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POSTHUMOUS REPRODUCTION: LIFE AFTER DEATH?

Abstract: *This paper reviews the issue of posthumous reproduction at the international and domestic levels. The overview covers the legal systems of the United Kingdom, as a country that allows posthumous reproduction, and France, as a country that prohibits posthumous reproduction. Subsequently, Serbian legal provisions, which forbid posthumous reproduction, are analyzed. The provisions are analyzed through the lens of the recent private initiative submitted to Serbian national authorities. Although infertility is a great obstacle in life, the proposed amendments present are one-sided as they mainly focus on fulfilling the individual's wish to become a parent, rather than on creating a legal framework. As a result, and bearing in mind that no consensus has been reached regarding the issue of permissibility of posthumous reproduction, the author determines that Serbian legislator is not at fault – at least for the time being.*

Key words: medically assisted reproduction, posthumous reproduction, written consent, the right to respect for private and family life, the child's right to know their origins.

1. INTRODUCTION

Various medically assisted reproduction procedures have undoubtedly grown in importance over the past several decades. This is best evidenced by the growing number of different medically assisted reproduction technologies aimed at treating infertility. The term medically assisted reproduction (MAR) covers different technologies of in vivo and in vitro fertilization, which are used when it is impossible to conceive a child without medical assistance.¹ One such technology is cryopreservation, the process of storing

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1 Draškić, M., Biomedicinski potpomognuto oplodjenje, in: Lilić, S. (ed.), 2013, *Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 219.

reproductive cells at sub-zero temperatures, allowing for the preserved cells to be used in medically assisted reproduction.² Some legal scholars³ point out that, as early as the 19th century Italian scientist Paolo Montegazza discovered that human spermatozoa may be preserved by freezing.⁴ Nevertheless, cryopreservation became successful only after experts came to the knowledge that a small quantity of glycerol added before the freezing significantly enhanced the sperm's survival rate.⁵

Due to its specific nature, cryopreservation has been, quite expectedly, primarily used by those individuals who are, for various reasons, concerned about their future reproductive capacity. For example, Greenfield⁶ maintains that astronauts, military personnel, and cancer patients receiving chemotherapy or radiation therapy have used cryopreservation to preserve their seminal fluid and subsequently use it at a later time.⁷ It was the development of cryopreservation that marked the beginning of posthumous reproduction.

2. POSTHUMOUS REPRODUCTION

Posthumous reproduction is carried out by combining cryopreservation and other MAR technologies, resulting in the birth of a child even after the death of one parent. It should be noted that cryopreservation may be employed in different circumstances. First, one can speak of a situation involving a couple that is undergoing in vitro fertilization treatment, and there are frozen embryos or fertilized cells, there is also partners' consent

2 Doroghazi, J., 2005, Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children, *Washington University Law Quarterly*, Vol. 83, No. 5, p. 1597. See also Živojinović, D., Posthumno začeće u evropskim pravima i novom srpskom zakonodavstvu, in: Mićović, M. (ed.), 2018, *XXI vek – vek usluga i Uslužnog prava*, 9, Kragujevac, Pravni fakultet, Institut za društvene nauke, p. 249.

3 Greenfield, J., 2006, Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance with a Focus on the Rule against Perpetuities, *Minnesota Journal of Law, Science & Technology*, Vol. 8, No. 1, p. 278, fn.16.

4 For more information on cryopreservation, see Bila, S., Tulić, I., Radunović, N., 1994, *Osnove vantelesnog oplodjenja*, Belgrade, Zavod za udžbenike i nastavna sredstva, p. 113. See Vidić, J., Posthumna oplodnja i njena naslednopravna dejstva, in: Marjanski, V. (ed.), 2011, *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 45, No. 3, Novi Sad, Univerzitet u Novom Sadu – Pravni fakultet, p. 554.

5 Greenfield, J., 2006, p. 281, fn. 24.

6 *Ibid.*, pp. 281–282.

7 Pennigs, G., et al., 2006, ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction, *Human Reproduction*, Vol. 21, No. 12, p. 3050; See Shuster, E., 1999, Posthumous Gift of Life: The World According to Kane, *Journal of Contemporary Health Law and Policy*, Vol. 15, No. 2, p. 402.

that in the case of death of one of the partners, the surviving partner is entitled to use the frozen genetic material to produce progeny.⁸ Second, there are situations in which the partners undergoing assisted reproduction treatment do not state their wishes regarding posthumous reproduction, however, since their genetic material has been frozen during the procedure itself, the surviving partner is granted the right to request that the frozen material be used for posthumous reproduction.⁹ Lastly, there are situations in which there is no pre-frozen genetic material and the surviving partner or another close family member requests that the deceased man's genetic material be released after his death.¹⁰

Nevertheless, the author is of the opinion that it is necessary to answer certain preliminary questions prior to addressing the issue of the permissibility of posthumous reproduction. The question could be raised about the legal status of the genetic material used in posthumous reproduction and whether disposition of such genetic material should be allowed. If the latter question can be answered in the affirmative, the question still remains whether disposition is possible only in cases when the deceased person has consented to the posthumous use of his or her genetic material. Further, if conception, and subsequently the birth of a child through posthumous reproduction, does occur, what will the child's legal status be in relation to the deceased person whose genetic material has been used?

This paper attempts to provide answers to some of these questions by looking at the existing legal provisions used in United Kingdom and France, which regulate posthumous reproduction differently. First, the legal norms and case law in the United Kingdom, as an example of a legal system that permits posthumous reproduction under specific conditions, are analyzed, followed by an examination of the French legal system, which has a negative attitude toward posthumous reproduction. Taking into consideration such positions in comparative law, the author then focusses on existing legal norms and current problems and challenges faced by the Serbian legislator in this regard.

2.1. POSTHUMOUS REPRODUCTION IN ENGLISH LAW

The United Kingdom presents a country with a permissive attitude toward posthumous reproduction. Prior to reviewing the current legal provisions, it is important to analyze one of the most significant cases

8 Vidić, J., 2011, pp. 554–556. See also Samardžić, S., *Porodičnopravni aspekti posthumne oplodnje*, in: Marjanski, V. (ed.), 2013, *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 4, Novi Sad, Univerzitet u Novom Sadu – Pravni fakultet, p. 389.

9 *Ibid.*

10 *Ibid.*

from its case law, namely the case of *R v. Human Fertilization and Embryology Authority*.¹¹ The said case involved a woman, Diane Blood, whose husband was comatose from meningitis. At that time reproduction matters were regulated by the 1990 Human Fertilization and Embryology Act. The Act prohibited the storage of gametes and their use in any treatment without written consent from the gamete provider.¹² After it became apparent that her husband would die soon, Mrs. Blood asked a doctor to use electroejaculation to obtain sperm from her husband for posthumous conception.¹³ The request was accepted and the doctors retrieved the seminal fluid from Mrs. Blood's husband using the aforementioned method, after which he was declared clinically dead.¹⁴ Mrs. Blood then sought release of her deceased husband's seminal fluid to her for posthumous insemination abroad.¹⁵

Since the gametes were retrieved from Mrs. Blood's husband without his consent, the Human Fertilization and Embryology Authority (HFEA)¹⁶ denied her request. The HFEA argued that such a request was intended to circumvent the norms regulating posthumous reproduction,¹⁷ as posthumous reproduction can be conducted provided that consent to perform it has been previously obtained.¹⁸ After Mrs. Blood appealed to the Court of Appeal, which allowed for the procedure to be carried out and pointed out that the HFEA did not take into account the value of human rights in health care when it prohibited Mrs. Blood from taking her husband's genetic material outside the United Kingdom.¹⁹ Therefore, the

11 Court of Appeal, *R v. Human Fertilisation and Embryology Authority*, ex parte Blood, [1997] EWCA Civ J0206 13, Judgement of 6 February 1997.

12 See Sch. 3, para. 5 (1) HFEA of 1990.

13 For more details on methods of posthumous seminal fluid collection, see Batzer, F. R., Hurwitz, J. M., Caplan, A., 2003, Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement, *Fertility and Sterility*, Vol. 79, No. 6, pp. 1264–1265.

14 *Ibid.*, p. 1264.

15 *Ibid.*

16 The Human Fertilisation and Embryology Authority was established by the Human Fertilisation and Embryology Act as a body that, among other things, performs activities related to the disposition of gametes, records data related to donors, treatments and children, and ensures that treatments and research are carried out with respect for human life and with a responsibility toward the parties involved in the procedures. For more details on the Human Fertilisation and Embryology Authority, see Section 5: The Human Fertilisation and Embryology Authority, its functions and procedure, of the 1990 Human Fertilisation and Embryology Act.

17 Deech, R., Smajdor, A., 2007, *From IVF to Immorality*, Oxford, Oxford University Press, p. 120.

18 Vidić, J., 2011, p. 556.

19 Deech, R., Smajdor, A., 2007, p. 120.

Court of Appeal indicated that the HFEA should reconsider its decision, and that the fact that the genetic material was obtained and stored in an illegal manner did not create an obstacle to granting permission to export the genetic material.²⁰ In response to the HFEA concerns that in the given case posthumous reproduction treatment would be unlawful, the Court of Appeal stated that, in the specific case, the doctors, though unlawfully, had already mistakenly retrieved the genetic material; therefore, its export should be allowed.²¹ Consequently, under the influence of the Court of Appeal, but also due to great pressure from the public, the HFEA allowed Mrs. Blood to take her husband's genetic material abroad.²² She went to Belgium where she underwent in vitro fertilization which resulted in the birth of a son.²³ Moreover, a few years later she underwent the same treatment again and had another son, and is now the mother of two boys, who were born using her husband's genetic material obtained posthumously and without his consent.²⁴ Such a decision by the Court of Appeal raised the question of whether the provisions of English law should be changed.²⁵ It was concluded that the legislator rightly envisaged the requirement for written consent from the person whose genetic material is to be used posthumously and that such a provision should not be changed.²⁶ Furthermore, it was explicitly recommended to the HFEA to prohibit the export of seminal fluid as the opposite would lead to possible circumvention of the provisions of English law.²⁷ Legal scholars underline that the HFEA could have very likely concluded that the interference with the right to provide services to Mrs. Blood was justified due to the requirement to protect the public interest, had there not been such tremendous public pressure.²⁸ Although the provisions of English law were eventually changed, it is important to note that it insists that posthumous reproduction may only be carried out if the genetic material provider had given their consent.²⁹ It is un-

20 *Ibid.*

21 *Ibid.*

22 Batzer, F. R., Hurwitz, J. M., Caplan, A., 2003.

23 *Ibid.*

24 *Ibid.*, p. 126. See Samardžić, S., 2013, p. 394. See also Vidić, J., 2011, p. 556, fn. 8.

