and violated the child's right to respect for his private life (as prescribed in Art. 8 of the ECHR and Art. 7 of the Charter). Such a position of the Court also expands to some more recent cases<sup>127</sup> and represents an incredible *salto mortale* regarding the impermissibility of the Court in Strasbourg's influence on national legislations in the domain of family law.<sup>128</sup> The Court gives precedence to the child's origin from one of the clients in relation to public policy (*mater semper certa est*) which is, we consider, impermissible, and thus legalizes not only surrogate motherhood (with a biological link) but also trafficking in children. Certainly, through such combinations and such a legal position, the child will remain deprived of his right under the Convention to information about his genetic mother (the surrogate mother or the donor of the ovum), which is again in contravention to Art. 7 of the Convention on the Rights of the Child and the child's right to an identity. It can be concluded that the Court's argumentation is very shallow and that the Court gives in to different liberal lobbies<sup>129</sup> that wish to destroy the traditional understanding of the family and enable financial gain for intermediaries in cross-border surrogacy arrangements. This represents "a denial of freedom and legitimacy of each Member State's choice not to recognize surrogacy arrangements and to view them as immoral and illegal".<sup>130</sup>

In the EU, there is no regulation that would govern surrogate motherhood and many issues pertaining to the permissibility, prohibition, or generally regulation of surrogate motherhood. However, there are certain recommendations aimed at prohibiting surrogacy arrangements. Thus, the Hague Conference on Private



International Law (HCPIIL) initiated a project on parenting and surrogate motherhood<sup>131</sup> collecting information from States in order to draft a relevant document on cross-border surrogate motherhood. The 2018 announced report speaks of the absence of uniform rules on legal parentage in EU Member States. In 2013, the European Parliament drafted a study that aspires to resolve the legal relationship of the child with the clients in order to protect the child's interests, including the possibility to leave the country of origin and make his lasting domicile in the receiving state. Prior to this, in 2011, the European Parliament adopted the Resolution on an EU Policy Framework to Fight Violence against Women<sup>132</sup> and the Annual Report on Human Rights and Democracy in 2014. The European Parliament considers that surrogate motherhood turns children into a commodity and breaches the provisions of the Convention on the Rights of the Child, especially the child's right to know who his parents are and to be cared for by his parents (Art. 7). Moreover, the European Parliament emphasizes that surrogate motherhood violates the provision of Art. 21 of the European Convention on Human Rights and Biomedicine,<sup>133</sup> whereby "the human body and its parts shall not, as such, give rise to financial gain". Furthermore, the Committee on Social Affairs of the Parliamentary Assembly of the Council of Europe (PACE) discussed the protection of children from cross-border surrogate motherhood in 2014. Two reports were drafted on the proposed draft resolution "Human Rights and Ethical Issues Related to Surrogacy"; however, PACE rejected them with the explanation that it refers (especially with regard to commercial surrogate motherhood) only to the protection of children born through surrogacy arrangements, without the explicit condemnation of the practice of surrogate motherhood.

Currently, the legislative situation in the EU is still legally vacant. However, it is certain that over time surrogate motherhood will be legalized considering the discernible starting point, namely the alleged protection of children and their rights, and not the prohibition of surrogate motherhood as the worst form of exploitation of women, as a means of trafficking in children, and a confusing omnibus. Unfortunately, this will be yet another indicator of fraud and proof that the EU and the Council of Europe unstopably get involved in national legal systems without legal legitimacy, as in the case of family legislation.

It suffices to emphasize that surrogate motherhood has no answer to a simple question: What does it mean to be a parent? If we depart from the word "parent", we shall see that in many languages its origin is in "birth"<sup>134</sup> and therefore surrogate motherhood is in itself illogical. Legally speaking, contracts on cross-border surrogate motherhood bypass domestic legislation, which is impermissible, fraudulent, and dangerous, ethically unacceptable and against basic legal postulates. The aforementioned mechanisms that serve to prevent cross-border surrogate motherhood (the travel restriction mechanism and the mechanism of non-recognition of legal parentage) have an adverse effect on the so-called best interests of children because they protect national public policy, and leave children without their legal parents.<sup>135</sup> On the contrary, when there is a biological link as the basis for a legal connection arising between the man from the commissioning couple and the child, a legally unacceptable construction emerges whereby the man who is legally and biologically the child's father creates a presumption for the benefit of his wife who is not the child's biological mother,

but is his legal mother. Therefore, uncertainty is certain and also illogical, jeopardizing at the same time a host of the child's rights.

