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THE CHILD'S RIGHT TO KNOW ITS ORIGIN IN THE CONTEXT OF NEW FORMS OF FAMILY

Summary: *This article studies the effects that the introduction of new family formations has had on children's rights, specifically the child's right to know its origin. In order to provide for a systematic and comprehensive answer to the question of whether the child can exercise its right to know its origin in the context of new family formations, the author will start off by making a brief overview of the development of the rights of the child. Following that, the question of how and when the right of the child to know its origin was initially recognized as a universal right granted to all children will be answered. The analysis will further on deal with the specific challenges to which the child is subjected to in the context of new forms of family, primarily in cases of adoption, and subsequently, in cases of families created with the help of MAR procedures. As a result, an outline of the existing and possible approaches towards this issue will be showcased in order to summarize the emerging trends related to the child's right to know its origin.*

Keywords: *new family formations, adoption, medically assisted reproduction procedures, right of the child to know its origin, best interests of the child*

1. INTRODUCTION

The last few decades testify to the introduction of new family formations, affecting the understanding of the concept of family thus far. Scholars usually define the concept of family either by listing the members of the family or by listing the functions which are typically related to family.[1] Some of them define the family as a 'circle of people connected through marriage (or extramarital union) and blood relations, between whom there are rights and duties stipulated by law'.[2]

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1 Marija Draškić, *Porodično pravo i pravo deteta* (Univerzitet u Beogradu – Pravni fakultet Centar za izdavaštvo 2023) 45.

2 Marko Mladenović, *Porodično pravo* (prvo i drugo izdanje, Privredna štampa 1981) as cited in Marija Draškić, *Porodično pravo i pravo deteta* (Univerzitet u Beogradu - Pravni fakultet Centar za izdavaštvo 2023) 45. For more details on the definition of family see Marija Draškić *Porodično pravo i pravo deteta* (Univerzitet u Beogradu - Pravni fakultet Centar za izdavaštvo 2023) 45. On

Kovaček Stanić and Samardžić on the other hand underline that a 'precise definition of family would result in law recognizing only a limited notion of 'family''.[3]

The emergence of new concepts of family has had an impact on the concept of parenthood. Now a distinction can be made between genetic, legal, and social parenthood.[4] Such a decoupling of legal and genetic parenthood raises a number of concerns. One of such concerns is whether it is possible for a child to exercise the right to know its origin in the context of new family formations. In order to provide an answer to such a complex question, I will make a brief overview of the development of the rights of the child, with a specific focus on the child's right to know its origin. I will then shift my attention to the reasons that explain the importance and the weight of the right of the child to know its origin. The analysis will further on deal with the specific challenges to which the child is subjected to in the context of new forms of family, primarily in cases of adoption and subsequently, in cases of families created with the help of MAR procedures.

1.1. HISTORICAL OVERVIEW ON THE DEVELOPMENT AND RECOGNITION OF CHILDREN'S RIGHTS

The 20th century resulted in changes 'bigger and greater than ever before related to the parent-child relationship'.[5] Scholars emphasize that a shift has happened and that the patriarchal model of familial relationship was abandoned and that the institution of parental rights, i.e. parental responsibility has been accepted.[6]

The horrors of First World War opened the doors for discussion about the need for the protection of basic human rights, including the human rights of children. Following the actions of the League of Nations the Declaration of the Rights of the Child,[7] also known as the Geneva Declaration, was adopted. This document was the 'first human rights Declaration adopted by any inter-governmental organization',[8] which proclaimed that the 'mankind owes to the child the best it has to give'.[9] Following the said actions of the League of Nations, which ceased to exist, the newly founded United Nations undertook the next step in securing the protection of

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the definition on family compare Jens Scherpe, "Organic European Family Law" in Jens Scherpe (ed.), *The present and the future European Family Law* (Edward Elgar Publishing Limited 2016) 41.

3 Gordana Kovaček Stanić, Sandra Samardžić, "Assisted Reproductive Technologies: New Family Forms and Welfare of Offspring in Comparative Family Law" in Carol Rogerson, Masha Antokolskaia, Joanna Miles, Patrick Parkinson and Machteld Vonk (eds.), *Family Law and Family Realities* (Eleven International Publishing 2019) 235.

4 Sandra Samardžić, *Prava deteta u oblasti medicinski asistirane reprodukcije* (University of Novi Sad Faculty of Law doctoral dissertation 2018) 233.

5 Marija Draškić, "Pravo deteta na saznanje porekla" in Stevan Lilić (ed.), *Pravni kapacitet Srbije za Evropske integracije* (Pravni fakultet Univerziteta u Beogradu Centar za izdavaštvo 2009) 37.

6 Marija Draškić, "Pravo deteta na saznanje porekla" in Stevan Lilić (ed.), *Pravni kapacitet Srbije za Evropske integracije* (Pravni fakultet Univerziteta u Beogradu Centar za izdavaštvo 2009) 37. Compare Sandra Samardžić, *Prava deteta u oblasti medicinski asistirane reprodukcije* (University of Novi Sad, Faculty of Law, doctoral dissertation 2018) 233.

7 Adopted by the League of Nations, on 26 September 1924.

8 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Law International 1998) 6.

9 Records of the Fifth Assembly, Supplement no. 23, League of Nations Official Journal 1924.

children rights. The General Assembly of the United Nations (hereinafter: the General Assembly of UN) adopted the Declaration of the Rights of the Child. This Declaration led to a shift on the understanding of children, as they were no longer perceived as passive recipients, but as subjects of international law who are able to 'enjoy the benefits of specific rights and freedoms'.[10] The impact of the said Declaration was conditioned by the fact that it was not binding. Hence, the General Assembly of UN began work on drafting a legally binding convention on children's rights and adopted the UN Convention on the Rights of the Child[11] (hereinafter referred to as: the CRC).[12]

The CRC was regarded as a milestone in the acceptance of children as rights-holders.[13] Its importance is primarily visible through the fact that it 'has had significant impact on international, regional and domestic policy-makers, legislators, courts' and 'has been the catalyst for reform of policy, law and practice'.[14] The CRC consists of the preamble and the provisions related to the rights of the child which can be divided in three groups – provision rights, participation rights and protection rights (the so-called three P's).[15] Even though there is much more to stress about the CRC and the actions conducted by the UN, I will shift my attention to specific provisions of CRC which relate to the subject matter of this paper.

1.2. HISTORICAL OVERVIEW ON THE DEVELOPMENT AND RECOGNITION OF THE CHILD'S RIGHT TO KNOW ITS ORIGIN

While the right of the child to know its origin was firstly enshrined in the CRC, it was the acts and initiative of the Argentinian government that paved the way in recognizing of this right to children internationally. The Argentinian government acted in such a manner in order to prevent any scenario that would be similar to the one happening during the so-called 'Dirty War',[16] which resulted in a number of missing children. Although many of the children were traced down, it was clear that there was a need for the creation of an efficient mechanism under international law which would secure the protection of children's rights and more

10 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Law International 1998) 12.