25 Deech, R., Smajdor, A., 2007, *From IVF to Immorality*, Oxford, Oxford University Press, p. 126.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*, p. 125.

29 The Human Fertilisation and Embryology Act was revised and amended in 2008. See the 2008 Human Fertilisation and Embryology Act. See Human Fertilisation and Embryology Authority Code of Practice 2021, Guidance 5.

derlined that written consent must be signed by the consentor³⁰ and that a woman would not be granted the right to undergo MAR treatment if the best interest of the child that would be born through the procedure had been taken into account beforehand.³¹

With that in mind, it is clear that the legislator took a positive stance regarding the permissibility of posthumous reproduction, provided that specific requirements are met. Certainly, this primarily refers to the fact that the deceased person's gametes (including brain death) cannot be stored or used without the person's prior written consent, whereby the consent must refer to the possibility of using them posthumously.³² Additionally, the man whose seminal fluid was used for posthumous conception, or the man whose genetic material was used for the creation of an embryo before his death, but which was transferred to a woman's uterus after his death, can be recognized as the father of the child.³³ In this sense, the current provisions differ from the ones in the 1990 Act, according to which the man whose sperm cells were used in conception after his death would not be considered the father of the child.³⁴ Kovaček Stanić underlines that the former legal provision was introduced with the aim of ensuring legal certainty regarding the distribution of property and discouraging fertilization after the death of one partner due to the possible psychological problems for the child and the mother, arising as a consequence of the posthumous reproduction.³⁵

However, the English courts have recently dealt with this issue quite differently. Specifically, the case of *Jennings v. Human Fertilisation and Embryology Authority*³⁶ demonstrates that, in certain cases, posthumous reproduction may be permitted without written consent. Mr. Jennings had

30 HFEA Sch. 3, 1(1).

31 Section 13(5) of the 2008 Human Fertilisation and Embryology Act.

32 HFEA Code of Practice 2021, Guidance 5.

33 Sections 5A and 5B of the 2008 HFEA. See also Kovaček Stanić, G., *Porodičnopravni aspekt biomedicinski potpomognutog oplodjenja u pravu Srbije i evropskim pravima*, in: Očić, Č. (ed.), 2010, *Zbornik Matice srpske za društvene nauke*, Novi Sad, Matica srpska – Odeljenje za društvene nauke, Vol. 131, p. 427.

34 *Ibid.*

35 *Ibid.* See also Warnock, M., 1984, *Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report)*, Her Majesty's Stationery Office, ch. 10.9. The Warnock Committee was established to evaluate the acceptability of measures in the area of infertility treatment involving in vitro fertilization and embryological research. See Draškić, M., *Ugovor o surogat materinstvu – između punovažnosti i ništavosti*, in: Baretić, M., Nikšić, S., (eds.), 2022, *Zbornik Treće regionalne konferencije o obveznom pravu*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, p. 350.

36 High Court of Justice, *Jennings v. Human Fertilisation and Embryology Authority*, [2022] EWHC 1619 Fam, 22 June 2022.

been in a committed relationship with Ms. Choya since 2007.³⁷ After they got married in 2009, they were planning of having a family of their own.³⁸ As they had trouble with natural conception, they opted for IVF and underwent three unsuccessful in vitro fertilization cycles.³⁹

Ms. Choya conceived naturally twice, but both pregnancies ended in miscarriages.⁴⁰ She underwent further cycles of in vitro fertilization treatment in late 2018. However, prior to undergoing in vitro fertilization treatment cycles, they decided to store two embryos so they could have more children in the future. After storing two embryos, the third embryo was transferred into Ms. Choya, and she conceived twins.⁴¹ Unfortunately, the pregnancy began to get complicated, resulting in Ms. Choya suffering a uterine rupture and dying on 25 February 2019.⁴² As a result, the second embryo that was stored, presented the subject of the dispute in this case. Specifically, even though Mr. Jennings and Ms. Choya filled out several HFEA forms prior to starting cycles of in vitro fertilization treatment, Ms. Choya never signed the form required for consent to use of an embryo for surrogacy.⁴³ She was asked to complete the HFEA WT form, while Mr. Jennings completed and signed the HFEA MT form.⁴⁴ However, the two forms differed in one very important item. On the one hand, the MT form offers the man the possibility to give his consent to the use of his embryo in his partner's treatment in the event of his passing.⁴⁵ In contrast, the WT form, which was signed by Ms. Choya, does not contain such a provision.⁴⁶ In this regard, Mr. Jennings sought permission from the HFEA to use the last embryo in storage to have a family with a surrogate.⁴⁷ The HFEA rejected his request due to the absence of Ms. Choya's written consent to the posthumous use of her genetic material.⁴⁸ Mr. Jennings then filed an application to the High Court of England and

37 *Ibid.*, para. 7.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*, paras. 7–8.

41 *Ibid.*, para. 8.

42 *Ibid.*, para. 2.

43 Zakreski, K., 2022, UK Court allows posthumous use of embryo despite lack of written consent, British Columbia Law Institute (<https://www.bcli.org/uk-court-allows-posthumous-use-of-embryo-despite-lack-of-written-consent/>, 14. 10. 2023).

44 *Ibid.*

45 High Court of Justice, *Jennings v. Human Fertilisation and Embryology Authority*, [2022] EWHC 1619 Fam, 22 June 2022, para. 12.

46 *Ibid.*, paras. 11–14.

47 *Ibid.*, para. 2.

48 *Ibid.*, para. 5.

Wales asking the court to declare that it is lawful for him to use his late wife's genetic material.⁴⁹ Mr. Jennings agreed that his wife's written consent was missing.⁵⁰ Instead, he pointed out that the staff at the Center for Reproductive and Genetic Health (CRGH), where the embryo was stored, did not raise any issue with the couple when one of them provided posthumous consent, while the other did not.⁵¹ Mr. Jennings argued that they lacked both the information and the opportunity to provide the requested consent.⁵² Moreover, he stressed that the court could conclude that Ms. Choya would have provided such consent had they not been deprived of such possibility.⁵³ The HFEA underlined that there was no "valid written consent at the relevant time by Ms. Choya to use the embryos in the way sought in the event of her death."⁵⁴ Instead, it was underlined that existing legal regulations require such consent to be in writing and that Ms. Choya was both well-informed and provided with the chance to give such consent.⁵⁵ After considering the previously presented arguments by both parties to the proceedings, the court first acknowledged that "the issue of consent is the cornerstone of the statutory scheme and that the statutory scheme requires such consent to be in writing that cannot, in my judgment, be considered in a vacuum."⁵⁶ The court emphasized two important considerations from these surrounding circumstances: (1) the WT form used for women was far from clear on the issue⁵⁷ and (2) there was ample evidence made available to the Court that indicated that Ms. Choya would undoubtedly have given her written consent to posthumous use of the embryo for birth by a surrogate if she had been given that option.⁵⁸ This was considered in the context where, according to the court's assessment, Ms. Choya was not given sufficient information or a sufficient opportunity to discuss it with the clinic. It was underlined that the court can "dispense with the requirement for written and signed consent in this limited situation where a person has been denied a fair and reasonable opportunity in their lifetime to provide consent for the posthumous use of their embryos and there is evidence that the court concludes, directly and/or by inference, that if that opportunity had been given, that consent

49 *Ibid.*, para. 1.

50 *Ibid.*, para. 2.

51 *Ibid.*, para. 18.

52 *Ibid.*, para. 2.

53 *Ibid.*

54 *Ibid.*, para. 5.

55 *Ibid.*

56 *Ibid.*, paras. 82–83.

57 *Ibid.*, paras. 88. See also Zakreski, K., 2022.

58 *Ibid.*, para. 92. See also Zakreski, K., 2022.

by that person would have been provided in writing.”⁵⁹ In this regard, the court held that there was an interference of Mr. Jennings’ right to respect for private and family life set forth in the European Convention on Human Rights (ECHR).⁶⁰ The court pointed out that a public authority interfered with the exercise of the right to respect for private and family life and such interference was not justified.⁶¹ Therefore, regardless of the fact that the court agreed that a requirement for written consent “pursues a legitimate aim, in the circumstances of this case, where, on the findings the court has made, there was a lack of opportunity to Ms. Choya to provide that consent in writing, in circumstances where [...] she would have given that consent, the interference with Mr. Jennings’ [...] right [to private and family life] would be significant, final and lifelong.”⁶² All the available evidence led the court to the conclusion that Ms. Choya would have given her consent to the possibility of using the partner-created embryo by Mr. Jennings in a surrogacy treatment.⁶³ Accordingly, the court allowed Mr. Jennings to posthumously use the said embryo for birth by surrogacy, even though Ms. Choya did not provide written consent for this use.⁶⁴

Hence, regardless of the fact that the legislator insists on the requirement for written consent to posthumous reproduction, the English courts tend to treat this issue differently. Such case law indicates that a requirement for written consent, in certain cases, according to their reasoning, should be relativized and considered in the circumstances of the case. However, caution should be taken, because written consent is in fact correlated with the protection of the reproductive autonomy of each individual. In other words, it has been stressed that consent occupies the central position in disputes regarding postmortem reproduction and that “the predominant approach is that retrieving and using the deceased’s gametes when there is no consent is morally wrong and represents a breach of the paramount ethical principle of respect for autonomy.”⁶⁵ Prior written consent is closely related to the need to protect

59 *Ibid.*, para. 104.