Surrogate motherhood raises the issue of human dignity, the principle of subsidiarity (artificial insemination only if natural insemination is impossible), and the principles of prohibition of discrimination due to genetic heritage. We would add, the issue of extreme egoism of the clients who think they have the right and undertake everything to become parents, regardless of the interests of children who are conceived and born this way, and of third parties, especially surrogate mothers.

## CONCLUSION

The postmodern age enabled many comforts, strengthened democracy, and at the same time handed on a platter a magic potion turning wishes into rights, regardless of ethics and the rights of others. The procedure of MAP unfortunately refuted noble goals in many of its extreme cases, because it did not heed the rights of third parties and did not manage to respond to individual deontological questions. It opened the door to disregard ethical standards — from surplus embryos to surrogate motherhood. There are traces on this path that are full of inconclusive answers to many questions, the fundamental and most worrying one: *Quo vadis homine?* We feel that biomedicine must slow down the race toward the goal that seems to have overgrown the initial idea of providing assistance to infertile couples. This is possible by means of law. However, ethics is a science above medicine and law to which everything else must be subjected. Moreover, this is an opportunity for humanity to say "stop" to certain procedures for the sake of their own benefit, and an opportunity for science to serve man instead of vice versa. Obstetrics pursues the objective of protecting the mother's and the child's health during pregnancy and birth,<sup>136</sup> assisting in case of infertility in the narrow area of infertility and family planning.<sup>137</sup> However, one needs to be careful that the treatment of and assistance in infertility do not result in undesirable consequences for the woman and the child, as well as different forms of damages to third parties. Physicians are called to protect patients and not to do injustice (in accordance with the Hippocratic oath), to serve humanity, to practice their profession with conscience and dignity, to respect human life from conception, and to support the noble traditions of the medical profession (from the Declaration of Geneva). These high objectives are guidelines for every physician, including MAP. If we add to this the juridical imperative: *honestere vivere, alterum non laedere, suum cuique tribuere*, we must become aware that law and medicine must return to their sources. Medically assisted procreation must not develop without ethical standards, and law should provide guidelines for the protection of human dignity. The objective must be noble and the means must be humane. Legal judgment and legal regulations, judging by individual standpoints nurtured by national legislations of the EU, and confirmed by the Court of Human Rights, must continue to stay within the framework of broad discretion of national states, adopting restrictive acts in relation to the destruction of the human embryo, bearing in mind both ethical and moral issues inherent to the concept of the beginning of human life, and differing views on the matter among the Member States.<sup>138</sup> United in diversity is under strain, but we believe that it is a bearable one.