11 Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entered into force on 2 September 1990, in accordance with article 49.

12 For more details on the drafting process of the CRC see Sandra Samardžić, *Prava deteta u oblasti medicinski asistirane reprodukcije* (University of Novi Sad, Faculty of Law, doctoral dissertation 2018) 31–32. Compare Draškić (n 5) 38; Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Law International 1998) 14–16.

13 Elaine E. Sutherland, "Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities" in Elaine E. Sutherland, Lesley-Anne Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child, Best Interests, Welfare and Well-being* (2017) 21.

14 Elaine E. Sutherland, Lesley-Anne Barnes Macfarlane, "Introduction" in Elaine E. Sutherland, Lesley-Anne Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the Child, Best Interests, Welfare and Well-being* (2017) 7–8.

15 This classification can be attributed to Thomas Hammarberg who grouped the Convention rights according to 'the three Ps', i.e. provision or 'the right to get one's basic needs fulfilled'; protection or 'the right to be shielded from harmful acts or practices'; and participation or 'the right to be heard on decisions affecting one's own life'. Thomas Hammerberg, "The UN Convention on the Rights of the Child-And How to Make It Work" (1990) 12 (1) *Human Rights Quarterly* 99–100.

16 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Law International 1998) 119.

specifically, the right of the child to know its origin.[17] Germany had taken steps of its own in ensuring the recognition and protection of the child's right to know its origin. On that note, Kovaček Stanić cites a judgement of the Federal Constitutional Court of Germany which dealt with the question of contesting paternity.[18] The Federal Constitutional Court argued that the right of the child to know its parents is a part of the child's right to privacy and that contesting the exercise of such rights would be unconstitutional.[19]

The CRC has also adopted a framework aimed to ensure the protection of the child's right to their own identity[20] and subsequently the right of the child to know its origin. To that end, it should be taken into account that the right of the child to their own identity is protected primarily through art. 7 and art. 8 of the CRC.[21]

The right of the child to know its origin is enshrined in art. 7 of the CRC which reads that: 'the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.'[22] Freeman considers the term parent used in the said provision of the CRC as being one which includes not only social and legal parents, but genetic parents as well.[23] It should however be underlined that many countries, as the contracting parties, made reservations to the contrary. Besson lists UK, the Czech Republic, Luxembourg and Poland, as an example of such countries.[24] Those countries insisted on adding the wording 'as far as possible' in order to keep an open window for possible derogations from the child's right to know their origin.[25]

Anyhow, the right of the child to know its origin needs to be considered in correlation with other rights of the CRC, mainly art. 8 of the CRC, which places a duty on State Parties to: 'respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'.[26] It further reads that 'where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity'.[27] Lyons underlines that art. 7 and 8 of the CRC, taken together, 'provide a

17 *Ibid.*

18 Gordana Kovaček Stanić, *Pravo deteta da zna svoje poreklo* (Pravni fakultet Univerziteta u Novom Sadu 1997) 15.

19 Draškić (n 5) 40, fn. 9.

20 Van Bueren however argues that several countries opposed to the enactment of the children's right to preserve their own identity. Those states believed that such provision was unnecessary. See more in Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Law International 1998) 119.

21 Donna Lyons, "Domestic Implementation of the Donor-Conceived Child's Right to Identity in Light of the Requirements of the UN Convention on the Rights of the Child" (2018) 32 (1) *International Journal of Law, Policy and The Family* 3.

22 See art. 7 of the CRC.

23 See Samantha Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" (2007) 21 *International Journal of Law, Policy and The Family* 143.

24 *Ibid.*

25 *Ibid.*

26 See Kovaček Stanić (n 18) 12.

27 See art. 8 of the CRC.

strong argument in favor of a right to know for those who have been adopted, and, by extensions for donor-conceived people'.[28]

Having in mind the aforementioned, as well as the fact that this paper is related to the child's right to know its origin, which as was said, is part of the child's right to their identity, it will be necessary to inspect the right of the child to know its origin.

2. WHY IS IT IMPORTANT FOR THE CHILD TO KNOW ITS ORIGIN?

There are several reasons as to why it is important for the child to know its origin.[29] The first being of psychological nature. Draškić underlines that if the child would not have a chance to exercise this right, that could cause 'strong negative feelings of marginalization, social exclusion, frustration, insecurity, confusion'.[30] Kovaček Stanić holds a similar viewpoint, emphasizing that the psychological interest is reflected precisely through the desire and need to know one's own origins.[31]

The second group of reasons are those of medical nature. It seems that it is important to consider that each individual has great interest in acquiring information about their genetics. As Mladenović underlines 'the right of the child to know their biological origin presents an important step on the way to forming a personal identity'.[32] The child's right to know its origin is particularly important if one considers the fact that certain diseases are genetically preconditioned and can as such be inherited,[33] hence affecting any decision with regards to family planning.

Finally, the third group of reasons are those of legal nature. Following the birth of the child a familial relationship is established between the child and the parents. Consequently,

28 Donna Lyons, "Domestic Implementation of the Donor-Conceived Child's Right to Identity in Light of the Requirements of the UN Convention on the Rights of the Child" (2018) 32 (1) *International Journal of Law, Policy and The Family* 3. The Implementation Handbook goes a step further as it deduces that art. 7 of the CRC should be read in conjunction not only with art. 8 but also with art. 9 (separation from parents), art. 10 (family reunification) and art. 20 (continuity in upbringing of children deprived of their family environment). Although I do agree with such understanding, I will primarily focus on article 7 and 8 of the CRC. For more details see Implementation Handbook for the Convention on the Rights of the Child (hereinafter: Implementation Handbook), 2007, 97.

29 O'Donovan underlines that an interest may relate to the desire to know one's origins as it is an interest in identity without which one is 'deracinated'. Moreover, an individual may be concerned about his medical history. In addition, the material interest may also play its part because of the individual's benefit of being qualified to take property in the event of the death of a social parent. Katherine O'Donovan, "A Right to Know One's Parentage?" (1988) 2(1) *International Journal of Law and the Family* 27, 29 as cited in Michael Freeman, "The new birth right, Identity and the child of the reproduction revolution" (1996) 4(3) *International Journal of Children's Rights* 277 fn. 24.

30 Marija Draškić, "Pravo deteta na saznanje porekla" in Stevan Lilić (ed.), *Pravni kapacitet Srbije za Evropske integracije* (Pravni fakultet Univerziteta u Beogradu Centar za izdavaštvo 2009) as cited in Ivana Barać, "Posthumous reproduction-life after death?" (2023) 2 *Pravni zapisi* 468.