60 *Ibid.*, para. 102. See ECHR Art. 8.

61 *Ibid.*

62 *Ibid.*, para. 102.

63 *Ibid.*, para. 92.

64 Zakreski, K., 2022.

65 Simana, S., 2018, Creating Life after Death: Should Posthumous Reproduction Be Legally Permissible without the Deceased’s Prior Consent?, *Journal of Law and the Biosciences*, Vol. 5, No. 2, p. 334, fn. 29. Batzer *et al.* point out that the best way to protect reproductive rights in this case is to have informed consent. See Batzer F. R., Hurwitz, J. M., Caplan, A., 2003, p. 1265.

the human body from unwanted and unsafe interventions, because the human body cannot be seen as the property of another person.⁶⁶

2.2. POSTHUMOUS REPRODUCTION IN FRENCH LAW

On the other hand, there are countries, such as France, that completely prohibit posthumous reproduction. When speaking about posthumous reproduction in France it is first important to analyze the case of *Parpalaix et. al v. CESCO*⁶⁷ – undoubtedly one of the most prominent cases in French judicial practice to deal with posthumous reproduction. Allain Parpalaix met Corrine Richards in 1981. Shortly thereafter, he was diagnosed with testicular cancer and decided to undergo chemotherapy treatment, which came with a risk of leaving him sterile. At the advice of his doctor, he decided to make a deposit of sperm at the Center for the Study and Conservation of Sperm (*Centre d'Etude et de Conservation du Sperme*, CECOS).⁶⁸ Mr. Parpalaix underwent a series of chemotherapy treatment over the following two years in order to cure cancer, which at some points went into remission. However, Allan and Corrine postponed their wedding date several times during the bout of illness and finally got married on 23 December 1984. Allan died two days later.⁶⁹ After his death, his wife Corinne requested that the CECOS release Allan's sperm in order for her to use it for artificial insemination.⁷⁰ The request was denied by the CECOS, as it was not clear whether Mr. Parpalaix, who has previously deposited the sperm to avoid sterility, would consent to his sperm being used posthumously.⁷¹ Hence, since the clear authorization from Mr. Parpalaix was missing, the CECOS was of the opinion that there was no obligation for it to make available the sperm to his wife Corinne.⁷² Corinne argued that her husband's decision to preserve his genetic material could have only been motivated by his wish to designate her as the mother of their future child.⁷³ Moreover, she stressed that the CECOS “violated not

66 Deech, R., Smajdor, A., 2007, p. 120.

67 Tribunal de Grande Instance Creteil, *Parpalaix et. al v. C.E.S.C.O.*, JCP II 20321, 16–17 September 1984. As cited in Jones, D. J., 1988, Artificial Procreation, Societal Reconceptions: Legal Insight from France, *The American Journal of Comparative Law*, Vol. 36, No. 3, p. 525, fn.1.

68 Draškić, M., 1992, Porodičnopravni aspekti artifičijelne inseminacije, *Annals (Belgrade Law Review)*, Vol. 40, No. 4, p. 240, fn. 6.

69 Jones, D. J., 1988, p. 527.

70 Draškić, M., 1992, p. 240, fn. 6.

71 Shuster, E., 1999, p. 405, fn. 20.

72 *Ibid.*, fn. 21.

73 *Ibid.*, fn. 23.

only her husband's implicit wishes, but also her protected right to procreate.⁷⁴ As a result, Corinne, together with her in-laws, decided to pursue the matter in the High Court of Creteil (*Tribunal de Grande Instance de Creteil*). They argued that, as them being Mr. Parpalaix's successors, they were the owners of the sperm and that "CECOS had broken its contract by not returning the sperm."⁷⁵ They relied on Article 1939 of the French Civil Code (*Code Civile*), which provides that if the person who has made a bailment passes away, the bailed item can be returned solely to their heirs.⁷⁶ Moreover, if the bailed item is indivisible, the heirs must reach a consensus among themselves to take possession of it.⁷⁷ Such an understanding leads to the conclusion that sperm is a movable object or property and consequently is inheritable.⁷⁸ The CECOS argued that "sperm is an indivisible part of the body, much like a limb, an organ, or a cadaver and is therefore not inheritable absent express instruction."⁷⁹ As Mr. Parpalaix omitted to verbalize his wishes in relation to the use of his sperm and as he and Ms. Corinne were not married at the time of the deposition, it was underlined that his intentions were unclear.⁸⁰

The High Court of Creteil focused its attention on the sperm and what it represented to Mr. Parpalaix.⁸¹ The Court underlined that "it is impossible to characterize human sperm as movable, inheritable property within the contemplation of the French legislative scheme"⁸² and that the French Civil Code was inapplicable.⁸³ The court characterized the sperm as "the seed of life ... tied to the fundamental liberty of a human being to conceive or not to conceive."⁸⁴ The court insisted that this fundamental right must be protected and cannot be subjected to the rules of a contract⁸⁵ and the fate of the sperm must be decided by the person from whom the

74 *Ibid.*, fn. 24.

75 Shapiro, D. E., Sonnenblick, B., 1986, Widow and the Sperm: The Law of Post-mortem Insemination, *Journal of Law and Health*, Vol. 1, No. 2, p. 230.

76 Art. 1939 of the French Civil Code (Code Civil) as cited in Shapiro, D.E., Sonnenblick, B., 1986, p. 230, fns. 12 and 13.

77 *Ibid.*, p. 230, fns. 12 and 13.

78 *Ibid.*, fn. 13.

79 *Ibid.*, p. 231, fn. 16.

80 *Ibid.*, p. 231.

81 Jones, D. J., 1988, p. 528, fn. 19.

82 Shapiro, D.E., Sonnenblick, B., 1986, p. 232.

83 *Ibid.*

84 For more details, see Shuster, E., 1999, p. 405, fn. 26.

85 It should be emphasized that the Court specifically rejected the applicability of the French Civil Code, pointing out that sperm does not constitute a thing in commerce but secretion containing the seed of life destined for human procreation. See Jones, D. J., p. 1988, 529, fn. 22.

sperm was drawn.⁸⁶ Accordingly, the court found that “[Mr.] Parpalaix’s intent and ‘deep desire’ to make his wife ‘the mother of a common child’ was ‘unequivocal, if not absolute.’”⁸⁷ Additionally, the Court noted that if sperm banks notify their clients in advance of their policy, they are free to decline the request for releasing of such sperm after their death.⁸⁸ The Court concluded that “[h]ad CECOS told Parpalaix that it would not release the sperm for posthumous insemination, CECOS would have been justified in its refusal to release the sperm.”⁸⁹ However, the CECOS failed to do so. The court noted that this was a specific contractual relationship according to which the CECOS undertook both to preserve the sperm and release it at the request of the sperm depositor or other person specified by the depositor.⁹⁰ Hence, the court decided that the CECOS is required to return the sperm to a doctor as chosen by Corrine and that it can dispose of such sperm provided that no request for obtaining the sperm has not been made within 6 months.⁹¹ Consequently, the CECOS adopted new gamete policy guidelines, stipulating that prior to the deposition of sperm, each depositor must sign a written agreement stipulating that his genetic material will only be used in his presence and with his explicit consent.⁹² Consequently, in a similar scenario, the CECOS denied to provide the sperm to the depositor’s heir.⁹³ The heir filed an appeal with the High Court of Toulouse (*Tribunal de Grande Instance de Toulouse*), stating that a person’s decision to bring a child into the world was being influenced in this way and that she was deprived of her fundamental right to procreate.⁹⁴ The High Court of Toulouse rejected her arguments, stating that a right to procreate is not the right to a child and no one is obligated to do everything scientifically possible to achieve a pregnancy.⁹⁵ As the CECOS had provided in advance the information that it would not release the sperm to a widow, it had no obligation to do so after his death.⁹⁶ The Court of Appeal of Toulouse (*Cour d’appel de Toulouse*) also decided on

86 Shuster, E., 1999, p. 406, fn. 27.

87 *Ibid.*, fn. 28.

88 *Ibid.*, p. 406.

89 *Ibid.*

90 Draškić, M., 1992, p. 240, fn. 6.

91 *Ibid.* See Shuster, E., 1999, p. 406. See also Jones, D. J., 1988, p. 530, fn. 27.

92 See Shuster, E., 1999, p. 406.

93 *Ibid.*, p. 406.

94 For more details, see Contin, M., 2010, Procréer par delà mort? À propos de l’ordonnance de référé du Tribunal de grande instance de Rennes du 15 octobre 2009, *Reveu juridique de l’Ouest*, No. 2, p. 131; See also Shuster, E., 1999, p. 406.

95 See Shuster, E., 1999, p. 406, fn. 32.

96 *Ibid.*, fn. 33.

the appeal and upheld the decision of the High Court of Toulouse.⁹⁷ In this sense, Contin indicates that the Court of Cassation emphasized that it cannot be said that: “the legitimate goal of having a child in an already formed family is achieved through medically assisted procreation, when in vitro fertilization or its continuation is impossible because a couple that was supposed to have a child was separated due to the death of the husband, and prior to the embryo transfer, which should be carried out as the last stage of the procedure.”⁹⁸

The legislator was of the same opinion, adopting legal norms that explicitly prohibit the use of gametes for posthumous reproduction. More precisely, the norms specified that MAR can be used only at the request of a heterosexual couple to make up for medically diagnosed infertility or to prevent the transmission of a serious disease to the future child.⁹⁹ Moreover, it was stipulated that both members of the couple must be alive, of reproductive age, must have previously consented to embryo transfer or insemination, and they must be married or able to provide evidence of at least two years of cohabitation.¹⁰⁰ The law has been amended and revised in the meantime. Medically assisted reproduction may now be used at the request of any couple, be it a heterosexual or lesbian couple, or a single woman. Moreover, persons undergoing MAR procedure or embryo transfer must consent to its implementation before starting the procedure itself. It should be underlined that this requirement applies to both persons in the given couple (the man and the woman/both women), or the single woman. The same article stipulates that it is forbidden to carry out the MAR procedure or embryo transfer when the request is submitted by a couple, and one of the persons in the couple dies.¹⁰¹

It may be deduced that the French legislator has a negative attitude toward posthumous insemination. Such an attitude of the French legislator was recently contested before the European Court of Human Rights (ECtHR), in the case of *Petitori Lanzmann v. France*.¹⁰² The applicant was a French citizen, whose son was diagnosed with cancer in 2014. Shortly after being diagnosed with cancer, the applicant’s son informed his mother

97 Cour d’appel de Toulouse, 18 avril 1994: Juris-Data n° 1994-043187; JCP 1995, II, n° 22472. As cited in Contin, M., 2010, p. 131.