## REFERENCES

1. It suffices to mention gender ideology as a deviation from the anthropological understanding of man, the issue of transplantation of the skin from the face of a deceased person in terms of identity issues, sex change, use of drones, issues of change in the scope and reach of privacy protection (through tracing apps on mobile phones) etc.
2. Roman lawyer Publius Juventius Celsus gave the following definition of law: The law is the art of the good and the fair/equitable.
3. The following saying is ascribed to Fyodor Mikhailovich Dostoevsky: "Everything has limits, which are dangerous to cross, for once you cross it, you can return no more."
4. The right to have a child and the right to parenting does not exist in any international document and consequently is not protected by any judgement of the European Court of Human Rights (ECtHR) in Strasbourg.
5. No other medical discipline gives rise to so many ethical contentions as the MAP; cf Busardò FP, Gulino M, Napoletano S, Zaami S, Frati P, *The Evolution of Legislation in the Field of Medically Assisted Reproduction and Embryo Stem Cell Research in European Union Members*, Journal of Biomedicine and Biotechnology, July 2014; 6:1.
6. In this paper, we restrict ourselves to medically assisted procreation in the narrow sense of the word and we omit discussion on the area of embryo stem cell research.
7. Steptoe PC, Edwards RG. Birth after the reimplantation of a human embryo. *Lancet* 1978;2(8085):366. DOI: 10.1016/s0140-6736(78)92957-4.
8. There can be no talk of a conservative one, since such would not allow any form of medically assisted procreation except homologous fertilisation.
9. For more on these issues cf, e.g. Matulić T, Pobačaj – drama savjesti, Zagreb, 2019.
10. Cook RJ, Dickens BM, Fathalla MF. *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*. Oxford, UK: Oxford University Press; 2003. quoted from Busardò FP, Gulino M, Napoletano S, Zaami S, Frati P, cf endnote no. 5 p. 1.
11. Sara. Abram's wife had borne him no children. She had a female Egyptian servant whose name was Hagar. And Sarai said to Abram "Behold now, the lord has prevented me from bearing children. Go in to my servant: It may be that I shall obtain children by her... And he went in to Hagar, and she conceived". Genesis 16:1–16.
12. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997), <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf98>.
13. One of them refers to the prohibition of cloning human beings, and the other to transplantation of organs and tissues of human origin.
14. Thus defined by Šehić D, *Teološko-bioetičko vrjednovanje ustavnosudskih odluka o pobačaju*, PhD thesis, Zagreb, 2020, p. 26.
15. An example is Lithuania where demographic insufficiency is caused by major emigration and negative natural increase (the fertility rate in 2013 was 1.59); cf Mikelénas V, Mikelénaitė R, *Is the Battle Over? The New Lithuanian Law on Assisted Reproduction*, Russian Law Journal, VI, 2018; 1: 119-132.
16. Mentioned are an ever later age for marriage and postponement of giving birth to the first child, woman's employment, generally the Western lifestyle that does not motivate starting a family but brings procreation to the fore.
17. Lithuania is a good example of recent changes in this area because over several years there were a dozen of liberal and conservative Bills until the final adoption of the 2016 Law. With the change of government in January 2017, amendments were adopted. For the Law cf endnote no. 15, Mikelénas, Mikelénaitė.
18. Public policy (French *ordre public*) is the totality of legal, social and moral norms of society, values and customs and serves to defend the national legal order from other legal systems.
19. A lower court in Germany invoked public policy when it declined to recognise the ruling of a California court of law whereby a homosexual couple, on their return to Germany, were supposed to be entered as parents (i.e. two fathers!). However, the Supreme Court modified the ruling and allowed the registration of the genetic father as the child's father creating thereby a legally incredible situation of a child having a registered father but not a mother.
20. There was information in the press that over three hundred children in Japan were born using the sperm of the same man.
21. An uneven attitude towards this issue is apparent in varied German case law, where in one case the court ruled that a widow is not entitled to *post mortem* insemination (OLG München, 3U4080/16), and in another case the court ordered that fertilised ova be surrendered to the widow (OLG Rostock 7U67/09).
22. We primarily mean hormonal therapy as part of the procedure that may subsequently have an adverse effect on the health of the woman as well as on the health of twins that are more frequently conceived in medically assisted procreative procedures, creating thus greater health risks.
23. Since 1991, Germany has the so-called *Gesetz zum Schutz von Embryonen* (*Embryonenschutzgesetz – EschG*) providing for substantial fines for different misdemeanors. This Act actually regulated medically assisted procreation, but its name is interesting since it implies a positive attitude towards the embryo. It is expected that the Act will be amended since it is allegedly not in line with "modern families and recent medical developments"; cf Dethloff N, Gössl SL, Sucker S, *Registration of intersex persons, medically assisted reproduction and other matters under consideration*, in: The International Survey of Family Law 2017, pp. 117-127.
24. Note no. 15, Mikelénas, Mikelénaitė, p. 122.
25. A thorough approach must consider not only the procreative rights of participants, but also very delicate issues e.g. the creation of a future child with the objective of medical assistance to an already born brother or sister (for the purpose of organ transplantation or some other medically adjuvant procedure).
26. In that sense, several approaches can be distinguished: naturalistic, constructivist and anticipation approach. For each of them, cf Ten Haaf L, *Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction*, Laws, 2016; 5:10, 5 ff.
27. As a follow-up question to this previous question, there is an increasing number of scientific debates on the interest of the future child not to be born; cf Buchanan A, Brock DW, Daniels N, Wikler D, *From Chance to Choice: Genetics and Justice*, Cambridge, Cambridge University Press, 2009; Wilkinson S, *Choosing Tomorrow's Children. The Ethics of Selective Reproduction*, Oxford: Oxford University Press; 2010; Bennett R, and Harris J, *Are there lives not worth living? When is it morally wrong to reproduce in Ethical Issues in Maternal-Fetal Medicine*, Dickenson DL, ed., Cambridge: Cambridge University Press, 2002; Archard D, *Wrongful Life, Philosophy*, 2004; 79, 2004, 403-420; and others.
28. Some authors go even further than interest and expand it to the right of an individual not to be born since his life will not be worthy of living; cf Buchanan A, Brock DW, Daniels N, and Wikler D, note no. 27, according to Ten Haaf L cf endnote no. 26, p. 1, f. 1. In the Netherlands, medically assisted procreation is considered unacceptable if it is certain that the child may be at risk of a serious disease, and the procedure of medically assisted procreation is warded off in order "to prevent the child from suffering from a life affecting disease"; Ten Haaf L, cf endnote no. 26, p. 4.
29. Ten Haaf L, cf endnote no. 26, p. 1.
30. In the UK *Human Fertilisation and Embryology Act*, there is an explicit reference to the welfare of the child, however without conclusive