31 Gordana Kovaček Stanić, *Pravo deteta da zna svoje poreklo* (Pravni fakultet Univerziteta u Novom Sadu 1997) as cited in Barać (n 30) 468.

32 Tamara Mladenović, "Pravo deteta na identitet u kontekstu pravila o anonimnosti donora reproduktivnih ćelija" (2023) 71(1) *Belgrade Law Review* 97.

33 Marija Draškić, "Pravo deteta na saznanje porekla" in Stevan Lilić (ed.), *Pravni kapacitet Srbije za Evropske integracije* (Pravni fakultet Univerziteta u Beogradu Centar za izdavaštvo 2009) as cited in Barać Barać (n 30) 468.

the creation of such a relationship has important legal effects. Once the relationship is established the child is granted with a set of rights towards his parents and vice versa. For example, parents are considered as the primary caregivers of the child and the ones who are obliged to provide for the child and comply with the child's right to maintenance. Moreover, the child has the right to inherit his parents, as well as the right to family pension.

3. CHALLENGES FOR CHILDREN IN EXERCISING THE RIGHT TO KNOW THEIR ORIGIN IN THE CONTEXT OF NEW FORMS OF FAMILY

There are, at best, three differing interest that need to be taken into consideration when inspecting the child's right to know its origin. Aside from the interests of the child to know its origin, the rights and interest of the adoptive, biological, or legal parents' ought to be considered as well. Moreover, Besson deduces that the child's right to know its origin can be conflicting to the rights of not only other persons, but also to the public interest or even the interest of the child itself.[34] It is for that reason precisely that Van Bueren considers the issue of the child's right to know its origin to be a 'Pandora's Box'.[35]

Seeing that the genetic connection of children with their biological parents is completely detached after adoption is established, and instead, a connection with the adoptive parents, who become the legal parents of that child, is created, I will firstly focus on adoptive families. At the time of the drafting of the CRC, some countries made reservations in relation to art. 7 of the CRC by remaining of the opinion that, in cases of adoption, children do not have the right to know their origin.[36] The main concern that such wording raised was whether or not biological and social childhood can and should be equated.

In addition to adoptive families, the following chapter will address the issue of new forms of family that have become prominent over the past few decades with medical advances. Of course, this refers to families created with the help of medically assisted reproduction, that is, families where conception occurred artificially with MAR procedures. MAR procedures have raised questions of maternity and paternity in all cases where conception occurs using donated genetic material (*in vivo* and *in vitro* fertilization) or even more so in cases of surrogacy. Hence, I will review and consider the most important types of MAR procedures where the question of genetic and legal parenthood can and is raised by taking into consideration the case law of the European Court of Human Rights (hereinafter: ECtHR), as well as the observations and recommendations of the Committee on the Rights of the Child.

The research will encompass the provisions of the CRC, but it will also focus on the Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. the European

34 Samantha Besson, "Enforcing the Child's Right to Know her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights" (2007) 21 *International Journal of Law, Policy and The Family* 138.

35 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Kluwer Law International 1998) as cited in Besson(n 34) 138.

36 Implementation Handbook, 105.

Convention of Human Rights (hereinafter: ECHR).[37] That is because the ECHR guarantees everyone the right to respect for private and family life, home and correspondence[38] and because the right to know one's origin is an 'essential part of the respect of private life'.[39] Since the ECtHR was created as an international body set up to ensure the full implementation of the ECHR, i.e. to assess decisions of Member States based on the ECHR, it would be interesting to make a brief overview of the understanding that the ECtHR has on the right of the child to know its origin in the context of art. 8 of the ECHR.

The analysis of the CRC and the ECHR with respect to the child's right to know its origin is in line with the argument that both the 'European Court of Human Rights and the original drafters of the CRC recognized the importance of cultural and social inheritance and a stable family to a child'.[40]

3.1. ADOPTION AND THE RIGHT OF THE CHILD TO KNOW ITS ORIGIN

Adoption can be described as a special method of family planning aimed to ensure the social protection of children without parental care. It is a 'legal institution which artificially, legally creates a parental relationship between someone else's minor child and an adult with legal capacity'.[41] Since adoption leads to the separation of social parenthood from the genetic parenthood, a question arises - can the child without parental care obtain information about his/her genetic parents or should such information remain hidden?

Legal scholars opt for one of the two conflicting principles. The first being the truth principle - recognizing the child's right to know its origin, by revealing information related to his/her biological parents. Such a stance can be seen in many national legal systems. English law has, for example, amended provisions in a manner which enables the child to exercise the right to know its origin, following a study which showcased that 'over 90% of children who were provided with information about their origin showed no signs of anxiety or stress'.[42]

The second principle relies on the argument that adoption should be followed by secrecy and that no information related to the biological parents should be revealed to the child. One of the main reasons for the application of such principle is the need to protect the interests of the biological mother, who can potentially be subject to grave punishment, such as corporal

37 Signed in Rome on 4 November 1950.

38 ECHR, art. 8 (1): "Everyone has the right to respect for his private and family life, his home and his correspondence."

39 Besson (n 34) 142.

40 Brigitte Clark, "A Balancing Act? The Rights of Donor-conceived Children to Know their Biological Origins" (2012) 40(3) *Georgia Journal of International and Comparative Law* 630.

41 Marija Draškić, *Porodično pravo i pravo deteta*, (Univerzitet u Beogradu - Pravni fakultet, Centar za izdavaštvo 2023) 228. Compare Gordana Kovaček Stanić, "Right of the child to parental care – contemporary aspects" in Tibor Varady, Gordana Kovaček Stanić, (eds.), *30 years of applying the United Nations Convention on the Rights of the Child-Contemporary Approach* (Serbian Academy of Sciences and Arts 2021) 19.

42 Stephen Michael Cretney, *Principles of Family Law* (Sweet & Maxwell 1994) as cited in Draškić (n 41) 243.

punishment or death, or be stigmatized by the society.[43] Hence, it is important to make an overview of the emerging trends in order to understand how the right of the child to know its origin is recognized nowadays in cases of adoption.

The ECtHR has underlined that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings' and continued by arguing that 'in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification'.[44] Such stance was formed in the famous case of Gaskin v. the United Kingdom in which the applicant, a British citizen, was received into care by the Liverpool City Council. The applicant wanted to obtain information about his past.[45] The Liverpool City Council rejected the applicant's request for disclosure, arguing that such a disclosure 'would be contrary to the public interest'.[46] Following the dismissal of his appeal by the Court of Appeal, the applicant relied on the Commission.[47] The ECtHR had to determine whether the United Kingdom breached the positive obligation it had stemming from art. 8 of the ECHR when deciding on the applicant's requests to access his case file. The ECtHR started off by stipulating that when determining a possible breach it will have regard to the 'fair balance that has to be struck between the general interest of the community and the interests of the individual'.[48] The Court continued by stipulating that 'persons in the situation of the applicant have a vital interest in receiving the information necessary to know and to understand their childhood and early development'.[49] The ECtHR concluded that there was a breach of art. 8 of the ECHR as the right to private and family life of the applicant was not respected.