98 Contin, M., 2010, p. 132, translated by author.

99 See Kovaček Stanić, G., 2010, p. 426.

100 See Law No. 94-654 of July 29th, 1994 related to the donation and use of elements and products of the human body, to assisted reproductive technologies and prenatal diagnosis (*Journal officiel de la République française, Lois et Décrets*). See also Shuster, E., 1999, pp. 421–422.

101 See Public Health Code (*Code de la santé publique*), L2141–4.

102 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019.

that he wanted to have children of his own, even in the event of his death.¹⁰³ He decided to deposit his sperm with the CECOS at a hospital in Paris and on 22 November 2016 he requested the hospital to extend the storage of the gametes.¹⁰⁴ However, the applicant's son died on 13 January 2017. In the spring of 2017, the applicant requested that her son's gametes be transferred to a healthcare establishment in Israel.¹⁰⁵ The president of the CECOS denied the applicant's request, a decision which she challenged¹⁰⁶ in the Administrative Court of Paris.¹⁰⁷ She underlined that her right to private and family life as well as her right to become a grandmother were being violated.¹⁰⁸ Her petition was rejected on the grounds that prohibitions on posthumous procreation are not in contravention with Article 8 of the ECHR.¹⁰⁹ On the contrary, the Administrative Court pointed out "that such a ban falls within a wide margin of appreciation that is recognized by every state when ensuring the rights and freedoms guaranteed by the ECHR."¹¹⁰ The applicant then appealed against the decision to the Council of State (*Conseil d'État*), France's supreme administrative jurisdiction, which upheld the lower courts' decisions.¹¹¹ The applicant then lodged an application with the ECtHR, complaining "that it was impossible to have access to her deceased son's gametes, in accordance with her son's last wishes, to arrange MAR treatment in a country that allows posthumous reproduction."¹¹²

The ECtHR noted that the applicant's complaint encompassed two parts.¹¹³ The first part of the complaint alleged that Article 8 of the ECHR was violated in relation to her deceased son, while the second part, alleging that there was a direct violation as her right to descendants, was denied.¹¹⁴ Regarding the first part, the ECtHR noted that the question of the fate of the gametes deposited by the individual and the question of respecting the will of the individual to use them posthumously refers to the individual's right to decide how and when they want to become a parent,

103 *Ibid.*, para. 4.

104 *Ibid.*

105 *Ibid.*, para. 5.

106 *Ibid.*

107 *Ibid.*, para. 6.

108 *Ibid.*

109 *Ibid.*, para. 7.

110 *Ibid.*, para. 7, translated by author.

111 *Ibid.*, para. 9.

112 *Ibid.*, translated by author.

113 *Ibid.*, para. 15.

114 *Ibid.*

which belonged to the category of non-transferable rights.¹¹⁵ Accordingly, the applicant could not claim, on her son's behalf, to be the victim of a violation of Article 8 of the ECHR.¹¹⁶ As to the second part, alleging a direct violation, the ECtHR underlined that although the concept of private and family life also includes the right to respect the decision of a person to become a parent in the genetic sense¹¹⁷ and make use of medically assisted procreation for that purpose, Article 8 of the ECHR does not guarantee a right to found a family.¹¹⁸ Instead, the court pointed out that on one hand "the national courts considered that the prohibition of posthumous reproduction was in accordance with the provisions of the ECHR, while on the other hand the refusal to authorize the export of the applicant's deceased son's gametes did not violate her right to respect for private and family life."¹¹⁹ Finally, it was pointed out that the applicant's inability to become a grandmother does not constitute a violation of the right to respect for private and family life, especially taking into account that the goal of the norms of French law that regulate the issue of medical reproduction is aimed at treating couples' infertility.¹²⁰ The ECtHR therefore noted that it did not intend to depart from such a position taken by national courts¹²¹ and declared both parts of the application inadmissible.¹²²

Hence, the use of posthumous reproduction is not a procedure that should and must be guaranteed to an individual, but rather each country has the right to regulate the issue at its own discretion. This claim is certainly supported by the position of the ECtHR, which has always held that states should enjoy a wide margin of appreciation in resolving issues related to medically assisted reproduction.¹²³ Such a position was recently

115 *Ibid.*, para. 16. See also, ECtHR, *Sanles Sanles v. Spain*, no. 48335/99, Decision of 26 October 2000; ECtHR, *Center for Legal Resources in the name of Valentin Câmpeanu v. Roumanice*, no. 47848/08, Judgment of 17 July 2014 [GC], para. 100; ECtHR, *Rõigas v. Estonia*, no. 49045/13, Judgment of 12 September 2017, para. 127.

116 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019, para. 16.

117 ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 72.

118 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019, para. 18. See also ECtHR, *E. B. v. France*, no. 43546/02, Judgment of 22 January 2008 [GC], para. 41.

119 ECtHR, *Petithory Lanzmann v. France*, no. 23038/19, Decision of 5 December 2019, para. 19, translated by author.

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*, para. 20.

123 ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 81. See also ECtHR, *S. H. and Others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 97.

unequivocally taken by the European Court in the case of *Pejrilov v. Czech Republic*,¹²⁴ in which it was emphasized that in a sensitive area such as artificial insemination, moral viewpoints and social acceptability must be taken seriously. This is precisely why it is important not only to assess whether the prohibition of a certain available method of artificial insemination is in accordance with the provisions of the ECHR, but also to look at the legal framework within which the prohibition falls and view it in a broader context.¹²⁵

2.3. COMPARATIVE REVIEW OF THE MOST COMMON LEGAL ISSUES SURROUNDING POSTHUMOUS REPRODUCTION

Some questions raised in the first paragraphs of Section 2 can now be answered. The first question is related to the legal qualification of the genetic material used for posthumous reproduction. In theory and in practice, no unique or clear answer can be found in this regard. Robertson points out that certain court cases raised the question about who has the greater property interest in stored seminal fluid and that the defining of the issue assumes that body fluids and gametes can be considered property and treated as any other thing, i.e., an asset of an estate.¹²⁶ On the other hand, Byk underlines that body parts cannot be considered property and that a distinction cannot be made between a person and their body, especially when a financial element is included in the process.¹²⁷ Vodinelić distinguishes between several different theories regarding the legal qualification of the human body, body parts, corpse, and *nasciturus*.¹²⁸ He underlines that: “a separate reproductive cell has all the properties of a (movable) object and the special ability (which other objects do not have) to create a human being from it (by uniting with another cell of the opposite sex).”¹²⁹ In this regard, Vodinelić emphasizes that reproductive cells, as personal property, represent the

124 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 58. See also ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 112.

125 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023. This case will be discussed in more detail in the section dealing with Serbian law.

126 Robertson, J. A., 1994, Posthumous Reproduction, *Indiana Law Journal*, Vol. 69, No. 4, p. 1038.

127 Byk, C., What Rules for Procreation?, in: Mazzoni, C.M. (ed.), 1998, *A Legal Framework for Bioethics*, The Hague, Kluwer Law International, p. 86.

128 For more on these theories see Vodinelić, V., 1995, Moderni okvir prava na život, *Pravni život*, Vol. 9, p. 26.

129 *Ibid.*, p. 27, translated by author.

object of a personal right and that each person has the authority to decide on the use of their reproductive cells.¹³⁰

With that in mind, it is not surprising that judicial practice does not have a clear answer to this question. As has been noted, the position taken by the French court in the case of *Parpalaix et. al v. CECOS*, is that sperm cannot be considered a movable, inheritable property, but rather a genetic expression of the fundamental human right to make a decision concerning procreation.¹³¹ Gilbert underlines that the approach adopted by American courts is to “view sperm as a unique kind of property because of its potential for human life”¹³² and that consequently “[t]he man from whom it is drawn, retains an ownership or possessory interest over the sperm.”¹³³ According to Katz, in *Hecht v. Superior Court (Kane)*,¹³⁴ the court underlined that „frozen sperm can only be utilized according to the intent of the donor.”¹³⁵ Moreover, it was stressed that “the fate of the sperm must be decided by the person from whom it is drawn, because genetic material represents a unique form of property.”¹³⁶ The author believes that it is important to mention that the ECtHR, in the case of *Parrillo v. Italy*,¹³⁷ also answered the question whether human embryos can be considered as property, within the meaning of Article 1 of Protocol 1 to the ECHR, which stipulates that “every person is entitled to the peaceful enjoyment of his possessions.”¹³⁸ The ECtHR first noted that “the concept of ‘possession’ within the meaning of Article 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets may also be regarded as ‘property rights’ and thus as ‘possessions’ for the purposes of this provision.”¹³⁹ The court further stated that although Article 1 only applies to a person’s existing possessions, in certain circumstances a *legitimate expectation* of obtaining

130 Vodinelić, V., 2023., *Građansko pravo, Uvod u građansko pravo i opšti deo građanskog prava*, Belgrade, Pravni fakultet Univerziteta Union, Službeni glasnik, p. 356.

131 Shapiro, D.E., Sonnenblick, B., 1986, p. 232.

132 Gilbert, S., 1993, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, *Hofstra Law Review*, Vol. 22, No. 2, p. 548, fn. 136.

133 *Ibid.*, fn. 137.