- indication and only in the form of an instruction to clinics to gather information from patients on possible risk factors to the child's wellbeing that could influence in a sense of significant harm and neglect of the child; Ten Haaf L *cf* endnote no. 26, p. 5.
31. Dutch regulation refers to moral contraindications for fertility treatments that could exclude patients from treatment, addressing "the wellbeing of the future child". Ten Haaf L *cf* endnote no. 26, p. 5.
  32. Ten Haaf L *cf* endnote no. 26, p. 2.
  33. Thus, in the case *S.H. and Others v. Austria* (App. 57813/00) ECHR found, in our view incorrectly, that the right to private life covers certain aspects of procreative autonomy, which includes "the right to respect... the decision to become a parent or not" (Para. 71) as well as "the right of a couple 'to make use of medically assisted procreation techniques' in order to conceive a child". Our view is that the right of the child to know his origin as protected by the Convention on the Rights of the Child is not sufficiently protected in case of heterologous insemination because the child, even if he has the right to get insight into his genetical heritage (*i.e.* information about the donor of the semen cell) does not enforce his right with respect to his remote relatives, such as grandmother and grandfather.
  34. *Cf* Ten Haaf L endnote no. 26, p. 5.
  35. Kamerstukken II 2000-2001, 27423, no. 3, quoted after Ten Haaf L *cf* endnote no. 26, p. 10.
  36. Ten Ten Haaf L, *cf* endnote no. 26, p. 9.
  37. Thus Naffine N. *Law's Meaning of Life, Philosophy, Religion, Darwin and the Legal Person*. Oxford and Portland: Hart Publishing; 2009.
  38. We only wish to indicate that human dignity is a legal term contained in Para. 1 of the Preamble of the Universal Declaration of Human Rights, which has not been replaced by any document that would abandon this term. In European documents, we find the concept of human dignity in the Charter of Fundamental Rights of the European Union, as well as in the aforementioned European Convention on Human Rights and Biomedicine that emphasises that, *inter alia*, the misuse of biomedicine can violate this dignity, giving examples such as human cloning, sex selection and germline gene therapy.
  39. Ten Haaf L, *cf* endnote no. 26, p. 14.
  40. "United in diversity" is the official motto of the European Union.
  41. Emperor Justinian's codification *Codex Iustinianus* from 528 and 534, which includes a collection of all imperial constitutions (*constitutiones principum*), representing the first codification of Roman law.
  42. It is indisputable that the increase points to the worrying trend of increase in infertility.
  43. The principle of the child's best interest is the supreme principle from Art. 3 of the UN Convention on the Rights of the Child (CRC) (1989) specifying (Para. 1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This principle is recognised by the Charter of Fundamental Rights of the EU specifying in Art. 24, Para. 2: "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."
  44. Art. 3 Para. 3 of CRC specifies: "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."
  45. The latter example is most probably the result of caution and unacceptable experiments with humans that were part of the broader Nazi plan for creating *Übermensch*. Consequently, Austria, Germany and Switzerland are in the group of such countries.
  46. Pascariu LT. Incidental principles in European legislation. The principle of motivation. *Euro J Law Public Administ* 2016;3(2):43. DOI: 10.18662/eljpa/2016.0302.04.
  47. Although the UK is out of the EU after Brexit, we think that it is important to illustrate the legal situation in this country as well.