A similar reasoning was visible in the case of Mitrevska v. North Macedonia.[50] The applicant submitted that she had been adopted as a child, and has requested information about her adoption. She underlined that she had been diagnosed with an anxiety disorder and that her doctors requested information concerning her family's medical history in order to determine whether she had a hereditary disease. As a result, she requested a copy of the adoption file, relying on the provisions of the CRC.[51] Following all her failed attempts to have access to her adoption files,[52] she lodged an application to the ECtHR. The ECtHR noted that the domestic authorities failed to address the applicant's argument concerning the need to obtain information about her biological parents' medical history.[53] It further underlined that the existing legal provisions do not provide for the possibility of obtaining non-identifying information

43 Marija Draškić, "Pravo deteta na saznanje porekla" in Stevan Lilić (ed.), *Pravni kapacitet Srbije za Evropske integracije* (Pravni fakultet Univerziteta u Beogradu Centar za izdavaštvo 2009) 46.

44 *Gaskin v. The United Kingdom* App no 10454/83 (ECHR, 7 July 1989), para. 39.

45 *Ibid.*, para. 11.

46 *Ibid.*, para. 15.

47 *Ibid.*, para. 30.

48 *Ibid*, para. 42. Compare *Rees v. The United Kingdom*, App no 9532/81 (ECHR, 17 October 1986), para. 37.

49 The. Court did underline the importance of keeping the records confidential in order to obtain objective and reliable information. *Gaskin v. The United Kingdom,* App no 10454/83 (ECHR, 7 July 1989), para. 49.

50 *Mitrevska v. North Macedonia*, App no 20949/2 (ECHR, 14 August 2024).

51 *Ibid.*, paras. 2–6.

52 For more details see *Mitrevska v. North Macedonia*, App no 20949/2 (ECHR, 14 August 2024), paras. 6–15.

53 *Ibid.*, para. 53.

concerning a person's biological origins, adoption or childhood.[54] The ECtHR noted that the Constitutional Court of North Macedonia gave no consideration at all to the interest of an adopted adult in obtaining information about his or her biological origins or his or her family's medical history.[55] It concluded that the domestic authorities failed to strike a balance between the competing interests at stake and thus overstepped the margin of appreciation afforded to them.[56]

It is interesting however that the ECtHR 'has paradoxically rejected the claim that the absolute birth secrecy granted in some European countries violates art. 8 ECHR'.[57] By that Besson refers to the well-known case of Odièvre v. France.[58] This case was initiated by a French national, whose mother opted for anonymous birth. Following the birth of the applicant she abandoned her child.[59] A few years later the applicant was adopted by Mr. and Mrs. Odièvre,[60] and was prevented from learning the truth about her genetic origin. Since she considered her right to family life was violated, she decided to lodge an application before the ECtHR.[61] The Grand Chamber of the ECtHR firstly reiterated that 'regard must be had to the fair balance which has to be struck between the competing interests'. The ECtHR compared the case at hand with the aforementioned case of Gaskin v. The United Kingdom and the case of Mikulić v. Croatia.[62] The ECtHR underlined that, unlike those cases 'access to information about one's origins and the identity of one's natural parents is not of the same nature, as that of an access to a case record concerning a child in care or to evidence of alleged paternity'.[63] In the present case the applicant was not only adopted, but abandoned at birth by her mother who explicitly wanted to keep the birth a secret.[64] Even though the applicant's vital interest in personal development is recognized, the applicant's biological mother obviously wanted no contact with the applicant and has made zero efforts with regards to the applicant.[65] The ECtHR took into account the interest of the adoptive parents of the applicant as well and concluded that 'non-consensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life'.[66] Consequently, the ECtHR found no violation of art. 8 of the ECtHR.

54 *Ibid.*, para. 54.

55 *Ibid.*, para. 56.

56 *Ibid.*, para. 58.

57 Besson (n 34) 142.

58 *Odièvre v. France*, App. No. 42326/98 (ECHR 13 February 2003).

59 *Ibid.*, paras. 9–10.

60 *Ibid*,. para. 11.

61 *Ibid.*, paras. 24–25.

62 *Mikulić v. Croatia*, App no. 53176/99, (ECHR, 4 September 2002).

63 *Odièvre v. France*, App. No. 42326/98 (ECHR 13 February 2003), para. 43.

64 *Ibid.*

65 *Ibid.*, para. 44.

66 *Ibid.*

In the following years the attitude of the ECtHR has changed. That can be confirmed with the case of Godelli v. Italy.[67] The applicant was an Italian national, abandoned by her mother at birth,[68] adopted by the Godelli family.[69] Upon learning that she was adopted, she sought information from her adoptive parents about her birth parents.[70] Her adoptive parents however remained silent. Subsequently, the applicant requested information about her origins from the state authorities in Italy. Although she was provided with the birth certificate, she could not see her mother's name because her mother had not agreed to have her identity disclosed.[71] After the applicant's appeal was rejected by the Court of Appeal, she lodged an application before the ECtHR.[72] The ECtHR has, unlike in the case of Odièvre v. France, stated that the 'applicant's request for information about her origins was totally and definitively refused, without any balancing of the competing interests or prospect of a remedy'.[73] Moreover, the Court asserted that the applicant showed interest in obtaining any information about her biological mother's identity and that such behavior on her behalf 'implies mental and psychological suffering'.[74] It was concluded that the Italian law failed to strike a fair balance between the competing rights and interests at stake.[75] Having in mind the previously stipulated it becomes obvious that the ECtHR does not opt for a clear and unequivocal stance on the question of the child's right to know its origin in the context of article 8 of the ECHR.

The right of the child to know its origin should also be considered through the lenses of the provisions of the CRC and the recommendations of the Committee on the Rights of the Child (hereinafter: the Committee). Although the Committee does not have 'any enforcement powers and there is no mechanism for individual petition under the CRC',[76] its influence cannot be denied. The Committee 'has expressed concern about a number of countries that maintain policies of 'secret' adoptions and always firmly recommends that the children be told about their parentage'.[77] One of the countries which was subject to such remarks was Armenia. The Committee noted that 'the adoption law should guarantee the right of the child to know his/her origin and to have access to information about the background and vital medical history of both the child and biological parents'.[78] In the case of Russian Federation the Committee asserted that 'the right of an adopted child to know his/her original identity is not protected in the State Party' and moreover 'encouraged the State party to protect the right of the adopted

67 *Godelli v. Italy*, App no. 33783/09, (ECHR 25 September 2012).