134 Court of Appeal, *Hecht v. Superior Court (Kane)*, no. B097742, 13 November 1996.

135 Katz, G. A., 1998. *Parpalaix v. CECOS: Protecting Intent in Reproductive Technology*, *Harvard Journal of Law & Technology*, Vol. 11, No. 3, p. 688.

136 Vidić, J., 2011, p. 555.

137 See ECtHR, *Parrillo v. Italy*, no. 46470/11, Judgment of 27 August 2015 [GC], para. 3.

138 ECHR Protocol 1, Art. 1.

139 See ECtHR, *Parrillo v. Italy*, no. 46470/11, Judgment of 27 August 2015 [GC], para. 211.

possessions may also be protected within the meaning of this Article.¹⁴⁰ However, it was concluded that given “the economic and pecuniary scope of that Article, human embryos cannot be reduced to ‘possessions’ within the meaning of that provision.”¹⁴¹

The provided analysis of these two different legislation approaches shows that the issue of legal qualification of reproductive cells is very complex. More precisely, English law does not discuss the issue of the legal status of gametes, concerning posthumous reproduction. Instead, the central issues are those related to the way posthumous reproduction is regulated. Yet, the Warnock Committee report recommends that legal norms ensuring there is no right of ownership in a human embryo should be enacted. However, this would not apply to the issue of the right to use the embryo previously deposited by a couple.¹⁴² When one member of a couple dies, the right to use or dispose of the embryo stored by that couple should pass to the surviving partner, according to the report.¹⁴³ In France, on the other hand, the position on the legal qualification of seminal fluid was expressed, with the Court clearly taking the position in *Parpalaix at. al. v. CECOS* that human sperm cannot be considered a movable or inheritable thing, but rather as a genetic expression of fundamental human rights.¹⁴⁴

It is clear that neither legal scholars nor case law provide a unique answer to the issue of the legal qualification of reproductive cells. Instead, the question of whether a person is entitled to the use of another person’s reproductive material in posthumous reproduction is given much more attention. Therefore, case law contains positions that when determining on whether a third party may use genetic material in posthumous reproduction, the intention of the person from whom the material is drawn must be considered prior to reaching a decision. Anyhow, there are wide differences in comparative law as to whether it is justified to allow the posthumous use of genetic material. This position was recently confirmed by the ECtHR, which pointed out that, based on the information obtained from the member states, it can be concluded that there is no consensus on this issue.¹⁴⁵ A comparative analysis of the legal provisions, which contain

140 *Ibid.*, para. 213.

141 *Ibid.*, paras. 211–216.

142 Warnock, M., 1984, ch. 10.11.

143 *Ibid.*, ch. 10.12.

144 For more details, see Jones, D. J., 1988, p. 528, fn. 20.

145 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 45.

entirely opposite solutions, demonstrates that specific issues related to posthumous reproduction remain to be solved, regardless of the solution chosen by any given state.

One of the questions also raised refers to whether posthumous reproduction (if allowed) can be carried out without prior written consent from the person whose genetic material is to be used. Byk points out that respect for human integrity represents the basis for setting a requirement that without a person's free and informed consent, their body cannot be treated, and that it is therefore clear that doctors, when implementing various reproductive technologies, have an obligation to obtain the consent of both the woman and the person whose gametes are to be used in the treatment.¹⁴⁶ Indeed, the previous analysis could lead to the conclusion that prior written consent is a mandatory condition in both French law and English law. However, unlike French law which provides for this condition in cases of medically assisted reproduction performed while the person whose genetic material is being used is alive, English law stipulates that a MAR treatment cannot be carried out without prior written consent from the person whose material is to be used (be they deceased or living). Such a solution is in line with the recommendation of the Warnock Committee, which emphasized that MAR treatment should not be carried out without the prior informed consent of the patient.¹⁴⁷ There is a prevailing opinion that the written consent of the person whose gametes are being used must be obtained in order to carry out posthumous reproduction treatment, because it is considered that doing otherwise would be morally wrong and would lead to a violation of the right to respect for autonomy.¹⁴⁸ In addition, legal scholars point out that the best way to resolve disputes over gametes, in the event of the death of the gamete provider, is to obtain written consent.¹⁴⁹

The final question, concerning the legal status of the person born as a result of posthumous reproduction, will be answered in the next section so that, on the one hand, the complexity of this problem can be systematically examined, while, on the other hand, presenting an appropriate argument indicating that there is no present need to adopt legal norms in the Republic of Serbia that would allow posthumous insemination.

146 Byk, C., 1998, p. 85.

147 Warnock, M., 1984, ch. 3.5.

148 Simana, S., 2018, p. 334, fn. 29.

149 Pennings, G. *et al.*, 2006, ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction, *Human Reproduction*, Vol. 21, No. 12, p. 3051.

3. POSTHUMOUS REPRODUCTION IN SERBIAN LAW

When speaking about the right to procreate in Serbia, it is important to start from the Constitution of the Republic of Serbia¹⁵⁰ which stipulates that everyone has a right to choose whether or not to procreate.¹⁵¹ Such a right encompasses a multitude of rights, one of them being the right to choose to conceive a child through artificial reproduction.¹⁵² Moreover, the right to procreate through MAR techniques is also guaranteed under the ECHR,¹⁵³ which has been confirmed on multiple occasions by the ECtHR.¹⁵⁴ The right to freely decide on giving birth is also provided by the provisions of the Family Act,¹⁵⁵ which stipulates that every woman is free to make choices about her pregnancy and childbirth.¹⁵⁶ A particularly important legal act that regulates the right to MAR procedure in Serbian law is the Law on Medically Assisted Reproduction¹⁵⁷ (LMAR). The LMAR defines MAR procedures as procedures managed in accordance with the contemporary biomedical standards aimed at combating infertility and safeguarding fertility.¹⁵⁸ Individuals entitled to the right to MAR procedures are spouses or extramarital partners who are of legal age and with legal capacity, as well as single women of legal age and with legal capacity.¹⁵⁹ The Serbian legislator insists on the requirement of the written consent of all individuals before undergoing MAR treatment.¹⁶⁰ Regarding the issue of posthumous reproduction, the law unequivocally prohibits posthumous reproduction. Specifically, the LMAR stipulates

150 The Constitution of the Republic of Serbia, *Official Gazette of the RS*, Nos. 98/06 and 115/02.

151 *Ibid.*, Art. 63.

152 Stevanov, M., 1977, Pravo na slobodno roditeljstvo, *Zbornik radova Pravnog fakulteta u Novom Sadu*, Vol. 11, p. 49.

153 The Act on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, *Official Gazette of Serbia and Montenegro – International Agreements*, Nos. 9/03, 5/05, 7/05 and *Official Gazette of the RS – International Agreements*, Nos. 12/10 and 10/15.

154 For more details, see Barać, I., 2021, Biomedicinski potpomognuto oplodjenje i demografska politika, *Politička revija*, Vol. 70, No. 4, p. 176, fns. 4 and 177.

155 Family Act, *Official Gazette of the RS*, Nos. 18/05, 72/11 – other law and 6/15.

156 *Ibid.*, Art. 5, para. 1. For more details on the constitutionality of such legal provisions, see Draškić, M., 2013, p. 224.

157 Law on Medically Assisted Reproduction, *Official Gazette of the RS*, Nos. 40/17 and 113/17 – other law.

158 LMAR, Art. 3, para. 1, point 1.

159 LMAR, Art. 25, para. 1 and 2. For more details on the conditions set for exercising the right to MAR, see Barać, I., 2021, p. 178.

160 LMAR, Art. 27, para. 1.

that reproductive cells, i.e., embryos used in MAR treatments, can only be used if they are obtained from living depositors.¹⁶¹ Additionally, the legislator clearly emphasizes that a person who, due to possible reduction or loss of reproductive function, has delayed the use of their reproductive cell, is entitled to store such reproductive cells and tissues in the MAR center, i.e., a bank,¹⁶² for their own use later, provided that they have given written consent.¹⁶³ The legal norms set in this way indicate that only the depositor is allowed to use reproductive cells in the future, and, in the event of their death, this right cannot be transferred to third parties.¹⁶⁴ Finally, it should be pointed out that the law explicitly prohibits any use of reproductive cells after the death of the depositor for the purpose of producing embryos.¹⁶⁵

The issues of whether such legal provisions are justified and whether the legislator's choice to prohibit posthumous reproduction is appropriate have been heavily debated in recent months. The debate was initiated by Mrs. Tijana Prizrenac-Nedeljković. Since Mrs. Prizrenac-Nedeljković's husband developed testicular cancer, the two of them decided to undergo in vitro fertilization treatment so that they could become parents. According to Mrs. Prizrenac-Nedeljković, before her husband died in 2019, they had deposited ten embryos with the SPEBO Clinic in Leskovac. Prior to his death, Mr. Prizrenac-Nedeljković made a will in the presence of two witnesses, in which he allowed his wife to use the embryos created from his and her reproductive material after his death. Upon her husband's death, Mrs. Prizrenac-Nedeljković contacted the Department of Biomedicine and requested the embryos. The Department of Biomedicine denied her request and advised her to undergo a psychological test and an interview with the ethics committee due to the specificity of her request, which she refused.¹⁶⁶ Bearing in mind that she believed that she should not be denied the right to use embryos created from her husband's and her own genetic material, she submitted the Initiative for the amendment

161 LMAR, Art. 41.

162 A reproductive cells, tissues and embryos bank is a healthcare institution or an organizational unit of a healthcare institution responsible for the intake, processing, preservation, storage and distribution of reproductive cells and tissues for heterologous insemination, including the storage and distribution of embryos for heterologous insemination. See LMAR, Art. 3, para. 1, point 34.

163 LMAR, Art. 50, para. 2 in connection with Art. 25, para. 3.

164 Živojinović, D., 2018, p. 256.