  48. All the data are borrowed from Busardò FP, Gulino M, Napoletano S, Zaami S, Frati P, *cf* endnote no. 5. Authors use PubMed and Scopus databases (from 1970 to January 2014).
  49. This excludes countries having no regulation on medically assisted procreation.
  50. According to the decision of the Italian Constitutional Court on the unconstitutionality of sections of Law 40/2004 (of 9 April 2014), heterologous artificial fertilisation is legitimised in Italy.
  51. According to the ECtHR decision in case *S.H. and Others v. Austria*, Austria is obliged to permit heterologous fertilisation in order to avoid violation of the right to respect private and family life (Art. 8) and prohibition of discrimination (Art. 14) of the European Convention on Human Rights.
  52. For criticism of more recent liberal solutions *cf* in more detail: Teixeira Pedro R, *The Dawn of a Brave New World in Portugal? A Critical Overview of the New Legal Framework Applicable to Medically-Assisted Procreation*, in: *The International Survey of Family Law 2017*, 271-282.
  53. The amended Portuguese Act on Medically Assisted Reproduction (2016) permits contracts on surrogate motherhood under certain quite clear and strict conditions; *cf* Teixeira Pedro R *cf* endnote no. 52, p. 277.
  54. Busardò FP, Gulino M, Napoletano S, Zaami S, Frati P, p. 2.
  55. *Ibid.*, p. 4.
  56. *Ibid.*, p. 6.
  57. *Ibid.*, p. 3.
  58. *Ibid.*, p. 10.
  59. *E.g.* in Belgium, the Czech Republic, Estonia, France, Greece, Hungary, Latvia, Lithuania, the Netherlands, Portugal, Slovakia, Slovenia and Sweden.
  60. Busardò FP, Gulino M, Napoletano S, et al., , endnote no. 5.
  61. Hrabar D. Pravni dosezi medicinske oplodnje u Hrvatskoj. *Zbornik Pravnog fakulteta u Zagrebu* 2010;60(2):415-442.
  62. Zakon o medicinski pomognutoj oplodnji, *Narodne novine* (Official Gazette), no. 86/12, hereinafter: MAPA.
  63. This religious consideration is of course very questionable considering, when it comes to Catholics, the very narrow scope in which the Catholic Church allows artificial insemination. *Cf* *Humanae vitae* (1968), encyclical of Pope Paul VI, as well as two encyclicals of Pope John Paul II: *Donum vitae* (1987) and *Evangelium vitae* (1995); more on this *cf* Matulić T, endnote no. 9.
  64. Aligned with this is the provision on the ban of export of reproductive cells and embryos, which indicates a cautious or more restrictive approach.
  65. When accessing the procedure, the participants are obliged to prove the existence of marriage or unmarried partnership with corresponding documents (in cases of unmarried partners with a notarised statement).
  66. There will be rare cases of women without sexual partners undergoing infertility treatment.
  67. Zakon o životnom partnerstvu [Life Partnership Act], *Narodne novine* (Official Gazette) no. 92/14, 98/19, provides for the so-called informal and formal (registered) partnerships.
  68. According to the Family Act, adoption is possible for married couples, unmarried couples and singles. However, according to the relevant regulation, such a partner could request the so-called partnership care that is very similar to parental care.
  69. Such cells are preserved up to the age of 42 for women and the age of 50 for men.
  70. The information concerns natural pregnancy planning, possibilities of infertility treatment, adoption, psychological/psychotherapy counselling, and in cases of heterologous insemination counselling is mandatory.
  71. Donors may also be persons who have been partially deprived of their legal capacity, except in cases where this partial deprivation concerns restrictions in giving statements of intention.
  72. Especially dubious is the result of a premise on the ownership over part (half) of the embryo in the case of a wife whose husband died,