68 *Ibid.*, para. 5.

69 *Ibid.*, para. 7.

70 *Ibid*,. para. 8.

71 *Ibid.*, para. 10.

72 *Ibid.*, para. 1.

73 *Ibid.*, para. 50.

74 *Ibid.*, para. 56.

75 *Ibid.*, para. 57.

76 Brigitte Clark, "A Balancing Act? The Rights of Donor-conceived Children to Know their Biological Origins" (2012) 40(3) *Georgia Journal of International and Comparative Law* 625.

77 See Armenia CRC/C/15/Add.225, para. 38. See also Russian Federation CRC/C/RUS/CO/3, paras. 40 and 41, Uzbekistan CRC/C/UZB/CO/2, paras. 40 and 41, Uruguay CRC/C/15/Add.62, para. 11.

78 See Armenia CRC/C/15/Add. 225, para. 38.

child to know his/her original identity.'[79] Such concerns were raised because the Family Code of the Russian Federation opts for secret adoption by explicitly entailing that 'the secret of the child's adoption shall be protected by law'[80] and that there is a possibility to amend the date and the place of birth of the adopted child in order to ensure the secrecy of the adoption.[81]

As can be seen the ECtHR has, in recent years, showcased a stance which supports the right of the child to know its origin. It did however argue that such right is not absolute and that instead a balancing of the child's right with the rights of others is needed. The Committee has held a firmer stance that adoption should not be kept a secret and instead recommended countries to amend their legislation accordingly. Considering the understanding of the ECtHR, as well as the stance of the Committee it comes as no surprise that many countries have now opted for the concept of the so-called open adoption, which enables the biological parents to become acquainted with the adoptive parents.[82]

3.2. MAR PROCEDURES AND THE RIGHT OF THE CHILD TO KNOW ITS ORIGIN

MAR procedures can be defined as a segment of human reproductive medicine aimed at treating infertility in cases in which the cause of infertility cannot be eliminated.[83] Although there are many different categories of MAR procedures, I will use the one which differentiates between *in vivo*, *in vitro* fertilization and surrogacy procedures.[84] This distinction is used mainly because these are the MAR procedures in which the question of the child's right to know its origin can be problematic.

In vivo fertilization relates to procedures of gamete transfer, i.e. injection of the seminal fluid in the reproductive organs of the women or the transfer of egg cells together with the seminal fluid in the woman's reproductive organs. A further distinction can be made between homologous artificial insemination and heterologous artificial insemination, based on the question of whose genetic material has been used in the process (the husband's or the donor's). Artificial insemination conducted by using the seminal fluid of a donor is referred to as heterologous artificial insemination, also known as artificial insemination by donor semen (Artificial Insemination by Donor - AID) or therapeutic donor insemination (Therapeutic Donor Insemination – TDI).

In vitro fertilization is a procedure which involves extracorporeal fertilization of eggs and seminal fluid and the transfer of such embryo in the woman's body. It can be differentiated depending on whether the fertilization is conducted using the genetic material of the couple

79 See Russian Federation CRC/C/RUS/CO/3, paras. 40 and 41.

80 See art. 139 (1) of the Family Code of Russian Federation (Семейный кодекс Российской Федерации – СФ от 29.12.1995 N 223-ФЗ, ред. от 4. 8. 2022, с изм. и доп., вступ. в силу с 1. 9. 2022).

81 See art.135 (1) of the Family Code of Russian Federation.

82 Draškić (n 41) 243.

83 Zorica Mršević, *Analiza uslova i načina ostvarivanja biomedicinski potpomognute oplodnje u Srbiji* (Labris – organizacija za lezbejska prava 2020) 3.

84 Bernard Morris Dickens, "Reproductive Technology and the New Family", in Elaine Sutherland, Alexander McCall Smith (eds.), *Family Rights: Family Law and Medical Advance* (Edinburgh University Press 1990) 21.

(homologous *in vitro* fertilization) or by using donated genetic material (heterologous *in vitro* fertilization).[85] Surrogacy on the other hand consists of *in vitro* fertilization (most often using the eggs and/or sperm of the intended parents who are assisted) and of transferring a certain number of zygotes to the uterus of the chosen recipient woman, with her consent.[86]

Since the aforementioned MAR procedures include the involvement of a third party (a donor or even potential donors of genetic material), the question of genetic/social parenthood as well as the question of whether or not the child can exercise its right to know its origin without interfering with the donor's right to privacy should be answered.

The child's right to know its origin in the context of maternity can be subject to question in MAR procedures which include the involvement of a donor of eggs/embryo or in cases of surrogacy. In such cases the old rule '*mater semper certa est*' is subject to question,[87] because the gestational mother is usually not the genetic mother of the child. It is precisely for this reason that some countries prohibit egg donation and surrogacy.[88] Although egg donation raises moral and legal dilemmas, surrogacy is subject to more scrutiny. The procedure is conducted in accordance with a surrogacy agreement concluded prior between the surrogate[89] and the intended parents.[90] The Hague Conference on Private International Law defines surrogacy agreements as agreements 'between a prospective surrogate and (a) prospective intended parent(s), made before a child is conceived, which provides that, following the child's birth, the parties intend for the intended parent(s) to be the child's legal parent(s) and for the child to be placed into the care of the intended parent(s)'.[91] To that end, it is important to note that in recent years there is a growing number of couples, as well as individuals opting for international surrogacy, i.e. surrogacy conducted abroad, since the procedure is prohibited under domestic law. Such is the case, for example, with French and German citizens. International surrogacy is defined as a 'surrogacy arrangement entered into by intending parent(s) resident in one

85 Radoslav Ninković, Zorica Kandić-Popović, *Medicinsko-pravni aspekti vantelesnog oplođenja* (ICN Galenika 1995) 131.

86 Marija Draškić, "Ugovor o surogat materinstvu – između punovažnosti i ništavosti" in Marko Baretić, Saša Nikšić, (eds.), *Zbornik treće regionalne konferencije o obveznom* pravu (2022) 343. For more details see Ivana Barać, "Surrogacy: A biomedical mechanism in the fights against infertility" (2023) 71(2) *Belgrade Law Review* 260. Available at: <https://anali.rs/surrogacy-a-biomedical-mechanism-in-the-fight-against-infertility> accessed 15 January 2025.

87 Barać, *ibid.*, 260.

88 Stefanie Schamhl, *United Nations Convention on the Rights of the Child, Article by Article Commentary*, (Nomos 2021) 143.