165 LMAR, Art. 52, para. 2.

166 Danas, *Država Tijani ne da da rodi dete pokojnog supruga: Neko mi je oduzeo čudo*, (<https://www.danas.rs/vesti/drustvo/drzava-tijani-ne-da-da-roditi-dete-pokojnog-supruga-neko-mi-je-oduzeo-cudo/>, 28. 11. 2022).

of ineffective regulations,¹⁶⁷ to the Public Policy Secretariat of the Republic of Serbia (PPSRS).¹⁶⁸ She pointed out that several articles of the LMAR should be amended to enable posthumous reproduction in cases when in vitro fertilization procedure is under way, but the provider of reproductive cells dies before the process of fertilization has begun. On the basis of her Initiative, the PPSRS submitted its own Initiative for the amendment of the LMAR in which it made two proposals to the Ministry of Health, stating the need to conduct an analysis of international comparative practices, with the aim of possibly approving posthumous reproduction, and to initiate proceedings for the amendment of the LMAR in order to prescribe the manner in which unused reproductive material is to be handled.¹⁶⁹

Although the author understands that the desire of people affected with infertility to have offspring is great, it is important for such a desire to be “carefully evaluated in regard to many other factors and interests affected by the development of reproductive technology.”¹⁷⁰ In this sense, it is important to make an appropriate assessment of the optimal relationship between the expected benefit and the possible risk.¹⁷¹

This analysis of the recent ECtHR’s decision, in which the facts of the case can largely be equated with the facts of Mrs. Prizrenac-Nedeljković case, will attempt to point out that there is presently no need to amend the text of the law in the Republic of Serbia, at least not the way it was proposed in the said Initiative. In the case of *Pejrilova v. The Czech Republic*,¹⁷² the applicant and her husband entered into marriage in 2012.¹⁷³ As they were unable to achieve natural conception and as there was a serious health problem by the applicant’s husband, the couple opted to undergo MAR treatment.¹⁷⁴ The applicant’s husband cryopreserved his sperm in June 2014 and following that had signed a consent form under which he had agreed upon that the storage of his genetic material is solely for the purposes of having infertility treatment.¹⁷⁵ The consent form explicitly stipulated that any future written consent would be needed before each

167 The document was obtained from the Ministry of Health archives.

168 The Public Policy Secretariat is the body responsible for collecting and processing initiatives submitted by business entities, other legal entities and citizens for the amendment of inefficient regulations at the national level. See Law on Ministries, *Official Gazette of the RS*, Nos. 128/20 and 116/22, Art. 38, para. 3.

169 PPSRS, 2022, Initiative for the amendment of the LMAR, p. 2.

170 Draškić, M., 1992, p. 262, translated by author.

171 *Ibid.*

172 ECtHR, *Pejrilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023.

173 *Ibid.*, para. 5.

174 *Ibid.*

175 *Ibid.*, para. 6.

instance in which the sperm needed to be obtained for the said procedure, and that, if not differently agreed upon, the storing of the sperm would be obsolete once the depositor of the sperm has died.¹⁷⁶ In December 2014, the applicant and her husband have signed the informed consent forms according to which they agreed to treatment using in vitro fertilization and to “the thawing of the applicant’s husband’s sperm and its use in intracytoplasmic sperm injection.”¹⁷⁷ Shortly thereafter, in June 2015, the applicant’s husband died, without any further steps having been taken.¹⁷⁸

Consequently, the applicant asked the Center where the sperm was stored to fertilize her eggs using the cryopreserved sperm of her late husband.¹⁷⁹ The Center denied her request on the basis of the fact that such procedure would violate the law, and instead proposed to the applicant to commence proceedings that would result in a settlement.¹⁸⁰ Although the applicant did so, the Plzeň-City District Court rejected such a possibility.¹⁸¹ The decision of the District Court was upheld by the Plzeň Regional Court.¹⁸² It was the court’s opinion that, regardless of the fact that the applicant’s husband had indeed provided his consent to the treatment, “his later wishes could be prejudged and replaced by a court decision.”¹⁸³ The Supreme Court, deciding on an appeal, underlined “that it was in a child’s best interests to be born to a complete family and have both parents, at least at the stage of conception.”¹⁸⁴ Additionally, the Supreme Court remarked that there was no real interference with the applicant’s right to respect for her private and family life since she was not denied of all possibilities of becoming a mother.¹⁸⁵ At that time, while the case was decided, the Specific Health Services Act¹⁸⁶ was

176 *Ibid.*

177 *Ibid.*, para. 7.

178 *Ibid.*, para. 8.

179 *Ibid.*, para. 9.

180 *Ibid.*

181 *Ibid.*, para. 11.

182 *Ibid.*, para. 12.

183 *Ibid.*

184 *Ibid.*, para. 15.

185 *Ibid.*

186 This Act stipulates that assisted reproduction means techniques and procedures for harvesting gametes, manipulating them, creating a human embryo by fertilizing the egg with the sperm outside the woman’s body. The same act further stipulates that artificial insemination can be performed on a woman of childbearing age, based on a written request from a woman and a man who intend to undertake this treatment together. This written request must not be older than six months. After the infertile couple had been given the aforementioned information, they could give written consent to assisted reproduction. The said consent would have to be given continuously

in force in the Czech Republic. The applicant then lodged an application with the ECtHR, emphasizing that the State should “respect her choice of the father of her child, as well as her late husband’s wish to have a child with her, and should allow her to continue with the assisted reproduction procedure using her late husband’s frozen sperm.”¹⁸⁷ In this she relied on the right to respect for private and family life, home and correspondence.¹⁸⁸ She pointed out that the fact that consent had been obtained at the commencement of the procedure should be enough,¹⁸⁹ as well as that the Czech Republic’s margin of appreciation “was not unlimited and could not justify any interference and certainly not the present one which prevented her from having a family with her husband.”¹⁹⁰ In response to the applicant’s allegations, the Government of the Czech Republic stated that the interference with the applicant’s right pursued two legitimate aims.¹⁹¹ The first aim was to enact legal norms aimed at securing the protection of rights and freedoms of the child to be born through this procedure, by providing them a chance to be born into a complete family.¹⁹² Moreover, the legal provisions were aimed at providing the protection of the autonomy of a man who had given his consent to the MAR procedure, since the mere fact that he had given his consent to such procedure while alive did not automatically lead to the conclusion that he would provide such a consent to it even after his death.¹⁹³ The second aim pursued by the interference was the protection of morals, since medically assisted reproduction is considered to be a rather sensitive topic, and that “the legislature’s policy choice reflected above all the moral, cultural, religious and ethical values of society.”¹⁹⁴

prior to any artificial insemination. See The Specific Health Services Act (Law No. 373/2011 as in force on 15 December 2014). See also ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 17–19.

187 See ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 22.

188 See Art. 8 of the ECHR. See ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 22.

189 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 29. It should be noted that under Czech law, due to the assumption that the father of the child is a man who consents to artificial insemination, insemination cannot be carried out without the continued consent of the infertile couple. ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 20.

190 *Ibid.*, para. 33.

191 *Ibid.*, para. 36.

192 *Ibid.*

193 *Ibid.*

194 *Ibid.*

The ECtHR first confirmed that the right to conceive a child through MAR treatment was protected under Article 8 of the ECHR.¹⁹⁵ It emphasized that its task was not to substitute the competent national authorities when deciding on the most suitable policy for dealing with the question of artificial reproduction, especially when having in mind that IVF treatment is at the center of moral and ethical debates related to medical discoveries.¹⁹⁶ This is one of the reasons why the ECtHR has always considered that states should enjoy a wide margin of appreciation in resolving these issues.¹⁹⁷ Such a wide margin of appreciation extends both to the state's decision to intervene in the area, and to the detailed rules it lays down to achieve an appropriate balance between competing public and private interests.¹⁹⁸ The ECtHR accepted the Czech Government's submission that these issues "are of a morally and ethically delicate nature and involve, beyond individual interests, a number of wider, public interests as well."¹⁹⁹ The Court underlined that since there was no common position of the European states regarding this issue, each state needs to be afforded a wide margin of appreciation with respect to regulating the issues of consent given for the use of genetic material provided for IVF treatment and using a deceased man's sperm.²⁰⁰ In the case at hand, the ECtHR analyzed whether the Czech Republic's interference with the applicant's rights guaranteed under Article 8 of the ECHR was in accordance with the law, whether it pursued a legitimate aim, and whether it was necessary in a democratic society.²⁰¹ Regarding the first issues, the ECtHR considered that prohibition on posthumous reproduction was provided for by law.²⁰² It then analyzed whether the measure pursued a legitimate aim. In the ECtHR's view, the decision of the Czech legislator to enact provisions such as those as well as the interpretation of the said provisions by national courts testify to the goal of respecting both human dignity and free will

195 *Ibid.*, para. 42.

196 *Ibid.*, para. 43.

197 ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 81; ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 97.

198 *Ibid.*, para. 43.

199 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 46.

200 *Ibid.*

201 In this way, the court wanted to apply a test that is based on the principle of proportionality, which it began to apply over time on a regular basis when deciding whether there were violations of the rights guaranteed under Arts. 8–11 of the European Convention on Human Rights.

202 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 47.

in order to allow for every person, as a donor of gametes for conducting such a procedure, to know in advance that “no use could be made of his or her genetic material without his or her continuing consent.”²⁰³ The ECtHR was of the opinion that the measure in question pursued a legitimate aim, i.e. “the protection of morals and the rights and freedoms of others.”²⁰⁴ In order to answer the last question, the Court had to consider whether such interference was necessary in a democratic society. It noted that “where such important aspects are at stake, it is not inconsistent with Article 8 [of the ECHR] that the legislature adopts rules of an absolute nature which serve to promote legal certainty.”²⁰⁵ It also underlined that rights guaranteed under Article 8 of the ECHR are not absolute and therefore do not require states to allow posthumous reproduction.²⁰⁶ Hence, in the present case, the court was of the opinion that the applicant’s legitimate right to respect for the decision to have a child genetically related to her deceased husband should not “be accorded greater weight than the legitimate general interests protected by the impugned legislation.”²⁰⁷ As a result, the Czech Republic “has to be afforded a wide margin of appreciation in this respect, which it did not overstep.”²⁰⁸ Therefore, the ECtHR concluded that there had been no violation of the applicant’s right to respect for private life.²⁰⁹

Based on all the above, it can be concluded that states must be afforded a wide margin of appreciation when deciding on issues of medically assisted reproduction and, where such important aspects of private life are at stake, it is consistent with Article 8 of the ECHR for the legislator to adopt rules of an absolute nature that serve to promote legal certainty. The author therefore believes it is important to relativize Mrs. Prizrenac-Nedeljković’s submissions and offer a different perspective on existing solutions in Serbian law.