and in line with the prohibition of *post mortem* insemination and donation of her “product” to somebody else. Also doubtful is the creation, *i.e.* the birth of a child who is entitled to parental care of both parents, under circumstances when it is certain that there is no father. Moreover, strange is the relationship between dates of the embryo’s creation and its implantation, birth of the child and death of the father. In all of this, the presumption on the fatherhood of the mother’s husband (with regard to the deadline of 300 days) will very likely not be applicable.

73. Art. 107 of the Criminal Code, Narodne novine (Official Gazette), no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19.
74. Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on the setting of standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, seeks to ensure the quality and safety aspects of human tissues and cells intended for human applications, and provides in its recital no. 12 as follows: “This Directive should not interfere with decisions made by Member States concerning the use or non-use of any specific type of human cells, including germ cells and embryonic stem cells. If, however, any particular use of such cells is authorised in a Member State, this Directive will require the application of all provisions necessary to protect public health, given the specific risks of these cells based on the scientific knowledge and their particular nature, and guarantee respect for fundamental rights. Moreover, this Directive should not interfere with provisions of Member States defining the legal term ‘person’ or ‘individual’.”.
75. Principle 11 of the *Principles* adopted in 1989.
76. It is worth mentioning that the 2002 *Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin* promotes donation of organs but expressly excludes reproductive organs and tissues from its scope.
77. Application no. 57813/00. In Para. 20, the Court ruled “The use of *in vitro* fertilisation as opposed to natural procreation raised serious issues as to the well-being of children thus conceived, their health and their rights, and also touched upon the ethical and moral values of society and entailed the risk of commercialisation and selective reproduction (*Zuchtauswahl*).”.
78. The judgement took into consideration the overview of law and practice concerning artificial procreation in Europe based essentially on the following documents: “Medically Assisted Procreation and the Protection of the Human Embryo: Comparative Study on the Situation in 39 States” (Council of Europe, 1998); replies by the Member States of the Council of Europe to the Steering Committee on Bioethics’ “Questionnaire on access to medically assisted procreation (MAP) and on right to know about their origin for children born after MAP” (Council of Europe, 2005); and a survey carried out in 2007 by the International Federation of Fertility Societies.
79. Cf Para. 92 of the judgement: “Consequently, the Court’s task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation.”.
80. These seven techniques are: artificial insemination within a couple; *in vitro* fertilisation within a couple; artificial insemination by a sperm donor; ovum donation; ovum and sperm donation; embryo donation and intracytoplasmic sperm injection (and *in vitro* fertilisation procedure in which a single sperm is injected directly into an ovum).
81. In Para. 117, the Court cautioned about dynamic developments in science and society, clearly signalling the need for expanding methods and changing the direction of changes, which we do not like at all and for which there is no justification. Moreover, it is stated: “This, however, did not mean that these criteria would not be subject to developments which the legislature would have to take into account in the future”.
82. In Para. 115, the Court states: “Having regard to the above considerations, the Court therefore concludes that, neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for *in vitro* fertilisation under section 3 of the Artificial Procreation Act, the Austrian legislature, at the relevant time, exceeded the margin of appreciation afforded to it.”.
83. Cf Para. 75 of the judgement which is the position of the European Centre for Law and Justice.
84. Thus, the aforementioned case *S.H. and Others v. Austria*, Para. 82, *i.e.* the right to respect the decision on becoming a parent in the genetical sense (according to judgements *Dickson v. the United Kingdom*, Para. 66; *Evans v. the United Kingdom*, Para. 72).
85. Thus *E. B. v. France*, Para. 41.
86. *Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence*, 2018, Para. 268.
87. Thus for example in the case of the partner withdrawing his consent to preserving and using jointly created embryos thereby preventing his former partner from becoming a mother (case *Evans v. the United Kingdom*, Para. 82).
88. Thus cases *Menesson v. France*, *Labassee v. France*; *D. and Others v. Belgium*; *Foulon and Bouvet v. France*; cf *Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence*, 2018, p. 270, and the case *Paradiso and Campanelli v. Italy* that referred to non-separation and giving the child conceived abroad through surrogate motherhood and brought back to Italy for adoption contrary to Italian adoption laws. The Court ruled that in this specific case family life did not exist and therefore considered it within the framework of the concept of “private life”; cf *Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence*, 2018, p. 249.
89. This concerns the right to abortion in relation to the scope of the right to respect for private life; thus, *A, B and C v. Ireland*, *Tysiqc v. Poland*, *R.R. v. Poland*, *P. and S. v. Poland*, and beyond the scope of this topic non-consensual sterilisation or inadvertent sterilisation without the obtained informed consent; thus *I.G. and Others v. Slovakia*, *Csoma v. Romania*.
90. *E.g. Evans v. the United Kingdom* (in Para. 71); *R.R. v. Poland* (in Para. 180); *Dickson v. the United Kingdom* (in Para. 66), *Paradiso and Campanelli v. Italy* (in Paras. 163 and 215).
91. This connection need not necessarily arise from kinship or legal relationship (*e.g.* step-father or step-mother towards step-child). In relation to this topic, it is interesting that the circumstances of birth are part of a person’s private life as defined by Art. 8 (*Ternovszky v. Hungary*, Para. 22). However, as a result of uneven policies in the Member States of the Council of Europe in relation to im/ permissibility of giving birth at home, the Court views that the State does not violate the right to privacy when it does not allow it due to health policy; thus in *Dubská and Krejzová v. the Czech Republic*.
92. Thus *e.g. S.H. and Others v. Austria* (Para. 82), *Knecht v. Romania* (Para. 54).
93. This especially refers to healthy potential carriers of hereditary diseases; so *Costa and Pavan v. Italy*; *A.K. v. Latvia*.
94. *Paradiso and Campanelli v. Italy*, Application no. 25358/12, Judgement 24 January 2017.
95. “The present case thus concerns applicants who, acting outside of any standard adoption procedure, brought to Italy from abroad a child who had no biological tie with either parent, and who had been conceived – according to domestic courts – through assisted reproduction techniques that were unlawful under Italian law. (...) The Court concludes that no family life existed in the present case. (...) It considers, however, that the impugned measures pertained to the applicants’ private life. (...) It follows that there has been no violation of Article 8 of the Convention (...) [since] the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the applicants’ interest in their personal development by continuing their relationship with the child.” (Paras. 131, 158, 216 and 215 of the Judgement) The facts of the case referred to ethically sensitive issues – adoption, placing the child in custody, medically