89 The word surrogate stems from the latin word '*surrogatum*' which represents a substitute, means of substitution. See Milan Vujaklija, *Leksikon stranih reči i izraza* (Prosveta Beograd, 1937) 885. A surrogate can be defined as a 'woman who carries a pregnancy with an agreement that she will give the offspring to the intended parent(s)'. See Fernando Zegers-Hochschild, G. David Adamson, Silke Dyer, Catherine Racowsky, Jacques de Mouzon, Rebecca Sokol, Laura Rienzi, Arne Sunde, Lone Schmidt, Ian D. Cooke, Joe Leigh Simpson, Sheryl van der Poell, "The International Glossary on Infertility and Fertility Care" (2017) 108(3) *Fertility and Sterility* 400. Aljinović defines a surrogate as a woman who accepts to carry and give birth to a child with the intention of giving the child away to another person or couple, who will have the role of legal parents of the child. See Nevena Aljinović, "Surogat majčinstvo: globalni pregled pravne regulacije" (2024) 45(3) *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 615 fn. 8.

90 Intended parents can be defined as 'the person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement'. See Hague Conference on Private International Law, The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project, Preliminary Document No. 3 B of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, Prel. Doc. No. 3 B March 2014, Annex A - Revised Glossary, ii.

91 See Hague Conference on Private International Law, 'Parentage / Surrogacy Experts' Group: Final Report "The feasibility of one or more private international law instruments on legal parentage"', Preliminary Document No. 1 of November 2022, 25.

State and a surrogate resident (or sometimes merely present) in a different State'.[92] Once the child is born, intended parent(s) return to their home country seeking to be recognized as the legal parents of the child by the domestic authorities, but are often faced with hurdles. For example, until recently the domestic authorities in both France and Germany rejected such requests by intended parents relying on the fact that surrogacy is contrary to the public policy of the said countries. However, in the past couple of years, at least in those countries, there has been a shift of views, under the influence of the ECtHR's judgement in the case of Menneson v. France.[93]

Hence, and considering the legal dilemmas that may arise in cases in which the legislator opts to prohibit surrogacy procedures, it is of no surprise that some countries select a different approach. Some of them opt for a permissive (Russian Federation and some U.S. states) or at the very least, tolerant or regulatory approach towards surrogacy (United Kingdom and Israel). Russian Federation, being an example of a country opting for a permissive approach, sets out rules that allow for the execution of surrogacy agreement. Nevertheless, the rules stipulate that the intended parents can be registered as the child's parents only if the surrogate mother consents to it after the birth of the child. As a result, a surrogacy agreement cannot produce any legal effect if, following the child's birth, the surrogate mother refuses to give away the child and consent to the registration of the intended parents as the child's legal parents. The said provisions were subject to criticisms by legal scholars. Consequently, the Plenary Session of the Supreme Court of Russia adopted an opinion in which it concluded that the fact that a surrogate mother refuses to consent to the registration of intended parents as the child's legal parents cannot be used as an unconditional basis for resolving the issue of parental rights.[94] English law, on the other hand, opts for a tolerant approach towards surrogacy – it does not regulate the execution of surrogacy agreements, but merely the legal effects stemming from such agreement. Better said, although the execution of the surrogacy agreement is not forbidden, the agreement alone does not produce any legal effect, which in turn means that the surrogate is recognized as the legal mother of the child. Intended parents can be recognized as the legal parents of the child only after they have submitted an application for the Parental

92 See Hague Conference on Private International Law, The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project, Preliminary Document No. 3 B of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, Prel. Doc. No. 3 B March 2014, Annex A - Revised Glossary, i.

93 In the said case the applicants were the parents of girls born through surrogacy in the U.S. Following the birth of the girls, the intended parents came back to France and attempted to register as their legal parents. However, the French state authorities refused to identify the girls as the children of the indented parents (the applicants), even though they were identified as their children in the state in which the surrogacy process had been carried out. As a result, the intended parents turned to the European Court of Human Rights claiming that the right to respect for their private and family life (Article 8 of ECHR), and that the children's best interests had been violated as they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad. The ECtHR ruled that there had been a violation of the right to respect for private and family life of the girls born through surrogacy. More importantly, the ECtHR underlined that since 'having in mind that one of the intended parents was the children's biological parent, and that biological parenthood is an important component of one's identity, it cannot be said that it is in the interest of the child to deprive them of a legal relationship of this nature where the biological reality of that relationship has been established and both the child and the intended parent demand full recognition thereof'. As a result, the ECtHR was of the opinion that the right of the girls to respect for their private life was infringed. See *Case of Mennesson v. France*, App. no. 65192/11 (ECHR 26 June 2014), § 96–101. For more details see Barać, "Surrogacy: A biomedical mechanism in the fights against infertility", 274, fn. 45. Following the said judgement, France decided to request an Advisory Opinion on 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'by the ECtHR, as guaranteed by Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms. For more details on the Advisory Opinion see Alice Margaria, "Parenthood and Cross-Border Surrogacy: What Is 'New'? The ECtHR's First Advisory Opinion" (2020) 28(2) *Medical Law Review* 413 *et seq*.

94 For more details see Barać (n 86) 265–266.

Order and the court has granted it, and adopted a Parental Order, if the predetermined conditions have been met.[95] Be that as it may, it is clear that surrogacy raises a myriad of ethical and legal dilemmas both in countries prohibiting the said procedure as well as the ones regulating, or at the very least tolerating it.

When speaking about the paternity of the child, the right of the child to know its origin can be problematic in cases of AID, i.e. in cases where the MAR procedure was conducted using the donor's semen for the fertilization of the women's eggs. Hence, it is clear that MAR procedures are not only complex, but raise important questions in relation to the child's origin in cases in which donated genetic material was used. In that respect, there are two possible approaches visible among legal scholars. On one hand there is the consequentialist approach according to which the lack of knowledge of the donor-conceived children about the donor is harmful. Warnock argues that the primary concern in the AID procedures has 'so far not been for the child but for the parents' and that if the child is indeed the one whose interests are to be protected first, then 'the whole issue of keeping that child in ignorance of his or her origins and of setting up procedures to ensure that such ignorance is maintained, needs to be examined very carefully'.[96] On the other hand, the conceptual approach derives on the idea that 'knowing is a basic human right and as such no empirical support is required to demonstrate what harm occurs when it is violated'.[97]

For a long time, it was accepted that it was in the best interest of the donor-conceived person to not inform him/her about their true origin.[98] Such an understanding stemmed from the fact that it was considered that anonymity of the donor would prevent any disruption of the family and that it was best for the wellbeing of the child to keep him/her oblivious about the manner of conception.[99] Nowadays there are several different approaches to this dilemma visible in comparative law. Some countries, like Sweden, have come a long way from the initial anonymity of donor to the truth principle, allowing for the child to obtain any knowledge about the donor. Sweden has initially opted for the anonymous sperm donations. Every MAR procedure was followed by the usual destruction of any medical files which contained information about the donor.[100] However, Sweden has amended its legal provisions, entitling the child with an unlimited right to access all information related to the donor, provided that the child is sufficiently mature. Mladenović underlines that there is an assumption that the child is sufficiently mature upon turning the age of 18, whereas for the underaged children a permission

95 For more details on transfering parenthood in cases of surrogacy England in Wales see Claire Fenton-Glynn, "England and Wales" in Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan (eds.) *Eastern and Western Perspectives on Surrogacy* (Cambridge – Antwerp – Chicago: Intersentia 2019) 125–129.