Firstly, Mrs. Prizrenac-Nedeljković claims that the “EU regulation recognizes situations of posthumous reproduction, which are regulated at the national level of the member states.”²¹⁰ However, although it is true

203 *Ibid.*, paras. 51–52.

204 *Ibid.*, para. 54.

205 *Ibid.*, para. 58. See ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 89; ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 110.

206 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 59.

207 *Ibid.*, para. 62.

208 *Ibid.*

209 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, paras. 62–63.

210 PPSRS, 2022, p. 4, translated by author.

that some European Union countries allow posthumous reproduction treatment (Belgium, the Netherlands, Greece, Denmark),²¹¹ this does not mean that the same possibility should be adopted in Serbian law. On the contrary, it should be emphasized that just as there are EU member states where there is a possibility to carry out posthumous reproduction, there are also countries that explicitly prohibit such a possibility, such as France, Germany, Croatia, Slovakia, Slovenia, and the Czech Republic.²¹² In this sense, it is important to underline that the ECtHR, as previously stated, unequivocally emphasized that states should not be required to allow posthumous reproduction.

Mrs. Prizrenac-Nedeljković further stated that the provisions should be amended to allow partners to decide the fate of the reproductive material in the event of unforeseen circumstances or the death of one of the providers/partners – at the beginning of IVF treatment. She also pointed out that the five-year period prescribed for the storage of reproductive material must be extended, “especially in situations related to posthumous reproduction.”²¹³ However, the author believes that such proposals are inappropriate for several reasons. Firstly, it should be emphasized that, as the ECtHR pointed out, when assessing whether prohibition on posthumous reproduction is contrary to the requirements of the ECHR, the legal framework of the state, which also contains those legal norms, must be taken into account, and such a prohibition must be viewed in a wider context.²¹⁴ It should also be noted that the Constitution of the Republic of Serbia stipulates that every person has the right to inviolability of physical and mental integrity.²¹⁵ In addition to the Constitution of the RS, the Convention on Human Rights and Biomedicine²¹⁶ stipulates that an intervention in the field of healthcare can only be performed after the person concerned has been given information about it and has given free consent to it. It is further stated that the person concerned can freely withdraw consent and at any time.²¹⁷ Also, it is important to note that the

211 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 21.

212 *Ibid.*, para. 35.

213 PPSRS, 2022, p. 5, translated by author.

214 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 58. ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 112.

215 See Constitution of the Republic of Serbia, Art. 25, para. 1.

216 The Act on the ratification of 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), *Official Gazette of the RS – International Agreements*, No. 12/10.

217 See Convention on Human Rights and Biomedicine, Art. 5, paras. 1 and 3.

Patients' Rights Act²¹⁸ stipulates that patients have the right to freely decide on everything concerning their life and health, and, that as a rule, medical or surgical procedures may not be carried out without their informed consent.²¹⁹ Moreover, it is explicitly stated that the patient can withdraw their consent to the proposed medical procedure (verbally or in writing), before it is performed, as well as in the course of treatment.²²⁰ As to MAR, the legislator emphasizes that all individuals are required to give written consent prior to undergoing MAR treatment.²²¹ Consent is given for each MAR treatment²²² and the patient can withdraw consent before the sperm or eggs, zygotes, or embryos are placed in the woman's body.²²³ The legislator also points out that before each transfer of sperm cells, zygotes or embryos to the woman, a competent specialist must check whether there is written consent or it has been withdrawn.²²⁴ The legislator's view is not surprising given that free consent, which can be withdrawn, is a universal principle in medical ethics.²²⁵

Therefore, it could be argued that Serbian law, as well as Czech law, requires continuous consent so that every person donating their reproductive material for the purpose of IVF treatment would know in advance that their genetic material cannot be used without their continued consent. It should, thus, be pointed out that a requirement for continuous consent, as well as the use of MAR treatment during the lifetime of the genetic material provider, is necessary in order to protect not only the free will of the man who has consented to assisted reproduction, but also the rights of the unborn child to know their parents.²²⁶ The ECtHR has concluded that this type of measure pursued a legitimate aim, i.e., the protection of the morals and the rights and freedoms of others,²²⁷ and that the woman's legitimate right to respect for the decision to have a child genetically related to her deceased husband should not be accorded greater weight than the legitimate general interests protected by the impugned legislation.²²⁸

218 Patients' Rights Act, *Official Gazette of the RS*, Nos. 45/13 and 25/19 – other law.

219 *Ibid.*, Art. 15. paras. 1 and 2.

220 *Ibid.*, Art. 16, para. 4.

221 See LMAR, Art. 27, para. 1.

222 See *Ibid.*, para. 2.

223 See LMAR, Art. 28, para. 1.

224 LMAR, Art. 28, para. 3.

225 Deech, R., Smajdor, A., 2007, *From IVF to Immorality*, Oxford, Oxford University Press, p. 103.

226 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 59.

227 *Ibid.*, para. 54.

228 *Ibid.*, para. 62.

Furthermore, if posthumous reproduction was allowed under the provisions of Serbian law, the question of establishing the paternity of the child born in this way could be raised. This issue becomes even more important if taking into account the abovementioned proposal to extend the period prescribed for the storage of reproductive material and also to “allow couples who have undergone all necessary IVF procedures to use their reproductive material, if their health permits, again after the five-year period has elapsed.”²²⁹ The author underlines that if legal norms were amended in this way, it would certainly contribute to legal uncertainty.

Serbia’s legal system stipulates that the father of a child conceived with biomedical assistance is considered to be the spouse/common-law partner, provided that he had consented to the MAR procedure.²³⁰ If, on the other hand, posthumous reproduction was allowed under Serbian law, it would be questionable whether a man, whose sperm cells were used for insemination after his death, should be deemed the father of the child or, if, on the contrary, it should be stipulated that in such cases the child’s legal father has not been determined. The author is of the view that both scenarios would result in a number of specific problems.

If it is assumed that the father of the child is considered to be a man whose sperm cells were used for conception after his death, the issue of inheritance rights would certainly arise – can a child conceived by IVF after the death of their father become an heir? Đurđević points out that opinions on this issue remain divided.²³¹ On the one hand, there are those who believe that the objective interpretation of *nasciturus* fiction²³² could be to derive the rule that the child can inherit its deceased father, if born alive, regardless of the time of conception.²³³ In this sense, Vidić-Trninić and Krstić²³⁴ point out that a child should be recognized as having the right to inherit its genetic parents, whose reproductive cells were used

229 PPSRS, 2022, p. 5, translated by author.

230 Family Act, Art. 58, paras. 1 and 2.

231 See Đurđević, D., 2023, *Institucije naslednog prava*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 63.

232 Serbian law has adopted the concept of the conditional legal capacity of *nasciturus*, which implies that if a child was in gestation at the time of the intestate person’s death and, if subsequently it was born alive, the child can also inherit from the intestate person. See Succession Act, *Official Gazette of the RS*, Nos. 46/95, 101/03 – decision CCRS and 6/15, Art. 3, para. 2. See Đurđević, D., 2023, p. 62. For more details, see Vodinelic, V., 2023, p. 355.

233 Antić, O., 2008, *Nasledno pravo*, Belgrade, Pravni fakultet Univerziteta u Beogradu, pp. 68–69. As cited in Đurđević, D., 2023, p. 63, fn. 223.

234 Vidić (Trninić), J., Krstić, N., 2014, Naslednopravne posledice rođenja deteta začetog biomedicinski potpomognutom oplodnjom, *Pravni život*, 10, p. 539.

for posthumous conception, and that the legislator must not discriminate children in terms of their inheritance rights because they were conceived differently.²³⁵ It seems that this kind of argument for the most part avoids problems that may arise from acknowledging the inheritance rights of a *nondum conceptus*. Thus, there are opinions that “the need to preserve legal security and trust of both heirs and third parties, speaks against expanding the *nasciturus* fiction to cases of posthumous reproduction.”²³⁶ As it is possible to talk about cases in which a child was born from seminal fluid that is thirty years old,²³⁷ the acknowledgment of the right of a child born as a result of posthumous artificial insemination, who appears as an heir, would “ruin any chance to definitively discuss and conclude a specific inheritance case, because the demands of posthumously conceived children for their shares of the inheritance would never cease.”²³⁸ The ECtHR took a similar position, emphasizing that where such important aspects of private life are at stake, it is consistent with Article 8 of the ECHR that the legislator adopts rules of an absolute nature that serve to promote legal certainty.²³⁹

An alternative to this solution would be to consider that the paternity of the child born through posthumous reproduction has not been established. Legal norms set in this way create a special type of problem pertaining to the violation of the right of a child born as a result of posthumous reproduction to know its parents. The right to know one’s own origin is guaranteed under the Convention on the Rights of the Child,²⁴⁰ which emphasizes that the child shall have the right from birth, and as far as possible, to know and be cared for by its parents.²⁴¹ Živojinović points out that the prohibition on posthumous reproduction is in accordance with

235 *Ibid.*, p. 540.

236 Đurđević, D., 2023, p. 63, translated by author.

237 In the United States, twins Lydia and Timothy Ridgeway were born from embryos that were stored and frozen for thirty years. Kristensen, J., Kounang, N., Parents welcome twins from embryos frozen 30 years ago, *CNN* (<https://edition.cnn.com/2022/11/21/health/30-year-old-embryos-twins/index.html>, 21. 11. 2022).

238 Đurđević, D., 2023, *Institucije naslednog prava*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 63, fn. 225, translated by author.