- assisted procreation and surrogate motherhood – with respect to which the Member States enjoyed a wide margin of appreciation (Para. 110); *cf Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence*, 2018, p. 21.
96. *Parrillo v. Italy*, Application no. 46470/11, Judgement 27.08.2015.
  97. This is indeed about the Court's attitude towards (European) values, rather than the mere application of law, since the Court indisputably becomes a creator of values, in spite of firm doubts about its impartiality. It suffices to monitor affairs concerning some of the judges that have been presented with valid arguments. Thus, the Report of the European Centre for Law and Justice (ECLJ) on "NGOs and the Judges of the ECHR" reveals serious dysfunctions within the European Court of Human Rights. Over the last 10 years, 22 of the 100 permanent judges at the Court have come from or worked closely with seven NGOs active at the Court. 18 of these judges have also sat in cases involving the NGO to which they were linked. Among these 7 NGOs, the network of the Open Society stands out for the number of judges linked to it (12) and for the fact that it funds the six other organisations mentioned in this report. This situation is serious, as it calls into question the independence of the Court and the impartiality of its judges; *cf*, <https://eclj.org/ngos-and-the-judges-of-the-echr>.
  98. Para. 159 of the Judgement; *cf Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence*, 2018, p. 21, Para. 75.
  99. Para. 197 of the Judgement.
  100. <http://curia.europa-eu/juris/document/document.jsf?text=111402&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=4893061>.
  101. Many scientists outside the medical profession consider the embryo a human being, especially with regard to abortion but also in a broader perspective. Thus, George RP, Tollefsen C, *Embryo – A Defense of Human Life*, Doubleday, New York, 2008 state: "The human embryo, although immature, is still a human being."
  102. Legal problems have been encountered by India, Switzerland, Georgia, France, Ireland, Israel, USA, Spain and Belgium.
  103. States either prohibit or allow surrogate motherhood or have no legal regulations on it.
  104. Khazova OA, Mezmur BD, *UN Committee on the Rights of the Child – Reflections on Family Law Issues in the Jurisprudence of the CRC Committee*, International Survey of Family Law 2019, Intersentia, Cambridge – Antwerp – Chicago, p. 322. On criminal aspects of trafficking related to medically assisted procreation, *cf* Sokanović L, Mišić Radanović N., *Human Reproduction – Selected Aspects of Criminal Justice in Croatia*, Criminal Justice in Croatia, 240. Journal of Eastern-European Criminal Law, 2016; 1: 232-240.
  105. Čulo Margaletić A, Preložnjak B, Šimović I, *Presumption of Motherhood on Crossroad of Surrogacy Arrangements in EU*, in: Duić D, Petrašević T (eds.), *EU and Comparative Law Issues and Challenges Series (ECLIC 3)*, Conference Book of Proceedings, Josip Juraj Strossmayer University of Osijek, Faculty of Law Osijek, p. 781.
  106. This annuls and depreciates the presumption of fatherhood of the mother's husband (*pater est quem nuptiae demonstrant*).
  107. Romanian Constitutional Court, Decision no. 418 of 18 June 2005, Official Gazette no. 664 of 26 July 2005, 3 (b(CCR2005)); *cf* Brodeala E, *The Legal Status of Assisted Reproduction in Romania, A Brief Discussion on Surrogacy*, 7 Romanian Journal of Comparative Law, 2016; 56: p. 70.
  108. The Committee on the Rights of the Child refers to violation of this right in Ireland in 2016, Georgia in 2017, Spain in 2018 and Belgium in 2019; *cf* Khazova OA, Mezmur BD, *cf* endnote no. 104, p. 324.
  109. Achmad Thus, C. I., *Children's Rights in International Commercial Surrogacy*, quoted after Čulo Margaletić, A, Preložnjak, B, Šimović I, *cf* endnote no. 105, p. 780.
  110. Achmad CI, *Children's Rights in International Commercial Surrogacy*, E. M. Meijers Institute, 2018, p. 55 ff.
  111. *Čulo Margaletić A, Preložnjak B, Šimović I, cf* endnote no. 105, p. 780.
  112. This is a case described by Beaumont, P., and Trimmings, K., where the clients provided their germ cells to the surrogate mother, but could not be registered as the mother and the father; *cf* Čulo Margaletić A, Preložnjak B, Šimović I, *cf* p. 782. Most frequently, the only possibility for such mothers (and fathers) is to adopt such a child.
  113. Bracken L. The assisted reproduction bill 2017; an analysis of proposals to regulate surrogacy in Ireland. *North Ireland Legal Quart* 2017;67(1):582.