96 Robert Snowden, G.D. Michael, *The Artificial Family* (Allen & Unwin 1981) cited in Mary Warnock, "The Good of the Child" (1987) 1(2) *Bioethics* 152.

97 Vardit Ravitsky, "The Shifting Landscape of Prenatal Testing: Between Reproductive Autonomy and Public Health" (2017) *Just Reproduction: Reimagining Autonomy in Reproductive Medicine* 47(3) 2.

98 Andrea Mulligan, "Anonymous gamete donation and Article 8 of the European Convention on Human Rights: The case of incompatibility" (2022) 22(2) *Medical Law International* 121–122.

99 *Ibid.*

100 Claes Gottlieb, Othon Lalos, Frank Lindblad, "Disclosure of donor insemination to the child: the impact of Swedish legislation on couples' attitudes" (2000) 15(9) *Human Reproduction*.

needs to be obtained from the National Board for Health and Welfare (Socialstyrelsen).[101] Other countries followed this approach as well. That was the case with Austria, Australia, Norway, UK, Switzerland, the Netherlands, Croatia.[102] Such amendments have raised concerns about the possible decrease in the number of interested persons acting as donors. It is interesting to point out that on one hand in Sweden there was no decrease in the number of interested donors, but that rather the type of the person being the donor has shifted from single and young men to older, married men.[103] Unlike Sweden, Croatia which amended its provisions in a similar manner to Sweden, testifies to the contrary. In Croatia the recognition of the right of the child to know the identity of the donor has led to 'no cases of heterologous insemination in practice'.[104]

There are however countries that still opt for the anonymity of the donor by legally forbidding any disclosure of information related to the donor. The only information that can, potentially be disclosed in such cases, is the one of medical nature. Such an approach was accepted by Serbian legislature in the Law on Medically Assisted Reproduction[105] (hereinafter: LMAR). The LMAR entails that a child who was conceived with MAR procedure using the genetic material of a donor, is entitled to seek information related to the donor of the genetic material from the responsible body, for medical reasons, only after the she/he has turned the age of 15.[106] Scholars argue that Greece has opted for a 'nearly identical solution' while also listing Poland, Bulgaria as countries opting for the anonymity of donor.[107]

Last but not least are the countries in which the 'double track system' is visible. Mladenović underlines the example of Denmark in which a choice can be made about the anonymity of the donor.[108] A choice is to be made first by the donor about whether or not he/she wishes to be identifiable to any offspring or to remain anonymous.[109] The recipients of the donated material are allowed to make a choice as to whether they want to receive the donation of the genetic material by a donor who has chosen to remain anonymous or by the one who wishes to be identifiable.[110] The same approach is visible in Iceland and the Czech Republic. This approach is considered to be a balanced compromise of the two possible perspectives elaborated earlier.[111] Such approach dismisses the interests of the child, as it gives precedence to the choice previously made by the child's parents, rather than the child.[112]

101 Barbara Preložnjak, "Modern Challenges in the Implementation of the Child's Right to Know His Origin" (2020) 4 *EU and Comparative Law Issues and Challenges* 1175–1203 as cited in Mladenović (n 32) 102.

102 Kovaček Stanić (n 41) 22.

103 Draškić (n 5) 47.

104 Kovaček Stanić (n 102) 22 fn. 28.

105 Law on Medically Assisted Reproduction - LMAR, *Official Gazette of the Republic of Serbia* 40/2017 and 113/2017 – state law.

106 See art. 57, para. 1 LMAR.

107 Mladenović (n 32) 104–105.

108 *Ibid.*, 105.

109 Eric Blyth, "Donor Anonymity and Secrecy versus Openness Concerning the Genetic Origins of the Offspring: International Perspectives" (2006) 5(2) *ASSIA – Jewish Medical Ethics* as cited in Mladenović (n 32) 105.

110 *Ibid.* 251.

111 Mladenović (n 32) 105.

112 *Ibid.*

It has long been debated whether or not anonymous gamete donation violates the rights guaranteed by art. 8 of the ECHR.[113] For a long time, there was no case law related to that particular question. Instead, a distinction between paternity case law and anonyms birth case law was visible.[114] For example, the ECtHR has expressed its views in relation to the right to know one's parentage, but only in cases where the child was not conceived with the involvement of an anonymous donor.[115] However, the Parliamentary Assembly of the Council of Europe (hereinafter: PACE) made some recommendations to the Committee of the Ministers in 2019. PACE started off by stipulating that until recently the need to balance out different rights, interests and obligations led many countries to opt for the protection of the donor's right to privacy.[116] PACE further noticed that there is a recent trend among some European and non-European countries which have amended their legislation accordingly by lifting the vail of secrecy of the donor.[117] PACE did point out that 'the current legislation and practices of Council of Europe Member States in the field of medically assisted procreation vary significantly'.[118] It made several recommendations to the Committee of Ministers of the Council of Europe. Firstly, that 'anonymity should be waived for all future gamete donations in Council of Europe Member States' and that the donor-conceived child should be given the opportunity to access such information between the ages of 16 and 18.[119] Secondly, that 'the donor should be protected from any request to determine parentage or from an inheritance or parenting claim'.[120] Finally, PACE recommended that anonymity should not be lifted retrospectively.[121] When answering to the said Recommendation, the Committee of the Ministers highlighted that, considering the fact that such area is a sensitive one, any proposal for regulation should not be legally binding.[122] Such an answer was based on the fact that any binding legal provisions on the subject matter could have potential negative effects on the 'supply and availability of donated gametes and embryos, the destiny of the cryopreserved gametes and embryos donated before'.[123]

It was not until recently that the ECtHR had the chance to deal explicitly with the question of donor anonymity and the right to know one's origin in the context of the ECHR. Such

113 Mulligan (n 98) 119.

114 *Ibid.*, 127.

115 See for example *Mikulić v. Croatia*, App no. 53176/99, (ECHR 7 February 2002). There the ECtHR reitrated that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality'. See *Mikulić v. Croatia*, App no. 53176/99, (ECHR 7 February 2002), paras. 54–55. Compare *Jäggi v. Switzerland*, App no. 58757/00, (ECHR 17 October 2006), paras. 37–38.

116 Parliamentary Assembly of the Council of Europe, Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, Recommendation 2156, 2019, 1. Available at: <https://pace.coe.int/en/files/27680/html> accessed 15 January 2025.