239 ECtHR, *Pejřilova v. The Czech Republic*, no. 14889/19, Judgment of 8 March 2023, para. 58; ECtHR, *Evans v. United Kingdom*, no. 6339/05, Judgment of 10 April 2007 [GC], para. 89; ECtHR, *S.H. and others v. Austria*, no. 57813/00, Judgment of 3 November 2011 [GC], para. 110.

240 The Act on the ratification of the UN Convention on the Rights of the Child, *Official Gazette of the SFRJ – International Agreements*, No. 15/90 and *Official Gazette of the SRJ*, No. 15/90 and *Official Gazette of the SRJ – International Agreements*, Nos. 4/96 and 2/97.

241 Convention on the Rights of the Child, Art. 7, para. 1.

the Convention on the Rights of the Child, which stipulates that the child has the right to know and be cared for by its parents.²⁴² Legal scholars emphasize that there are three groups of reasons that explain the interest of a person to know their biological or genetic origins.²⁴³ The first group of reasons is of psychological nature. Draškić states that “psychologically speaking, the person’s identity is a confirmation of their existence” and “an important component of that recognition is the fact that one can trace the origin of one’s biological ancestors.”²⁴⁴ The opposite action, as pointed out, would cause “strong negative feelings of marginalization, social exclusion, frustration, insecurity, confusion.”²⁴⁵ Kovaček Stanić takes a similar point of view, emphasizing that psychological interest is reflected precisely in the desire and need to know one’s own origin.²⁴⁶ If, on the other hand, the child was granted the right to know its origins when it was conceived through posthumous reproduction, it could give rise to additional negative psychological consequences for the child. The second group of reasons why such a legal solution would be inappropriate is of a medical nature. Specifically, the medical interest of a person to know their origins is especially important if genetic inheritance is taken into account, i.e., the fact that certain genetically determined diseases are hereditary.²⁴⁷ The third group of reasons is of a legal nature. Specifically, if paternity was not established in relation to the child, then the child would not be entitled to the right to inheritance, the right to family pension, etc.²⁴⁸

All of the issues that have been discussed thus far lead to a single conclusion. More precisely, and contrary to the claims by Mrs. Prizrenac-Nedeljković and the PPSRS, the legal norms of the Republic of Serbia should not be amended in the manner proposed. This position is based on the fact that the previous analysis confirmed that the current position of the ECtHR is unequivocally directed toward the fact that states must be afforded a wide margin of appreciation when deciding on issues of medically assisted reproduction, such as posthumous reproduction. With this in mind, it is unquestionable that a comparative analysis of international

242 Živojinović, D., 2018, pp. 257–258.

243 Kovaček Stanić, G., 1997, *Pravo deteta da zna svoje poreklo*, Novi Sad, Pravni fakultet Univerziteta u Novom Sadu. See also Draškić, M., *Pravo deteta na saznanje porekla*, in: Lilić, S. (ed.), 2009, *Pravni kapacitet Srbije za evropske integracije*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 42.

244 Draškić, M., 2009, p. 42, translated.

245 *Ibid.*, translated.

246 Kovaček Stanić, G., 1997, p. 11.

247 Draškić, M., 2009, p. 42. See Kovaček Stanić, G., 1997, p. 11.

248 See Kovaček Stanić, G., 2010, p. 11. See Draškić, M., 2009, p. 42.

practices would be heterogeneous, which would confirm the position that the legal norms in Serbia should not be changed. Additionally, the proposal to allow partners to decide the fate of reproductive material in the event of the death of one of the partners at the beginning of the IVF treatment, completely bypasses the existing legal norms that require continuous consent of the persons whose genetic material is used in MAR. The opposite solution could lead not only to the violation of the interest of the depositor of genetic material, but also to the violation of the unborn child's right to know its parents. The last proposal, which is aimed at extending the five-year period prescribed for the storage of reproductive material and allowing couples who have undergone all necessary IVF procedures to use their reproductive material again even after the five-year period has elapsed, is particularly problematic. Thus, a Pandora's box would be opened, because it would be possible to imagine children being posthumously born from the genetic material drawn from the same person several decades prior. The consequence of such a solution would prevent any considerable discussion about and the resolution of the inheritance status of a posthumous child, precisely because the genetic material could be used at any time after the person's death. The alternative to this proposal is equally problematic, as it potentially creates room for the violation of the child's right to know its origins.

4. CONCLUSION

The questions that arise regarding posthumous reproduction remain unsolved pieces of the puzzle. This is why the author has attempted, through different legal solutions adopted by the United Kingdom and France, to provide answers to some of the questions concerning posthumous reproduction. The first in a series of questions concerns the legal qualification of reproductive cells. However, an analysis of both theory and case law in both countries indicated there was no single answer to that question. In other words, the issue of legal qualification of reproductive cells is barely discussed in English law, while the French courts have clearly taken the position that human sperm cannot be considered a movable or inheritable property because it represents a part of fundamental human rights. Here it would be useful to recall Vodinelić's position that "a separate reproductive cell has all the properties of a (movable) object and a special ability (which other objects do not have) to create a human being from it (by uniting with another of the opposite sex)."²⁴⁹

249 See Vodinelić, V., 2023, p. 256, translated by author.

Nevertheless, in both English and French law considerable attention has been focused on resolving the issue of whether a person is authorized to posthumously use another person's genetic material. Unlike English law, which permits posthumous reproduction, French law prohibits posthumous reproduction. By setting several different norms, the French legislator explicitly stipulated that genetic material cannot be used posthumously by a third party. These two opposite solutions reflect the positions taken by all other countries, because, on a comparative level, a broad consensus on whether it is justified to allow the posthumous use of genetic material has not been reached.

Finally, an answer to the question of whether posthumous reproduction could be carried out without the written consent of the genetic material provider, in legal systems that allow posthumous reproduction, was provided. The conclusion is that posthumous reproduction, as a rule, could only be carried out if written consent had been obtained from the genetic material provider. However, as previously elaborated, recent case law in England testifies that the courts have treated posthumous reproduction issues differently. In other words, the intention of the court in the specific case was not to circumvent or violate the legal provisions, but on the contrary, to enable the fulfillment of the intention of the person whose genetic material was used posthumously.

The Serbian legislator banned posthumous reproduction, and instead stipulated that reproductive cells, i.e., embryos, may only be used in MAR if the depositors are living. Additionally, the legislator stipulated that written consent must be obtained from all persons undergoing MAR treatment prior to starting each treatment cycle. However, Mrs. Prizrenac-Nedeljković has fiercely criticized this position taken by the legislator in recent months, emphasizing that several provisions of the LMAR need to be amended. The author explained that such proposals cannot be accepted, for the time being, for a number of reasons. The first argument by Mrs. Prizrenac-Nedeljković for allowing posthumous reproduction was that there were Member States of the European Union that allowed posthumous reproduction. Such an argument is weak, because there are also those that do not permit posthumous reproduction. Hence, there is no generally accepted position at the level of the European Union with which Serbia would be required to align. Further proposals are aimed at allowing the partners to decide the fate of the reproductive material in the event of the death of one of the providers/partners at the beginning of the IVF treatment or in the case of unforeseen circumstances. First, it is necessary to reiterate that when assessing whether the imposition of a prohibition on posthumous reproduction is contrary to the requirements of the

ECHR, the legal framework of the country that contains such legal provisions must be taken into account, and such a prohibition must be viewed in a wider context. As it could have been seen, the legal framework of the Republic of Serbia is undoubtedly focused on the person's continuous, free and informed consent without which no medical procedure, i.e., medical measure, can be carried out. The adoption of the said proposal would contribute to the violation of existing legal norms that require continuous consent from the persons whose genetic material is used in MAR, including potential violations of the rights and interests of the unborn child. The last proposal in the Initiative was to extend the five-year period prescribed for the storage of reproductive material and allow couples who have undergone IVF treatment to use their reproductive material again after the five-year period has elapsed. This proposal raises the question of the legal status of a posthumous child. In the previous section, the author pointed out that both possible solutions to the legal status of a posthumous child would lead to a series of problems. More precisely, we would be faced with a dilemma of whether a child's paternity was established by written consent to the posthumous use of genetic material or whether to consider the child as being without established paternity.

Be that as it may, it is evident that the proposals stated in the Initiative were viewed one-sidedly. It seems that the issue of posthumous reproduction was approached from the perspective of those who have difficulties in conceiving. Without disputing the gravity of the problem of infertility and the struggle of all persons affected by infertility to produce their offspring, when deciding MAR issues, it is necessary to look at the wider picture and take into account both the legal framework of the country where the proposal is made and the fact that self-interest does not take precedence over the general interest of the state, which is protected by the law.

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POSTHUMNA OPLODNJA: ŽIVOT POSLE SMRTI?

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APSTRAKT

Predmet rada je analiza posthumne oplodnje na međunarodnom i nacionalnom nivou. Autorka analizira pravni sistem Velike Britanije, kao države koja ima permisivni stav prema posthumnoj oplodnji, a potom i pravni sistem Francuske, kao države sa negativnim stavom prema posthumnoj oplodnji. Analizi su podvrgnute i zakonske norme srpskog prava koje zabranjuju posthumnu oplodnju. Zakonske norme sagledane su iz perspektive jedne privatne inicijative koja je upućena nadležnim državnim organima Srbije. Iako autorka razume da neplodnost predstavlja veliku prepreku u životu svakog čoveka, zaključuje da su predložene izmene jednostrane jer se njima zanemaruje činjenica da one treba da budu deo pravnog okvira sa kojim ujedno moraju biti usklađene. Upravo zato, a kako među državama nema konsenzusa o dozvoljenosti posthumne oplodnje, autorka ističe da srpski zakonodavac, u ovom trenutku, ne čini povredu prava pojedinaca propisujući zabranu posthumne oplodnje.

Ključne reči: medicinski asistirana reprodukcija, posthumna oplodnja, pismena saglasnost, pravo na poštovanje privatnog i porodičnog života, pravo deteta na saznanje sopstvenog porekla.

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