  114. A case before an Irish court of law AB (*Surrogacy: Consent*) [2016] EWHC 2643 (Fam).
  115. Bracken L. *cf* endnote no. 113,1, p. 582.
  116. According to Art. 5 of the CRC.
  117. In this case, we could take into consideration two donors of ova where the nucleus of one ovum and the rest of the other ovum would be taken through embryological manipulation.
  118. The Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2007/C 303/01.
  119. Thus also, Čulo Margaletić A, Preložnjak B, Šimović I, *cf* endnote no. 105 p. 794, indicate that there is no jurisdiction of the Court in relation to national family laws, and Yetano MT, *The Constitutionalisation of Party Autonomy in European Family Law*, *Journal of Private International Law*, 2010; 6:1, on p. 180 and 192 states that the ECJ and the ECtHR make a "mess" and that certain limits and careful deliberations are needed in the domain of family law.
  120. This is a serious legal problem that can be compared to prohibited trade arrangements (*e.g.* offshore companies serving to launder money). Namely, "allowing citizens to bypass domestic law by simply travelling abroad leads to the irreparable erosion of that country's domestic prohibitions and often anticipates their reform"; *cf*, Yetano, M. T., *cf* endnote no. 119, p. 179; quoted after Čulo, *cf* endnote no. 105, p. 785.
  121. *D. and Others v. Belgium*, Application no. 29176/13, Judgment of 11 September 2014.
  122. More on this case and legal dilemmas *cf* Čulo Margaletić A, Preložnjak B, Šimović I, *cf* endnote 105, p. 786 ff.
  123. Čulo Margaletić A, Preložnjak B, Šimović I, *cf* endnote no. 105, p. 788.
  124. Thus Beaumont; Trimmings; *cf* after Margaletić, A., Preložnjak, B., Šimović, I., *cf* endnote no. 105, p. 793.
  125. *Mannesson v. France*, Application no. 65192/11, Judgement of 26 June 2014; *Labassee v. France*, Application on. 65941/11, Judgement of 26 June 2014.
  126. More on this *cf* Margaletić, A., Preložnjak, B., Šimović, I., *cf* endnote no. 105, p. 790 ff.
  127. Thus, *Foulon and Bouvet v. France*, Application nos. 9063/14 and 10410/14, Judgment of 21 July 2016.
  128. Similarly also Margaletić, A., Preložnjak, B., Šimović, I., *cf* endnote no. 105, p. 793 have doubts about the authority of the ECtHR "to, albeit in an indirect way, interfere with a member state's choice not to recognise the legal effects of surrogacy arrangements (especially the commercial ones)" and raise the question whether this matter falls within the exclusive competence of Member States to regulate national substantive family law (*e.g.* the issue of the origin of children). We believe that systems of substantive family law of the Member States of the Council of Europe and the EU are national systems in which the Member States continue to retain exclusive competence to create their national family law as they see fit and that the ECtHR should resist the temptation to act as "a back door legislation of surrogacy".
  129. Beaumont P, Trimmings K, *Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-Border Surrogacy; Is There Still a Need for Global Regulation of Surrogacy?*; quoted after Margaletić, A., Preložnjak, B., Šimović, I., *cf* endnote no. 105, p. 793. The authors state further: "The ECtHR jurisprudence will thus become a vehicle of the pro-surrogacy lobby groups that have commercial interest in the area of surrogacy in the receiving countries".

130. Margaletić, A., Preložnjak, B., Šimović, I., *cf* endnote no. 105, p. 793.
131. *Cf* the official web-site of the Hague Conference: [www.hcch.net](http://www.hcch.net).
132. 2010/2209(INI).
133. <https://rm.coe.int/168007cf98>.
134. In Croatian 'roditelj' (parent) is derived from 'roditi' (give birth), Latin 'parens, tis, m. and f.' and derivations in different languages (English 'parent', French 'parent', derive from the Latin word 'pario, 3. peperit, partum' – to give birth, or in Italian 'genitore' from genus.
135. Thus 10 Margaletić, A., Preložnjak, B., Šimović, I., *cf* endnote no. 105, p. 798.
136. *Cf* Dražančić A, *Porodništvo*, Školska knjiga, Zagreb, 1994, p. 3.
137. Together with gynecological endocrinology.
138. *Cf* the judgement *Parrillo v. Italy*, Para. 180: "Furthermore, the above-cited Council of Europe and European Union materials confirm that the domestic authorities enjoy a broad margin of discretion to enact restrictive legislation where the destruction of human embryo is at stake, having regard, *inter alia*, to the ethical and moral questions inherent in the concept of the beginning of human life and the plurality of existing views on the subject among the different Member States."