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*, 2.

120 *Ibid.*

121 *Ibid.* Compare Mulligan (n 98) 126.

122 *Ibid.* 126.

123 Committee of Ministers, 'Reply to the recommendation: Recommendation 2156 (2019)', no. 14995, 2019, Available at: <https://pace.coe.int/en/files/28259#trace-6> accessed 15 January 2025, cited in Mulligan (n 98) 126–127.

a chance arose with the Case of Gauvin-Fournis v. France[124] and Silliau v. France.[125] The said cases related to the right of the persons born through MAR procedures involving a donor to obtain information about the said donor. Upon learning that she was conceived from donor insemination, the first applicant requested from the Centre for the Study and Conservation of Sperm – CECOS (Centre d'Etude et de Conservation du Sperme), to provide her with information related to the origins of her conception. Moreover, she wanted to know if her brother was conceived by the same donor as well.[126] In the case of Sillia v. France, the applicant was also born through MAR procedure involving a donor. After the applicant's parents revealed the truth about his conception, the applicant requested information from CECOS related to the origins of his conception, i.e. the identity of the donor, and to be allowed access to medical information about the donor and other non-identifying information.[127]

At that time, French legal provisions disabled both applicants from exercising their right to know their origin, as the principle of anonymity prevented any person conceived through gamete donation to obtain information about the identity of the biological parent or to obtain non-identifying information about him or her. In the meantime, France has amended its legal norms in a manner which now enables the child to exercise its right to know the identity of the donor, once he/she is of legal age.[128] The amended legal provisions stipulate that all gamete donations became conditional upon the donors' express consent to having records kept of their identity and of non-identifying information about them.[129] The ECtHR had a task to determine whether France has overstepped its margin of appreciation or not. The ECtHR has firstly underlined that, according to a comparative study of the Member States of the Council of Europe, there is no consensus on the issue of the right of persons conceived through donor gamete donations to know their origin.[130] Moreover, the 'legislature had duly weighed up the interests and rights at stake after an informed and gradual process of reflection on the need to lift donor anonymity'.[131] The ECtHR found that France had not overstepped its margin of appreciation and consequently found no violation of the Art. 8 of the ECHR.

Unlike the ECtHR, the Committee took a different approach. The Committee rightfully argued that the policy of Member States opting for secrecy of donors to be in contradiction to Art. 7 of the CRC.[132] What is more, unlike in the cases of adoption, in these cases there can

124 *Gauvin-Fournis v. France*, App no. 21424/16, (ECHR 15 April 2016).

125 *Sillia v. France*, App no 45728/17, (ECHR 23 June 2017).

126 *Gauvin-Fournis v. France*, App no. 21424/16, (ECHR 15 April 2016), para. 2–4.

127 *Sillia v. France*, App no 45728/17, (ECHR 23 June 2017, para. 2–4.

128 Mladenović (n 32) 103.

129 See art. Article R2143-4 *Public Health Code (Code de la santé publique),* L2141–4.

130 See ECtHR Legal Summary.

131 ECtHR, Legal summary Gauvin-Fournis and Silliau v. France, Application no. 21424/16 and Application no. 45728/17, 7 September 2023, 3, Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-226590%22]}> accessed 15 January 2025.

132 Stefanie Schamhl, *United Nations Convention on the Rights of the Child, Article by Article Commentary*, (Nomos 2021) 21. See Norway CRC/C/15/Add.23, 1994, para. 10; Cf. Denmark CRC/C/15/Add. 33, 1995, para. 11.

never be a real conflict of interest between the parties, as the donor can 'simply refuse to make a donation if he wishes to stay anonymous'.[133]

It is important to underline that the ECtHR opts for careful wording and continues to put great importance and due consideration to the margin of appreciation of Member States when dealing with such dilemmas. Truth be told, such views of the ECtHR can be understood to a certain point, as there is no consensus of Member States on these issues, which naturally comes as no surprise, given the moral and ethical dilemmas such concerns entail. Hence, it becomes clear that the right to know one's origin in the context of MAR procedures is a rather complex question which raises many dilemmas. Anyhow, it is safe to say that the emerging trend in many countries nowadays is shifting to lifting the ban of anonymity, thus providing the persons born through donated gamete material the possibility to obtain knowledge about their origin.

4. CONCLUDING REMARKS

Everything previously stated leads to the conclusion that the issue of the child's right to know its origin opens up a number of dilemmas. Some of them are interconnected with the competing interests of other parties, i.e. individuals that need to be protected as well. This issue becomes even more significant in cases of adoption and MAR procedures because here, a misalignment between genetic and legal parenthood occurs, further complicating the problem. As a result, there is a need to struck a fair balance between the interests of the child on the hand, while at the same time taking into consideration the interests of adoptive and biological parents (adoption) or the interests of donors (MAR procedures). What can certainly be highlighted after the conducted analysis, is that now, more than ever the need to protect children's rights is considered to a greater extent. Nevertheless, the contemporary developments open up many questions and potentially raise many moral, ethical and legal dilemmas. The emergence of MAR procedures, as a result of medical developments, has raised questions that, sixty years ago, were unimaginable. It remains to be seen what will be the challenges and issues that legislators and our society in general will have to understand and tackle with in the future.

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133 Stefanie Schamhl, *United Nations Convention on the Rights of the Child, Article by Article Commentary*, (Nomos 2021) 21; compare Mladenović (n 32) 108.

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PRAVO DJETETA DA ZNA SVOJE PODRIJETLO U KONTEKSTU NOVIH OBLIKA OBITELJI

Sažetak

Ovaj članak proučava učinke koje je uvođenje novih obiteljskih formacija imalo na dječja prava, posebno na pravo djeteta da zna svoje podrijetlo. Kako bi se pružio sustavan i sveobuhvatan odgovor na pitanje može li dijete ostvariti svoje pravo da zna svoje podrijetlo u kontekstu novih obiteljskih formacija, autorica će započeti kratkim pregledom razvoja prava djeteta. Nakon toga, odgovorit će se na pitanje kako i kada je pravo djeteta da zna svoje podrijetlo u početku prepoznato kao univerzalno pravo dodijeljeno svoj djeci. Analiza će se nadalje baviti specifičnim izazovima kojima je dijete izloženo u kontekstu novih oblika obitelji, ponajprije u slučajevima posvojenja, a potom i u slučajevima obitelji stvorenih uz pomoć MAR postupaka. Kao rezultat toga, bit će prikazan pregled postojećih i mogućih pristupa ovom pitanju kako bi se saželi novi trendovi vezani uz pravo djeteta da zna svoje podrijetlo.

Ključne riječi: *nove obiteljske formacije, posvojenje, postupci medicinski potpomognute oplodnje, pravo djeteta da zna svoje podrijetlo, najbolji interes djeteta*

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